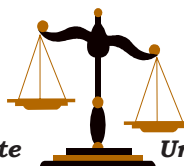




CJI Legal Briefs



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ARREST: Probable Cause

United States v. Mendoza, CA8, No. 04-1386, 8/30/05

In April 2003, a confidential source informed the Minneapolis Police Department that Cassandra Holmes was engaged in dealing both powder and crack cocaine. On May 22, 2003, an undercover agent of the Minneapolis Police Department, Officer Luis Porras, set up a meeting with Holmes at her residence. Porras and Holmes then negotiated the purchase of one ounce of crack for \$950. Holmes stepped away from Porras and immediately made a cellular telephone call to an unidentified person, the contents of which Porras was not able to hear. Holmes subsequently returned to Porras and discussed future transactions, mentioning that “her guy”—which Porras took to be an identification of her drug source—was a Hispanic male.

Approximately fifteen minutes after the call, surveillance officers outside the house observed a Hispanic male arrive on a bicycle. The officers testified that their experience and training led them to believe that the individual was a runner—someone who delivers drugs to a low or mid-level dealer and then takes the profits to the drug source. When the individual knocked on Holmes’s door, Holmes told Porras that “her guy” had arrived, stepped out of Porras’s sight, and answered the door. The individual delivered one ounce of crack to Holmes and left with the prerecorded buy money from Porras. Holmes then reappeared

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and handed the ounce of crack to Porras. Although officers pursued the individual on the bicycle after he left Holmes' residence, they were unable to capture him.

On June 5, 2003, Porras again arranged to purchase crack from Holmes. Unlike the May 22 deal, however, Porras and Holmes agreed beforehand that Porras would purchase four ounces of crack for \$3800. When Porras arrived, Holmes retrieved the drugs from a bag in her kitchen and completed the transaction. After Porras left the residence, Minneapolis narcotics officers entered, arrested Holmes, and secured the scene to await a search warrant. The arresting officers noted that Holmes had a cellular phone in hand when they arrived and had commenced or completed a call just prior to their entry.

Fifteen minutes after the entry, surveillance officers outside the residence observed two Hispanic males approach in a sport utility vehicle. At the time, there were approximately eight undercover police vehicles parked near the residence. The vehicle traveled at slow speed, and both occupants stared intently in the direction of Holmes's residence. After passing the residence and circling the block, the vehicle approached the scene a second time. The occupants again focused their attention on the residence and, after parking behind one of the undercover vehicles, continued to stare at the house while occasionally looking in other directions and engaging in conversation between them.

Eventually, the driver of the vehicle exited and walked approximately two feet away from his door, which remained open. The driver looked at the front door of Holmes's residence, looked around the whole area, made eye contact with

one of the undercover officers, and abruptly got back into the vehicle and drove away at high speed. The undercover officers relayed this information to the officers inside the residence and were told to stop the vehicle. The police then arrested Mendoza, the driver of the vehicle, and seized an identification card and a cellular phone from him.

A brief inspection of the phone showed that the last number received on the phone had originated from Holmes's cellular phone. A subsequent investigation revealed that the call made by Holmes at the May 22 deal had also been placed to Mendoza's phone.

Mendoza moved to suppress the cellular phone and all evidence obtained thereby on the ground that the officers lacked probable cause to arrest him. Upon review, the Eighth Circuit Court of Appeals found as follows:

"Probable cause exists if the totality of the circumstances known to all officers involved at the time of the arrest 'were sufficient to warrant a prudent person's belief that the suspect had committed or was committing an offense.' *United States v. Amaya*, 52 F.3d 172, 174 (8th Cir. 1995) (totality of the circumstances); *United States v. Morgan*, 997 F.2d 433, 435 (8th Cir. 1993) (court may consider collective knowledge). Because probable cause requires only a probability or substantial chance of criminal activity, rather than an actual showing of criminal activity, *United States v. Payne*, 119 F.3d 637, 643 (8th Cir. 1997), the police need not have amassed enough evidence to justify a conviction prior to making a warrantless arrest. *United States v. Caves*, 890 F.2d 87, 93 (8th Cir. 1989).

“In determining whether probable cause exists, we recognize that the police possess specialized law enforcement experience and thus may draw reasonable inferences of criminal activity from circumstances which the general public may find innocuous. Accordingly, we view the totality of the circumstances in Mendoza’s case through the eyes of the experienced narcotics agents involved in his arrest. Furthermore, we give due weight to inferences drawn from the facts and circumstances of each case by local law enforcement officers.

“At the May 22 deal, a call from Holmes immediately after the price and amount of drugs had been negotiated heralded the arrival of a Hispanic courier, who brought the crack and took the buy money in exchange. Given the larger magnitude of the June 5 deal, officers testified that their training and experience suggested that ‘somebody’ would soon arrive to retrieve the money. A government expert testified that such behavior was consistent with a person who sells drugs out of their home. This likelihood was further increased by the officers’ discovery that Holmes had made or was in the process of making a phone call immediately after completing the deal with Porras.

“The officers’ suspicions were soon confirmed by the arrival of Mendoza and his passenger in the SUV. By slowly approaching Holmes’s residence twice and staring intently at the house each time, and by cautiously exiting the

“In determining whether probable cause exists, we recognize that the police possess specialized law enforcement experience and thus may draw reasonable inferences of criminal activity from circumstances which the general public may find innocuous.”

vehicle, Mendoza exhibited behavior which, based upon the surveillance officers’ training and experience in past deals, indicated that he was involved with what was going on at the residence. In addition, like Holmes’s description of her source and the May 22 runner, Mendoza was a Hispanic male. Furthermore, by reentering the vehicle and speeding

away after making eye contact with one of the undercover surveillance officers, Mendoza behaved in a manner suggesting that he had just ‘made’ the surveillance officers and wished to leave as quickly as possible. Given Mendoza’s behavior, as well as their experience with the specific deals at issue here, the officers had ample probable cause to believe that Mendoza was connected to the drug deal and thus had committed a crime. Accordingly, his warrantless arrest was proper, and the search of his person and seizure of his cellular phone were valid as a search incident to a lawful arrest.”

CHILD PORNOGRAPHY:
Multiple Fictitious Minors; Sentencing

United States v. Sims, CA10,
No. 03-2151, 11/9/05

In September 1999, Stanley Howard Sims, using the screen name *Nats565*, began using an Internet chat room to converse with *sweetthingforyou16*. As far as Sims knew, this screen name belonged to a 16-year-old girl

named Sue Walker and was shared by a 12-year-old named Kate, whom Sue babysat. Over a period of five months, Sims communicated with *sweetthingforyou16* frequently, usually daily, in chat rooms and through instant messages. These conversations were of a sexual nature. He gave the girls his personal e-mail address, and Sims eventually began attaching sexually explicit images, of himself and of other children, to the e-mail messages.

In reality, Sims was actually communicating with Michael Walker, an adult male in Missouri. According to Walker, he created the profile *sweetthingforyou16*, identifying himself as "Sue," a dancer, as a gag, and he was approached by *Nats565* in a Yahoo! chat room for persons interested in model airplanes. Walker posed as a 16-year-old named Sue and a 12-year-old named Kate, and he started saving the e-mails and images sent to "the girls" by Sims.

In October 1999, Sims began suggesting he would travel to Missouri to meet Sue and Kate. In his messages, he referred to previous encounters with other young girls and emphasized that he was gentle and would not hurt the girls.

After Walker reported his Internet communications to the National Center for Missing and Exploited Children, local police and the FBI became involved. The FBI ultimately assumed the identities created by Walker and, as *sweetthingforyou16*, made plans for Sims and the girls to meet at a roller-skating rink in Missouri. Sims planned to pick up the girls, hide them in the back seat of his rental car, and go back to his motel to swim, engage in sexual acts, and take photographs. Sims was

arrested on January 22, 2000, when he arrived at the roller-skating rink.

At the FBI office where he was taken, Sims signed a "Consent to Search" form, and his luggage, briefcase, hotel room, rental car, and personal belongings were searched, producing several cameras and film, gifts he bought for the girls, and assorted sexual paraphernalia and aids. Sims also made a statement to FBI at this time.

On the same day, Sims' home in New Mexico was searched, with the FBI seizing computer equipment, photographs, travel itineraries, and related items. A few days later, the FBI searched Sims' office, seizing other e-mail messages and travel itineraries. The FBI also obtained a warrant to search the contents of nineteen floppy disks found in Sims' possession at the time of his arrest, which produced several images of child pornography and other graphic e-mail messages. The grand jury returned a four-count indictment against Sims:

Count One—attempting to coerce and entice a minor to engage in sexual acts

Count Two—traveling in interstate commerce for the purpose of engaging in sexual acts with a minor

Count Three—transporting by interactive computer system visual depictions of minors engaging in sexually explicit conduct; and

Count Four—receiving visual depictions of minors engaging in sexually explicit conduct.

Sims was convicted federally and appeals his sentence on the ground that the various counts should not have been grouped separately because the children were not real. The court's grouping of Sims' multiple counts resulted in a two-level increase in offense levels.

Sims' essential arguments are that the district court erred by not grouping all of his counts together based on a single, shared harm to society in general and in creating two separate groups for attempting to entice both Sue and Kate when these girls were in fact the product of a single imagination. The Tenth Circuit Court of Appeals found as follows:

"We disagree with Sims that the only victim of his offenses was society. The guideline itself provides that society-at-large is the victim only where there are no identifiable victims. Here, Sims attempted to engage in sexual acts with specific minors, and if Sue and Kate had been available, they, rather than society in general, would have been harmed. *United States v. Butler*, 92 F.3d 960, 963-64 (9th Cir. 1996). We agree with the Ninth Circuit in *Butler* that fictitious children, used as part of an undercover sting operation, may be treated as separate victims for grouping purposes."

CHILD PORNOGRAPHY:

**Private Intrastate
Production and Possession**

United States v. Forrest, CA4,
No. 04-4665, 11/14/05

Defendant Forrest was the Chief of Police of the Seat Pleasant, Maryland Police Department. He met the victim, Steven, through the department's Junior Police

Program. Steven helped found the program because he hoped to become a police officer and wanted to learn more about police work. Initially, the two interacted only when Forrest oversaw the program's activities on weekends. Eventually, however, Steven asked if he could come over to Forrest's house. Forrest agreed.

Steven would go to Forrest's house either to do chores or to "go out somewhere" with him. Beginning in January 2001, around the time Steven turned thirteen, he started spending the night at Forrest's house. When Forrest's daughter was away, Steven would sleep in her room, but when she was home he would stay with Forrest in his room. Through these visits, Steven, who had never lived with his own father, came to view Forrest as a father figure.

