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## Contents

- 1 **CIVIL RIGHTS:** First Amendment; Employee Statements as Part of Their Official Duties
- 3 **CIVIL RIGHTS:** Retaliatory Prosecution Suits; Proof There Was No Probable Cause
- 4 **CONFRONTATION CLAUSE:** Non-testimonial Evidence; 911 Call
- 6 **DOUBLE JEOPARDY**
- 7 **EVIDENCE:** Motive
- 8 **EXTRADITION:** Recovery of Costs; Sovereign Immunity
- 8 **INTERROGATION:** In Custody; Parole Officer's Instructions
- 11 **INTERROGATION:** Routine Traffic Stops
- 11 **PRISONS AND JAILS:** Inmates; First Amendment Rights
- 11 **PROBABLE CAUSE:** Search Warrant for Home Computers; Web Site Subscription
- 13 **RAPE SHIELD LAW:** Minors
- 14 **SEARCH AND SEIZURE:** Automobile Searches; Incident to Arrest
- 15 **SEARCH AND SEIZURE:** Emergency Search; Community Caretaking Function
- 17 **SEARCH AND SEIZURE:** Emergency Search; Threat of Ongoing Violence
- 19 **SEARCH AND SEIZURE:** Expectation of Privacy; Computers
- 20 **SEARCH AND SEIZURE:** Good Faith Exception
- 21 **SEARCH AND SEIZURE:** Knock and Announce Requirement
- 25 **SEARCH AND SEIZURE:** Search Incidental to Arrest
- 26 **SEARCH AND SEIZURE:** Seizure of Person
- 27 **SEARCH AND SEIZURE:** Warrant for Search of Vehicles; Vehicle Arrives During Course of the Search
- 29 **SEARCH AND SEIZURE:** Suspicionless Search of Parole
- 30 **SEARCH AND SEIZURE:** Garbage Searches
- 31 **TREATIES:** Foreign Nationals; Consular Notification

## CIVIL RIGHTS:

### First Amendment; Employee Statements as Part of Their Official Duties

*Garcetti v. Ceballos, No. 04-473, 5/30/06*

**R**ichard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to challenge the warrant but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

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Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case. Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court

for the Central District of California, asserting, as relevant here, a claim under 42 U. S. C. §1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

The United States Supreme Court stated that Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way, he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

The Court stated that its holding likewise is supported by the emphasis of precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

When an employee speaks as a citizen addressing a matter of public concern, the

First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no need for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

CIVIL RIGHTS:  
**Retaliatory Prosecution Suits;  
Proof There Was No Probable Cause**  
*Hartman v. Moore, No. 04-1495, 4/26/06*

**R**EI, a company who manufactured multiline optical readers, began an extensive lobbying and public-relations campaign in an effort to convince the United States Postal Service to incorporate multiline optical scanning technology. In the end, the Postal Service begrudgingly embraced the multiline technology, but awarded the lucrative equipment contract to a competing firm. Subsequently, Postal Service inspectors investigated REI and its chief executive, William G. Moore, Jr., for their alleged involvement in a consulting-firm kickback scandal and for their alleged improper role in the search for a new Postmaster General. Urged at least in part by the inspectors to bring criminal charges, a federal prosecutor tried REI and its top officials. But, finding a complete lack of evidence connecting them to any wrongdoing, the District Court acquitted the defendants.

Moore then filed an action against the postal inspectors arguing that they had engineered the prosecution in retaliation for his lobbying efforts. In District Court, the inspectors moved

for summary judgment, claiming that because the underlying criminal charges were supported by probable cause they were entitled to qualified immunity. The District Court denied the motion, and the Court of Appeals affirmed.

The United States Supreme Court stated that a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges, finding as follows:

“First, evidence showing whether there was probable cause for the criminal charge will be highly valuable circumstantial evidence to prove or disprove retaliatory causation. Demonstrating a lack of probable cause will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that the prosecution would have occurred even without a retaliatory motive.

“Second, since the defendant in a retaliatory-prosecution case will not be the prosecutor, who has immunity, but a law enforcement official who allegedly influenced the prosecutorial decision, the causal connection required is not between the retaliatory motive of one person and that person’s own injurious action, as it is in the ordinary retaliation case, but between the retaliatory motive of one person and the adverse action of another. Because evidence of the postal inspector’s motive does not necessarily show that the inspector induced the prosecutor to act when he would not have pressed charges otherwise and because of the longstanding presumption of regularity accorded prosecutorial decision making, a showing of the absence of probable cause is needed to bridge the gap between the non-prosecuting government agent’s retaliatory

motive and the prosecutor's injurious action and to rebut the presumption.

"The significance of probable cause or the lack of it is of obvious evidentiary value. Though not necessarily dispositive, the absence of probable cause along with a retaliatory motive on the part of the official urging prosecution are reasonable grounds to suspend the presumption of regularity behind the charging decision and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to go forward."

#### CONFRONTATION CLAUSE:

##### Non-testimonial Evidence; 911 Call

*Davis v. Washington, No. 05-5224, 6/19/06*

**O**n February 1, 2001, a 911 emergency operator answered a call, but the connection was terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend, Adrian Davis, the petitioner in this case. The phone conversation was as follows:

**911 Operator:** Hello.

**Complainant:** Hello.

**911 Operator:** What's going on?

**Complainant:** He's here jumpin' on me again.

**911 Operator:** Okay. Listen to me carefully. Are you in a house or an apartment?

**Complainant:** I'm in a house.

**911 Operator:** Are there any weapons?

**Complainant:** No. He's usin' his fists.

**911 Operator:** Okay. Has he been drinking?

**Complainant:** No.

**911 Operator:** Okay, sweetie. I've got help started. Stay on the line with me, okay?

**Complainant:** I'm on the line.

**911 Operator:** Listen to me carefully. Do you know his last name?

**Complainant:** It's Davis.

**911 Operator:** Davis? Okay, what's his first name?

**Complainant:** Adrian.

**911 Operator:** What is it?

**Complainant:** Adrian.

**911 Operator:** Adrian?

**Complainant:** Yeah.

**911 Operator:** Okay. What's his middle initial?

**Complainant:** Martell. He's runnin' now."

As the conversation continued, the operator learned that Davis had "just run out the door" after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you."

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings

and her children so that they could leave the residence.”

The State charged Davis with felony violation of a domestic no-contact order. The State’s only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries. McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis’ objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed. The Supreme Court of Washington also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. The United States Supreme Court granted certiorari.

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**“...In a very significant case for law enforcement officers dealing with domestic violence where the victim refuses to testify, the United States Supreme Court stated that the Confrontation Clause of the Sixth Amendment provides that ‘in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.’ This provision bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”**

Supreme Court stated that the Confrontation Clause of the Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” This provision bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.

The Court concluded that the circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not

testifying. What she said was not “a weaker substitute for live testimony” at trial. The Court found as follows:

“...This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot evolve into testimonial statements once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator

then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial.

"This presents no great problem. Just as, for Fifth Amendment purposes, 'police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,' *New York v. Quarles*, 467 U. S. 649, 658– 659 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. The court should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the complete 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

"In a companion case, *Hammon v. Indiana*, No. 05-5705, 6/19/06, when police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept Hershel Hammon in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for domestic

battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her.

"Amy Hammon's statements were testimonial. It is clear from the circumstances that Amy's interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the interrogation was to investigate a possible crime. The comparison to Davis is unpersuasive. The statements in Davis were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. The Sixth Amendment operates to exclude Amy Hammon's affidavit."

## DOUBLE JEOPARDY

*Winkle v. State*, CR05-862, 5/11/06

**P**rentis Winkle was charged in federal court with three counts of violating the "Mann Act," 18 U.S.C. § 2423(a), by "knowingly transporting a female, who at that time was under the age of eighteen years, in interstate commerce from the State of Texas to the State of Arkansas, with intent that such female engage in sexual activity under such circumstances as would constitute a criminal offense" under Ark. Code Ann. § 5-14-103(a)(1)(C)(i) (Repl. 2006). The charges stemmed from allegations that, on three occasions in June and July of 2003, Winkle took a then-thirteen-year-old girl from Mount Pleasant, Texas, to Ashdown, Arkansas, where

he had sexual intercourse with her. The case was tried to a federal jury on December 15, 2003, which acquitted Winkle on all three counts.

On May 19, 2004, however, the Miller County prosecuting attorney filed a criminal information charging Winkle with one count of statutory rape; the information alleged that on July 1 and July 2, 2003, Winkle engaged in sexual intercourse or deviate sexual activity with one who was less than fourteen years of age. Winkle filed a motion to dismiss the charges on September 2, 2004, in which he contended that the Arkansas rape prosecution was barred by application of the Double Jeopardy Clause. The Miller County Circuit Court denied Winkle's motion in an order entered on March 18, 2005. Winkle filed a timely notice of appeal, arguing that double jeopardy barred Arkansas from seeking to try him for rape.

