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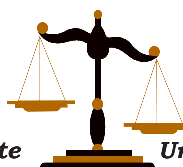

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CAPITAL CASES: Death Penalty for Juveniles

Roper v. Simmons, No. 03-633, 3/1/05

The United States Supreme Court held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

CIVIL LIABILITY: Handcuffing Violent Offenders During Search

Muehler vs. Mena, No. 03-1423, 3/22/05

Based on information gleaned from the investigation of a gang-related, driveby shooting, Officer Muehler had reason to believe at least one member of a gang—the West Side Locos—lived at 1363 Patricia Avenue. He also suspected that the individual was armed and dangerous, since he had recently been involved in the driveby shooting. As a result, Muehler obtained a search warrant for 1363 Patricia Avenue that authorized a broad search of the house and premises for, among other things, deadly weapons and evidence of gang membership. In light of the high degree of risk involved in searching a house suspected of housing at least one, and perhaps multiple, armed gang members, a Special Weapons

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and Tactics (SWAT) team was used to secure the residence and grounds before the search.

At 7 a.m. on February 3, 1998, Muehler, along with the SWAT team and other officers, executed the warrant. Mena was asleep in her bed when the SWAT team, clad in helmets and black vests adorned with badges and the word "POLICE," entered her bedroom and placed her in handcuffs at gunpoint. The SWAT team also handcuffed three other individuals found on the property. The SWAT team then took those individuals and Mena into a converted garage, which contained several beds and some other bedroom furniture. While the search proceeded, one or two officers guarded the four detainees, who were allowed to move around the garage but remained in handcuffs.

The search of the premises yielded a .22 caliber handgun with .22 caliber ammunition, a box of .25 caliber ammunition, several baseball bats with gang writing, various additional gang paraphernalia, and a bag of marijuana. Before the officers left the area, Mena was released.

In her §1983 suit against the officers she alleged that she was detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment. In addition, she claimed that the warrant and its execution were overbroad, that the officers failed to comply with the "knock and announce" rule, and that the officers had needlessly destroyed property during the search.

The officers moved for summary judgment, asserting that they were entitled to qualified immunity, but the District Court denied their motion. The Court of Appeals affirmed that denial, except for Mena's claim that the warrant was overbroad—on this claim the Court of Appeals held that the officers were entitled to qualified immunity. After a trial, a jury, pursuant to a special verdict form, found that Officer Muehler and a fellow officer, Brill, violated Mena's Fourth Amendment right to be free from unreasonable seizures by detaining her both with force greater than that which was reasonable and for a longer period than that which was reasonable. The jury awarded Mena $10,000 in actual damages and $20,000 in punitive damages against each petitioner for a total of $60,000.

The Court of Appeals affirmed the judgment on two grounds. It first held that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to confine her in the converted garage and keep her in handcuffs during the search. In the Court of Appeals' view, the officers should have released Mena as soon as it became clear that she posed no immediate threat. The Court additionally held that the questioning of Mena about her immigration status constituted an independent Fourth Amendment violation. The Court of Appeals went on to hold that those rights were clearly established at the time of Mena's questioning, and thus the officers were not entitled to qualified immunity.

In *Muehler v. Mena,* No. 03-1423, 3/22/05, the United States Supreme Court reviewed the case and chose to vacate and remand. The Court held that Mena's detention in handcuffs for the length of the search was consistent with their opinion in *Michigan* v. *Summers*, 452 U. S. 692 (1981), stating as follows:

"In *Michigan* v. *Summers,* 452 U. S. 692 (1981), we held that officers executing a search

warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.' Such detentions are appropriate, we explained, because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial. We made clear that the detention of an occupant is 'surely less intrusive than the search itself,' and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home.

"Against this incremental intrusion, we listed three legitimate law enforcement interests that provide substantial justification for detaining an occupant: 1.) **preventing flight in the event that incriminating evidence is found**; 2.) **minimizing the risk of harm to the officers**; and 3.) **facilitating the orderly completion of the search**, as detainees' self-interest may induce them to open locked doors or locked containers to avoid the use of force. Mena's detention was, under *Summers*, plainly permissible. An officer's authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure. Thus, Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search…

"The officers' use of force in the form of handcuffs to effectuate Mena's detention in the garage, as well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion. The imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to detention in the converted garage. The detention was thus more intrusive than that which we upheld in *Summers*.

"But this was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a search for wanted gang member who reside on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. Though this safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable…We conclude that the detention of Mena in handcuffs during the search was reasonable."

CIVIL LIABILITY: Probable Cause to Arrest Not Closely Related to the Offense Stated at the Time of Arrest

Davenpeck v. Alford, No. 03-710, 12/13/04

On the night of November 22, 1997, a disabled automobile and its passengers were stranded on the shoulder of State Route 16, a divided highway, in Pierce County, Washington. Jerome Alford pulled his car off the road behind the disabled vehicle, activating his "wig-wag" headlights (which flash the left and right lights alternately). As he pulled off the road, Officer Joi Haner of the Washington State Patrol passed the disabled car from the opposite direction. He turned around to check on the motorists at the first opportunity, and

when he arrived, Alford had begun helping the motorists change a flat tire. Alford hurried back to his car and drove away. The stranded motorists asked Haner if Alford was a "cop," stating that his statements and the wig-wag headlights had given them that impression. They also informed Haner that as Alford hurried off he left his flashlight behind.

On the basis of this information, Haner radioed his supervisor, Sergeant Gerald Devenpeck, and told him he was concerned Alford was an "impersonator" or "wannabe cop." He pursued Alford's vehicle and pulled it over. Through the passenger-side window, Haner observed that Alford was listening to the Kitsap County Sheriff's Office police frequency on a special radio, and that handcuffs and a hand-held police scanner were in the car. These facts bolstered Haner's suspicion that Alford was impersonating a police officer. Haner thought, moreover, that Alford seemed untruthful and evasive. Alford told Haner that he had worked previously for the "State Patrol," but under further questioning, claimed instead to have worked in law enforcement in Texas and at a shipyard. He claimed that his flashing headlights were part of a car alarm system and acted as though he was unable to trigger the system. However, during these feigned efforts, Haner noticed that Alford avoided pushing a button near his knee, which Haner suspected (correctly) to be the switch for the lights.

Sergeant Devenpeck arrived on the scene a short time later. After Haner informed Devenpeck of the basis for his belief that Alford had been impersonating a police officer, Devenpeck approached the vehicle and inquired about the wig-wag headlights. As before, Alford said that the headlights were part of his alarm system and that he did not know how to activate them. Like Haner, Devenpeck was skeptical of Alford's answers. In the course of his questioning, Devenpeck noticed a tape recorder on the passenger seat of Alford's car, with the play and record buttons depressed. He ordered Haner to remove Alford from the car, played the recorded tape, and found that Alford had been recording his conversations with the officers. Devenpeck informed Alford that he was under arrest for a violation of the Washington Privacy Act, Wash. Rev. Code §9.73.030 (1994). Alford protested that a state court-of-appeals decision, a copy of which he claimed was in his glove compartment, permitted him to record roadside conversations with police officers. Devenpeck returned to his car, reviewed the language of the Privacy Act, and attempted unsuccessfully to reach a prosecutor to confirm that the arrest was lawful. Believing that the text of the Privacy Act confirmed that the recording was unlawful, he directed Officer Haner to take Alford to jail.

A short time later, Devenpeck reached by phone Mark Lindquist, a deputy county prosecutor, to whom he recounted the events leading to Alford's arrest. The two discussed a series of possible criminal offenses, including violation of the Privacy Act, impersonating a police officer, and making a false representation to an officer. Lindquist advised that there was "clearly probable cause," and suggested that Alford also be charged with "obstructing a public servant" based on the runaround he given the officers. Devenpeck rejected this suggestion, explaining that the State Patrol does not, as a matter of policy, "stack charges" against an arrestee.

At booking, Haner charged Alford with violating the State Privacy Act and issued a

ticket to him for his flashing headlights. Under state law, Alford could be detained on the latter offense only for the period of time "reasonably necessary" to issue a citation. The state trial court subsequently dismissed both charges.

Alford filed suit against Davenpeck and Haner. He asserted a federal cause of action under 42 U. S. C. §1983 for unlawful arrest and imprisonment based on the allegation that he had been arrested without probable cause in violation of the Fourth and Fourteenth Amendments. The District Court denied the officer's motion for summary judgment on grounds of qualified immunity, and the case proceeded to trial. The jury returned a unanimous verdict in favor of the petitioners.

Alford appealed and a divided panel of the Court of Appeals for the Ninth Circuit reversed. The majority concluded that the officers could not have had probable cause to arrest because they cited only the Privacy Act charge and tape recording officers conducting a traffic stop is not a crime in Washington. The Ninth Circuit Court of Appeals rejected the officer's claim that probable cause existed to arrest Alford for the offenses of impersonating a law enforcement officer and obstructing a law enforcement officer because those offenses were not "closely related" to the offense invoked by Devenpeck as he took Alford into custody. The United States Supreme Court granted certiorari, finding as follows:

"…The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. In this case, the Court of Appeals held that the probable cause inquiry is further confined to the known facts bearing upon the offense actually invoked at the time of arrest, and that (in addition) the offense supported by these known facts must be 'closely related' to the offense that the officer invoked. We found no basis in precedent or reason for this limitation.

"Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

"Reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.

"The rule that the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent. Such a rule

makes the lawfulness of an arrest turn up on the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not 'closely related' to that subjective reason. This means that the constitutionality of an arrest under a given set of known facts will vary from place to place and from time to time, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection.

"Those who support the 'closely related offense' rule say that, although it is aimed at rooting out the subjective vice of arrests made for the wrong reason, it does so by objective means—that is, by reference to the arresting officer's statement of his reason. The same argument was made in *Whren* in defense of the proposed rule that a traffic stop can be declared invalid for malicious motivation when it is justified only by an offense which standard police practice does not make the basis for a stop. We rejected the argument there, and we reject it again here. Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.

"Finally, the 'closely related offense' rule is condemned by its perverse consequences. While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required. Hence, the predictable consequence of a rule limiting the probable cause inquiry to offenses closely related to (and supported by the same facts as) those identified by the arresting officer is not, as Alford contends, that officers will cease making sham arrests on the hope that such arrests will later be validated, but rather that officers will cease providing reasons for arrest. And even if this option were to be foreclosed by adoption of a statutory or constitutional requirement, officers would simply give every reason for which probable cause could conceivably exist.

"The facts of this case exemplify the arbitrary consequences of a 'closely related offense' rule. Officer Haner's initial stop of Alford was motivated entirely by the suspicion that he was impersonating a police officer. Before pulling Alford over, Haner indicated by radio that this was his concern. During the stop, Haner asked Alford whether he was actively employed in law enforcement and why his car had wig-wag headlights. When Sergeant Devenpeck arrived, Haner told him why he thought respondent was a 'wannabe cop.' In addition, in the course of interrogating Alford, both officers became convinced that he was not answering their questions truthfully and, with respect to the wig-wag headlights, that he was affirmatively trying to mislead them. Only after these suspicions had developed did Devenpeck discover the taping, place Alford under arrest, and offer the Privacy Act as the reason.

"Because of the 'closely related offense' rule, Devenpeck's actions render irrelevant both Haner's developed suspicions that Alford was

impersonating a police officer and the officers' shared belief that respondent obstructed their investigation. If Haner, rather than Devenpeck, had made the arrest on the stated basis of *his* suspicions, if Devenpeck had not abided the county's policy against 'stacking' charges, or if either officer had made the arrest without stating the grounds, the outcome under the 'closely related offense' rule might well have been different. We have consistently rejected a conception of the Fourth Amendment that would produce such haphazard results."

CIVIL LIABLITIY: Qualified Immunity; Police Consulting with Prosecutor on Question of Probable Cause

Cox v. Hainey, CA1, No. 04-1761, 12/01/04

Our saga starts in Norway, Maine. Members of the Norway Police Department arrested Joseph Cox, the appellant's fifteen-year-old son, for alleged involvement in a series of snowmobile thefts that occurred during the winter of 2000-2001. In the course of the ensuing investigation, an informant volunteered that Joseph had sold drugs to high school students. The informant expressed a willingness to participate in a controlled buy, and the local gendarmes arranged a sting. The Maine State Police were asked to assist.

On April 28, 2001, the informant, fitted with an electronic listening device, drove to the appellant's residence in Woodstock, Maine. Maine State Police Trooper Hainey and a local police officer followed in a second vehicle. Once there, the informant went inside and purchased four tablets of Roxicodone (a non-time-released version of Oxycontin) from Joseph Cox. Hainey, who listened to the conversation by transmitter, overheard Joseph tell the informant that his father recently had returned from a "drug run" to North Carolina and that he could have his father procure "an eighth of marijuana" for future purchase.

Based on what he knew to that point, Hainey obtained a warrant to search the Cox home for scheduled drugs, drug paraphernalia, and kindred items related to furnishing or trafficking in drugs. Hainey and other officers conducted the search on the morning of May 9th. In Joseph's bedroom, they found two Roxicodone tablets and drug paraphernalia. In the kitchen, they found a triple-beam scale with marijuana residue, a bottle containing sixty-five Roxicodone tablets, and an empty Roxicodone bottle. The appellant was present during the search. He told the officers that the Roxicodone had been legally prescribed for his back condition, that he never had provided pills to his son or to anyone else (but, rather, had kept them on his person at all times except while sleeping), and that he had called his pharmacist on April 21st because he was concerned that a few of his pills were missing.

Later that morning, Hainey consulted with Richard Beauchesne, an assistant district attorney. The two reviewed the evidence obtained during the search, discussed whether that evidence, together with the information previously known to Hainey, amounted to probable cause to arrest, and agreed that it did. Hainey then made the arrest. Cox was booked and released on bail that day. The bail bond indicated that his arrest had been for aggravated furnishing of a schedule W drug. After some jockeying, the assistant attorney general assigned to the case determined that he would not issue a complaint.

Once all charges had been dropped, Cox filed suit in a Maine state court against various officers and entities. He alleged, under 42 U.S.C. § 1983, that the named defendants had violated his constitutional rights and, in the bargain, had committed a variety of tortious acts. The defendants removed the case to the U.S. District Court for the District of Maine.

The sole count relevant to this appeal charges that Hainey violated Cox's Fourth Amendment rights by arresting him without probable cause. When Hainey moved for summary judgment on that count, the district court referred the matter to a magistrate judge. The magistrate judge recommended that the count proceed to trial.

Hainey lodged a timely objection to the recommendation. Upon de novo review, the district court rejected the magistrate judge's view and found Hainey entitled to qualified immunity on the ground that an objectively reasonable police officer could have understood that there was probable cause to arrest Cox. Accordingly, the court granted summary judgment in Hainey's favor. This appeal followed with the First Circuit Court of Appeals finding as follows:

"Cox contends that a police officer should not be able to insulate himself from liability for an erroneous probable cause determination simply because he obtained a prosecutor's blessing to arrest upon evidence that did not establish probable cause.

"We agree with Cox's premise that a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one. That is not to say, however, that a reviewing court must throw out the baby with the bath water. There is a middle ground: the fact of the consultation and the purport of the advice obtained should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity.

"Whether advice obtained from a prosecutor prior to making an arrest fits into the totality of circumstances that appropriately inform the qualified immunity determination is a question of first impression in this circuit. In *Suboh v. Dist. Atty's Office of Suffolk Dist.*, 298 F.3d 81 (1st Cir. 2002), we noted the question but had no occasion to answer it. In dictum, we implied that if an officer seeks counsel from a prosecutor on the legality of an intended action and furnishes the latter the known information material to that decision, the officer's reliance on advice might be relevant, for qualified immunity purposes, to the reasonableness of his later conduct.

"Other courts, however, have spoken authoritatively to the issue. The Seventh Circuit recently recognized that pre-arrest consultation with a prosecutor may lend reasonableness to an officer's conclusion that probable cause exists and, thus, may help to establish qualified immunity. *Kijonka v. Seitzinger*, (7th Cir. 2004). Similarly, the Eighth Circuit has held that such advice can assist in showing the reasonableness of the action taken and, thus, assist in determining the existence of qualified immunity. *E-Z Mart Stores, Inc. v. Kirksey*, (8th Cir. 1989). The Ninth and Fourth Circuits also have recognized that a pre-seizure consultation with a prosecutor is a factor to be considered in determining an officer's entitlement to qualified immunity. See *Dixon v. Wallowa County*, (9th Cir. 2003); *Wadkins v. Arnold*, (4th

Cir. 2000). The Tenth Circuit has substantially adopted this reasoning, acknowledging the relevance of a prosecutor's advice for qualified immunity purposes, at least where the officer's duty is unclear. See *Lavicky v. Burnett*, (10th Cir. 1985).

"We agree there is some room in the qualified immunity calculus for considering both the fact of a pre-arrest consultation and the purport of the advice received. As a matter of practice, the incorporation of these factors into the totality of the circumstances is consistent with an inquiry into the objective legal reasonableness of an officer's belief that probable cause supported an arrest. It stands to reason that if an officer makes a full presentation of the known facts to a competent prosecutor and receives a green light, the officer would have stronger reason to believe that probable cause existed. And as a matter of policy, it makes eminently good sense, when time and circumstances permit, to encourage officers to obtain an informed opinion before charging ahead and making an arrest in uncertain circumstances. Although we acknowledge the possibility of collusion between police and prosecutors, we do not believe that possibility warrants a general rule foreclosing reliance on a prosecutor's advice.

"We caution, however, that the mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow. Rather, that consultation comprises only one factor, among many, that enters into the totality of the circumstances relevant to the qualified immunity analysis. The primary focus continues to be the evidence about the suspect and the suspected crime that is within the officer's ken.