Steven asked Forrest to take pictures of him to give to his girlfriend. Forrest took digital pictures of Steven, who was clothed at the time, while an X-rated movie played in the background. That same day, Forrest asked if he could take semi-nude photographs of Steven. Originally, Steven refused but agreed after Forrest asked repeatedly and offered to pay Steven between \$50 and \$80. Forrest then asked to take fully nude photographs of Steven. Steven again refused, but agreed after Forrest offered to pay him more money.

On a separate occasion, Forrest used a Polaroid camera to take pictures of Steven lying on Forrest's bed. In some of the polaroids Steven was clothed, but in others he was unclothed. Forrest again offered Steven money to pose for these pictures. Steven testified that Forrest twice attempted to assault him sexually, once in Forrest's bedroom and once in his office. In 2003, Forrest's fiancée suspected him of infidelity. While searching his house for

evidence, she discovered a photo album in his home office. The album included pictures of Steven and another young man she recognized, as well as nude photographs of the fiancée herself. It also contained pictures of adult males; those images bore the logo of a website called "Rude Jam." She left the album at Forrest's house, but returned a few days later to retrieve the album and turn it over to the FBI. Before turning it over, she removed the nude pictures of herself from the album because they embarrassed her.

FBI officers subsequently searched the hard drives of Forrest's home and office computers. They determined that both hard drives contained the same adult male photographs bearing the "Rude Jam" logo that were found in the photo album.

At trial, a jury convicted Forrest of two counts of sexually exploiting a minor for the purpose of producing child pornography in violation of 18 U.S.C. § 2251(a) and two counts of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The defendant argued that the power of Congress under the Commerce Clause does not extend to the private, intrastate production and possession of child pornography.

The Fourth Circuit Court of Appeals concluded that Congress has the authority to proscribe the defendant's wholly intrastate production and possession of child pornography, regardless of any intent to sell or trade it. The Court noted that Congress might rationally fear that homemade child pornography would find its way into interstate commerce, especially since much of the child pornography traded on the interstate market is homemade.

CIVIL LIABILITY: **Deadly Force**

Phillips v. James, CA10, No. 03-4272, 9/2/05

This case began as a call for help. On August 12, 2001, Mr. and Mrs. Phillips had a marital dispute which ended with Mr. Phillips entering his bedroom alone stating, "You started this and I'll finish it." Fearing that her husband might hurt himself, Mrs. Phillips called 911. Before speaking with anyone at 911, however, she hung up the telephone because she saw Mr. Phillips leave the bedroom.

A dispatch officer called Mrs. Phillips back. Mrs. Phillips told the officer that the problem was resolved, and that there was no need to send over assistance. The officer informed Mrs. Phillips that it was routine procedure to send an officer to her house and that such procedure would be followed. After Mrs. Phillips hung up the phone this time, Mr. Phillips discerned from the caller ID that 911 had been contacted. He then barricaded himself in his bedroom.

Shortly thereafter, officers arrived from the Salem City Police Department. Mrs. Phillips let the officers into the house so they could discuss the problems that had occurred earlier. As a result of this discussion, the officers learned that Mr. Phillips was upset (according to Mrs. Phillips, she and her husband had been fighting for a few days), that there was a considerable amount of firearms in the house, and that he had threatened to harm himself. The officers attempted to talk to Mr. Phillips through the bedroom door.

Despite the officers' repeated requests, Mr. Phillips refused to leave the bedroom. To the officers, Mr. Phillips appeared agitated. At one point during their discussion, an officer believed that he heard the sound of shotgun rounds being loaded into a shotgun. Thereafter, in an effort to determine if the door was locked, an officer began to turn the doorknob on the bedroom door. When he saw the doorknob turning, Mr. Phillips exclaimed to the officers that if anybody tried to come through the bedroom door, they would be sorry.

After this exchange, the officers determined that they needed further assistance in assessing the situation and decided to call in the Salem City Police Chief, Brad James. Chief James asked Mr. Phillips if he could talk to him. Mr. Phillips vehemently denied Chief James' request and told him to leave. In addition, Mr. Phillips threatened Chief James indicating that if his bedroom door moved an inch, he would fire five shotgun shells into the door. Chief James told Mr. Phillips that he would not leave until Mr. Phillips came out of his room and assured them that the situation was non-threatening. After Mr. Phillips repeatedly failed to comply with his requests, Chief James called the SWAT team.

The SWAT team arrived and set up around the perimeter of the home. Sergeant Shaun Adamson, as part of the SWAT team, set up post in a tree near the room where Mr. Phillips was located. Lieutenant Scott Carter, a trained hostage negotiator with the Utah County Sheriff's Department, attempted to contact Mr. Phillips by phone. After several attempts, Lt. Carter finally contacted Mr. Phillips on the phone and, for over an hour, tried to convince him to come out of the house. During the

course of the conversation, Mr. Phillips became more and more agitated and made repeated references to his "guns." For example, Mr. Phillips stated, "I got 30 guns, and I got more ammo. I can hold up in here for an hour." He also informed Lt. Carter about his violent history with police officers: "I pulled a gun on a Wasatch County Sheriff and he pissed his pants and I loved to see it...I shoved the gun right up his nose and he pissed his pants."

He then warned Lt. Carter not to send any officers into the house: "Yeah, just don't try to come in the house. Just thought I'd tell ya. Come through the back door, 20 gauge is gonna go off. Come up to the front door, a 410's gonna go off."

When asked whether he had been drinking, Mr. Phillips responded, "Just as much as I can." Mr. Phillips again told Mr. Carter what would happen if he tried to go inside his home:

MR. PHILLIPS: There's a gun (inaudible) house. I checked the whole house, nobody's in the house.

LT. CARTER: Good.

MR. PHILLIPS: Let the dogs in the house (inaudible) they'll chew whoever comes in the house.

LT. CARTER: Okay, I see.

MR. PHILLIPS: Okay. I put a gun (inaudible) that door come own [sic], it goes off. Put a gun on the back door, between...two doors in the back door...Okay. I got a 20 gauge on that one. Anybody opens that door, boom, it goes off. Next door, again, it will go off. My door,

I got a 12 gauge, a (Inaudible) 500 Browning automatic five shell, or six counting one in the barrel.

As this conversation continued, Mr. Phillips became convinced that someone had altered the temperature in his house. In an effort to remedy the situation, he left the house. For reasons known only to him, he was armed when he went outside. While outside, the officers repeatedly asked Mr. Phillips to drop his weapon. He refused to comply with their requests. Instead, Mr. Phillips took this opportunity to take note of the officers' location in the surrounding area, looking directly at the officers in the trees, including Sgt. Adamson. Mr. Phillips, still armed, then went back into his house. Inside his room again, Mr. Phillips slid open a window and propped it up with a cup. Sgt. Adamson believed Mr. Phillips was preparing to shoot at the SWAT team through the window.

While Mr. Phillips continued to talk with Lt. Carter, other officers attempted to disconnect the power to Mr. Phillips' residence. Mr. Phillips apparently spotted one of the officers and yelled, "Hey a**hole, get away from there." Mr. Phillips continued yelling, "Tell those guys in the backyard - the back screens are off so I got a CLEAN shot." Immediately upon hearing of Mr. Phillips' clean shot opportunity, Sgt. Adamson shot Mr. Phillips.

Based on the foregoing events, Mr. Phillips brought suit pursuant to 42 U.S.C. § 1983 against Sgt. Adamson, Chief James, Utah County, and Salem City alleging excessive use of force. Mrs. Phillips joined the suit claiming emotional damages. After protracted litigation, the defendants brought motions for summary judgment. The district court granted the

defendants summary judgment motions, concluding that Chief James and Sgt. Adamson were entitled to qualified immunity because Mr. Phillips did not suffer a constitutional injury. Correspondingly, the district court held that their respective employers, Salem City and Utah County, were also entitled to summary judgment; dismissal of all the claims hinged on issues addressed by the qualified immunity inquiry. The plaintiffs now appeal and raise the following four issues: (1) whether Mr. Phillips was unreasonably seized, (2) whether the decision to deploy the SWAT team was reasonable, (3) whether it was reasonable for Sgt. Adamson to shoot Mr. Phillips, and (4) whether interview statements of Sgt. Adamson are admissible hearsay. The Tenth Circuit Court of Appeals found as follows:

"The Phillips' argument relies heavily on the 'precise moment' factor. Specifically, the Phillips' argue that Sgt. Adamson was not in danger of serious bodily injury immediately prior to the time when he shot Mr. Phillips. Strict reliance on just one factor when the totality must be considered is inappropriate. *See Florida v. Bostick*, 501 U.S. 429 (1991). In addition, although the precise moment before Sgt. Adamson shot is a critical factor, the events leading up to that moment are also extremely relevant. When considered in the totality of the circumstances, Sgt. Adamson's decision to shoot Mr. Phillips was not unreasonable.

"In addition to the circumstances noted above, the situation presented to Sgt. Adamson had escalated considerably from the point when Chief James requested the assistance of the SWAT team. When the SWAT team arrived, Lt. Carter, the hostage negotiator, spoke with Mr. Phillips for over an hour. SWAT team

members learned of the status of these negotiations by radio. They learned that Mr. Phillips (1) was acting aggressively, (2) possessed a number of firearms that were located in the residence, including a high powered rifle, (3) had stated that he was willing to wait things out for however long they took, (4) had stated he was agitated by the number of law enforcement personnel surrounding the residence, (5) was possibly intoxicated, and (6) had stated he would shoot any officers who tried to remove him from the home.

“In addition, SWAT team members also personally saw Mr. Phillips exit his home carrying a handgun. Mr. Phillips repeatedly refused to cooperate with the officers when they requested that he put down his weapon. Instead, Mr. Phillips looked directly at Sgt. Adamson who was positioned in the tree. After he went back inside his house, Mr. Phillips opened a small window and propped it up with a cup. Mr. Phillips then threatened officers who were attempting to shut off the power to his house: ‘Hey, a**holes, get away from there...I’m gonna shoot his f***ing arm off.’ Mr. Phillips then knocked the screen out of the small window, and an officer thought he saw him holding a gun in his other hand. Mr. Phillips yelled through the window that he could ‘take somebody’s arm off’ and that ‘the back screen [was] off so [he had] a clean shot.’ Immediately after exclaiming that he had a clean shot, Sgt. Adamson shot Mr. Phillips.

“The situation presented to Officer Adamson was clearly a tense, uncertain, and rapidly evolving situation that we do not like to second-guess using the 20/20 hindsight found in the comfort of a judge’s chambers. There was no reason for Sgt. Adamson to have to wait to be shot at or even to see Mr. Phillips raise a gun

and point it at him before it would be reasonable for him, under these circumstances, to shoot Mr. Phillips. From the beginning Mr. Phillips’ actions were unreasonable. He had the power to defuse the situation by coming out of his bedroom and talking to the officers to allow them to reasonably assess the situation. The officers’ requests for him to do so were certainly reasonable. He repeatedly refused to do so. Mr. Phillips made the situation worse by continually threatening the officers with a high degree of physical force as they attempted to perform their job in a reasonable manner.