In *Winkle v. State*, the Arkansas Supreme Court held that the Double Jeopardy Clause does not bar the State from prosecuting a defendant for statutory rape after he has been acquitted by a federal jury of transporting a female under the age of eighteen across state lines with the intent to engage in criminal sexual activity.

#### EVIDENCE: **Motive**

##### *Armstrong v. State, No. CR 05-1028, 4/13/06*

**O**n February 14, 2004, the body of Armstrong's estranged wife, Dashunda Armstrong, was found burning in her van on McDonald Road in Pulaski County. She was approximately twenty-weeks pregnant at the time and had been shot at least once prior to burning in the fire. Pulaski County deputy sheriffs investigated the deaths and discovered that on the previous evening, Dashunda

Armstrong had a hair appointment with her sister until around 1:00 a.m. According to her sister, the victim planned to meet Armstrong after she left the hair salon. When questioned by the investigators regarding his wife, Armstrong responded that she never arrived at his house as they had planned. Further investigation of Armstrong revealed that he had made several cellular telephone calls to a former girlfriend, Kim Waller, on the night of his wife's death. The calls made by Armstrong that evening were made through a cellular tower located near where Dashunda Armstrong's van was found.

Ms. Waller told police that on the evening in question, Armstrong called her sometime after midnight to pick him up not where her sister lived, but the "opposite way...down McDonald Road." While she was driving to the area, Armstrong told Ms. Waller that he set "[his wife's] van on fire." When she arrived in the area, Ms. Waller saw the burning van and returned home. Her brother-in-law, Ronnie Neal, took Armstrong home after Armstrong appeared at his house, requesting a ride home and smelling of smoke. The next morning, Armstrong told Ms. Waller that he did not have a choice "to do it" because his wife was trying to hurt Ms. Waller and her daughter. A later search of Armstrong's room at his father's home revealed two laptop computers, which included email information from a woman named Adrian Nimmer regarding how to change one's identity. In addition, several letters from various creditors were found. The investigation further revealed an ongoing and contentious divorce between Armstrong and his wife.

The State waived the death penalty, and Armstrong was tried on two counts of capital murder, one for the death of Dashunda Armstrong, and one for the death of the

twenty-week-old fetus. He was convicted and sentenced. Armstrong then filed appeals from his two convictions for capital murder and his sentence to life imprisonment without parole.

One of Armstrong's arguments on appeal was his claim "that while it was true that he was behind on his child-support payments, that fact hardly makes it more likely that he committed a double homicide. Hence, he contends that that evidence was irrelevant and should have been excluded. He asserts that even assuming, *arguendo*, that a \$784 child-support debt was in some marginal way relevant to the killing of his wife and unborn child, the causal connection between the debt and the killing was so tenuous that any probative value was substantially outweighed by the danger of unfair prejudice to him. Armstrong maintains that despite the prosecution's use of the evidence for the sole purpose of motive, the theory lacked credibility and should not have been heard by the jury."

In *Armstrong v. State*, the Arkansas Supreme Court held that the fact that a murder defendant had a prior outstanding child-support obligation to his victim is sufficiently probative of the possible motive for killing her to come in at trial under Arkansas Rules of Evidence, Rule 404(b). While this rule bars admission of evidence of prior crimes to prove a defendant's character, it allows such evidence to be introduced as proof of motive. The Court found as follows:

"Clearly, evidence of an acrimonious divorce and evidence that Armstrong owed the victim, his estranged wife, back child support could provide a motive for his wife's killing. This court has held that when the purpose of evidence is to show motive, anything and everything that might have influenced the commission of the criminal act may, as a rule, be shown. See *Morgan v. State*, 359 Ark. 168, \_\_\_ S.W.3d

\_\_\_ (2004). Furthermore, the State is entitled to produce evidence showing circumstances which explain the act, show a motive, or illustrate the accused's state of mind. See *id.* The fact that Armstrong had a prior outstanding child-support obligation owed to the victim was certainly relevant in that it provided a possible motive for her murder. For this reason, we cannot say that the circuit court abused its discretion in admitting this evidence."

#### EXTRADITION:

##### **Recovery of Costs; Sovereign Immunity**

*St. Charles County, Mo. v. Wisconsin,*  
CA8, No. 05-2808

**I**n *St. Charles County, Mo. v. Wisconsin*, the County filed this action against the State of Wisconsin to collect \$5,421.86 in expenses that St. Charles County allegedly incurred for jailing a Wisconsin fugitive pending extradition. The Eighth Circuit Court of Appeals ruled that the county did not have a cause of action against the state. The Eleventh Amendment precludes an action against a state by a citizen of another state and the county is, in effect, a citizen of another state.

#### INTERROGATION:

##### **In Custody; Parole Officer's Instructions**

*United States v. Ollie,*  
CA8, No. 05-2503, 3/3/1/06

**A**del, Iowa, police chief James McNeill responded to a call asking for certain property to be removed from an apartment. When he arrived, Nicola Teed escorted him to a bedroom and directed him to a dresser behind which he discovered a loaded .22 revolver and a holster. Ms. Teed said that neither she nor her

boyfriend, Johnny Lee Ollie, Jr., owned the gun. During that conversation, she also told Chief McNeill that Mr. Ollie was on parole.

Upon returning to his office, Chief McNeill telephoned Roy Klobnak, Mr. Ollie's parole officer. In their conversation, Chief McNeill stated that he wanted to talk with Mr. Ollie concerning the handgun. Mr. Klobnak had a regularly scheduled meeting with Mr. Ollie the following day and told Chief McNeill that he would order Mr. Ollie to meet the chief at the police station.

The next day, following his parole meeting, Mr. Ollie arrived at the police station, and Chief McNeill escorted him to an interview room. Chief McNeill did not give Miranda warnings to Mr. Ollie before beginning an interview. In response to Chief McNeill's questioning, Mr. Ollie twice said that he did not own or possess a gun, but when the chief asked if Mr. Ollie would continue to deny ownership if the police found fingerprints on the weapon that matched Mr. Ollie's, Mr. Ollie admitted that he had handled the gun. Chief McNeill then asked Mr. Ollie if he would be willing to give a written statement. He agreed, and Chief McNeill gave him Miranda warnings. Mr. Ollie then completed a brief written statement, which indicated that he had received the gun in exchange for driving two people to a liquor store.

Before trial, Mr. Ollie moved to suppress statements that he made during his interview with Chief McNeill and his subsequent written statement, arguing that Chief McNeill's failure to give him Miranda warnings at the outset of the interview made all of his statements inadmissible. The district court denied the motion, holding that Mr. Ollie was not in custody when he confessed and therefore Chief

McNeill had no obligation to give Mr. Ollie those warnings. After a brief trial, Mr. Ollie was convicted of being a felon in possession of a firearm and a felon in possession of ammunition. He was sentenced to ten years in prison. The Eighth Circuit Court of Appeals found as follows:

"When a suspect is interrogated in a custodial setting, the police must advise him of his right not to answer questions and to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The clearest example of custody is when a suspect is placed under formal arrest. Absent a formal arrest, the police must give Miranda warnings when the suspect's freedom of movement is restricted to a degree akin to a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). Whether Mr. Ollie was in custody is not a matter of his own subjective belief, but turns on whether a reasonable person in his shoes would have felt free to end the interview. See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). In deciding whether a person is in custody, we consider all the circumstances confronting the person when he or she was questioned.

"We have identified several matters that are relevant to a determination of whether an interview is custodial. Some considerations generally act to mitigate the custodial atmosphere: These are, for instance, whether the police told the suspect that he or she was free to leave, was free to refuse to answer questions, or was not under arrest; whether the person's movements were unrestrained during the interview; and whether the person either initiated contact with authorities or voluntarily acquiesced to official requests. Other considerations tend to aggravate the interview's custodial nature: They are, among

other things, whether the police used coercive or deceptive tactics that restricted the suspect's freedom to terminate the encounter and whether the questioning occurred in a police-dominated atmosphere. No single consideration is dispositive, nor must they all weigh in the defendant's favor for us to decide that he or she was in custody.

"Both sides agree that Chief McNeill told Mr. Ollie twice that he was not under arrest. At the same time, he did not mention that Mr. Ollie could terminate the interview or refuse to answer questions. While advising someone that he or she is not under arrest helps to mitigate an interview's custodial nature, an explicit assertion that the person may end the encounter is stronger medicine. Such a statement provides an individual with a clear understanding of his or her rights and generally removes any custodial trappings from the questioning. Chief McNeill's statements to Mr. Ollie, while falling short of an ideal, do weigh against a determination that he was in custody.