"In considering the relevance of an officer's pre-arrest consultation with a prosecutor, a reviewing court must determine whether the officer's reliance on the prosecutor's advice was objectively reasonable. Reliance would not satisfy this standard if an objectively reasonable officer would have cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy. Law enforcement officers have an independent duty to exercise their professional judgment and can be brought to book for objectively unreasonable mistakes regardless of whether another government official (say, a prosecutor or a magistrate) happens to compound the error.

"The officer's own role is also pertinent. If he knowingly withholds material facts from the prosecutor, his reliance on the latter's opinion would not be reasonable.

"In this case, the advice that Trooper Hainey received from the assistant district attorney was of the kind that an objectively reasonable officer would be free to consider reliable. The undisputed facts indicate that the two reviewed the available evidence fully and had a frank discussion about it. This discussion culminated in the prosecutor's statement that he believed Hainey had probable cause to arrest the Cox. And, finally, there is nothing to suggest that the prosecutor was operating in bad faith. We conclude, therefore, that an objectively reasonable officer would have taken the prosecutor's opinion into account in deciding whether to make the arrest. Thus, the district court appropriately considered that opinion in assessing the objective reasonableness of Hainey's actions and, ultimately, in granting him qualified immunity."

CIVIL LIABILITY:
Qualified Immunity; Reasonableness
Brosseau v. Haugen, No. 03-1261, 12/13/04

In *Brosseau v. Haugen,* Officer Rochelle Brosseau, a member of the Puyallup, Washington, Police Department, shot Kenneth Haugen in the back as he attempted to flee from law enforcement authorities in his vehicle. The material facts, construed in a light most favorable to Haugen, are as follows:

On the day before the fracas, Glen Tamburello went to the police station and reported to Brosseau that Haugen, a former crime partner of his, had stolen tools from his shop. Brosseau later learned that there was a felony no-bail warrant out for Haugen's arrest on drug and other offenses. The next morning, Haugen was spray painting his Jeep Cherokee in his mother's driveway. Tamburello learned of Haugen's whereabouts, and he and cohort Matt Atwood drove a pickup truck to Haugen's mother's house to pay Haugen a visit. A fight ensued, which was witnessed by a neighbor who called 911.

Brosseau heard a report that the men were fighting in Haugen's mother's yard and responded. When she arrived, Tamburello and Atwood were attempting to get Haugen into Tamburello's pickup. Brosseau's arrival created a distraction, which provided Haugen the opportunity to get away. Haugen ran through his mother's yard and hid in the neighborhood. Brosseau requested assistance, and, shortly thereafter, two officers arrived with a K–9 to help track Haugen down. During the search, which lasted about 30 to 45 minutes, officers instructed Tamburello and Atwood to remain in Tamburello's pickup. They instructed Deanna Nocera, Haugen's girlfriend who was also present with her 3-year-old daughter, to remain in her small car with her daughter. Tamburello's pickup was parked in the street in front of the driveway; Nocera's small car was parked in the driveway in front of and facing the Jeep; and the Jeep was in the driveway facing Nocera's car and angled somewhat to the left. The Jeep was parked about 4 feet away from Nocera's car and 20 to 30 feet away from Tamburello's pickup.

An officer radioed from down the street that a neighbor had seen a man in her backyard. Brosseau ran in that direction, and Haugen appeared. He ran past the front of his mother's house and then turned and ran into the driveway. With Brosseau still in pursuit, he jumped into the driver's side of the Jeep and closed and locked the door. Brosseau believed that he was running to the Jeep to retrieve a weapon.

Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the vehicle. Haugen ignored her command and continued to look for the keys so he could get the Jeep started. Brosseau repeated her commands and hit the driver's side window several times with her handgun, which failed to deter Haugen. On the third or fourth try, the window shattered. Brosseau unsuccessfully attempted to grab the keys and struck Haugen on the head with the barrel and butt of her gun. Haugen, still undeterred, succeeded in starting the Jeep. As the Jeep started or shortly after it began to move, Brosseau jumped back and to the left. She fired one shot through the rear driver's side window at a forward angle, hitting Haugen in the back. She later explained that she shot Haugen because she

was fearful for the other officers on foot who she believed were in the immediate area, and for the occupied vehicles in Haugen's path and for any other citizens who might be in the area.

Despite being hit, Haugen, in his words, stood on the gas, navigated the small, tight space to avoid the other vehicles, swerved across the neighbor's lawn, and continued down the street. After about a half block, Haugen realized he had been shot and brought the Jeep to a halt. He suffered a collapsed lung and was airlifted to a hospital. He survived and subsequently pleaded guilty to the felony of "eluding" in violation of Wash. Rev. Code §46.61.024 (1994). By so pleading, he admitted driving his Jeep with "a wanton or willful disregard for the lives of others."

"In considering the relevance of an officer's pre-arrest consultation with a prosecutor, a reviewing court must determine whether the officer's reliance on the prosecutor's advice was objectively reasonable."

Haugen subsequently filed this action in the United States District Court for the Western District of Washington pursuant to 42 U. S. C. §1983. He alleged that the shot fired by Brosseau constituted excessive force and violated his federal constitutional rights.

The District Court granted summary judgment to Brosseau after finding she was entitled to qualified immunity. The Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit found, first, that Brosseau had violated Haugen's Fourth Amendment right to be free from excessive force and, second, that the right violated was clearly established and thus Brosseau was not entitled to qualified immunity. Brosseau then petitioned the United States Supreme Court for a writ of certiorari. The United States Supreme Court granted the petition on the qualified immunity question and reversed the Ninth Circuit Court of Appeals, finding as follows:

"When confronted with a claim of qualified immunity, a court must ask first whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right? *Saucier* v. *Katz*, 533 U. S. 194 (2001). The constitutional question in this case is governed by the principles enunciated in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and *Graham* v. *Connor*, 490 U. S. 386 (1989). These cases establish that claims of excessive force are to be judged under the Fourth Amendment's 'objective reasonableness' standard. With regard to deadly force, we explained in *Garner* that it is unreasonable for an officer to seize an unarmed, non-dangerous suspect by shooting him dead. But where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the

time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law…The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision.

"We therefore turn to ask whether, at the time of Brosseau's actions, it was clearly established in this more particularized sense that she was violating Haugen's Fourth Amendment right. The parties point us to only a handful of cases relevant to the situation Brosseau confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. Specifically, Brosseau points us to *Cole* v. *Bone*, 993 F. 2d 1328 (CA8 1993), and *Smith* v. *Freland*, 954 F. 2d 343 (CA6 1992).

"In these cases, the courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others…*Smith* is closer to this case. There, the officer and suspect engaged in a car chase, which appeared to be at an end when the officer cornered the suspect at the back of a deadend residential street. The suspect, however, freed his car and began speeding down the street. At this point, the officer fired a shot, which killed the suspect. The court held the officer's decision was reasonable and thus did not violate the Fourth Amendment. It noted that the suspect, like Haugen here, 'had proven he would do almost anything to avoid capture' and that he posed a major threat to, among others, the officers at the end of the street.

"Haugen points us to *Estate of Starks* v. *Enyart*, 5 F. 3d 230 (CA7 1993), where the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect. There, the court concluded that the threat created by the fleeing suspect's failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force.

"These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the hazy border between excessive and acceptable force. The cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment.

"The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion."

CIVIL LIABILITY:
Repossession of Property

Marcus v. McCollum,
CA10, No. 03-6148, 12/30/04

Diana Marcus borrowed money from Carl McCollum in December 2001 and gave him the title to an automobile in January 2002. On February 22, 2002, McCollum, accompanied by a driver from Swope 24-Hr.

Wrecker Service, approached the Marcus home and noticed defendant Mason Wilson, an on-duty Shawnee police officer, parked across the street in a school parking lot. McCollum told Officer Wilson he was going to repossess a car and wanted Officer Wilson to be aware of the situation. McCollum did not have the title to a car with him, but had a piece of paper with a VIN number matching that of a 1978 Pontiac Firebird.

McCollum and the tow truck operator then began the process of towing the Pontiac from the Marcuses' driveway. According to plaintiffs, the Pontiac was owned by Ms. Marcus' husband, plaintiff Mike Marcus, and was not the collateral securing McCollum's loan. Mr. Marcus was not home, but Mrs. Marcus and her minor son, plaintiff Nicholas Shiel, were there. They noticed McCollum's activities, ran outside, and began arguing loudly with him. They told him he had no right to the Pontiac, and that he had title to "a car in Bethel."

Officer Wilson called for back-up assistance in the developing dispute and drove his patrol car over to the Marcus' driveway. It is disputed whether Officer Wilson was alerted by the confrontation and drove over on his own initiative or did so because McCollum beckoned him. Officer Wilson was soon joined by three other officers, defendants Jennifer Thomas, David Powell, and Kent Borcherding.

Mrs. Marcus and Nicholas asserted to the officers that McCollum had no legal interest in the automobile. Although the officers may have looked at Mr. McCollum's "piece of paper," they did not ask for further documentation of his ownership interest. The plaintiffs continued arguing with McCollum and also made several attempts to unhook the car from the wrecker. At some point, according to plaintiffs, Officer Wilson poked Nicholas "several times in the chest with sufficient force to knock [him] backwards."