“This conduct coupled with the increasing threats of violence gave Sgt. Adamson probable cause to believe that he was being threatened with serious bodily harm. Therefore, Sgt. Adamson acted reasonably in shooting Mr. Phillips.”

CIVIL LIABILITY:
**Substantive Due Process;
Protection of Parent-Child Relations**

Robertson v. Hecksel, CA11,
No. 04-12367, 8/16/05

In *Robertson v. Hecksel*, a mother whose 30-year-old son was fatally shot by a police officer during a traffic stop was not deprived of a constitutionally protected liberty interest and thus cannot recover damages in an action under 42 U.S.C. § 1983. The substantive due process protection afforded the parent-child relationship under the Fourteenth Amendment does not extend to adult children and the mother’s asserted deprivation of a constitutionally protected right to a continuing relationship with her son does not give rise to a Section 1983 claim. Also see *Russ v. Watts*,

CA7, No. 04-3628, 7/11/05, where the Seventh Circuit also held that a parent does not have a substantive due process right to companionship of an adult child. In this case, the parents, claiming the loss of the society and companionship of their son, sued police officers following their son's death in a shooting incident.

INFORMANTS:

**Cut of Forfeiture Proceedings
Did Not Prevent Informer from Testifying**

United States v. Dawson, CA7,
No. 04-2557, 9/28/05

Pierre Dawson and Alphonso Ingram were convicted by a jury of federal drug offenses and sentenced to 300 months in prison (Ingram) and 360 months (Dawson). On appeal, they argue that in every trial of a federal drug offender the prosecution must prove that the defendant's offense had an actual impact on interstate or foreign commerce. Otherwise, they argue, the prosecution may exceed the regulatory power conferred on Congress by the commerce clause of the Constitution.

The government's principal evidence of the defendants' guilt consisted of testimony and recordings by Oscar Diaz, who after years as a major drug dealer following his illegal entry into the United States, had agreed to cooperate with the DEA in exchange for 20 percent of any proceeds of drug sales that the government recovered as a result of Diaz's efforts. Diaz also received additional compensation in an unknown amount. The DEA also, though apparently not pursuant to an explicit agreement with Diaz, failed to inform the INS

that he had, as the DEA knew, lied on his application for U.S. citizenship when he said he hadn't committed any crimes. (By the time of trial, Diaz was a U.S. citizen.)

Diaz was also assured that as long as he continued cooperating and told the truth, he would not be prosecuted for his past drug dealing. Before and after becoming a government informant, Diaz sold cocaine to the defendants. Diaz recorded (or transmitted to government agents who recorded) a number of his conversations, both telephonic and in person, with the two defendants.

The defendants argue that Diaz should not have been allowed to testify at all because of the benefits he received in exchange for his assistance to the prosecution, in particular the 20 percent bounty that he received. The defendants imprecisely describe this as a contingent fee for his testimony. The Seventh Circuit Court of Appeals found as follows:

"A bounty and a witness fee are different. A bounty is a reward for rendering a service that the offeror wants done, whether it's shooting wolves that prey on sheep or catching criminals who prey on humans. Here the bounty was for helping the authorities nail drug offenders. Although rather than being a flat fee it was a percentage of the money that the government recovered from the offenders, *United States v. Estrada*, 256 F.3d 466, 468 (7th Cir. 2001), this form of compensation is what economists call 'incentive compatible' ('motivational' would be an alternative term for it). It gives the bounty hunter an incentive to concentrate on the biggest prey.

"The bounty was not a contingent fee for testimony because it was paid whether or not

Diaz testified. Since most cases, including forfeiture cases (and the forfeiture components of criminal cases), are settled rather than tried, probably Diaz usually earned the bounty without having to testify. Of course when he did testify, as in this case, his bounty may have been riding on the outcome (though this is unclear), giving him a monetary incentive to testify favorably to the government. From the standpoint of incentive to lie, a bounty based on an adjudicative outcome is much more suspect than one obtained simply by procuring a seizure of forfeitable goods. And the defendants are right to point out that paying witnesses (other than experts) for their testimony is forbidden. Even an expert witness, and an occurrence witness, may not be paid more if the party for whom he is testifying wins the case.

“Most of the key witnesses in cases of drug dealing and other ‘victimless’ crimes (that is, crimes consisting of voluntary transactions, so that there is no *complaining* victim) are criminals testifying in the hope of obtaining leniency or other benefits from the government. Such testimony is frequently indispensable, and it is not worthless; Diaz’s testimony, for example, was amply corroborated, and not only by the recordings.

“Judges are in no position to evaluate the government’s need to offer monetary or other inducements to the criminals whom it hopes to enlist in the ‘war against drugs.’ Should we tell the Justice Department that 20 percent was too great a bounty to pay Diaz? That 5 percent

“Judges are in no position to evaluate the government’s need to offer monetary or other inducements to the criminals whom it hopes to enlist in the ‘war against drugs’.”

would have been sufficient? That too-generous bounties might actually induce people to *become* drug dealers, in the thought that if the business becomes too hot they can always enlist as bounty hunters for the DEA? Our job, so far as it relates to the question whether Diaz

should have been excluded from testifying at all, is to make sure that grossly unreliable evidence is not used to convict a defendant. We do this by requiring that the inducements be disclosed to the jury, which can use its common sense to screen out evidence that it finds to be wholly unreliable because of the inducements that the witness received. The more extravagant the blandishments, the more likely the jury is to discredit the witnesses who received them.”

INTERNATIONAL LAW:

Alien Right to Sue Law Enforcement for Violation of Vienna Convention Treaty on Consular Relations

Jogi v. Voges, CA7, No. 01-1657, 9/27/05

Since 1969, the United States has been a party to the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, a multilateral treaty. Among other things, the Vienna Convention requires its member states to ensure that a foreign national charged with a violation of host country law knows that he or she has the right to contact an official representative of his or her native country for assistance with legal proceedings.

Tejpaul S. Jogi is an Indian citizen who was charged with aggravated battery with a firearm in Champaign County, Illinois. Jogi pleaded guilty to the crime and served six years of a twelve-year sentence; at that point, he was removed from the United States and returned to India. No state official ever advised him of his right under the Vienna Convention to contact the Indian consulate for assistance, nor is there any hint that the Champaign County law enforcement officials ever contacted the Indian consulate on their own initiative on Jogi's behalf.

At some point after Jogi was in prison, he learned about the Vienna Convention. This prompted him to file several lawsuits, but the only one that is pertinent is his present case, in which he filed a *pro se* complaint seeking compensatory, nominal, and punitive damages to remedy this violation. He named as defendants various Champaign County law enforcement officials, including the two investigators who questioned him after his arrest. Jogi's complaint relied on the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which establishes jurisdiction in the district courts over a civil action by an alien for a tort committed in violation of a treaty of the United States. *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004). The district court found that state officials violated the Vienna Convention but concluded that Jogi's allegations were insufficient to trigger subject matter jurisdiction under the Alien Tort Statute.

The United States Court of Appeals for the Seventh Circuit stated that, to put it mildly, this case raises a bewildering array of complex issues. Although the Seventh Circuit found that the district court erred in granting the defendants' motion to dismiss, it recognized

the difficulty of the questions that lie just below its surface. The Seventh Circuit Court of Appeals, in a thirty page opinion, concluded that the district court did have jurisdiction over the case, that Jogi had an individual right to consular notification under the Vienna Convention, and a remedy by private action under this Convention. The Court reversed and remanded the case for further proceedings.

The Seventh Circuit Court of Appeals noted that the United States had signed the Vienna Convention multilateral treaty. Article 36 of this treaty reads as follows:

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

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

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

authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

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

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the *said laws and regulations must enable full effect* to be given to the purposes for which the rights accorded under this Article are intended.

Among other requirements, this provision instructs authorities of a receiving state to notify an arrested foreign national of “his rights” under the Convention “without delay.”

The Seventh Circuit Court of Appeals noted that Secretary of State William P. Rodgers indicated that Article 36 provided an individual right in his Letter of Transmittal, through which he officially submitted the certified copy of the Convention to the

President. There he wrote that Article 36 requires that authorities of the receiving State inform the person detained of *his right* to have the fact of his detention reported to the consular post concerned and of *his right* to communicate with that consular post. The U.S. Vienna Report explained that this provision has the virtue of setting out a requirement which is *not beyond means of practical implementation in the United States*, and, at the same, is useful to the consular service of the United States in the protection of our citizens abroad.

The Seventh Circuit Court of Appeals noted that they were the first court to be confronted with the question whether a private civil action may be based on the Vienna Convention. The Court concluded that even though many, if not most, parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals. The Court also noted that regulations issued by the Department of Justice and (now) the Department of Homeland Security that address the subject of consular notification highlight the right of the individual alien to notification. The State Department sends regular notices to state and local officials reminding them of their notification obligations under the treaty. In addition, The Foreign Affairs Manual issued by the State Department says that Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee’s *right* to communicate with the American consul. Courts have observed that the United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access.

The Seventh Circuit Court of Appeals concluded that relying on the language of Article 36, the purpose of the Article, and the need to interpret the Vienna Convention in a manner consistent with the other states party to the Convention, that there is an implied private right of action to enforce the individual's Article 36 rights.

INTERROGATION: **Miranda;**
Ambiguous Request for an Attorney
Baker v. Arkansas, CR04-542, 9/29/05

On April 24, 2002, Investigator J.R. Davenport called and requested that James E. Baker, Jr. come to the Carroll County Sheriff's Office for an interview and to give a statement regarding an allegation of child maltreatment of his granddaughter, A.V. When Baker arrived, Investigator Alan Hoos read him his *Miranda* rights. Baker executed a written waiver and was subjected to three interviews, lasting just over an hour.

During his initial interview, Baker was told that A.V. had accused him of touching her in a sexual manner, and a short discussion ensued, leading to numerous ambiguous responses by Baker. When his answers raised more questions, Investigator Hoos asked Baker if he would be willing to take a polygraph examination. Baker agreed and, after discussing scheduling times for the polygraph, Baker was taken to another interview room and asked to wait there for a few moments.

Approximately twelve minutes later Investigator Hoos returned, informed Baker that he had just spoken to his wife, and told

him that some of his statements were inconsistent with hers. While Investigator Hoos was questioning Baker about his previous ambiguous and inconsistent statements, Baker stated that he felt like he should not answer any more questions without having an attorney present. When asked to clarify his statement, Baker replied that he thought that he would need one. Baker continued answering questions by Investigator Hoos without making any further attorney references. And, during a third interview conducted by Investigator Davenport, Baker admitted to having sexual relations with A.V., which ultimately led to his arrest and conviction.

Baker says his confession was involuntary and should have been suppressed, arguing that once he invoked his *Miranda* right to counsel, any statements made thereafter were inadmissible; and, he did not waive this right simply by continuing to communicate with law enforcement officers. A review of the taped interview contains the following colloquy between Baker and Investigator Hoos:

INVESTIGATOR: Okay. So I'm trying to figure out what's going on.