"The Eighth Circuit Court of Appeals concluded that Mr. Ollie neither initiated contact with the Adel police nor voluntarily acquiesced to questioning. Chief McNeill told Mr. Ollie's parole officer that he wished to speak with Mr. Ollie concerning the gun found at the apartment. At their meeting the following day, the parole officer ordered Mr. Ollie to go talk with Chief McNeill. Despite this, the district court concluded that Mr. Ollie went to meet Chief McNeill of his own free will.

"We think that this finding is clearly erroneous. The parole officer testified that it would have been a violation of his parole for Mr. Ollie to refuse to go to the meeting and that a refusal could have led to Mr. Ollie's parole being

revoked, and Mr. Ollie testified that because of this order he felt that he had no choice but to meet with Chief McNeill. Faced with such pressures, we think that Mr. Ollie had little choice but to comply. Mr. Ollie's conduct revealed little more than an absence of resistance. While a defendant does not need to be enthusiastic about an interview for us to conclude that he voluntarily acquiesced, we think it clear here that Mr. Ollie was responding to pressure.

"The ultimate decision requires a hard look at all of the circumstances. That assessment leads us to believe that Mr. Ollie was in custody at the time that he made his inculpatory statements to Chief McNeill. Above all else, we think that it is the parole officer's order that Mr. Ollie meet with Chief McNeill that quite clearly tips the balance. Faced with such an order, we think that a reasonable person in Mr. Ollie's position would have been extremely reluctant either to refuse the interview or to terminate it once it began. In the words of the parole officer, had Mr. Ollie refused to attend the interview it would have been a violation of his parole and a revocation of his parole status very well could have happened.

"Had Mr. Ollie attempted to leave the interview, he could have reasonably expected the same reaction. We therefore disagree with the district court and hold that the failure to advise Mr. Ollie of his rights pursuant to Miranda requires the suppression of the oral confession to Chief McNeill."

## INTERROGATION:

**Routine Traffic Stops***Gorman v. State, CR05-973, 4/6/06*

**I**n *Gorman v. State*, the Arkansas Supreme Court reaffirmed its rule that questioning by law enforcement officers in the course of a routine traffic stop is not custodial questioning and Miranda warnings are not required. (See *Berkemer v. McCarty*, 468 U.S. 420 (1984) where the United States Supreme Court held that persons temporarily detained pursuant to a routine traffic stop are not “in custody” for purposes of Miranda.” The Court reasoned that Miranda warnings were not required in such cases because the stop was temporary, it was public, and the atmosphere on a public street is not comparable to the “police dominated” custodial interrogation. The Court held that a motorist who is detained pursuant to a traffic stop is entitled to recitation of his rights only when the stop becomes such that he is subjected to treatment that renders him “in custody” for practical purposes.

## PRISONS AND JAILS:

**Inmates; First Amendment Rights***Beard v. Banks, No. 04-1739, 6/28/06*

**I**n *Beard v. Banks*, the United States Supreme Court considered whether a Pennsylvania prison policy that denies newspapers, magazines, and photographs to a group of especially dangerous and recalcitrant inmates violates the First Amendment. The Court reviewed these prison regulations in the context of *Turner v. Safley*, 428 U.S. 78 (1987) and concluded that justifications for the prison’s policy—including the need to motivate better

behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to assure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire—were adequate.

## PROBABLE CAUSE:

**Search Warrant for Home Computers;  
Web Site Subscription***United States v. Wagers,  
CA6, No. 05-5296, 6/27/06*

**I**n *United States v. Wagers*, Lyman Wagers of Lexington, Kentucky, was convicted for the second time on child pornography charges. In this case, Wagers, a 57-year-old erstwhile lawyer and C.P.A., pleaded guilty to one count of conspiracy to receive child pornography, nineteen counts of receiving child pornography, and one count of possession of child pornography. The terms of his guilty plea allowed him to appeal the conviction on the grounds that the search warrants used in the investigation were not supported by probable cause.

A Homeland Security sting operation led to Wagers’ arrest. From March to August 2003, federal agents purchased subscriptions to and visited websites available at redlagoon.com, video2000.com, and darkfeeling.com. While visiting these sites, the agents found images of child pornography. They obtained records from the billing services of these sites. These records revealed that Wagers had purchased subscriptions to redlagoon.com on June 30, 2002; to video2000.com on March 22, 2003 and again on June 3, 2003; and to darkfeeling.com on April 15, 2003. Though the lengths of Wagers’ subscriptions are not clear from the record,

based on the prices he paid for his subscriptions, as compared to the prices the agents paid for one-month subscriptions, it appears that each of Wagers' subscriptions was for between one and two months of membership. This inference has been offered by Wagers and is not contested by the government. The agents who examined the websites did so by purchasing one-month subscriptions on March 26, 2003, August 1, 2003, and July 21, 2003, respectively.

On April 5, 2004, federal agents executed a search warrant at the home of Wagers. After finding child pornography on Wagers' home computer, agents swore out another affidavit for his office. On April 7, agents obtained a separate warrant for his office. The same day, he was arrested for possession of child pornography. The following day, agents obtained a third search warrant, directed to America Online (AOL), the company supporting Wagers' email account. Wagers' guilty plea and conviction are based on images found on his home computer, at least some of which, he concedes, were transmitted via his AOL account.

The home and office affidavits were both more than thirty pages long and quite detailed. The AOL affidavit is seven pages and less detailed, but it states that agents had connected Wagers' AOL email address to his home address and to the purchase of subscription memberships to all of the websites containing offending material. It further states that the affiant's "experience and training" lead him to believe that Wagers uses his AOL account to order, arrange for the payment of, and arrange for the receipt of child pornography. The warrants alleged that Wagers had bought subscriptions to websites that were found at a later date to display child pornography. They did not specifically allege that Wagers had viewed the sites or that he had

accessed unlawful content on them.

Regarding Wagers' appeal that the search warrants used in the investigation were not supported by probable cause, the United States Supreme Court found as follows:

"The Sixth Circuit Court of Appeals held that the evidence in this case connecting the defendant, his computer, his IP address, and his home to the offense is strong, particularly where the criminal activity (viewing child pornography) is tied to a place of privacy, seclusion, and high-speed Internet connectivity to home or office. Our opinion today is consistent with the views of our sister circuits. The Second and Fifth Circuits, for example, have noted that evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material. *United States v. Martin*, 418 F.3d 148 (2d Cir. 2005); *United States v. Froman*, 355 F.3d 882 (5th Cir. 2004).

"Wagers also argues that the affidavit for the home warrant 'relies heavily upon the fact that Wagers had a previous child pornography conviction.' Though the affidavit supporting that warrant does take note of his prior offense over less than two full pages, the document is 32 pages long, plus four pages of attachments, and the discussion of his prior offense is not the preponderant support for the application for the warrant.

"Implying that a prior conviction cannot properly raise an inference of later criminal activity, even for an identical or nearly identical offense, Wagers argues that an individual's criminal history is not the appropriate focus for a search warrant affidavit. The test for probable cause, as the Supreme Court affirmed very recently in *United States v. Grubbs*, 126 S. Ct. 1494 (2006),

is whether ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’ The application of this test is not fettered by the presumption of innocence embodied in the test for conviction. Instead, a ‘person of reasonable caution’ would take into account predelictions revealed by past crimes or convictions as part of the inquiry into probable cause.

“Wagers’ prior conviction for possession of child pornography followed the seizure of illegal images on both his home and his office computers. When, in our case, the Homeland Security agents uncovered evidence of Wagers’ connection to the websites carrying child pornography, his prior conviction was relevant, though not dispositive. Given the requirements of seclusion and a high-speed Internet connection, a home and office search warrant is supported by probable cause under these circumstances.”

#### RAPE SHIELD LAW: **Minors**

*State v. Townsend, CR05-1263, 4/13/06*

**I**n *State v. Townsend*, Denver Townsend, a 63-year-old male, was charged with the rape of his six-year-old former step-granddaughter. Townsend wanted to introduce evidence that the victim had been sexually assaulted two years earlier in another incident.

Under the rape-shield law, section 16-42-101, evidence of a victim’s prior sexual conduct is

**“Under the rape-shield law, section 16-42-101, evidence of a victim’s prior sexual conduct is inadmissible by the defendant to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.”**

inadmissible by the defendant to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose. Ark. Code Ann. § 16-42-101(b). An exception to this rule exists when the trial court, at an in camera hearing, makes a written determination

that such evidence is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature. Ark. Code Ann. § 16-42-101(c)(2)(c). The statute’s purpose is to shield victims of rape or sexual abuse from the humiliation of having their sexual conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant’s guilt. *Graydon v. State*, 329 Ark. 596, 953 S.W.2d 45 (1997).”