Although the officers stated that repossession was a civil matter in which the police could not be involved, they also told Mrs. Marcus and Nicholas to stop their interference, advising "let them do what they're going to do and take it up in small claims court." Mrs. Marcus and Nicholas contend Officer Wilson stated that if the situation escalated, "someone" would be going to jail. They claim that an officer told them "for our best bet, we should keep our mouth shut, go back in the house or we would indeed go to jail that day." Because they took these statements as threats directed toward them, they followed the officers' instructions and allowed the car to be towed away. Defendants assert that no one was threatened with force or arrest. Officer Wilson stayed until the wrecker drove away; the other officers left when the situation seemed to be under control.

In the wake of the incident, the Marcus family brought this action in state court against McCollum, the wrecker service, the police officers, and the City of Shawnee (the City). In their federal civil rights claim arising under 42 U.S.C. § 1983, plaintiffs asserted that the police officers "entered upon the property of the Plaintiff and aided a certain Carl McCollum and the employee of SWOPE 24 HR. WRECKER SERVICE, L.L.C., in the unlawful taking of a certain 1978 Pontiac Firebird Automobile belonging to the Plaintiff, Mike Marcus," and "used the threat of force and threats to have Diana Marcus and her son taken into custody if they did not yield to the authority of the police in the taking of said

property," all in violation of their Fourth and Fourteenth Amendment rights to due process and freedom from unreasonable search and seizure.

In response, the Tenth Circuit Court of Appeals stated law: "Officers are not state actors during a private repossession if they act only to keep the peace, but they cross the line if they affirmatively intervene to aid the repossessor. When an officer begins to take a more active hand in the repossession, and as such involvement becomes increasingly critical, a point may be reached at which police assistance at the scene of a private repossession may cause the repossession to take on the character of state action."

"Officers are not state actors during a private repossession if they act only to keep the peace, but they cross the line if they affirmatively intervene to aid the repossessor. When an officer begins to take a more active hand in the repossession...it may cause the repossession to take on the character of state action."

"This view is echoed among the circuits…This area of the law is particularly fact-sensitive, so the circumstances must be examined in their totality. If the evidence showed, for example, that an officer came on the scene at the request of the repossessor and said to the debtor, 'don't interfere with this repossession,' or 'you know you're not the rightful owner of the property,' an officer might be liable. An officer's arrival with the repossessor could give the repossession a cachet of legality and have the effect of intimidating the debtor into not exercising his right to resist, thus facilitating the repossession. Even if unintended, such an effect could constitute police intervention and aid sufficient to establish state action.

"Other factors courts take into consideration include: 1.) intervening at more than one step; 2.) failing to depart before completion of the re-possession; 3.) standing in close proximity to the creditor. To repeat, the overarching lesson of the case law is that officers may act to diffuse a volatile situation, but may not aid the repossessor in such a way that the repossession would not have occurred but for their assistance.

"The repossessor's greatest obstacle to self-help repossession is the requirement that repossession must be accomplished without a breach of peace. [Roger D. Billings, Jr., *Handling Automobile Warranty and Repossession Cases* § 11:24 (2d ed. 2003).] The plaintiff's resistance to the taking of his property need not be strong. The general rule is that a debtor's request for the financer to leave the car alone must be obeyed. Even polite repossessors breach the peace if they meet resistance from the debtor. If a breach of peace occurs, self-help repossession is statutorily precluded.

"It stands to reason that police should not weigh in on the side of the repossessor and assist an illegal repossession. To diffuse a volatile situation while ensuring a lack of state action, officers could direct both parties to seek a judicial determination. A curbside courtroom, in which officers decide who was entitled to possession, is precisely the situation and deprivation of rights to be avoided."

INTERROGATION:
Miranda; Pedigree Questions

Rosa v. McCray, CA2, No. 04-2188, 1/27/05

The question presented in this case is whether, absent Miranda warnings, the admission at trial of an unsolicited comment by a defendant to a police officer—volunteered as an additional response to a "pedigree" question during booking—violates the defendant's Fifth Amendment right to be free from self-incrimination. The case is as follows:

On September 5, 1997, at approximately 7:25 p.m., Juana Hernandez was robbed by two men. Hernandez, who made a living going from restaurant to restaurant selling jewelry, had just left a restaurant in the Bronx when Jose Rosa, along with another man, approached her. They pushed her up against a car, demanded her bag while pointing a gun into her stomach, grabbed her bag and ran away. Hernandez had in her bag somewhere between $4000 and $5000 worth of jewelry. After her assailants fled, Hernandez received help from a couple in a car, who drove her to a police station. At the police station, Hernandez met with Detectives José Arroyo and Thomas Fitzgerald. Hernandez provided the detectives with a detailed description of the robbers, including the man with the gun. During that interview, Hernandez told Arroyo that the robber with the gun had brown hair, with the ends slightly lighter. Later that evening, Arroyo and Fitzgerald led Hernandez on an unsuccessful canvass of the area where the robbery had occurred.

At approximately 3:30 p.m. on the following day, Hernandez saw Rosa standing on the sidewalk. She identified him as the robber with the gun, despite his hair being a different color (blonde) than that of her assailant (brown). She approached nearby police officers, told them that she had been robbed by Rosa the night before, and gave them Arroyo's business card. The officers took Rosa into custody.

Once Rosa was in custody, Fitzgerald was assigned to the case. Arroyo served as an interpreter for Fitzgerald while Fitzgerald completed an on-line booking sheet. Arroyo asked Rosa a series of "pedigree" questions (pertaining to, for example, Rosa's name, date of birth, age, race, height, weight, eye color, and—the subject of this appeal—hair color). As to Rosa's hair color, Arroyo—noticing that Rosa's hair was bright blonde, including the roots—asked Rosa: "What is your real hair color?" Rosa responded, "Brown. I colored my hair yesterday." Arroyo translated Rosa's statement for Fitzgerald.

At trial, the State sought to introduce Rosa's statements, made in response to Arroyo's questioning for completion of the post-arrest booking form, that Rosa's natural hair color was brown and that he had dyed it blonde on the day after the robbery. Defense counsel moved to preclude the statements because the prosecutor had not given Rosa notice, pursuant to New York Criminal Procedure Law § 710.30. The prosecutor, citing *People v. Rodney*, 85 N.Y.2d 289 (1995), argued that the statements were within the "pedigree exception" and, therefore, that notice was not required.

A jury found Rosa guilty of all charges. Rosa appealed his conviction. The Supreme Court of the State of New York, Appellate Division, First Department, by decision and order dated May 9, 2002, affirmed Rosa's conviction.

On June 24, 2003, Rosa filed a habeas petition in the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 2254, arguing that his convictions were unconstitutional because of the State's use of statements elicited in violation of federal law. Specifically, Rosa argued that Arroyo's question—"What is your real hair color?"—amounted to interrogation designed to elicit an incriminating response, because Arroyo had observed that Rosa's hair appeared to be dyed blonde. Accordingly, the argument continued, "the detective should have known that the question was reasonably likely to elicit an incriminating response."

In its decision dated April 1, 2004, the District Court granted the habeas petition. The State of New York appealed the judgment entered by the District Court granting Rosa's petition for habeas corpus. Upon review of the case, the Second Circuit Court of Appeals found as follows:

"*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

"The Supreme Court has explained that 'any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining what the police reasonably should have known.' *Pennsylvania v. Muniz*, 496 U. S. 582 (1990). The collection of biographical or pedigree information through a law enforcement officer's questions during the non-investigative booking process that typically follows a suspect's arrest, however, does not ordinarily implicate the prophylactic protections of *Miranda*, which are designed to protect a suspect only during investigative custodial interrogation. Such interrogations customarily involve questions of a different character than those that are normally and reasonably related to police administrative concerns.

"In *Muniz*, the Supreme Court explained that a routine booking question exception exempts from *Miranda*'s coverage questions to secure the biographical data necessary to complete booking or pretrial services and permissible questions include those that appear reasonably related to the police's administrative concerns.

"Whether the information gathered turns out to be incriminating in some respect does not, by itself, alter the general rule that pedigree questioning does not fall under the strictures of *Miranda*. Arroyo's inquiry as to Rosa's actual hair color was reasonably related to administrative concerns, and was neither intended, nor reasonably likely, to elicit an incriminating response. Arroyo and Fitzgerald were engaged in a routine administrative process, and the booking questions were presented to Rosa in the exact order that the questions appeared on the booking form and without any substantive deviation from the form of the questions presented. Spaces were provided on the form for the entry of basic identifying information, including Rosa's name, date of birth, age, race, height, weight, eye color, and hair color. Hair color—like eye color, skin tone, or other personal physical

characteristics—is a common element of pedigree information. Proper completion of the booking form in this case required the officer to complete the relevant portions of the form by filling in the correct information pertaining to the various elements that comprise the basic personal physical characteristics, including hair color.