APPELLANT: I don't know. I don't know what's going on. Maybe I need to see a psychiatrist.

INVESTIGATOR: Why would you need to see a psychiatrist?

APPELLANT: Because I feel like I'm only being-I feel like I did something wrong and I don't know what I did wrong.

INVESTIGATOR: Okay. Is there something that you-

APPELLANT: I don't feel like I can talk with you without an attorney sitting right here to give-have them here to give me some legal advice.

INVESTIGATOR: Okay. So you're telling me you want an attorney?

APPELLANT: I think I'm going to need one. I mean, it looks like that.

Upon review, the Arkansas Supreme Court found as follows:

"The United States Supreme Court has made it very clear that when invoking the *Miranda* right to counsel, the accused must be unambiguous and unequivocal. *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981); *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350 (1994). See also *Whitaker v. State*, 348 Ark. 90, 71 S.W.3d 567 (2002), and *Higgins v. State*, 317 Ark. 555, 879 S.W.2d 424 (1994). When invoking the right to counsel, the Court has said:

If a suspect makes a reference to an attorney that is ambiguous or equivocal such that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require cessation of questioning. Higgins, 317 Ark. at 562, 879 S.W.2d at 427 (quoting *Davis*, 512 U.S. 461, 114 S. Ct. at 2356).

"In recognizing the balance between the necessity for law enforcement officers to gather information to assist in an investigation and the accused's constitutional right to counsel, the Court said:

If we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

"This case is similar to the facts in *Higgins*. There, after the appellant was given his *Miranda* warnings and executed a waiver, he asked before questioning began, 'Do you think I need a lawyer?' to which the police officer replied, 'You will have to have one.' The appellant continued with the interrogation and eventually made incriminating statements that were used against him at trial. Relying on the Court's guidelines from *Edwards* and *Davis*, *supra*, we determined that the appellant's reference to an attorney 'was surely ambiguous and hardly amounted to the sort of direct request required to invoke his Fifth Amendment right to counsel.' *Higgins*, 317 Ark. at 563, 879 S.W.2d at 428.

"Like the appellant in *Higgins*, Baker's reference to an attorney was ambiguous. After Baker was *Mirandized* and executed a waiver, he told Investigator Hoos 'I don't feel I can talk to you without an attorney sitting right here to give-have them give me some legal advice,' Mr. Hoos followed up by asking Baker whether he wanted an attorney. Baker answered and said, 'I think I'm going to need one. I mean, it looks like that.' This response is prospective, indicating Baker thought he might need an attorney at some time in the foreseeable future.

Baker, then continued with the interview, which eventually led to his confession.

“We conclude that because Baker was *Mirandized* before the interviews, and his reference to an attorney was equivocal and ambiguous, law enforcement officers did not violate Baker’s right to counsel by continuing to question him. Accordingly, Baker’s confession was voluntary.”

PUBLIC NUISANCE:
**Injunction To Close Club;
 Property Owner not a Participate
 in Club’s Activities**

Bashaw v. State, No. 04-897, 12/1/05

Harold D. Goffin, Sr. is the operator of the Club, a non-profit corporation. The Club is licensed by the Arkansas Alcohol Beverage Control Board (ABC) as a private club. The Club is located in Monticello, Arkansas, on property owned and leased by Glen Bashaw. The Club has been the site of numerous alcohol-related violations, as well as other criminal activity. Specifically, ABC Agent Roger Archie testified that Goffin and the Club had been cited for multiple violations, fined \$500.00, suspended for two weeks, and placed on probation. These violations include the selling of unauthorized alcohol; selling alcohol in unauthorized containers; allowing minors on the premises without food service; gambling; and allowing an unauthorized weapon. Archie further testified that during the Club’s suspension, the Club continued to violate the rules by dispensing alcohol, failing to cooperate with law enforcement, and failing to be a good neighbor by allowing altercations on the premises.

In addition to the ABC violations, on February 14, 2003, the Monticello Police Department executed a search warrant and raided the Club. The police found club patrons engaged in a dice game for money. The police seized \$7,172.25 and arrested Goffin for operating a gambling house. Following Goffin’s arrest, Bashaw terminated the Club’s lease but he has allowed the Club to continue using the premises on a month-by-month basis.

Lastly, the Club has been the site of at least forty disturbances, ranging from vandalism to theft to homicides. Based upon the alcohol violations, the gambling, and the numerous public disturbances, the State filed a complaint for abatement of a nuisance. On February 19, 2004, the trial court issued an order finding that the operation of the Club constituted a public nuisance, enjoining Goffin from operating the Club, and finding that Bashaw has the obligation to not knowingly allow illegal activity to occur on his property. This appeal followed, with the Arkansas Supreme Court finding as follows:

“This court has repeatedly held that the operation of a gambling house is a public nuisance. *See Masterson v. State*, 329 Ark. 443, 949 S.W.2d 63 (1997); *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943). Additionally, this court has found that the illegal sale of alcohol is a public nuisance. *Click v. State*, 206 Ark. 648, 176 S.W.2d 920 (1944). There, this court found that even if an appellant is not convicted of the unlawful sale of alcohol, ‘it does not follow that his place of business did not become a nuisance for other unlawful practices and conduct, as disclosed by the evidence.’ Moreover, a public nuisance can exist where the place of business or activities that occur on the premises constitute a threat

to public health and safety. See *Masterson*, 329 Ark. 443, 949 S.W.2d 63; *State v. Vaughan*, 81 Ark. 117, 98 S.W. 685 (1906).

“In the present case, the trial court based its finding that the Club constituted a public nuisance upon a multitude of factors. Specifically, the trial court found that the Club was (1) unlawfully selling and dispensing alcoholic beverages; (2) permitting organized gambling on the premises; (3) selling alcohol in half-pints; (4) allowing minors into the Club; (5) selling alcohol for a flat fee; (6) allowing a shotgun to be accessible to patrons; and (7) advertising free alcohol. The court also noted that the Club and its immediate area has been the scene of numerous disturbances and breaches of the peace. Relying on this evidence, the court concluded that this unlawful activity in and around the Club constituted a threat to public health and safety and, thus, the Club was a public nuisance. This evidence is more than sufficient to support the trial court’s finding that the Club was a public nuisance.

“Bashaw argues he should not be included in the injunction because he was simply the owner of the premises and not a participant in the activities that created the public nuisance. While there is no Arkansas law directly on point, other jurisdictions have faced the issue of allowing an injunction in cases such as this.

“In *Armory Park Neighborhood Ass’n v. Episcopal Community Servs.*, 148 Ariz. 1, 712 P.2d 914 (1985), the Arizona Supreme Court explained that under general tort law, liability for nuisance may be imposed upon one who sets in motion the forces which eventually cause the tortious act; liability will arise for a public nuisance when one person’s acts set in motion a force or chain of events resulting in the invasion.

Furthermore, in *Packett v. Herbert, II*, 237 Va. 422, 377 S.E.2d 438 (1989), the Virginia Supreme Court explained that property owners cannot avoid responsibility for the maintenance of a nuisance upon or near their property because the activities complained of were not their own. These two cases indicate that an owner, even though not a party to the nuisance activities, can be enjoined by the court to abate a nuisance. See also *City of Rochester v. Premises Located at 10-12 South Washington Street*, 180 Misc.2d 17, 687 N.Y.S.2d 523 (1998) (finding that the fault of the owner is not an issue if a nuisance is found to exist).

“These cases indicate that a property owner, such as Bashaw, can be enjoined from allowing the public nuisance activities to continue on the premises. Furthermore, the evidence in the present case indicates that Bashaw was at least aware of some of the activities occurring at the Club. Specifically, he spoke to the Monticello Chief of Police and received information about complaints filed against the Club. He also was aware of the gambling charges filed against Goffin, and although he cancelled the lease, he allowed the Club to continue operating on the premises. Thus, it is clear that he was at least knowledgeable of the activities surrounding the Club. Accordingly, the trial court did not err in finding that the Club constituted a public nuisance and in enjoining Bashaw as the owner.”



SEARCH AND SEIZURE:
Automobile Searches; Inventory Search

United States v. Kennedy, CA8,
 No. 04-2634, 11/7/05

Jason Mark Kennedy was stopped and arrested in his automobile for driving without a license. The arresting officer had what the Eighth Circuit deemed “stale” information from an informer, Kennedy’s ex-girlfriend, that Kennedy kept methamphetamine in a box behind a speaker in the trunk of his vehicle. The arresting officer ordered the vehicle to be towed to the impound lot pursuant to the Coon Rapids Police Department procedure. While the vehicle was still on the street being readied for tow, the officer opened the trunk, looked at the speakers, and saw that one was not screwed down. He lifted it and found two large packages of methamphetamine, along with more than \$6,000 in cash.

The Government argued, and the magistrate judge concluded, that Kennedy’s car was properly stopped, he was properly arrested for driving while suspended, and his car was properly impounded pursuant to the impound policy of the Coon Rapids Police Department. Because the impoundment was proper, the Government argues that the hidden contraband was seized during a valid inventory search. The Eighth Circuit Court of Appeals found as follows:

“Police may conduct a warrantless search of a lawfully-impounded vehicle even in the absence of probable cause. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *United States v. Petty*, 367 F.3d 1009, 1011-12 (8th Cir. 2004). The

inventory search exception to the warrant requirement is premised on an individual’s diminished expectation of privacy in an automobile coupled with the governmental interests in inventorying the vehicle’s contents: to protect an owner’s property while the automobile is in custody, to ensure against claims of lost, stolen, or damaged property, and to guard police from danger. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

“The central question in evaluating the propriety of an inventory search is whether, in the totality of the circumstances, the search was reasonable. *United States v. Rankin*, 261 F.3d 735, 740 (8th Cir. 2001). Inventory searches conducted according to standardized police procedures, which vitiate concerns of an investigatory motive or excessive discretion, are reasonable. Adherence to standardized procedures is necessary to ensure that the search is not merely ‘a ruse for general rummaging in order to discover incriminating evidence,’ since inventory searches are often conducted in the absence of the safeguards of a warrant and probable cause. *Wells*, 495 U.S. at 4 (1990).

“Requiring an officer to conduct an inventory search pursuant to ‘standardized criteria’ or an ‘established routine’ does not mean that the search must be made in a ‘totally mechanical’ fashion. *Petty*, 367 F.3d at 1012 (quoting *Wells*, 495 U.S. at 4). Indeed, police may keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime. The Constitution does not permit police to raise the inventory-search banner in an after-the-fact attempt to justify what was purely and simply a search for incriminating evidence.