The Arkansas Supreme Court stated that the rape-shield statute is applied to situations where the public airing of the alleged past unchastity of an adult woman and its attendant humiliation may make her reluctant to report a rape, or to prevent the defendant from insinuating that the sexual complicity of the woman made the compulsion element of a rape unnecessary. Its larger purpose is to protect rape victims from the trauma caused by the review of past sexual experiences, and this protection is especially needed in cases involving minor victims. Therefore, the Court found that evidence of the prior sexual abuse of a minor is within the ambit of the rape-shield statute.

SEARCH AND SEIZURE:  
**Automobile Searches; Incident to Arrest**

*United States v. Hrasky,*  
*CA8, No. 05-2111, 7/18/06*

**O**n July 2, 2004, Nebraska State Trooper Jeff Wallace stopped a truck driven by Zachary Hrasky. Wallace had reason to believe that Hrasky was driving without a proper license, so he brought Hrasky to the patrol car and made further inquiry. Trooper Wallace then determined that Hrasky was driving on a suspended license and that this was his third such offense. Based on this information, Wallace handcuffed Hrasky and placed him in the back of the patrol car.

When Wallace informed Hrasky that he would not be released with a citation, Hrasky asked whether he could instead speak with a narcotics investigator about his knowledge of drug crimes in the area. Trooper Wallace acceded to Hrasky's request and summoned Investigator Cody Enlow, a member of a drug task force. Enlow arrived at the scene of the traffic stop shortly after 4:00 p.m., and entered Wallace's patrol car to speak with Hrasky.

Enlow spoke with Hrasky for approximately 45 minutes about becoming an informant. During that time, Trooper Wallace reserved judgment on whether Hrasky would be subjected to a full custodial arrest and transported from the scene. If Investigator Enlow reached an agreement with Hrasky involving cooperation in drug trafficking investigations, Wallace was prepared to consider simply giving Hrasky a ticket and releasing him. Ultimately, however, it became apparent to Investigator Enlow that Hrasky was not ready to make a commitment to help law enforcement. Enlow thus told Trooper Wallace

that Enlow was not "going to do anything" with Hrasky, and that Wallace should proceed as he would have done before Hrasky broached the possibility of cooperation.

At approximately 5:05 p.m., Trooper Wallace, Investigator Enlow, and another officer who had arrived at the scene began a search of Hrasky's truck. While searching the passenger area of the truck's extended cab, Enlow encountered a plastic insert covering a small cubby hole. The insert was loose, so Enlow pulled it up, and he discovered two handguns beneath the plastic.

After the search was completed, Trooper Wallace called a tow truck to remove Hrasky's vehicle. Hrasky was then taken to jail. After he was indicted for possession of the weapons found within his truck cab, Hrasky moved to suppress the evidence uncovered during the search, arguing that it was the fruit of an unreasonable search conducted in violation of the Fourth Amendment.

The district court ruled that it was a "close question" whether the search was permissible as a contemporaneous incident of Hrasky's arrest, and granted the defendant's motion to suppress. Although the court agreed that the initial traffic stop was constitutional, it held that the search was not incident to Hrasky's arrest because it was not "contemporaneous" with the arrest. The court also rejected the government's alternative contention that the search was permissible as a standard inventory of the vehicle. On appeal, the government contends only that the search was consistent with the Fourth Amendment as a search incident to Hrasky's arrest. The Eighth Circuit Court of Appeals found as follows:

"We are required once again to apply the 'bright-line' rule of *New York v. Belton*, which

provides that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. Belton built on *United States v. Robinson*, 414 U.S. 218 (1973), which held that a lawful custodial arrest establishes authority to conduct a full search of the arrestee's person, and that such a search is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

"Applying the Belton rule, we have upheld searches of automobiles incident to arrest where the arrestee has exited the vehicle and has been handcuffed and placed in a police officer's patrol car, e.g., *United States v. Barnes*, 374 F.3d 601, 603 (8th Cir. 2004), or even removed from the scene entirely. *United States v. Snook*, 88 F.3d

"Under *Belton*, we see merit in the view that the determination whether a search is a 'contemporaneous' incident of an arrest involves more than simply a temporal analysis. In the context of a rule whose applicability does not depend on the presence of one of the specific reasons supporting a search incident to arrest, it is sensible to conclude that 'a search need not be conducted immediately upon the heels of an arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events.' *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004) The focus should be not strictly on the timing of the search but its relationship to (and reasonableness in light of) the circumstances of arrest. Like our court in *Snook* and *McCrary*, the Ninth Circuit approved a search as incident to an arrest, even though it was conducted five minutes after the defendant was removed from the scene.

"The precise context is important to the reasonableness of the search, and it is significant that during the sixty minutes that Hrasky was in the patrol car, the officers were unsure whether he would be transported to the police station for booking, or released at the scene with only a citation. A police officer seeking to apply the Supreme Court's 'bright-line rules' reasonably could be concerned, if the police elected merely to issue a citation, whether a search incident to the initial arrest would have been unauthorized. It was only after Hrasky was deemed unable or unwilling to assist law enforcement that the trooper determined to make a 'full custodial arrest.'

"The search of Hrasky's truck certainly was contemporaneous with this decision to proceed with a full custodial arrest. Although an hour had elapsed since the initial detention, we think that it was still reasonable for police to consider Hrasky a 'recent occupant' of the truck."

## SEARCH AND SEIZURE:

### Emergency Search;

### Community Caretaking Function

*United States v. Quezada*,  
CA8, No. 05-3254, 4/10/06

**I**n *United States v. Quezada*, the Court noted that the Clay County, Missouri, Sheriff's Department often serves papers in civil proceedings. In this case, Deputy Danny Ruth went to Tiffany Giannone's apartment to serve her with a child protection order. The deputy had been to Giannone's apartment in the past and believed that she lived alone.

Deputy Ruth knocked on the apartment door. Although the door had been closed, the latch was not engaged; the door therefore yielded

to the deputy's knock. Through the gap in the door, the deputy could see that the lights were on in the apartment and he heard a television playing. He shouted, "Deputy Sheriff, Sheriff's Department!," into the apartment several times, but received no response. Deputy Ruth then called his dispatcher and told him of the open door; the dispatcher in turn "held the air" (stopped all other radio traffic) so that fellow police officers could hear if the deputy needed assistance. With the radio silenced and his weapon drawn, Deputy Ruth opened the door further and went inside.

Soon after entering the apartment, Deputy Ruth looked down a hallway. There he saw a pair of legs on the ground sticking out from a bedroom. As he got closer, the deputy discovered that the legs belonged to a man lying on the ground with a shotgun protruding from beneath him. Deputy Ruth yelled but received no reply. He kicked the man's feet to no avail. Only when the deputy took the shotgun from underneath the man did he begin to stir.

After being handcuffed and moved to the living room, the man said that his name was Carlos Pacheco and that he was staying in the apartment at Giannone's invitation. Further investigation revealed, however, that the man's true name was Christopher Quezada and that he had previously been convicted of felony theft.

A grand jury indicted Mr. Quezada for being a felon in possession of a firearm in violation of § 922(g)(1). After the district court denied his motion to suppress, Mr. Quezada entered a conditional guilty plea. Mr. Quezada maintains that Deputy Ruth's entry into the apartment was unreasonable.

The Eighth Circuit Court of Appeals noted at the outset that there is a difference between the standards that apply when an officer makes a warrantless entry when acting as a so-called community caretaker and when he or she makes a warrantless entry to investigate a crime. The Court found as follows:

"...Police officers, unlike other public employees, tend to be 'jacks of all trades,' who often act in ways totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of criminal law. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). These activities, which are undertaken to help those in danger and to protect property, are part of the officer's 'community caretaking functions.' They are unrelated to the officer's duty to investigate and uncover criminal activity. A police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention. *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978).

"The district court found on an ample record that Deputy Ruth entered the apartment to investigate a possible emergency situation. In fact, Mr. Quezada does not even assert that Deputy Ruth did not believe that an emergency existed or that he used this belief as a pretext to search for criminal wrongdoing. Deputy Ruth's entry into the apartment therefore violated the fourth amendment only if no reasonable officer could have believed that an emergency was at hand.

"We agree with the district court that Deputy Ruth's belief was reasonable. Had the apartment been dark and quiet, it might have been reasonable to assume that Ms. Giannone had simply not closed the door securely on her

way out. But when the door opened, Deputy Ruth saw that the lights were on and heard a television playing, making it more likely that someone was at home. When Deputy Ruth yelled into the apartment several times but received no answer, a reasonable officer in the deputy's position could conclude that someone was inside but was unable to respond for some reason. Because Deputy Ruth had a lawful basis for entering Ms. Giannone's apartment, the shotgun that he saw protruding from beneath Mr. Quezada is admissible under the plain-view doctrine. See *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971)."