"Moreover, if the officer perceives—either through direct observation or otherwise—that a specific piece of information provided by the arrestee is patently incorrect, then it is not only reasonable, but arguably the officer's duty, to inquire further. Detective Arroyo was engaged in a booking process that was reasonably related to police administrative concerns.

"The question—'What is your real hair color?'—was narrowly crafted by the officer to obtain information necessary to complete the booking form. The likely answer that an officer in Arroyo's position would, or should, have expected is a one-word description of the accurate hair color (e. g., 'brown' or 'blonde'). Here, Rosa not only responded to the question but also volunteered a response beyond the scope of the question. Rosa provided, without elicitation from Arroyo, the additional information that he 'dyed it yesterday.' The fact that Rosa's hair was dyed a different color was not necessarily incriminating.

"In addition to admitting that he had dyed his hair, Rosa's response provided Detective Arroyo with information pertaining to when Rosa dyed his hair. Arroyo, however, could not reasonably have expected Rosa to offer additional inculpatory information that was outside the scope of the question. Indeed, requiring an officer to be on guard at all times for responses outside the scope of the booking questions would allow suspects to circumvent or hinder the police administrative process. In any event, the fact that Rosa's hair was dyed is not a tell-all piece of evidence demonstrating his guilt—it was merely a piece of evidence supporting Hernandez' identification of Rosa as the individual who had robbed her."

JAILS AND PRISONS:
Pretrial Detainee Rights; Toothpaste
Board v. Farnham, CA7, No. 03-2628, 1/5/05

In this case, the United States Court of Appeals for the Seventh Circuit stated that a pretrial detainee has a clearly established constitutional right to be supplied with toothpaste during a lengthy jail stay. Jail officials who refuse to provide a detainee with toothpaste for a period of several months cannot claim qualified immunity in a 42 U.S.C. § 1983 civil action.

POLICE DISCIPLINE:
Freedom of Speech; Use of Police Uniform in Adult Videos on the Internet
San Diego v. Roe, No. 03-1669, 12/6/04

John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. His user name was "Codestud3@aol.com," a word play on a high priority police radio call. The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Roe also sold custom videos, as well as police equipment,

including official uniforms of the San Diego Police Department (SDPD) and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.

Roe's supervisor, a police sergeant, discovered Roe's activities when, while on eBay, he came across an official SDPD police uniform for sale offered by an individual with the username "Codestud3@aol.com." He searched for other items Codestud3 offered and discovered listings for Roe's videos depicting the objectionable material. Recognizing Roe's picture, the sergeant printed images of Roe's offerings and shared them with others in Roe's chain of command, including a police captain. The captain notified the SDPD's internal affairs department, which began an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe, again in police uniform, issuing a traffic citation but revoking it after undoing the uniform and masturbating.

The investigation revealed that Roe's conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to cease displaying, manufacturing, distributing, or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U. S. Mail, commercial vendors or distributors, or any other medium available to the public. Although Roe removed some of the items he had offered for sale, he did not change his seller's profile, which described the first two videos he had produced and listed their prices as well as the prices for custom videos. After discovering Roe's failure to follow its orders, the SDPD—citing Roe for the added violation of disobedience of lawful orders—began termination proceedings. The proceedings resulted in Roe's dismissal from the police force.

Roe brought suit in the District Court pursuant to 42 U. S. C. §1983, alleging that the employment termination violated his First Amendment right to free speech. In granting summary judgment to the City, the District Court decided that Roe had not demonstrated that selling official police uniforms and producing, marketing, and selling sexually explicit videos for profit qualified as expression relating to a matter of "public concern" under this Court's decision in *Connick* v. *Myers*, 461 U. S. 138 (1983).

The Ninth Circuit Court of Appeals reversed the decision of the District Couty, holding that Roe's conduct fell within the protected category of citizen commentary on matters of public concern. Central to the Court of Appeals' conclusion was that Roe's expression was not an internal workplace grievance, took place while he was off-duty and away from his employer's premises, and was unrelated to his employment.

The case was then reviewed by the United States Supreme Court, who reversed the ruling of the Ninth Circuit Court of Appeals, finding as follows:

"A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if

applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to com-ment. See *Connick, supra; Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it. *United States* v. *Treasury Employees,* 513 U. S. 454, 465, 475 (1995) *(NTEU).* We have little difficulty in concluding that the City was not barred from terminating Roe under either line of cases.

"In concluding that Roe's activities qualified as a matter of public concern, the Court of Appeals relied heavily on the Court's decision in *NTEU*. In *NTEU* it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer. The question was whether the Federal Government could impose certain monetary limitations on outside earnings from speaking or writing on a class of federal employees. The Court held that, within the particular classification of employment, the Government had shown no justification for the outside salary limitations. The Court of Appeals' reliance on *NTEU* was seriously misplaced. Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own that were compromised by his speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in the field of law enforcement,' and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.

"To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

"*Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee

is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. This concern prompted the Court in *Connick* to explain a threshold inquiry that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of public concern.

"In *Connick*, an assistant district attorney, unhappy with her supervisor's decision to transfer her to another division, circulated an intraoffice questionnaire. The document solicited her co-workers' views on office transfer policy, office morale, the need for grievance committees, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.

"Finding that—with the exception of the final question— the questionnaire touched not on matters of public concern but on internal workplace grievances, the Court held no *Pickering* balancing was required. To conclude otherwise would ignore the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.' *Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'

"Applying these principles to the instant case, there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test…The speech in question was detrimental to the mission and functions of the employer. There is no basis for find-ing that it was of concern to the community as the Court's cases have understood that term in the context of restrictions by governmental entities on the speech of their employees.

"The judgment of the Court of Appeals is reversed."

SEARCH AND SEIZURE:
Automobile Search; "Belton" Rule

United States v. Smith,
CA9, No. 04-50046, 11/23/04

Kory Ray Smith was driving a Camaro at 96 miles per hour with the high beam lights on when he passed a California Highway Patrol car moving in the opposite direction. Officers Eric Price and Timothy Ratcliff pulled Smith over. When Officer Price approached the Camaro and requested Smith's license and registration, Smith said that he did not have any identification with him. Smith stated that he was licensed to drive in the State of Arizona. Officer Price then asked Smith to get out of his car and walk over to the patrol car.
At the front of the patrol car, Officer Price asked Smith his name, date of birth, and home address. Smith responded that his name was Vernon Paul Smith, that he was born on January 27, 1971, and that he lived on Fox Street in Mesa, Arizona. Officer Price contacted CHP dispatch to determine whether the California or Arizona driver's license databases included a license that matched this information. CHP dispatch reported that it found no match. Officer Price confronted Smith with this fact, but Smith maintained that the information he had provided was accurate. Officer Price then approached the passenger of the Camaro, Jaime Beth Cottle, and inquired as to the driver's name. Cottle responded that she only knew his first name,

which was Vernon, and that she had only known him for about a month.

Officer Price returned to the front of the patrol car and, with Officer Ratcliff at his side, asked Smith whether he knew his social security number. Smith provided the officers with a social security number. Dispatch then reported that the social security number corresponded to Vernon Paul Smith of Mesa, Arizona, born January 27, 1970. Dispatch also informed the officers that Vernon Smith had brown hair and eyes, stood six feet tall, and weighed 200 pounds. Officers Price and Ratcliff observed that Smith had blue eyes, stood five feet eight inches, and weighed approximately 175 pounds. Officer Ratcliff informed Smith of this discrepancy, while Officer Price patted Smith down in search of a wallet. Finding no wallet, Officer Price again asked Smith to divulge his identity.

While Officer Price was questioning Smith about his identity, Officer Ratcliff returned to the Camaro and searched it for Smith's identification. After a brief search of the car's interior, Officer Ratcliff uncovered a black wallet wedged under the rear seat. The wallet contained a driver's license and an identification card, each of which had Smith's picture on them. The driver's license was issued under the name Steven Stone, and was eventually discovered to be fake. The identification card was issued from the State of Arizona to Kory Ray Smith and was authentic.

While Officer Ratcliff searched the car, Officer Price continued to question Smith. Smith finally conceded that he had provided the officers with his brother's identification information, and that his real name was Kory Ray Smith. Officer Price contacted dispatch with the new date of birth Smith had provided and confirmed that Smith was in fact Kory Ray Smith. Officer Price then arrested Smith for falsely impersonating another and placed him in the patrol car. Once Smith was in the patrol car, Officer Ratcliff returned from searching the Camaro and informed Officer Price that he had found Smith's identification. Officer Price stated that Smith had already disclosed his identity.

Because the wallet contained currency, Officer Ratcliff asked Smith whether he wanted to leave the money in the wallet during booking or to leave it with Cottle. Smith told Officer Ratcliff to give the money to Cottle. When Officer Ratcliff took the money out of the wallet he discovered that the bills had neither the texture nor the appearance of real money. After comparing the bills in Smith's wallet to bills in their own, the officers concluded that the currency in the wallet was counterfeit. Officer Ratcliff then returned to the Camaro and examined a $20 bill that he had previously noticed on the floor, which also appeared to be counterfeit.