“The Coon Rapids Police Department has a standardized impound and inventory search policy, codified in the Coon Rapids Department Manual, which was in effect at the time of the search. The policy provides that vehicles involved in a crime and which are evidence or contain evidence are subject to towing or impoundment. There is no dispute that the vehicle was properly impounded pursuant to this standardized policy. The issue is whether the inventory search conducted by the officer likewise complied with department procedure.

“The department’s inventory search procedures require an inventory of the impounded vehicle’s contents. In addition, if there is personal property of value not permanently affixed in a vehicle, the officer shall list the contents on the tow sheet. The policy also requires an inventory of the contents of the trunk and the glove box after making every reasonable attempt to open these areas. If these areas are locked and no key is available, the officer ‘shall not do damage to the vehicle in an attempt to open these areas,’ but if an officer has ‘probable cause to believe there is evidence of a crime in these locked areas, they should place a hold on the vehicle until a search warrant can be obtained.’ The policy also provides that objects such as boxes,

“Police may conduct a warrantless search of a lawfully-impounded vehicle even in the absence of probable cause...The inventory search exception to the warrant requirement is premised on an individual’s diminished expectation of privacy in an automobile coupled with the governmental interests in inventorying the vehicle’s contents.”

briefcases, or other closed containers should be opened and the contents inventoried. Once again, if the container is locked, officers may attempt to open the container without doing damage, but if the container cannot be opened the officer ‘must determine if they have probable cause to obtain a search warrant for the container.’

“The Government advances a number of arguments in support

of its contention that Officer Abbott’s search beneath the loose speaker in Kennedy’s trunk was conducted pursuant to the department’s policy. First, the Government claims that the loose speaker qualifies as ‘property of value not permanently affixed,’ and that the guidelines’ directive to list such property on the tow sheet necessarily requires the officer to handle the property. Next, the Government argues that the area beneath the speaker is the functional equivalent of the ‘boxes, briefcases, and containers’ the department guidelines permit officers to search.

“Fatal to both of the Government’s arguments is the lack of evidence produced at the suppression hearing to support them. As with any warrantless search, the Government bears the burden of demonstrating the need for an exemption from the warrant requirement and that its conduct fell within the bounds of the

exception. In the context of an inventory search this burden requires the government to produce evidence that impoundment and inventory search procedures were in place and that law enforcement complied with those procedures.

“All the Government established at the suppression hearing is that procedures were in place. It failed to establish compliance with those procedures. There was no testimony as to what specific places would have been searched absent the information from the ex-girlfriend. Specifically, there was no evidence that an officer performing an inventory search would have lifted a stereo speaker out of the box in which it was mounted pursuant to the policy’s requirements that ‘personal property of value not permanently affixed’ be listed on the tow sheet. Nor was there evidence that a searching officer would construe ‘boxes, briefcases, and containers’ to include the area beneath a stereo speaker. Absent such evidence, the Government has failed to demonstrate that the officer conducted the search in compliance with the department’s inventory search policy, and thereby failed to demonstrate that the inventory search exception applies.”

SEARCH AND SEIZURE:

Border Searches

United States v. Chaudhry, CA9,
No. 04-50421, 9/14/05

On May 7, 2004, Dora Chaudhry drove her Ford F-150 pickup truck to the San Ysidro Port of Entry in Southern California. In pre-primary inspection, a narcotics detector dog alerted on Chaudhry’s vehicle by biting and

scratching on the undercarriage of the truck. Chaudhry was then referred to secondary inspection, where a 5/16-inch hole was drilled in the bed of the truck, revealing a blue plastic material. Inspector Jose Mella testified that, based on his experience, the blue plastic evidenced a probability that narcotics were hidden beneath the bed of the truck. He then used a saw and “jaws of life” to remove what turned out to be a false truck bed, revealing numerous bricks of what later tested to be marijuana. Inspectors took a series of photographs that were introduced into evidence at the suppression hearing.

Once the government disclaimed any reliance on the detector dog alert, Chaudhry moved to suppress the marijuana evidence, contending that it had been seized in violation of the Fourth Amendment during a “destructive” or “intrusive” vehicle search unsupported by a reasonable suspicion of unlawful activity. The district court then denied the motion, ruling that the drilling of a 5/16-inch hole “was not the type of intrusive search that would trigger something other than a routine search description under *Flores-Montano*, and that no reasonable suspicion was required.” The district court made clear that it was not relying on the dog alert as justification for its denial of the motion. Thus the only issue presented in the present appeal is whether the border patrol agents needed any degree of suspicion prior to drilling the hole.

The United States Court of Appeals for the Ninth Circuit held that the Fourth Amendment does not require federal agents conducting warrantless border searches to have reasonable suspicion before drilling small holes into beds of pickup trucks crossing the border. The hole in question was only 5/16th of an inch. The

court noted that a small single diameter hole in the truck bed does not reduce the functionality, operation or safety of the vehicle.

SEARCH AND SEIZURE:

Consent Search; Scope of the Consent

United States v. Breit, CA7,

No. 05-1372, 11/22/05

On April 18, 2004, at approximately 9:00 p.m., Rockford, Illinois police department patrol officers Daniel Fick and Apostolos Sarantopoulos were separately dispatched to 3012 Sunnyside Drive in Rockford to investigate a weapons violation. Fick had been advised by the communication center that an anonymous female caller reported hearing a gunshot, that one of her neighbors (later identified as Breit) told her that he accidentally fired a blank round from his rifle, and that this neighbor was acting weird. Fick and Sarantopoulos arrived at Breit's apartment complex at approximately the same time and attempted to locate Breit's apartment. Upon arriving at Breit's apartment door, but prior to the officers knocking, Breit came outside of his apartment and stated, "I screwed up."

The officers asked Breit if they could enter his apartment and talk to him. Breit agreed, and the officers entered the apartment. Once inside the kitchen area, the officers asked Breit what happened. Breit stated he was trying to dismantle his newly purchased AK-47 assault rifle. He did not realize there was a round in the rifle, and it fired during disassembly. Breit led the officers into the living room and showed them where the bullet traveled, which was through the patio door frame and out of the apartment. During this time, the officers

noticed a large amount of ammunition on the kitchen table, as well as two handguns, one on a bookcase in the living room and one on top of the entertainment center. They also observed additional ammunition on top of the entertainment center. Breit stated the handgun on top of the entertainment center was loaded, and that it was a black powder handgun. At this time, Sarantopoulos quickly walked through the apartment to make sure that no one else was in the apartment and that no one had been injured. Sergeant Danny Foltz, Fick's and Sarantopoulos's supervisor, then arrived. Upon being apprised of the situation, Foltz ordered Breit put in handcuffs "for everyone's protection."

Approximately eleven minutes later, Fick read Breit his *Miranda* rights. Breit did not ask for an attorney and in fact was completely cooperative. Foltz then asked Breit for permission to search the apartment as well as Breit's vehicle. Foltz stated he wanted permission to search "for any other guns or anything related to them." Breit orally agreed. Sarantopoulos retrieved two identical consent-to-search forms. Sarantopoulos removed Breit's handcuffs and gave Breit one copy of the consent form. Sarantopoulos kept the other form and read it to Breit verbatim. The form stated, "I, Michael Josiah Breit, knowingly and voluntarily give consent to City of Rockford police officers to conduct a complete search of the following." Breit's apartment and vehicle were then set forth on the form. The bottom of the consent form read, "These officers are authorized by me to seize property which they determine may pertain to a crime investigation they are conducting. I understand and have been informed by at least one of the undersigned officers that I have the right to refuse this consent." Breit did not ask any

questions, and he signed both forms. Breit was removed from his residence and placed in a squad car. The police then initiated their search. Sarantopoulos recovered a paintball gun and a journal from Breit's car.

The journal was closed with a vinyl cover, and it had a velcro strap around it. Sarantopoulos had to use his flashlight to actually open the journal. The journal contained something of a "hit list" of Senators, government officials, and celebrities. Next to each name was the word "marked." In addition, the journal contained a drawing of a limousine that appeared to be under attack. In Breit's apartment, the police recovered five long guns, two black powder pistols, a large amount of ammunition in various calibers, several books, and two notebooks. The two notebooks contained diagrams of rocket launchers and bombs, along with writings such as "Fight, fight, fight, kill, kill, kill." The various books recovered dealt with the making of explosives and drugs or espoused "political views of a terrorist nature." Finally, the officers recovered items consistent with bomb-making materials, such as threaded pipe, shotgun shells, black powder, and fuse cord.

After Breit was indicted, the district court denied Breit's motions to suppress the evidence seized from his apartment and vehicle as well as his subsequent statements to police. Breit argued that his written consent was not valid since the police exceeded the scope of his consent. As Breit points out, an officer testified he told Breit the police wanted to search for any guns or anything related to them. Breit argues this would not reasonably include a search for receipts and paperwork relating to guns that, in turn, allows the officers to retrieve and read Breit's private notebooks and journals.

Upon review, the Seventh Circuit Court of Appeals found as follows:

"The scope of a search is generally defined by its expressed object. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). We have explained how the scope of a consent search is limited by the breadth of actual consent, and whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of all the circumstances. *United States v. Torres*, 32 F.3d 225, 230-31 (7th Cir. 1994). In *Torres*, we stated the standard as follows: what would the typical reasonable person have understood the scope of consent to be by the exchange between the officer and the suspect? Along the same lines, we have repeatedly emphasized that a general consent form does not override a more explicit statement specifying the object of the search. See, e.g., *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002) (Although the consent form is probative of the voluntariness of the defendant's consent, it helps little in determining its scope).

"First, Breit signed a clearly-worded consent form that gave the police permission to search his entire apartment and vehicle. One of the officers even read the consent form verbatim to Breit prior to Breit signing it. Furthermore, an officer testified he told Breit they were searching for anything related to criminal activity, not just evidence related to guns. We believe, given this information, a reasonable person would have understood that a broader scope of consent had been given than what Breit now argues.

"More important, however, is the analysis contained in *United States v. Raney*, 342 F.3d 551 (7th Cir. 2003). It contains a useful

discussion on the issue presented here. In that case, the defendant signed written consent forms authorizing the police to search his car, residence, and other items for materials in the nature of child abuse, child exploitation, and child erotica. The defendant argued that the seizure of homemade *adult* pornography exceeded the scope of his consent. We held the evidence should not be suppressed because the use of the ‘in the nature of’ phrase broadened the scope of the search. In making this determination, we also relied on the following hypothetical: Had the agents in *Dichiarinte* obtained consent to search for evidence ‘in the nature of’ narcotics, the search would have been broad enough to include the seizure of drug paraphernalia, scales, and even drug ledgers; *such language also would have enabled the agents to read the defendant’s private papers and seize them if they discovered some link to narcotics. Id.* (emphasis added). We then explained that the homemade adult pornography could reasonably be construed to be evidence ‘in the nature of’ child abuse, child erotica, or child exploitation, given the broad nature of the consent.