## SEARCH AND SEIZURE:

### **Emergency Search; Threat of Ongoing Violence**

*Brigham City, Utah v. Stuart*,  
No. 05-502, 5/22/06

**I**n *Brigham City, Utah v. Stuart*, the Brigham City, Utah, Police Department Officers responding to a 3 a.m. call about a loud party, arrived at the house in question, heard shouting inside, proceeded down the driveway, and saw two juveniles drinking beer in the backyard. Entering the yard, they saw through a screen door and windows an altercation in the kitchen between four adults and a juvenile, who punched one of the adults, causing him to spit blood in a sink. An officer opened the screen door and announced the officers' presence. Unnoticed amid the tumult, the officer entered the kitchen and again cried out, whereupon the altercation gradually subsided. The officers arrested the defendants and charged them with contributing to the delinquency of a minor and related offenses.

The trial court granted their motion to suppress all evidence obtained after the officers entered the home on the ground that the warrantless entry violated the Fourth Amendment. The Utah Court of Appeals affirmed. The Utah Supreme Court held that the injury caused by the juvenile's punch was insufficient to trigger the "emergency aid doctrine" because it did not give rise to an objectively reasonable belief that an unconscious, semiconscious, or missing person feared injured or dead was in the home. Furthermore, the court suggested the doctrine was inapplicable because the officers had not sought to assist the injured adult but had acted exclusively in a law enforcement capacity. The court also held that the entry did not fall within the exigent circumstances exception to the warrant requirement. The United States Supreme Court granted certiorari and found as follows:

"...in this case, we consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions. We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), to prevent the imminent destruction of evidence, *Ker v. California*, 374 U.S. 23, 40 (1963), or to engage in 'hot pursuit' of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976). Warrants are generally

required to search a person's home or his person unless the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U. S. 385, 393–394 (1978).

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

"It is argued that there are two reasons why the officers' entry here was unreasonable. First, they argue that the officers were more interested in making arrests than quelling violence. They urge us to consider, in assessing the reasonableness of the entry, whether the officers were indeed motivated primarily by a desire to save lives and property.

"Our cases have repeatedly rejected this approach. An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. The officer's subjective motivation is irrelevant. *Graham v. Connor*, 490 U. S. 386, 397 (1989) Our prior cases make clear that the subjective motivations of the individual officers have no bearing on whether a particular seizure is unreasonable under the Fourth Amendment. It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the

kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.

"It is further contended that the conduct here was not serious enough to justify the officers' intrusion into the home. They rely on *Welsh v. Wisconsin*, 466 U. S. 740, 753 (1984), in which we held that 'an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.' This contention, too, is misplaced. *Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the only potential emergency confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level)—an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. Here, the officers were confronted with ongoing violence occurring within the home. *Welsh* did not address such a situation.

"We think the officers' entry here was plainly reasonable under the circumstances. The officers were responding, at 3 o'clock in the morning, to complaints about a loud party. As they approached the house, they could hear from within an altercation occurring, some kind of a fight. It was loud and it was tumultuous. The officers heard thumping and crashing and people yelling 'stop, stop' and 'get off me.' As the trial court found, it was obvious that knocking on the front door would have been futile. The noise seemed to be coming from the back of the house; after looking in the front window and seeing nothing, the officers proceeded around back to investigate further. They found two juveniles drinking beer in the backyard. From there, they could see that a fracas was taking place inside the kitchen. A juvenile, fists

clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults, sending the adult to the sink spitting blood.

“In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone unconscious or semi-conscious or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

“The manner of the officers’ entry was also reasonable. After witnessing the punch, one of the officers opened the screen door and yelled in ‘police.’ When nobody heard him, he stepped into the kitchen and announced himself again. Only then did the tumult subside. The officer’s announcement of his presence was at least equivalent to a knock on the screen door. Indeed, it was probably the only option that had even a chance of rising above the din. Under these circumstances, there was no violation of the Fourth Amendment’s knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

**“...what the U.S. Supreme Court wanted was for officers to (1) have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) ensure the manner and scope of the emergency search is reasonable.”**

“Accordingly, we reverse the judgment of the Supreme Court of Utah, and remand the case for further proceedings not inconsistent with this opinion.”

**Editor’s Note:** *In U.S. v. Najar, CA10, No. 05-2000, 6/21/06, the Tenth Circuit Court of Appeals recently reviewed the United*

*States Supreme Court decision in Brigham City, Utah v. Stuart, supra, in a case of 911 emergency line hang up calls. The Tenth Circuit concluded that what the U.S. Supreme Court wanted was for officers to (1) have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) ensure the manner and scope of the emergency search is reasonable.*

#### SEARCH AND SEIZURE: Expectation of Privacy; Computers

*United States v. Ziegler,  
CA9, No. 05-30177, 8/8/06*

**I**n *United States v. Ziegler*, the Ninth Circuit Court of Appeals stated that the Fourth Amendment and its warrant requirements will not normally protect worker’s privacy interests in the hard drives of their workplace computers. Normally, employees are not entitled to privacy interests in computers which belong to their employers. In this case, the company had policies that included routine monitoring, a right of company access, and a prohibition against private use of the company-owned computers.

## SEARCH AND SEIZURE:

**Good Faith Exception***Newcomb v. State, CACR05-1119, 6/21/06*

**S**ergeant Randy Murray of the Van Buren County Sheriff's Department submitted the following affidavit when he sought a search warrant for Benny Newcomb's property:

That the facts establishing probable cause and grounds for issuance of this Search Warrant are as follows: During the past fifteen (15) days, Affiant Murray has received information from a concerned citizen that Benny L. Newcomb has purchased ephedrine/pseudoephedrine pills, HEET, and Starting Fluid during the evening hours. The concerned citizen advised that Newcomb has purchased these items almost every evening.

On July 15, 2002, at approximately 10:35 a.m., deputies from the Van Buren County Sheriff's Department traveled to the Newcomb residence to attempt to serve a felony bench warrant on Newcomb. Sergeant Murray and other officers located Newcomb inside the residence. While placing him under arrest, Sergeant Murray detected a strong chemical odor and observed in plain view items that he believed were items used in the manufacture of methamphetamine—Red Devil lye, solvents, propane torch, and other paraphernalia.

On July 15, 2002, the magistrate found probable cause for the issuance of a search warrant. Police officers immediately executed the warrant and seized over a dozen incriminating items.

Pursuant to Ark. R. Crim. P. 24.3(b), Newcomb pleaded guilty to manufacturing

methamphetamine, possession of methamphetamine, and possession of drug paraphernalia, but he reserved his right to appeal the Van Buren County Circuit Court's denial of his motion to suppress evidence. On appeal, one of the points raised was that in an affidavit for a search warrant, an affiant's conclusion that legal items are involved in the process of manufacturing methamphetamine does not amount to probable cause under the Fourth Amendment to the United States Constitution, art. 2, § 15 of the Arkansas Constitution, and the Arkansas Rules of Criminal Procedure.

Regarding this issue, the Arkansas Court of Appeals found as follows:

"Under the totality-of-the-circumstances analysis, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. See *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). The duty of a reviewing court is simply to ensure that the magistrate has a substantial basis for concluding that probable cause existed.

It is the uniform rule that some mention of time must be included in the affidavit for a search warrant unless it can be inferred from other information in the affidavit. See *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004). Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985). Although Murray stated that he received information

within the previous fifteen days, there was no indication as to when the concerned citizen saw appellant making suspicious purchases. Accordingly, we give the first paragraph no consideration whatsoever.

“Newcomb contends that a strong chemical odor is not sufficient to establish probable cause for the issuance of a search warrant. We agree. The smell of a legal or noncontraband substance, standing alone, is insufficient to support a finding of probable cause. *Bennett v. State*, 345 Ark. 48, 44 S.W.3d 310 (2001) (emphasis added). Appellant further avers that the items he possessed, namely, the Red Devil lye and a propane torch, are legal items with legitimate uses. While that is true, Murray saw the otherwise legitimate items in conjunction with the smell of a strong chemical odor. See, e.g., *Stephenson v. State*, 71 Ark. App. 254, 29 S.W.3d 744 (2000) (holding that probable cause to issue a warrant was shown by affiant’s stated facts that appellant purchased an unusual amount of starter fluid, that she stated a preference for a brand with a high ether content, and that the smell of ether emanated from her residence). Finally, Newcomb maintains that Murray’s conclusory statement that the items were used in the manufacturing of methamphetamine is insufficient to support the issuance of the search warrant because the affiant did not set forth his experience and training regarding the manufacturing process. The failure to include some mention of Murray’s experience does not render the search warrant invalid given the totality of the circumstances. An affiant’s experience, training, and special knowledge are simply factors that an issuing magistrate may consider. See *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001).