On July 2, 2003, a federal grand jury indicted Smith for knowing possession of falsely made, forged and counterfeited obligations and securities of the United States, in violation of 18 U.S.C. §§ 2 and 472. Smith moved to suppress the evidence that the officers discovered in the Camaro, arguing that the searches did not fall under either the search incident to an arrest exception or the automobile exception to the Fourth Amendment prohibition on warrantless searches. Initially, the district court agreed and granted Smith's motion to suppress. Then the government moved for reconsideration,

contending that no party had briefed the question of whether a search incident to an arrest could constitutionally precede the arrest.

The district court granted the government's motion for reconsideration. After reconsidering, the district court held that (1) the search was valid as incident to the arrest because the officers had probable cause to arrest Smith before Officer Ratcliff searched the Camaro, and (2) Officer Ratcliff had probable cause to search the car under the automobile exception, which permits law enforcement officers to conduct a warrantless search of a person who is arrested, and of his surrounding area, when the search is incident to the arrest. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

Law enforcement officers may also search, contemporaneously with an arrest, the passenger compartment of an automobile and all containers found in the compartment. *New York v. Belton*, 453 U.S. 454, 460-61 (1981). Such searches have long been considered valid, despite the absence of a warrant, because of the need to remove any weapons that threaten the arresting officers or bystanders and the need to prevent concealment or destruction of evidence. The Court stated as follows:

"We have held that the warrantless search of a person incident to a contemporaneous arrest may precede the arrest, but we have not heretofore specifically held that the warrantless search of a vehicle incident to a contemporaneous arrest may precede the arrest. There is, however, no sound reason to treat these circumstances differently. Accordingly, we now hold that as long as there is probable cause to make an arrest, and the search is conducted roughly contemporaneously with the arrest, the search-incident-to-arrest doctrine applies and no warrant is required.

"Each of the requirements for a valid search incident to arrest is satisfied in the present case. There was probable cause to make the arrest immediately preceding the search. The arrest followed the search of Smith's car, but probable cause for the arrest preceded the search. There was no significant delay in the series of events from the moment probable cause arose, to the initial search of Smith's car, to his arrest. Thus, the search of Smith's car was a contemporaneous incident of a lawful arrest. *Belton*, 453 U.S. at 460."

SEARCH AND SEIZURE:
Automobile Search; Hatchback Cargo Area

United States v. Mayo,
CA9, No. 04-10076, 1/15/05

On July 16, 2002, Officer Fritts of the Stockton Police Department Narcotics Unit received a call from the manager of a Super 8 Motel. The manager reported suspicious activity in the motel's parking lot. Four cars—a brown Chevrolet truck, red Pontiac Firebird, silver Dodge Caravan, and a silver Honda Civic (Mayo's car)—pulled up next to each other. The occupants got out of their cars and began talking. One of the occupants handed another a package of some sort. The driver of the truck wiped down the steering wheel and door handle of the truck with a rag or shirt, and then he walked away from the group, carrying a maroon backpack. The manager gave Officer Fritts the make and license plate number of each of the four vehicles.

After Officer Fritts received the call, he radioed the police dispatcher to send a patrol car to the motel to investigate suspicious activity, possibly involving narcotics. He also gave the dispatcher the descriptions of the four cars involved. He told the dispatcher nothing else. Responding to the dispatcher, Officer Golden arrived at the motel within a few minutes. By the time of his arrival, however, three of the cars had left the motel. Officer Golden spotted the fourth car, Mayo's Honda Civic, parked by the manager's office. Officer Golden pulled in behind the Civic and, as part of standard safety procedure, entered Mayo's license plate information into his computer. Officer Golden then approached Mayo, who was standing next to his Civic. He informed Mayo that he was investigating possible narcotics activity, and he asked Mayo for identification. Mayo handed him his driver's license and California vehicle sales license. The two then chatted informally for a minute, and Officer Golden asked Mayo whether he owned the Civic, to which Mayo responded that he was in the process of buying it from a third party. Officer Golden then took Mayo's licenses back to his patrol car to enter the information into his computer.

After returning to his patrol car, Officer Golden noticed for the first time that the Civic's registration expired in 1999, but the sticker on the plate read 2003, indicating that the sticker probably was stolen. Officer Golden walked back to Mayo and asked him about the registration. Mayo denied any knowledge of the stolen sticker on the license plate.

During this time, Officer Fritts arrived to investigate narcotics activity. The motel manager told him that Mayo attempted to rent a room with a credit card in the name of Bennie Bindi. Officer Fritts approached Mayo, and Fritts, along with another narcotics officer, smelled a chemical odor commonly found in methamphetamine labs. Officer Fritts asked Mayo about the smell, and Mayo denied any knowledge of it.

Officer Fritts then asked Mayo about the credit card that he tried to use to rent the motel room. Mayo explained that Bennie Bindi authorized the use of the card because Mayo did not have enough cash to rent a room. Mayo then consented to a pat-down search. The search produced nothing suspicious, except $160.00 in twenty-dollar bills. Officer Fritts asked Mayo why he did not rent the room with this money, and Mayo responded that he wanted to rent the room for two nights.

Shortly thereafter, Bennie Bindi approached the group. Officer Fritts searched Bindi's car—the silver Dodge Caravan that the manager had seen earlier—because Bindi was on searchable probation. The search produced glass pipes for smoking methamphetamine and an altered driver's license, among other things. Officer Fritts returned to Mayo and asked him several times to consent to a search of his vehicle. Mayo refused each time. Finally, Officer Fritts instructed Mayo that, if Mayo did not consent to the search, he would arrest Mayo for the felony vehicle registration violation. When Mayo again refused, Officer Fritts arrested him and searched his Civic incident to arrest. Officer Fritts found the stolen mail—the subject of the indictment—in bags located in both the passenger compartment and hatchback area behind the rear seat. From the slim record, it appears that Mayo could access the hatchback area from the passenger compartment. The entire event lasted between twenty and forty minutes, from the first arrival of the police to the search of Mayo's vehicle.

Mayo filed a motion in the district court to suppress the evidence from the search of his vehicle. After a hearing, the district judge denied the motion. Mayo then entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress. The district court sentenced Mayo to six months in prison followed by three years of supervised release. Mayo appealed.

Upon review, the Ninth Circuit Court of Appeals was faced with determining a workable rule, consistent with the regime of *Belton*, to govern searches of the cargo area behind the rear seat of a hatchback vehicle. The Ninth Circuit concluded that the hatchback area meets the criterion for automobile searches under *Belton,* stating it is "generally, even if not inevitably," accessible to an arrestee from the passenger area of the vehicle.

"Contrary to Mayo's contention, the hatchback area is much more easily viewed as part of the passenger compartment than as the equivalent of a conventional vehicle trunk. Accordingly, an officer conducting a search incident to the arrest of an occupant of the vehicle may search the hatchback area.

"We adopt that workable rule for this circuit. Our decision echoes that of other circuits that have addressed comparable searches. *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996); *United States v. Doward*, 41 F.3d 789, 794 (1st Cir. 1994); *United States v. Olguin-Rivera*, 168 F.3d 1203, 1205-07 (10th Cir. 1999); *United States v. Pino*, 855 F.2d 357, 364 (6th Cir. 1988)."

SEARCH AND SEIZURE:

Canine Sniff During a Lawful Traffic Stop

Illinois v. Caballes, No. 03-923, 01/24/05

In this case, the issue before the United States Supreme Court was whether the Fourth Amendment requires reasonable articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop. The case is as follows:

Illinois State Trooper Daniel Gillette stopped Caballes for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmis-sion and immediately headed for the scene with his narcotics-detection dog. When they arrived, Caballes' car was on the shoulder of the road and Caballes was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around Caballes' car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested Caballes. The entire incident lasted less than 10 minutes.

Caballes was convicted of a narcotics offense and sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed

without any specific and articulable facts to suggest drug activity, the use of the dog unjustifiably enlarged the scope of a routine traffic stop into a drug investigation. The United States Supreme Court disagreed, finding as follows:

"Here, the initial seizure of Caballes when he was stopped on the highway was based on probable cause and was concededly lawful. It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *United States* v. *Jacobsen*, 466 U. S. 109, 124 (1984). A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. *People* v. *Cox*, 202 Ill. 2d 462, 782 N. E. 2d 275 (2002). We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while Caballes was being unlawfully detained.

"In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. We accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

"Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that Caballes possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed Caballes' constitutionally protected interest in privacy. Our cases hold that it did not.

"The use of a well-trained narcotics-detection dog—one that does not expose noncontraband items that otherwise would remain hidden from public view—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of Caballes' car while he was lawfully seized for a traffic violation. Any intrusion on Caballes' privacy expectations does not rise to the level of a constitutionally cognizable infringement. A dog sniff conducted during a concededly lawful traffic stop that reveals no information, other than the location of a substance that no individual has any right to possess, does not violate the Fourth Amendment."

SEARCH AND SEIZURE: Consent Search; False Statement by Police

United States v. Esobar,
CA8, No. 03-4046, 11/18/04

In this case, the Eighth Circuit Court of Appeals dealt with a situation where two bus passengers were falsely informed by police that a drug detection dog had alerted on their luggage. The officers then communicated to the passengers that there was probable cause to search, and they had no choice but to permit it. This fact helped convince the Court that the consent was tainted.