“Applying this reasoning to the instant case, we conclude Breit’s consent was also of a broad nature, as it (at a minimum) allowed the police to search for anything ‘related to’ guns. We find the phrase ‘related to’ in this context to be equivalent to the phrase ‘in the nature of,’ which was used to modify the consent given in *Dichiarinte*. Thus, when Breit consented to a search for guns ‘or anything related to them,’ he consented to a search of his private papers, which included notebooks and journals.”

SEARCH AND SEIZURE:
Emergency Aid; Protective Sweep

United States v. Martins, CA1,
No. 04-1474, 6/27/05

On the evening of February 10, 2002, Sergeant Detective Daniel Linskey responded to a radio call from an anti-gang unit about a shooting at the corner of Wendover and Dudley Streets in Boston’s Roxbury section. Upon his arrival, he discovered a victim nursing a gunshot wound. The wounded man could not provide any useful information about the shooting.

A bystander informed Linskey that there was a second victim up the street. Linskey proceeded north on Wendover Street for about 100 yards. Another bystander directed him to an apartment building. Linskey entered the structure’s first-floor common area and saw a man he knew as “Fats” sitting in a kitchen chair outside Apartment No. 1. The area was otherwise devoid of furniture. Linskey asked Fats, who was bleeding from a gunshot wound to the leg, where he had gotten the chair. Fats replied that he had received it from “his boy” inside Apartment No. 1.

Linskey approached the exterior door of the apartment and noticed a strong odor of marijuana wafting from within. He knocked on the door and an adult male voice asked him to identify himself. Linskey replied that he was a police officer and asked to speak with the occupant. He next heard voices and the sound of movement coming from within the apartment. This was followed by utter silence.

After ninety seconds or so, Linskey knocked again and asked to speak with the occupant. A

young boy (perhaps eleven or twelve years old) opened the door and stepped back into the foyer of the apartment. The interior was poorly lit, but Linskey noticed marijuana smoke drifting through the air. He asked the youth whether his parents were home or whether anyone else was in the unit. The boy responded in the negative. His voice was markedly different from the voice that had originally spoken to Linskey from behind the closed door.

Linskey then stepped into the apartment and spied an even younger girl watching television in a bedroom. When he was three or four feet inside the threshold, he heard yelling from outside. This proved to be the defendant, who entered the apartment by way of the common hallway. The defendant asked what Linskey was doing there and Linskey replied that he was investigating a shooting. Adverting to the marijuana smoke, Linskey asked whether anyone was in the apartment with the children. The defendant said that he was in charge and that nobody else was present.

By that time, several other officers had arrived at the scene and gathered in the common hallway. Linskey ordered them to undertake a protective sweep of the premises to ascertain whether the adult who originally had answered Linskey's knock was still there. During the suppression hearing, Linskey testified that he ordered the sweep for a variety of reasons, including the location of one of the shooting victims immediately outside the apartment, the marijuana smoke within, and the presence of young, apparently unsupervised children. The principal impetus for his decision, however, was that he had heard an older man speak from within the apartment, yet both the youngster who

answered the door and the defendant insisted that no one else was there. Linskey indicated that he was not sure who this other man was, what involvement he may have had with the shootings, or even whether the defendant was aware that someone might have entered the apartment. Given these manifold uncertainties, Linskey was concerned for the safety of everyone involved.

The sweep quickly bore fruit. In a bedroom, Linskey discovered José DeVeiga sitting on a bed, wrapped in a cloud of marijuana smoke. DeVeiga seemed to be under the influence of drugs. Linskey patted DeVeiga down, found no weapons, and asked where the marijuana was stashed. When DeVeiga denied having any marijuana, an incredulous Linskey remarked the thick marijuana smoke filling the room.

At that point, the defendant volunteered that he had been smoking marijuana and called Linskey's attention to two marijuana roaches in an ashtray on the floor. Linskey told the defendant that the cold roaches could not have been the source of the billowing smoke. He then announced that he would obtain a search warrant in an effort to locate the marijuana and instructed other officers to "freeze" the apartment. He thereupon arrested both DeVeiga and the defendant for possession of marijuana and placed the two children in a relative's care.

The police rapidly obtained and executed a search warrant for the premises. The ensuing search retrieved, inter alia, handgun and rifle ammunition, as well as a Pyrex dish containing crack cocaine residue.

The defendant, Christopher Martin, objects on Fourth Amendment grounds to both the initial

entry into his apartment and the subsequent protective sweep of the apartment. The United States Court of Appeals for the First Circuit found as follows:

“...it is a bedrock principle that the protection of the Fourth Amendment is at its zenith with respect to an individual’s home. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001). Thus, a ‘warrantless police entry into a residence is presumptively unreasonable unless it falls within the compass of one of a few well-delineated exceptions.’ *United States v. Romain*, 393 F.3d 63, 68 (1st Cir. 2004). Some of these exceptions are bundled together under the heading of ‘exigent circumstances’—a heading that encompasses those situations in which some compelling reason for immediate action excuses law enforcement officers from pausing to obtain a warrant. Common examples of exigent circumstances include (1) hot pursuit of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to herself. *Hegarty v. Somerset County*, 53 F.3d 1367, 1374 (1st Cir. 1995).

“The *Hegarty* list is not an exclusive compendium, and the government’s principal argument here invokes another species of exigent circumstances: the emergency aid doctrine. See *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (noting, in dictum, that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within a private residence is in need of immediate aid). The *Mincey* dictum has prompted several courts to designate a general ‘emergency aid’

category as a type of exigent circumstances sufficient to justify a warrantless entry into a home. See, e.g., *United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002); *United States v. Richardson*, 208 F.3d 626, 630 (7th Cir. 2000); *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J.). We joined this parade in *United States v. Beaudoin*, 362 F.3d 60, 66 (1st Cir.), cert. denied, 125 S. Ct. 484 (2004). Under this doctrine the police, in an emergency situation, may enter a residence without a warrant if they reasonably believe that swift action is required to safeguard life or prevent serious harm. To rely upon the doctrine, the government must show a reasonable basis, approximating probable cause, both for the officers’ belief that an emergency exists and for linking the perceived emergency with the area or place into which they propose to intrude. The requisite inquiry must be undertaken in light of the totality of the circumstances confronting the officers, including, in many cases, a need for an on-the-spot judgment based on incomplete information and sometimes ambiguous facts bearing upon the potential for serious consequences.

“In applying this yardstick in the case at hand, we survey the objective facts known to Linskey in the time frame leading up to his entry. Upon knocking on the door, Linskey heard an adult male voice, followed by conversation, movement, and then silence. Upon a second knock, the door opened to reveal a young boy in an apartment filled with thick marijuana smoke. The child indicated that he was home alone—a dubious proposition in light of Linskey’s knowledge that an adult male had been inside the dwelling moments earlier. It seemed implausible that the boy was unaware of the man’s presence; indeed, the two most

likely inferences were that the boy was following instructions given to him or that the man had fled. Thus, the officer could have been reasonably certain either that a man seeking to conceal himself from the police, was using the boy as a pawn in a dicey game of hide-and-seek, or that the man had bolted and left the boy unsupervised.

“Either way, the child was present in the midst of an ongoing crime (marijuana use) and was exposed to toxic smoke, placing his welfare at risk. The officer would have been remiss had he refused any attempt to improve the boy’s plight. Because this state of affairs gave Linskey ample cause to believe that the boy needed emergency assistance, it justified his entry. See 3 Wayne R. LaFave, *Search and Seizure* § 6.6(a) (4th ed. 2004) (stating that warrantless entry for the purpose of rendering aid is reasonable in order to assist unattended small children).

“This holding is within the mainstream of Fourth Amendment jurisprudence. Other courts have found exigent circumstances in similar situations. In *United States v. Bradley*, 321 F.3d 1212 (9th Cir. 2003), the police became aware that a nine-year-old boy was potentially home alone after his mother’s arrest. After receiving no response to repeated knocking, the police announced their presence, entered the home through an unlocked back door, and discovered the child. The Ninth Circuit emphasized that the officers were aware that a child was home alone but were not aware of conditions inside the house. Based primarily on those facts, the court reasoned that the ‘possibility of a nine-year-old child in a house in the middle of the night without the supervision of any responsible adult is a situation requiring immediate police assistance.’ Consequently, the court found the

officers’ warrantless entry justified under the emergency aid doctrine.

“So too *United States v. Hughes*, 993 F.2d 1313 (7th Cir. 1993), in which the police learned that an adolescent—a thirteen-year-old girl—was inside a house occupied by persons smoking crack cocaine. A police officer entered without a warrant, explaining that he had done so because he did not know if the girl was being held against her will, or if she was there using drugs. Predicated on the officer’s reasonable belief that the child might be in danger, the Seventh Circuit found that exigent circumstances justified the entry.

“The defendant seeks to debunk the reasonableness of Linskey’s belief that the boy was in need of emergency assistance. He points to several cases in which risk to children was found not to amount to exigent circumstances. See, e.g., *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240-41 (10th Cir. 2003); *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999); *Good v. Dauphin County Social Servs. for Children & Youth*, 891 F.2d 1087, 1095 (3d Cir. 1989). But without exception, these cases involve much less ominous fact patterns. Far from helping the defendant, they put the situation here into clearer focus. Unlike, say, the officer in *Calabretta*, 189 F.3d at 813, Linskey did not enter the home based on some unsubstantiated report of possible danger; rather, he personally witnessed a child at the center of illicit drug activity and had reasonable cause to believe that the child either had been abandoned or else forced to help conceal an adult’s presence. The moment cried out for an immediate entry.

“The defendant makes a last-ditch effort to blunt the force of this conclusion: he suggests that the exigency was manufactured by the

police and, thus, cannot justify their warrantless entry. While we agree that law enforcement officers may not manipulate events to create an emergency and bootstrap that invented emergency into a justification for a warrantless entry of a person's home, see *United States v. Curzi*, 867 F.2d 36, 43 n.6 (1st Cir. 1989), that principle is unavailing here.

"We hold that notwithstanding the absence of a warrant, the officer's entry into the defendant's apartment was justified by exigent circumstances.

"The defendant's remaining Fourth Amendment claim focuses on the legality of the protective sweep that the officers conducted after entering the apartment. The baseline rule is that police officers, in conjunction with an arrest on residential premises, may undertake a protective sweep so long as they can point to 'articulable facts which, taken together with the rational inferences from those facts,' would warrant a reasonably prudent officer in believing that the area harbors an individual posing a danger. *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

"Taking the facts known to the officer—the high-crime area, the shootings, their connection with the apartment, the officer's experience and knowledge anent gang behavior, the evasive action of the adult known to be present behind the door, and the seeming attempt to misinform—we find them sufficient to ground a reasonable suspicion that the unknown adult posed a threat to the officers on the scene. That suspicion justified the protective sweep.