“In any event, when an officer relies in good faith on a search warrant that is later determined to be unsupported by probable cause, any evidence discovered by reason of that search will not be suppressed. *Yancey v. State*, supra. In the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient. Even assuming that probable cause was lacking, we hold that the officers here acted in good faith.”

## SEARCH AND SEIZURE:

### **Knock and Announce Requirement**

*Hudson v. Michigan*, No. 04-1360, 6/15/06

**I**n *Hudson v. Michigan*, the United States Supreme Court was faced with the issue of whether violation of the “knock-and-announce” rule requires the suppression of all evidence found in the search.

Police obtained a warrant authorizing a search for drugs and firearms at the home of Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson’s pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

Detroit police entered Hudson’s home in violation of the Fourth Amendment’s “knock-and-announce” rule. The trial court granted Hudson’s motion to suppress the evidence seized, but the Michigan Court of Appeals reversed on interlocutory appeal. Hudson was convicted of drug possession. Affirming, the State Court of Appeals rejected Hudson’s

renewed Fourth Amendment claim. The United States Supreme Court found as follows:

“This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps three to five seconds—before turning the knob of the unlocked front door and entering Hudson’s home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

“The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See *Wilson v. Arkansas*, 514 U. S. 927, 931–932 (1995). In *Wilson*, we were asked whether the rule was also a command of the Fourth Amendment. Tracing its origins in our English legal heritage, we concluded that it was.

“We recognized that the new constitutional rule we had announced is not easily applied. *Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce. It is not necessary when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, *id.*, at 936, or if knocking and announcing would be ‘futile,’ *Richards v. Wisconsin*, 520 U. S. 385, 394 (1997). We require only that police have a reasonable suspicion under the particular circumstances that one of these grounds for failing to knock and announce exists, and we have acknowledged that this showing is not high.

“When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds’ wait are too few? Our ‘reasonable wait time’ standard, see *United States v. Banks*, 540 U. S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs—but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. If our ex post evaluation is subject to such calculations, it is unsurprising that police officers about to encounter someone who may try to harm them will be uncertain how long to wait.

“Happily, these issues do not confront us here. From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy. *Wilson* specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. That question is squarely before us now.

“In *Weeks v. United States*, 232 U. S. 383 (1914), we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in *Mapp v. Ohio*, 367 U. S. 643 (1961). Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates ‘substantial social costs,’ *United States v. Leon*, 468 U. S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, *Colorado v. Connelly*, 479 U. S. 157, 166 (1986),

and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle or those urging its application, *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U. S. 357, 364–365 (1998). We have rejected indiscriminate application of the rule and have held it to be applicable only where its deterrence benefits outweigh its substantial social costs.

“Cases excluding the fruits of unlawful warrantless searches, see, e.g., *Boyd v. United States*, 116 U. S. 616 (1886); *Weeks*, 232 U. S. 383; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920); *Mapp*, supra, say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant has issued, citizens are entitled to shield their persons, houses, papers, and effects from the government's scrutiny. U.S. Const., Amdt 4. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

“One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. See, e.g., *McDonald*

**“What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”**

*v. United States*, 335 U. S. 451, 460–461 (1948). Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who did not know of the process, of which, if he had notice, it is to be presumed that he would obey it. The knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned

by a forcible entry. And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the opportunity to prepare themselves for the entry of the police. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed. In other words, it assures the opportunity to collect oneself before answering the door.

“What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable. The exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs. The costs here

are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted justification for a no-knock entry had inadequate support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that the exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded. Unlike the warrant or Miranda requirements, compliance with which is readily determined (either there was or was not a warrant; either the Miranda warning was given, or it was not), what constituted a 'reasonable wait time' in a particular case, (or, for that matter, how many seconds the police in fact waited), or whether there was 'reasonable suspicion' of the sort that would invoke the Richards exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review. Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, see *supra*, at 3, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others.

"Next to these substantial social costs we must consider the deterrence benefits, existence of

which is a necessary condition for exclusion. The value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises— dangers which, if there is even 'reasonable suspicion' of their existence, suspend the knock-and announce requirement anyway. Massive deterrence is hardly required.

"Hudson contends that without suppression there will be no deterrence of knock-and-announce violations. Deterrence exists in several forms. First, citizens and lawyers are much more willing to seek relief in the courts for police misconduct. The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

"Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980, we felt it proper to assume that unlawful police behavior would be dealt with appropriately by the authorities, *United States v. Payner*, 447 U. S. 727, 733–734, n. 5 (1980), but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been wide-ranging reforms in the education, training, and supervision of police officers. Numerous sources are now available to teach officers and

their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. See *Canton v. Harris*, 489 U. S. 378, 388 (1989). Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.

"In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable. Resort to the massive remedy of suppressing evidence of guilt is unjustified."

#### SEARCH AND SEIZURE:

##### **Search Incidental to Arrest**

*United States v. Currence*,  
CA4, No. 05-4894, 5/4/06

**O**n June 6, 2004, police received information from a confidential informant that a man on a bicycle was selling drugs on a street corner in Richmond, Virginia. Police Detective Fred Bates and another detective went to the location and approached Currence, who matched the description given by the informant. At Detective Bates' request, Currence stepped off the bicycle and was frisked but no weapon was found.

Currence identified himself to the detectives, and they ran a radio check on him. As a result, the detectives learned that Currence had an outstanding criminal warrant. The detectives handcuffed Currence and placed him under arrest pending confirmation of the warrant.

At that time, Detective Michael Bohannon arrived on the scene. Detective Bates asked Detective Bohannon to search the bicycle, which was next to Currence and the detectives. Detective Bohannon was aware that drug dealers sometimes use hollow areas on bicycles to attempt to conceal drugs. As he was searching the bicycle, Detective Bohannon—without using any tools—slid off the end cap from the right handlebar and discovered plastic baggies containing what appeared to be crack cocaine inside the handlebar. A subsequent test of the substance found in the handlebar indicated that it was crack cocaine.

The Court of Appeals for the Fourth Circuit held that the search of the bicycle handlebar was permissible as a search incident to Currence's lawful arrest. When the detectives first encountered Currence, he was on the bicycle, and it appears that during the entire time before they discovered the crack cocaine, he was in close proximity to the bicycle. The bicycle was therefore within Currence's "immediate control" and was subject to being searched incident to his lawful arrest. The Court found as follows:

"We believe that because Detective Bohannon was able to remove the handlebar end cap by simply sliding it off with very minimal intrusion, there is no basis under *Chimel* to treat the handlebar differently from other items within the immediate control of an arrestee that may be opened during a search incident to an arrest. Just as an arrestee's ability to reach into, for example, a closed drawer or a locked bag makes those items searchable incident to an arrest, Currence's ability to reach into the easily accessible handlebar likewise makes it searchable."

## SEARCH AND SEIZURE:

**Seizure of Person**

*United States v. Ojeda-Ramos,*  
CA10, No. 04-5118, 7/31/06

**O**jeda-Ramos, a Panamanian national, was traveling on September 17, 2003, by Greyhound bus from Calexico, California, to Newark, New Jersey. During a scheduled stop in Tulsa, Oklahoma, all twenty-five passengers, including Ojeda-Ramos, left the bus. Thereafter, Tulsa Police Officer Pat Dunlap had a canine sniff the cargo bays. The dog alerted to a blue suitcase, which was locked and bore a tag containing the name "Ojeda-Ramos R." and a telephone number.

Typically, passengers re-board the bus fifteen minutes prior to departure. In this case, however, Officer Dunlap directed the bus driver to recall the passengers ten minutes earlier, i.e., twenty-five minutes prior to departure, in order to attempt to determine which passenger was connected to the blue suitcase. After the passengers re-boarded the bus, Officer Dunlap, posing as a Greyhound employee wearing a Greyhound shirt and hat, informed them the bus had mechanical problems. He directed the passengers to leave the bus, claim their luggage and await the arrival of another bus. Dunlap then began removing luggage from the cargo bays. While doing so, he observed Ojeda-Ramos walk up to the blue suitcase, look down at it, stand it on end, and examine its tag.

Officer Dunlap approached Ojeda-Ramos, identified himself as a police officer and received Ojeda-Ramos's permission to speak with him. Dunlap asked Ojeda-Ramos for his bus ticket; the name on the ticket matched the name on the blue suitcase's tag. He then requested

identification. Ojeda-Ramos provided Dunlap with his passport and United States visa. Next, Dunlap asked Ojeda-Ramos why a drug dog had alerted to his suitcase. Ojeda-Ramos responded, "I don't speak English." Dunlap asked Ojeda-Ramos if the bag belonged to him. Ojeda-Ramos replied in English, "That's not my bag."