SEARCH AND SEIZURE: Stop and Frisk; Anonymous Tip

United States v. Brown,
CA4, No. 04-4353, 3/25/05

In September 2003, police in Newport News, Virginia, received an anonymous telephone tip that a short, black male with glasses was carrying a firearm outside the Roseman Court apartment complex. Two officers approached the scene: Officer C.J. Lewis in a marked patrol car and Officer Randall Petrosky on foot. Officer Petrosky was accompanied by a K-9 police dog.

Officer Petrosky was the first to arrive at the scene. When he arrived, Brown was standing on the sidewalk outside one of the apartments. Brown generally matched the description provided in the anonymous tip. As Officer Petrosky approached, Brown turned and walked into the apartment. Through the open blinds of the apartment window, Officer Petrosky could see people in the apartment telling and motioning for Brown to leave. Brown left the apartment and walked out onto the sidewalk.

By this point, Officer Lewis had arrived in a patrol car. She approached Brown on the sidewalk and asked, "Excuse me, can we talk to you a minute?"

Officer Petrosky and the police dog were standing just behind her. Brown voluntarily and without prompting produced his Virginia identification card. Officer Lewis ran the identification through dispatch and returned it to Brown. The officers then told Brown that he matched the description of the anonymous tip. Brown responded that he was not the person for whom they were looking. Officer Lewis asked Brown if he would consent to a pat-down for weapons. Brown refused.

According to Officer Lewis, throughout the conversation Brown had "the strong odor of alcoholic beverage emitting from his breath, and his eyes were bloodshot and glassy." Officer Petrosky agreed that Brown's eyes were "bloodshot and glassy" and added that he was "fidgety and nervous." At one point, Officer Lewis asked Brown if he had been drinking that evening and Brown responded, "I'm going to be honest. Yes, I have." Brown exhibited no other physical impairments, such as slurred speech or staggered movements.

Based on the conversation with Brown and the impairments she observed, Officer Lewis testified that she decided to place Brown under arrest for public intoxication. Before she could do so, a fight broke out inside the apartment from which Brown had exited. Officer Petrosky called for backup to assist with the

fight. Especially important to this appeal is the chronology of events that took place after the fight broke out. At the suppression hearing, Officer Petrosky described the ensuing events as follows:

Officer Lewis told Mr. Brown to go ahead and place his hands on a nearby car. He started to bend over to place his hands on the car. When he bent over, I noticed in the pants that he was wearing, on the left rear pocket of his pants I noticed this bulge that was in the shape of a gun. So immediately to me I knew he had a gun in his left rear pocket.

Officer Lewis' testimony supported this account: "For our safety, I asked Brown to place his hands on the car that was directly in front of him. . . As he placed his hands on the car, I saw Officer Petrosky immediately draw his weapon and order Mr. Brown to keep his hands on the car." At that point, Officer Lewis also drew her weapon and pointed it at Brown. Brown became very nervous and began to lift his hands up and down on the car. According to Officer Lewis, Brown then said, "The weapon is in my back pocket. Just take it, just take it." Officer Lewis removed the firearm from Brown's pocket. Officer Petrosky ordered Brown to his knees, and one of the backup officers who had arrived placed Brown in handcuffs and into a patrol car.

According to Officer Lewis, during the car ride to the booking station Brown "was speaking pretty freely and just stated that someone in the apartment had told him to take this burn and bounce," which meant to take the firearm and leave the apartment. Brown also stated that "the only reason he had taken the gun out of the apartment was because there were children present in the apartment." At no point before Brown made these statements had the officers informed him of his *Miranda* rights, though Brown's statements in the patrol car were not in response to any police questioning.

Brown moved to suppress evidence of the firearm and his statements in the patrol car as having been obtained in violation of the Fourth Amendment. The district court found that a reasonable person in Brown's position during his initial encounter with the police, faced with two uniformed officers, a police dog, and information about an anonymous tip, would not have considered himself free to disregard the police and go about his business. The district court concluded, therefore, that the initial encounter between the officers and Brown was a *Terry* stop (see Terry v. Ohio, 392 U.S. 1, 1968), not a consensual police-citizen encounter, and the officers thus needed reasonable, articulable suspicion that Brown was armed and dangerous to justify the stop. Citing Florida v. J.L., 529 U.S. 266 (2000), the district court explained that the anonymous tip alone did not provide adequate suspicion because the tip contained no information predicting future acts by which the officers could corroborate the substance of the tip. Therefore, the district court ruled that the Terry stop was illegal and suppressed the firearm and statements obtained after the stop.

The district court ruled alternatively that even if the initial encounter between the officers and Brown was a consensual police-citizen encounter, not a Terry stop, the officers did not have probable cause to arrest Brown for public intoxication. Glassy, bloodshot eyes, the smell of alcohol, and Brown's admission that he had been drinking, the district court explained, were not sufficient under Virginia law to establish probable cause for the arrest.

Evidence of the firearm and Brown's statements was therefore suppressed as fruit of the illegal arrest. On appeal, the Fourth Circuit Court of Appeals reviewed the case, finding as follows:

"…An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. Though the quantum of suspicion necessary for a *Terry* stop is less demanding than that for probable cause, an officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.

"Officers Lewis and Petrosky initially approached Brown in response to an anonymous telephone tip that Brown was carrying a firearm. An anonymous telephone tip that alleges illegal possession of a firearm but that merely identifies a suspect and his location does not itself provide reasonable suspicion for a *Terry* stop. To justify a *Terry* stop, such a tip must contain sufficient indicia of reliability to enable officers to evaluate the veracity of the tip before stopping whomever the tip identifies. *Alabamav. White*, 496 U.S. 325, 330 (1990). For example, an anonymous telephone tip sufficient to justify a *Terry* stop might predict a suspect's future actions, which can then be corroborated by police surveillance of the suspect's movement. Once the predictions are corroborated, police may have reasonable suspicion to make a *Terry* stop. Or, police may be able to credit an anonymous telephone tip based on their experience in having received reliable tips from the same informant in the past (identified by the sound of the informant's voice), thereby justifying a *Terry* stop.

"Here, the tip provided nothing more than a brief, general description of Brown, his whereabouts, and an allegation that he was carrying a firearm. While the officers were able to corroborate immediately the identification and location components of the tip, at no point before Officer Lewis ordered Brown against the car did the officers observe any conduct by Brown that would cause them to suspect that he was carrying a firearm. *See J.L.*, 529 U.S. at 272 ('The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.') Moreover, nothing in the record indicates either a history of reliable tips from the anonymous informant or a basis for the informant's knowledge on this occasion. Therefore, regardless of whether a seizure occurred during the initial encounter between Brown and the officers, or whether a seizure did not occur until Brown submitted to Officer Lewis' order, the anonymous tip alone did not provide reasonable suspicion to justify seizing Brown. Because the officers had acquired no additional information that Brown was carrying a firearm before Officer Lewis ordered him against the car, we agree with the district court that the officers lacked authority under *Terry* to seize Brown."

SEARCH AND SEIZURE:
Stop and Frisk; Protective Sweep

United States v. Maddox,
CA10, No. 03-2311, 11/15/04

In July 12, 2002, two federal marshals and a local deputy sheriff, Anthony Medrano, served an arrest warrant on Rachel Page, a fugitive wanted for narcotics trafficking. Page was staying in the mobile home of Richard

"Pops" Buhrle in the sparsely populated westside of Albuquerque, New Mexico. Buhrle's residence is located in a high crime area and known by local law enforcement officers to be a dangerous place. Because a previous homicide investigation had taken Deputy Medrano to Buhrle's residence, he personally knew of the dangerousness of the residence prior to Page's arrest. He also knew that the residence had been the location of numerous violent crimes and that several narcotics traffickers and violent fugitives had been arrested there.

Deputy Medrano and the federal marshals drove an unmarked car down the long driveway to the dimly-lit Buhrle residence at dusk (approximately 8:45 p.m.). As Deputy Medrano and the marshals pulled up, they saw Buhrle's adult son, Richard Buhrle, Jr., standing in the driveway. The officers asked if Page was in the residence, and Richard said that she was. Deputy Medrano, based upon his knowledge that Richard was a homicide suspect with a violent history, asked him to sit down in the carport area near the mobile home. At this point, a car pulled up the driveway. The driver exited and approached Deputy Medrano. Deputy Medrano asked this person to remain seated in the carport as well.

The federal marshals then went into the home to serve the warrant; they remained inside for approximately fifteen minutes. While the marshals were inside, Deputy Medrano stayed outside to prevent others from entering the residence and to ensure that the persons in the carport did not interfere with the arrest.

While the federal marshals were still inside, a pick-up truck carrying three people, including Maddox, pulled into the driveway. As the truck approached, Deputy Medrano saw Maddox reach under the seat. Deputy Medrano could not tell whether Maddox had put something under the seat or was retrieving something from there, and thus interpreted the action as "an unknown threat." Deputy Medrano informed the three new arrivals that there were marshals making an arrest inside and asked them to stay in the carport area.