SEARCH AND SEIZURE:

Good Faith Exception

United States v. Frazier, CA6,

No. 04-5719, 9/6/05

In *United States v. Frazier*, the United States Court of Appeals for the Sixth Circuit in reviewing whether evidence obtained pursuant to an invalid search warrant is admission under the good-faith exception can look beyond the four corners of the warrant affidavit. In this case the officer sought six search warrants as part of a drug investigation. The magistrate reviewed the affidavits, discussed them with the officer, and made suggestions for changes. The officer made revisions to five of the affidavits but failed to correct the remaining sixth affidavit. A search based on the sixth invalid search warrant resulted in the seizure of guns and narcotics from the defendant's home.

The Sixth Circuit Court of Appeals noted that under *United States v. Leon*, 468 U.S. 897 (1984), evidence is admissible if the searching officers' reliance on a warrant that is subsequently determined to be invalid was objectively reasonable. The Sixth Circuit held that the seized evidence in this case was admissible under the "Good Faith Exception" because the officer had orally communicated the information to the magistrate and the information was inadvertently left out of the affidavit.

SEARCH AND SEIZURE:
Luggage; What Constitutes a Seizure

*United States v. Va Lerie, CA8,
No. 03-3394, 10/3/05*

In *United States v. Va Lerie*, the United States Court of Appeals for the Eighth Circuit dealt with the difficult issue of when a detention of luggage in interstate transport becomes a seizure. In this case, a Nebraska State Police Investigator removed an interstate bus passenger's luggage from the bus's luggage compartment to a room inside the bus terminal to seek the bus passenger's consent for search of the bag. The Eighth Circuit Court of Appeals found as follows:

"...In reviewing the Supreme Court's enunciation of Fourth Amendment seizure principles, as well as the approaches taken by the Fifth, Seventh, and Ninth Circuits in applying Fourth Amendment seizure principles to checked luggage cases, we make a few observations of our own. Because seizure is defined as some meaningful interference with an individual's possessory interests in his property, not all police interference with an individual's property constitutes a Fourth Amendment seizure, i.e., the police do not seize property every time they handle private property. By requiring some *meaningful interference* with an individual's possessory interests in property, the Supreme Court inevitably contemplated excluding *inconsequential interference* with an individual's possessory interests. We also readily recognize the Supreme Court instructed courts to consider an individual's possessory interests in his property in determining whether a seizure has occurred.

"Applying the Supreme Court's definition of seizure with an eye toward the applications provided by the Fifth, Seventh, and Ninth Circuits over the past seventeen years, we glean a number of principles that relate to checked luggage cases. First, the Fourth Amendment's Seizure Clause prohibits the government from restraining an individual's freedom of movement. Thus, if law enforcement's detention of checked luggage delays a passenger's travel or significantly impacts the passenger's freedom of movement, the Seizure Clause is implicated.

"Second, a commercial bus passenger has less possessory interest in checked luggage than he has in carry-on luggage in his immediate possession. To be certain, a passenger gives up his immediate possessory interest when he checks his luggage with the commercial carrier as bailee. At a minimum, the passenger's possessory interests in his checked luggage entail the right (or at least the expectation) to regain custody, i.e., reclaim immediate possession of the checked luggage at the passenger's or the luggage's destination.

"Finally, a commercial bus passenger who checks his luggage should reasonably expect his luggage to endure a fair amount of handling—if his luggage were not handled, it would not reach its destination. For instance, a commercial bus passenger's checked luggage must be sorted, loaded, rearranged, possibly transferred to another bus, and unloaded. The luggage may be damaged and require removal from the luggage compartment. If a bus breaks down, a passenger should expect his luggage to be removed from the luggage compartment and either transferred to another bus or taken inside the bus terminal. As long as law enforcement officers do not deprive the

commercial carrier of its custody of the checked luggage, no meaningful interference with the passenger's checked luggage occurs.

"Boiling these principles down, we believe courts must focus on three factors when considering whether law enforcement's interference with checked luggage constitutes a seizure. First, did law enforcement's detention of the checked luggage delay a passenger's travel or significantly impact the passenger's freedom of movement? Second, did law enforcement's detention of the checked luggage delay its timely delivery? Third, did law enforcement's detention of the checked luggage deprive the carrier of its custody of the checked luggage? If none of these factors is satisfied, then no Fourth Amendment seizure has occurred. Conversely, if even a single factor is satisfied, then a Fourth Amendment seizure has occurred.

"Our holding is consistent with the holdings of other courts that have confronted seizure issues involving checked luggage. See, e.g., *State v. Peters*, 941 P.2d 228, 232 (Ariz. 1997) (holding the warrantless detention of checked

"...We believe courts must focus on three factors when considering whether law enforcement's interference with checked luggage constitutes a seizure. First, did law enforcement's detention of the checked luggage delay a passenger's travel or significantly impact the passenger's freedom of movement? Second, did detention of the checked luggage delay its timely delivery? Third, did detention of the checked luggage deprive the carrier of its custody of the checked luggage? If none of these factors is satisfied, then no Fourth Amendment seizure has occurred.."

luggage at an airport for examination without reasonable suspicion is not a seizure and is permissible if made in such a manner that neither the traveler nor his luggage is unreasonably delayed); *State v. Goodley*, 381 So. 2d 1180, 1182 (Fla. Dist. Ct. App. 1980) (It is obvious that an airline traveler who checks his luggage has no knowledge and, in fact, no real concern as to precisely where his bag may be located within the airline's custody at any given time. It follows that the slight movement by law enforcement of the defendant's unopened bag from the baggage cart to the floor [about a foot away so a drug dog could conduct a sniff search] did not, even remotely, amount to a fourth amendment

seizure); cf. *United States v. Gant*, 112 F.3d 239, 240, 242 (6th Cir. 1997) (holding police officers' removal of luggage from an overhead compartment of a Greyhound bus to subject the luggage to a drug sniffing dog did not constitute a seizure under the Fourth Amendment).

"Our holding also comports with the views expressed by many judges in this circuit. See,

e.g., *Va Lerie*, 385 F.3d at 1150 (Melloy, J., concurring) (opining ‘that a brief detention of a piece of luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a seizure’); *Gomez*, 312 F.3d at 923-24 (holding no seizure occurred when a drug interdiction officer at a post office moved a package to a command center twenty yards from a conveyor belt in a sorting area); *Demoss*, 279 F.3d at 640 (choosing ‘to cast my lot with those cases both from this and other circuits indicating that a piece of luggage delivered to a common carrier is not seized within the meaning of the Fourth Amendment until the authorities have interfered with a possessory interest in the luggage such that the expectation of timely delivery of the luggage has been frustrated’); *Vasquez*, 213 F.3d at 426 (holding no seizure occurred when drug interdiction officers at a Federal Express facility subjected a package to a drug-sniffing dog); *Riley*, 927 F.2d at 1048 n.4 (implying no seizure occurred when police subjected an airline passenger’s checked luggage to a drug-sniffing dog); cf. *Harvey*, 961 F.2d at 1363-64 (holding police officers’ removal of luggage from a bus’s overhead luggage compartment to subject the luggage to a drug-sniffing dog during a refueling stop did not constitute a Fourth Amendment seizure).

“Having announced what we hope are manageable factors to consider when confronted with seizure cases involving checked luggage, we now apply those factors to this case. First, the Nebraska State Police’s (NSP) brief and temporary removal of the checked luggage from the luggage compartment to ask for to consent to a search did not delay the defendant’s travel or impact his freedom of movement. The defendant’s

travel was delayed, and his freedom of movement impacted, only after the NSP searched the luggage and discovered a large amount of illegal drugs. Second, the NSP’s removal of the defendant’s checked luggage from the bus did not affect the timely delivery of the luggage. No evidence suggests the luggage would not have been placed back on the bus for transport to its destination had it not been for the discovery of illegal drugs.

“Finally, the defendant’s possessory interests in his checked luggage certainly included an expectation that Greyhound—or others at Greyhound’s request—would remove the luggage from the lower luggage compartment. The NSP would have preferred to bring the defendant to the bus in the refueling area to seek permission to search, but Greyhound asked the NSP not to bring passengers to that area. Thus, the NSP removed the checked luggage from the lower luggage compartment to a room inside the terminal at Greyhound’s request. In doing so, the NSP never deprived Greyhound of its custody of the checked luggage.

“We conclude the NSP’s removal of the defendant’s checked luggage from the bus to a room inside the terminal to seek consent to search did not constitute a meaningful interference with his possessory interests in his luggage. Therefore, no Fourth Amendment seizure occurred.”



SEARCH AND SEIZURE:

Probation Search

United States v. Barnett, CA7,
No. 04-3646, 7/18/05

In *United States v. Barnett*, the United States Court of Appeals for the Seventh Circuit held that law enforcement officers do not violate the Fourth Amendment when they search a probationer's home pursuant to a condition of probation that requires him to submit to searches at the request of a probation officer. The Seventh Circuit stated that a blanket waiver of Fourth Amendment rights as a condition of probation is valid.

SEARCH AND SEIZURE:

**Protective Sweep by Law Enforcement;
Officers Lawfully Present**

United States v. Miller, CA2,
No. 04-2637-CR, 11/16/05

In *United States v. Miller*, the Second Circuit Court of Appeals considered whether a law enforcement officer who is lawfully present in a particular area of a home for a purpose other than the execution of an arrest warrant may conduct a protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325 (1990), if he has reasonable suspicion that an individual present in another area of the home poses a threat to those on the premises. The case is as follows:

Alfred Miller's cousin and roommate, Kendu Newkirk, obtained an order of protection against Miller in the Bronx County Family Court on September 23, 2003. The order

provided, inter alia, that Newkirk could enter the apartment he had been sharing with Miller on one occasion with police assistance to remove personal belongings. On the day that the order of protection was signed, N. Y. P. D. Officers Henry Vidal and David Sanchez accompanied Newkirk to the apartment pursuant to the terms of the order. Before the trio went to the apartment, Newkirk informed the officers that he had obtained the order of protection because Miller had threatened to "kick [Newkirk's] ass and put a bullet through his head." Tr. of Suppression Hr'g, Jan. 30, 2004 ("Tr."), at 9.

Vidal, Sanchez, and Newkirk arrived at the apartment together, and Newkirk opened the door with his keys. The apartment had a foyer, a living room, two bedrooms to the left of a hallway, and a room at the end of the hallway. Encountering Miller and Mozon upon entry, the officers explained that they had come to serve an order of protection and assist Newkirk in obtaining his belongings. Regarding Newkirk, Miller told the officers, "You better watch him, I don't want [him] to take my stuff." Id. at 13. Newkirk began to move about the apartment to collect his belongings.

Vidal followed Newkirk into the second bedroom on the left side of the hallway (the "second bedroom"), but then immediately left when Newkirk did. Newkirk then proceeded to remove property from the other rooms in the apartment, and the officers waited for Newkirk in the apartment's hallway. At one point, while in the process of moving items out, Newkirk stepped outside the apartment and the officers remained inside. Miller, who had remained in the living room, approached the officers, who were standing in the apartment's hallway near the entrance to the

second bedroom, and asked whether he could enter the second bedroom to retrieve something.