Finally, Dunlap asked Ojeda-Ramos to accompany him to the parcel storage area of the bus station. Ojeda-Ramos agreed, picked up the suitcase and followed Dunlap into the parcel storage room. The other passengers re-boarded the bus, which departed on time.

In the parcel storage room, Dunlap asked Ojeda-Ramos if he could search the suitcase. Ojeda-Ramos again replied in English, "That's not my bag." Considering the suitcase abandoned, another officer broke the lock on the suitcase and discovered twelve pounds of heroin.

Ojeda-Ramos was arrested and read his Miranda rights in English. He remained silent. Later, after he requested an interpreter and was read his Miranda rights in Spanish, Ojeda-Ramos confessed to Drug Enforcement Administration (DEA) officers.

On appeal to the United States Court of Appeals for the Tenth Circuit, Ojeda-Ramos alleged that there was an illegal seizure of his person and an illegal search of the suitcase in violation of the Fourth Amendment.

The Tenth Circuit Court of Appeals first addressed the issue of the seizure of Ojeda-Ramos stating that Dunlap's order to leave the bus and claim luggage was not a seizure and would not have been even if he had identified himself as a police officer:

“He wanted the passengers to comply, but he did not demand, intimidate, threaten or use force against them. However compulsory Dunlap’s order may have appeared, it would not have left an impression upon a reasonable person that he was not ‘free to leave.’ After all, Dunlap required the passengers to leave the bus, not remain on it. The passengers were not only free to leave, they could have ignored Dunlap’s request to claim their luggage. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Ojeda-Ramos acted voluntarily in associating himself with his luggage. When he left the bus he could have continued out of the area, even left the bus station.

“Dunlap’s disguise as a Greyhound employee is irrelevant. Conceding the ruse most likely influenced Ojeda-Ramos’s actions does not change the calculus. Had Ojeda-Ramos known he was dealing with a police officer, he may not have approached the blue suitcase or may have left the bus terminal to avoid detection. However, that is not the test. A ruse by law enforcement officers to influence behavior is not prohibited unless it is unconstitutional. Because Dunlap’s actions would not have been a seizure if he had identified himself as a police officer, the ruse did not violate Ojeda-Ramos’ constitutional rights. Speculation about whether he might have behaved differently absent the ruse does not inform the debate.”

Ojeda-Ramos next contended he did not voluntarily abandon the suitcase because he did not understand English, placing him at the mercy of the officers and unable to assert his rights. He further asserts his actions were inconsistent with abandonment. He never

physically abandoned the suitcase and in fact, when Dunlap asked him to proceed to the parcel storage room, he brought the suitcase with him. The Court found as follows:

“When Dunlap asked Ojeda-Ramos whether the blue suitcase was his, he expressly disclaimed any interest in it. Therefore, Ojeda-Ramos abandoned the blue suitcase. See *United States v. Denny*, 441 F.3d 1220, 1227-28 (10th Cir. 2006) (concluding an express disclaimer of ownership in response to a lawful police inquiry constitutes abandonment). That Ojeda-Ramos may have voluntarily carried the suitcase to the parcel storage room (i.e., not pursuant to an order from Dunlap) does not affect this conclusion. After Ojeda-Ramos had carried the suitcase to the parcel storage room, he again expressly and unequivocally disclaimed any interest in it. Dunlap was entitled to take Ojeda-Ramos at his word. Ojeda-Ramos’s abandonment of the suitcase was voluntary. As we concluded above, Ojeda-Ramos was not seized by Dunlap’s order to leave the bus. A warrantless search and seizure of abandoned property is not unreasonable under the Fourth Amendment.”

#### SEARCH AND SEIZURE:

##### **Warrant for Search of Vehicles;**

##### **Vehicle Arrives During Course of the Search**

*United States v. Tamari,*

*CA11, No. 05-10618, 7/6/06*

**I**n *United States v. Tamari*, the issue before the court was whether a valid search warrant that authorizes the search of vehicles on specified property includes the search of a vehicle that arrives on the property during the course of the search.

In early 2003, federal, state, and local law

enforcement agents began conducting an investigation into a large-scale conspiracy in south Florida to harvest and distribute controlled substances. The agents had reason to believe the organization was run by an individual named Humberto Febles, who owned a yellow Hummer that he used in the conspiracy. During the course of the investigation, a confidential informant alerted authorities to several properties the organization used to cultivate and house various controlled substances. Pursuant to this information, agents obtained a warrant to search a parcel of rural, isolated property located on Southwest 254th Street in Miami, Florida. The warrant authorized agents to search the property, including “vehicles or vessels or trailers registered to or owned by the occupants of the place to be searched, or under the care, custody or control or on the property on which the place to be searched is situated.”

Between 7:30 a.m. and 8:00 a.m. on September 1, 2004, agents arrived at the location, whereupon they served the search warrant and proceeded to execute the warrant by conducting the search. Upon entering the residence on the property, they arrested three individuals: Roberto Cano, Marta Gonzalez, and Rudolfo Aguilera. The agents then searched the residence and seized cocaine, drug paraphernalia, cash, and a number of loaded weapons. Soon thereafter, agents searched a Freightliner truck parked on the property, finding slightly less than 13 kilograms of cocaine and stacks of cash totaling \$536,421.

Approximately 30 minutes to one hour after combing the Freightliner truck, while the search was still in progress, Tamari drove onto the property in a yellow Hummer. He approached Special Agent Debra Crane, who was standing in the driveway, and began to speak in Spanish.

Agent Crane, not fluent in Spanish, called for assistance from Detective Jorge Rodriguez, who asked for Tamari’s name, identification, and his purpose for being on the property. Exiting the Hummer, Tamari responded with a name, but was unable to produce any identification or vehicle registration. Tamari then told agents the vehicle belonged to a family member, but later claimed it belonged to an individual named Humberto, who loaned him the vehicle in exchange for Tamari’s Honda Accord. He also said he was on the premises to see a man about some animals, but it appeared there were no animals on the property.

Agent Crane then searched the car, looking for its registration or any indicia of ownership. After searching the glove compartment, center console, and pockets in the driver and passenger doors, Agent Crane briefly scanned the rear cargo area. She neither found nor seized any evidence during this search. Shortly thereafter, agents ran a narcotics detection dog, Ho Jo, around the perimeter of the Hummer. Ho Jo gave a positive alert to a wheel well compartment in the rear cargo area, in which agents found around \$45,000 in cash. Agents then searched the Hummer again, finding and seizing documents concerning Roberto Cano, photographs of Roberto Cano, a key to the Freightliner truck, calling cards, and gold jewelry.

Tamari was subsequently arrested and charged with (1) conspiring to possess with the intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 846; and (2) possessing with the intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1).

Before trial, Tamari moved the district court to suppress physical evidence obtained during

the searches of the Hummer. Tamari also moved to suppress statements he made during those searches, arguing they were the product of unlawful searches and thus inadmissible “fruit of the poisonous tree” under *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963). The district court held a preliminary hearing and denied the motion, concluding the vehicle was subject to search under the warrant’s authorization to search “vehicles...on the property on which the place to be searched is situated.” Alternatively, the district court found that even if the search warrant did not justify the searches, sufficient probable cause existed to permit warrantless searches of the Hummer.

The jury convicted Tamari of conspiring to possess with the intent to distribute a controlled substance. He was acquitted on the remaining count. Tamari appealed his conviction, arguing the district court erred by denying his motion to suppress evidence and statements obtained during the September 1, 2004, vehicle searches.

The Court of Appeals for the Eleventh Circuit stated that a valid search warrant authorizing the search of vehicles on the subject property permits the search of vehicles arriving on that property during the course of the search, so long as those vehicles could reasonably contain items the officers are searching for. In this case, a valid search warrant allowed agents to search vehicles on the property on which the place to be searched is situated. After agents served and proceeded to execute the search warrant, Tamari drove a Hummer onto the subject property. The Hummer, moreover, reasonably could have contained items agents sought in the search warrant, including documents, account books, currency, jewelry, firearms, and drug paraphernalia. As a result, the vehicle searches

in this case, conducted pursuant to warrant language authorizing the search of vehicles ‘on the property on which the place to be searched is situated,’ were within the scope of the search warrant.

#### SEARCH AND SEIZURE: Suspicionless Search of Parole

*Samson v. California*,  
No. 04-9728, 6/19/06

In *Samson v. California*, the United States Supreme Court dealt with a California statute that states every prisoner eligible for release on state parole “shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.”

In September 2002, petitioner Donald Curtis Samson was on state parole in California, following a conviction for being a felon in possession of a firearm. On September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed Samson walking down a street with a woman and a child. Based on a prior contact, Officer Rohleder was aware that Samson was on parole and believed that he was facing an at large warrant. Accordingly, Officer Rohleder stopped Samson and asked him whether he had an outstanding parole warrant.