Deputy Medrano now had five people under surveillance—three unknown individuals, one person he knew to be violent, and Maddox, who had begun to act erratically. He ignored Deputy Medrano's instructions and paced in circles farther and farther away from the carport, and at one point he urinated in the carport. Nevertheless, Deputy Medrano did not handcuff anyone nor did he unholster his sidearm. Rather, he asked these people to remain seated in the carport for the remainder of Page's arrest.

A few minutes later, another vehicle, carrying only a driver, arrived at the residence. Deputy Medrano asked this person to sit in the carport. When two more people arrived, Deputy Medrano directed them to the carport as well, bringing the total number of people detained to eight. During this time, one person threw an item—later found to be drug paraphernalia—underneath one of the vehicles in the driveway. At this point, feeling outnumbered by the group, concerned about his and the marshals' safety, knowing the violent history associated with this residence, and considering Maddox's threatening behavior, Deputy Medrano called for backup.

While Deputy Medrano was waiting for backup, the marshals exited the residence with Page. Page, however, could not be taken

immediately from the premises. Local protocol requires having a female officer pat down a female suspect during her arrest, and a marked car must be used to take the suspect away. Because Deputy Medrano and the federal marshals were all male and had arrived in an unmarked car, Page's arrest could not be concluded until a female officer arrived in a marked car.

Prior to the arrival of the female officer, additional deputies arrived in response to Deputy Medrano's call for backup. Deputy Medrano instructed the arriving officers to pat down the persons in the carport for weapons. Deputy Medrano informed one of the officers, Deputy McCoy, that Maddox had been acting suspiciously and instructed him to separate Maddox from the group. Deputy Medrano testified that he requested the separation of Maddox from the group because, at that time, he considered him a critical and deadly threat.

After moving him away from the group, Deputy McCoy asked Maddox for identification. Maddox supplied his name but stated that he had recently lost his driver's license. Deputy McCoy then asked Maddox if he had any weapons. Maddox replied that he was carrying a concealed gun. Deputy McCoy then handcuffed disarmed and arrested Maddox. The entire encounter, from the arrival of Deputy Medrano and the federal marshals to Maddox's arrest, took approximately a half hour. This encounter occurred entirely within the period when Deputy Medrano was waiting for a female officer to arrive and conclude Page's arrest.

The Government filed felony in possession of a firearm charges against Maddox. Arguing that the deputies ran afoul of the Fourth Amendment to the Federal Constitution by detaining and questioning him, Maddox moved to suppress the gun evidence. After considering the totality of the circumstances, the District Court denied the motion. Maddox entered into a conditional plea agreement, reserving the right to appeal the motion to suppress. Maddox filed a timely motion of appeal with the Tenth Circuit Court of Appeals, who found as follows:

"In *Maryland v. Buie*, 494 U.S. 325 (1990), the United States Supreme Court applied this so-called *Terry* stop rule to 'protective sweeps.' A protective sweep allows officers to conduct a search of a home without probable cause solely for the purpose of officer protection as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Because the risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter, officers may take steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The Court stressed that this intrusion be no more than necessary to protect the officer from harm, and that the arresting officers are permitted in such circumstances to take only reasonable steps to ensure their safety after, and while making, the arrest. Finally, the Court held that a protective sweep should last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

"The Court then established two sets of criteria for evaluating the reasonableness of protective

sweeps, which are applied depending on the area in which the search occurs. The Court first held that closets and spaces immediately adjoining the place of arrest may be searched without probable cause or a reasonable suspicion of potential danger. The Court further held that with articulable facts which, taken together with the rational inferences from those facts, a reasonably prudent officer who believes that the broader area poses a danger to those on the arrest scene may conduct a protective sweep of the area surrounding the location of the arrest.

“The Government argues that *Buie* controls this case. *Buie* is not directly on point, however. In *Buie*, the Court considered the reasonableness of an in-house search incident to an in-house arrest. Here, we consider the reasonableness of a detention taking place outside of a house in which an in-house arrest is occurring. Thus, we first determine whether *Buie* applies to both protective searches and temporary seizures of persons (i.e. ‘protective detentions’). And if *Buie* encompasses both, we then consider whether these protective searches and detentions are limited to the confines of the house in which the arrest is taking place or whether they can occur in the area immediately outside of the home.

> **“Because the ability to search for dangerous individuals provides little protection for officers unless accompanied by the ability to temporarily seize any dangerous individuals that are located during the search, we conclude that detaining potentially dangerous persons for the duration of the arrest qualifies as a reasonable step to ensure the officers’ safety.”**

“We hold that *Buie* applies to both protective searches and protective detentions because the Court’s reasoning in *Buie* supports treating protective sweeps and protective detentions similarly. In authorizing officers to protect themselves by making a limited search for potentially dangerous individuals, the Court stated that officers may take reasonable steps to ensure their safety after, and while making, the arrest. Because the ability to search for dangerous individuals provides little protection for officers unless it is accompanied by the ability to temporarily seize any dangerous individuals that are located during the search, we conclude that detaining potentially dangerous persons for the duration of the arrest qualifies as a reasonable step to ensure the officers’ safety. As such, we find that *Buie*’s two sets of evaluative criteria—one for when the search is immediately adjoining the place of arrest and one for when the search is located in the broader area of the arrest scene—apply to protective detentions as well. “Because we hold that *Buie* applies to both protective searches and protective detentions, we next consider whether *Buie* limits protective detentions to the area inside the home or whether a detention taking place immediately outside the home falls within *Buie*’s scope. In *Buie*, the Supreme Court described the area in which a protective sweep

can be performed as the arrest scene. While the protective sweep performed by the officers in *Buie* extended only to other areas of the home, the Court's opinion does not define the arrest scene, and thus does not expressly limit the protective sweep to areas within the home.

"Here, therefore, we must determine whether the area in which Mr. Maddox was detained was part of the 'arrest scene.' In making this determination we look to the same concerns that justify protective sweeps and protective detentions. The Supreme Court justified permitting protective sweeps of the arrest scene by noting that such sweeps protect officers from potentially dangerous individuals that may be present nearby. Consequently, we conclude that it is proper to consider the reasonable threats posed to the officers when drawing the boundaries of the arrest scene in an individual case.

"With this standard in mind, we find that the officer-safety interests at issue in *Buie* are nearly identical to those in play here. We hold that the same reasonableness test employed in *Buie* for the protective sweep of the broader arrest area applies to this protective detention. That is to say, we hold that law enforcement officers may only detain individuals on the scene of the arrest who are not within the 'immediately adjoining' area of the arrest if the officers 'possess a reasonable belief based on specific and articulable facts,' that the individual poses a danger to them.

"To be clear, our holding is not a carte blanche for law enforcement officers to detain any third party, using any means, as an adjunct to a lawful arrest. To the contrary, we apply the same limitations as the Court did in *Buie*. Thus, the protective detention must be for officer safety purposes only, based upon a reasonable and articulable suspicion of potential danger to the arresting officers. *See Buie*, 494 U.S. at 333. Further, the protective detention must be no more than necessary to protect the officers from harm, taking only reasonable steps to ensure their safety after, and while making, the arrest. Finally, the protective detention should last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises. These conditions were met here."

SEXUAL HARASSMENT:
Constructive Discharge

Davison v. City of Lone Jack,
CA8, No. 04-1825, 1/31/05

In this case, which was unpublished, Terri Davidson, resigned after one month as an employee of Lone Jack, Missouri. She sued the city and four police officers, claiming she was denied equal protection of law and constructively discharged due to her gender. In support of her sexual harassment and hostile work environment claims, Davison emphasizes she daily overheard officers make offensive and vulgar statements about women. But, she acknowledges that no gender-related statements were directed at her. The Eighth Circuit Court of Appeals found as follows:

"Although the officers' alleged statements about women were lewd and offensive, they do not constitute discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of Davison's employment and create an abusive working environment. Mere offensive utterances do

not constitute sexual harassment, nor create a hostile work environment. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). Davison failed to demonstrate she was subjected to sexual harassment and a hostile work environment.

"Davison also claims to have been constructively discharged. For an employee to be constructively discharged, an employer must have deliberately created intolerable working conditions with the intention of forcing the employee to quit. An employee who resigns without giving the employer a reasonable chance to resolve a problem has not been constructively discharged. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998).

"Here, Davison failed to present evidence that the officers deliberately made offensive remarks with the intent to force her to resign because of her gender. She admitted that she had no idea whether the remarks were made because of her gender. In fact, Davison stated that the reason she resigned was to accept a higher paying job. Further, Davison did not give Lone Jack an opportunity to resolve the situation. During her four-week employment, the City Council adopted a sexual harassment policy in response to Davison's complaints. One week later, she resigned. Afterwards, city officials requested that Davison rescind her resignation, in order to give them an opportunity to resolve the problems. She declined. Thus, Davison failed to demonstrate she was constructively discharged."

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