Samson responded that there was no outstanding warrant and that he was in good standing with his parole agent. Officer Rohleder confirmed, by radio dispatch, that Samson was on parole and that he did not have an outstanding warrant. Nevertheless, pursuant to the California Penal Code and based solely on Samson’s status as

a parolee, Officer Rohleder searched Samson. During the search, Officer Rohleder found a cigarette box in Samson's left breast pocket. Inside the box he found a plastic baggie containing methamphetamine.

The State charged Samson with possession of methamphetamine pursuant to California Health & Safety Code Ann. §11377(a) (West 1991). The trial court denied Samson's motion to suppress the methamphetamine evidence, finding that California Penal Code Ann. §3067(a) (West 2000) authorized the search and that the search was not "arbitrary or capricious." A jury convicted Samson of the possession charge and the trial court sentenced him to seven years' imprisonment.

The United States Supreme Court granted certiorari to answer the question of whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment. Answering that question in the affirmative the United States Supreme Court affirmed the judgment of the California Court of Appeal.

The Court concluded that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee which has been authorized by statute.

## SEARCH AND SEIZURE:

### Garbage Searches

*United States v. Segura-Baltazar*,  
CA11, No. 05-12705, 5/12/06

**I**n *United States v. Segura-Baltazar*, the issue involved garbage which was being picked up by sanitation workers from a suspect's home and later examined by law enforcement officers.

In the course of a drug investigation involving a suspect known only as "Alejandro," police identified numerous incoming calls from a phone number registered to Bernabe Perez, an alias of Roberto Segura-Baltazar, at 480 Sheringham Court in Roswell, Georgia. Based on that information, police began surveillance on the residence. Officer Ronald Gooden of the City of Roswell Police Department determined that it would be helpful to inspect the trash discarded from the house, and he contacted the Roswell sanitation department for assistance.

The police recovered many inculpatory items from the trash pulls indicating that the residents of 480 Sheringham Court were involved in illegal drug activity. Specifically, they found 42 grams of methamphetamine; 41 grams of marijuana; plastic wrappings that field-tested positive for cocaine; and numerous bags containing residue that field-tested positive for cocaine, marijuana, and methamphetamine. Additionally, the police found papers depicting names with numerical amounts listed next to each name (which they believed were drug ledgers); financial documents indicating the presence of large amounts of currency, including evidence of wire transfers exceeding \$10,000; and boxes that had contained wireless surveillance cameras and monitors that would

enable a user to see in low light conditions. Officer Gooden testified that, based on his experience, devices such as these are often used by drug dealers as countersurveillance tools. Finally, the police recovered two types of magazines for semiautomatic handguns, an empty box of 12-gauge shotgun shells, and one live round of .45-caliber ammunition.

Based on the evidence obtained through the trash pulls and information provided by a confidential informant, Gooden obtained a federal search warrant for the house located at 480 Sheringham Court. Because of the “exigent circumstances of potential bodily injury to law enforcement officers,” the warrant was issued by the magistrate with a “no-knock” provision. The search warrant was executed on March 25, 2004, and the officers entered the residence without knocking or announcing their presence. During the ensuing search police recovered approximately 1200 grams of methamphetamine, 130 grams of cocaine, two semiautomatic handguns, two .22-caliber rifles, one shotgun, \$19,631 in U.S. currency, and numerous forms of identification bearing several different names matched with the defendant’s picture.

In a similar case, *California v. Greenwood*, 486 U.S. 35 (1988), the United States Supreme Court stated that there was no reasonable expectation of privacy in garbage.

In *Segura-Baltazar*, the trash collected was at two locations—one location at the curb and another location closer to the house. Court of Appeals for the Eleventh Circuit stated *Segura-Baltazar* did not have a reasonable expectation of privacy in the trash that he left in the usual course of events for collection outside but near his home:

“The trash was placed in a location where it was customarily retrieved by sanitation employees, it was left there at the designated time for trash collection, and it was clearly visible and accessible from the street. Unfortunately, we can offer no bright-line rule to fit all future garbage suppression cases. These inquiries are highly fact-intensive, and we simply find that on the particular facts of this case, *Segura-Baltazar* had no reasonable expectation of privacy in either the trash near the curb or the trash near his house.”

## TREATIES:

### Foreign Nationals; Consular Notification

*Sanchez-Llamas v. Oregon*,  
No. 04-10566, 6/28/06

**I**n *Sanchez-Llamas v. Oregon* and a companion consolidated case, *Bustillo v. Johnson*, the United States Supreme Court addressed issues raised by the Vienna Convention on Consular Relations. Article 36 of the Convention concerns consular officers’ access to their nationals detained by authorities in a foreign country. The article provides that “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.” In other words, when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee’s home country if the detainee so requests. Article 36(1)(b) further states that the authorities shall inform the detainee of this right without delay.

Moises Sanchez-Llamas is a Mexican national.

In December 1999, he was involved in an exchange of gunfire with police in which one officer suffered a gunshot wound in the leg. Police arrested Sanchez-Llamas and gave him Miranda warnings under in both English and Spanish. At no time, however, did they inform him that he could ask to have the Mexican Consulate notified of his detention.

Shortly after the arrest and Miranda warnings, police interrogated Sanchez-Llamas with the assistance of an interpreter. In the course of the interrogation, Sanchez-Llamas made several incriminating statements regarding the shootout with police. He was charged with attempted aggravated murder, attempted murder, and several other offenses. Before trial, Sanchez-Llamas moved to suppress the statements he made to police. He argued that suppression was warranted because the statements were made involuntarily and because the authorities had failed to comply with Article 36 of the Vienna Convention. The trial court denied the motion. The case proceeded to trial, and Sanchez-Llamas was convicted and sentenced to 20 years in prison.

Sanchez-Llamas appealed, again arguing that the Vienna Convention violation required suppression of his statements. The Oregon Court of Appeals affirmed. The Oregon Supreme Court also affirmed, concluding that Article 36 “does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding.” The United States Supreme Court granted certiorari.

Mario Bustillo, a Honduran national, was with several other men at a restaurant in Springfield, Virginia, on the night of December 10, 1997. That evening, outside the restaurant, James Merry

was struck in the head with a baseball bat as he stood smoking a cigarette. He died several days later. Several witnesses at the scene identified Bustillo as the assailant. Police arrested Bustillo the morning after the attack and eventually charged him with murder. Authorities never informed him that he could request to have the Honduran Consulate notified of his detention. A jury convicted Bustillo of first-degree murder, and he was sentenced to 30 years in prison. His conviction and sentence were affirmed on appeal.

After his conviction became final, Bustillo filed a petition for a writ of habeas corpus in state court. There, for the first time, he argued that authorities had violated his right to consular notification under Article 36 of the Vienna Convention. He claimed that if he had been advised of his right to confer with the Honduran Consulate, he would have done so without delay. Moreover, the Honduran Consulate executed an affidavit stating that it would have endeavored to help Mr. Bustillo in his defense had it learned of his detention prior to trial. His habeas petition also argued, as part of a claim of ineffective assistance of counsel, that his attorney should have advised him of his right to notify the Honduran Consulate of his arrest and detention.

The state habeas court dismissed Bustillo’s Vienna Convention claim as “procedurally barred” because he had failed to raise the issue at trial or on appeal. The court also denied Bustillo’s claim of ineffective assistance of counsel, ruling that his belated claim that counsel should have informed him of his Vienna Convention rights was barred by the applicable statute of limitations and were also meritless. In an order refusing Bustillo’s petition for appeal, the Supreme Court of Virginia found

“no reversible error” in the habeas court’s dismissal of the Vienna Convention claim. The United States Supreme Court granted certiorari to consider the Vienna Convention issue.

There were three questions presented in these cases: (1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.

The United States Supreme Court held that even assuming without deciding that the Convention creates judicially enforceable rights, suppression is not an appropriate remedy for a violation:

“Article 36 has nothing to do with searches or interrogations and, indeed, does not guarantee defendants any assistance at all. It secures for foreign nationals only the right to have their consulate informed of their arrest or detention—not to have their consulate intervene, or to have police cease their investigation pending any such notice or intervention. Moreover, the failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions or to give the police any practical advantage in obtaining incriminating evidence. Suppression would also be a vastly disproportionate remedy for an Article 36 violation. The interests Sanchez-Llamas claims Article 36 advances are effectively protected by other constitutional and statutory requirements, including the right to an attorney and to protection against compelled self-incrimination. Finally, suppression is not the only means of vindicating Article 36 rights.

For example, diplomatic avenues—the primary means of enforcing the Vienna Convention—remain open.”

The United States Supreme Court also held that Bustillo’s failure to raise an Article 36 claim in state court prevented him from having the claim heard in a subsequent federal habeas proceeding.

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