After receiving permission from Vidal, Miller entered the second bedroom and Vidal followed Miller in for safety. *Id.* at 24. Once inside the second bedroom, Miller gathered certain belongings, and began to leave the room. Vidal followed Miller towards the door of the room to exit, but on his way out, Vidal saw a shotgun with a black barrel and a yellow band standing upright in an open closet. Miller was arrested, and he then turned over another firearm and admitted possession of both firearms to the officers. On November 21, 2003, a one-count indictment was filed charging Miller with possessing a firearm after having been convicted previously of a felony, in violation of 18 U. S. C. § 922(g)(1).

Miller thereafter brought a motion to suppress the admission of the firearms and his post-arrest custodial statement on the ground that they were obtained in violation of his Fourth Amendment rights. After an evidentiary hearing held on January 30, 2004, the District Court filed a Memorandum Opinion denying Miller's motion and concluding that Officer Vidal had discovered the initially-recovered firearm in plain view while engaging in a protective sweep pursuant to *Maryland v. Buie*, 494 U. S. 325 (1990). See *United States v. Miller*, 306 F. Supp. 2d 414, 416-18 (S. D. N. Y. 2004).

The District Court determined that Vidal possessed "articulable facts that gave rise to the entirely rational inference that allowing Miller unsupervised access to the [second] bedroom might prove dangerous to the safety of the officers and Newkirk." *Id.* at 417. The Court also determined that Vidal had

conducted an appropriately limited protective sweep under the circumstances. *Id.* Following the denial of his motion to suppress evidence, Miller consented to a bench trial on stipulated facts and preserved his appellate rights with respect to the District Court's denial of his suppression motion. Miller was convicted of being a felon in possession of a firearm, in violation of 18 U. S. C. § 922(g)(1), and on April 30, 2004, he was sentenced principally to a twenty-nine month term of imprisonment.

On appeal, Miller challenges the District Court's conclusion that the initially-recovered firearm was discovered during a constitutionally permissible *Buie* protective sweep. The Second Circuit Court of Appeals found as follows:

"In *Maryland v. Buie*, 494 U.S. 325 (1990), the Supreme Court applied the Fourth Amendment reasonableness test and permitted a limited warrantless search, or protective sweep, in a home by officers who were executing an arrest warrant inside the home and who had a reasonable suspicion that an individual posing a threat to the officers was present elsewhere on the premises. The Supreme Court explained that the Fourth Amendment did not prohibit the officers from taking reasonable steps to ensure their safety after, and while making, the arrest. Accordingly, the officers could search beyond the area immediately adjoining the place of arrest if they had articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. The Court emphasized, however, that any such

warrantless sweep may not be unnecessarily invasive and may extend only to a cursory inspection of those spaces where a person may be found. Moreover, the sweep must last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

“In *Miller* the evidence showed that a police officer, who was lawfully present in Miller’s apartment to carry out a protective order issued to Miller’s roommate, had followed Miller into his bedroom for safety and there encountered a firearm in plain view. The officer then arrested Miller, who turned over another firearm and admitted possession of both firearms while in custody. Miller was subsequently convicted in federal court of being a felon in possession of a firearm.

“The United States Court of Appeals for the Second Circuit concluded that an officer in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep when the officer possesses articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the scene.”



SEARCH AND SEIZURE:
**Investigative Detention; Awaiting the
 Arrival of an Interpreter**

United States v. Ruiz, CA8,
 No. 04-3205, 7/5/05

Minnesota Bureau of Criminal Apprehension (BCA) Agent Enrique Vasquez received a tip in November 2003 that Melvin Benitez was trying to sell drugs at a Gold’n Plump chicken processing plant near St. Cloud, Minnesota. Vasquez called Benitez to set up a purchase of methamphetamine. After several conversations they arranged that Vasquez would purchase three and a half pounds of methamphetamine for \$31,500. The transaction was arranged for November 14 between 8:00 and 8:30 a.m. in the parking lot of a Kentucky Fried Chicken (KFC) in Waite Park. Benitez told Vasquez to set aside \$3,500 of the purchase money because the proceeds were to be divided between himself and the owner of the drugs.

Vasquez called Benitez on the morning of November 14 and left a message around 7:35 a.m. Benitez called him back around 8:00 a.m., told him that he had just finished work and would be ready in about twenty minutes, and said that he would be driving either a pickup truck or a Honda with Washington plates. Benitez called Vasquez again around 8:25 a.m. and asked him if he would do the deal at an apartment building. Vasquez heard voices speaking in Spanish in the background and refused to change the location of the meeting. Benitez agreed to meet at the KFC. Benitez arrived at the KFC parking lot around 8:35 a.m. in a black pickup truck driven by Adolfo.

Benitez went over to Vasquez's vehicle carrying a soft black cooler, and Vasquez asked him why he had brought someone else along. Benitez said his companion was the owner, which Vasquez understood to mean the owner of the methamphetamine, not the owner of the truck. When Vasquez asked Benitez if the driver was the main guy, he said no. Vasquez told Benitez that he wanted to see the drugs, and Benitez handed him the black cooler which contained about three and a half pounds of methamphetamine. Vasquez opened the cooler, saw methamphetamine inside, and gave an arrest signal. Benitez and Adolfo were then arrested.

BCA Agent Adam Castilleja interviewed Benitez in Spanish at the scene of the arrest. Benitez told him that Adolfo had picked up the methamphetamine from building 811 of the nearby Gatewood Apartment complex. Castilleja then spoke with Adolfo and told him that Benitez said the drugs were his. Adolfo said that was not true and that Benitez had obtained the black bag at building 901 of the Gatewood Apartments, the building next to the one Benitez had mentioned. Adolfo consented to a search of his trailer home in St. Cloud, and officers found a .40 caliber handgun in a drawer under the bed in a bedroom. They also found .38 caliber ammunition on the headboard of the bed. Adolfo admitted that the gun and ammunition were his.

While officers were searching the black pickup truck in the KFC parking lot, a cell phone on the seat began ringing with the number of the caller displayed. The number was traced to an apartment where Evencio Ruiz and Steven Martinez lived, at 301 Birch Street in Rockville, apartment 101. Evencio and Steven rented the

apartment under the names Juan Zabala and Antonio Orduna. Officers were dispatched to the Birch Street apartment building where they saw a black Honda with Washington plates and a red pickup truck in the parking lot; both were registered to Adolfo. They then observed Evencio make at least two trips from building 301 to building 305, where he remained for five to ten minutes each time. On the first trip, he stopped inside the Honda for about thirty seconds before walking over to building 305. Evencio and Steven left in the black Honda about five minutes after Evencio returned from his last trip.

Officers informed BCA Agent Billings that the men were leaving, and he instructed them to stop the car and identify the occupants because the Honda met the description of the other vehicle Benitez had told Vasquez about. Officers stopped the car, but they were unable to communicate with either Evencio or Steven because of language difficulties. Billings directed that they be detained until a Spanish speaking officer could arrive. Billings arrived at the scene about ten minutes later at about the same time as Agent Castilleja; already there were at least two other police vehicles, including a marked squad car. Evencio and Steven were standing in the road; they were not in handcuffs and no guns were drawn, but they had not been informed that they were free to leave. One of the officers handed Steven's wallet to Castilleja; another had Evencio's wallet, and the trunk of the Honda was open.

Castilleja spoke with Evencio in Spanish while the other officers were fifteen to twenty feet away. He gave him a Miranda warning, informed him that cooperation was voluntary, and asked if he would agree to a search of his

apartment at 301 Birch Street. Evencio said he would but that Steven had the key. Castilleja then gave Steven a Miranda warning in Spanish, informed him that cooperation was voluntary, and asked for his permission to search the apartment. Steven agreed, and officers drove the men back to their apartment and used the key found in Steven's wallet to go inside.

After entering the apartment Castilleja read the two men a consent to search form in Spanish. They signed the form, which authorized a search of the apartment, a gray Honda, and the red truck. In the bottom of the kitchen garbage can officers found 36.1 grams of methamphetamine, 10.5 grams of cocaine, and two electronic scales. Elsewhere they found two bindles – small pieces of plastic knotted around a white powdery substance. One bindle was found between the cushions of the couch in the living room, and the other was found in a boot in Steven's room. Both bindles were placed into the same evidence bag.

Before any drugs were found in the apartment, Castilleja had asked Evencio about the other building he walked to earlier. Evencio said that he had been visiting his friend Reyna Barbosa and volunteered to take Castilleja to that apartment at 305 Birch Street, number 304. Barbosa agreed to a search of the apartment, and officers found a .38 caliber handgun wrapped in cloth inside a cardboard box in a bedroom closet. Officers found .38 ammunition and an identification card with Evencio's photograph and the name Juan Zabala in the box with the gun. The ammunition was made by the same manufacturer as that found in Adolfo's home. As part of the investigation, officers went to the Gatewood Apartment complex and asked

management if any residents spoke Spanish. The manager directed them to two different apartments, one of which was located in building 811. The officers spoke with the resident of that apartment and concluded that he had no connection to the transaction at the KFC. Pursuant to a separate investigation, officers searched the same apartment in January 2004 and recovered a pound of methamphetamine.

In *United States v. Ruiz*, Evencio and Steven conceded that the officers had a reasonable suspicion to stop the Honda but alleged that they were unreasonably detained. The Eighth Circuit Court of Appeals was called on to determine whether their continued detention was reasonable. The court found as follows:

"...On this issue, we consider the duration of the detention and whether the officers tried to conduct their investigation quickly and unintrusively, and we keep in mind that an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

"Time is an important factor in distinguishing between an investigative stop and a de facto arrest, and other significant factors include whether there were unnecessary delays and whether the suspects were handcuffed or confined in a police car. Since the officers at the scene could not communicate with Evencio and Steven, Agent Castilleja was called to the scene because he speaks Spanish. Castilleja arrived within ten minutes of the initial stop. When he arrived, Evencio and Steven were standing by the side of the road and neither was in handcuffs. Castilleja advised them of their Miranda rights and informed them that

they did not have to speak with him. We note that Castilleja arrived quickly and that the circumstances of the stop do not support the conclusion that it turned into a de facto arrest. We conclude that the investigative stop was reasonable in duration and scope.”

SEARCH AND SEIZURE: Investigative Detention; Reasonable Suspicion for a Canine Sniff After Traffic Stop

Malone v. State, No. CR05-218, 11/17/05

Anthony Malone was driving on Arkansas Highway 67/167 in Bald Knob at about 2:30 a.m., when he was pulled over by Officer Brandon Wilson of the Bald Knob Police Department for a broken taillight. It was cold and snowing. Officer Wilson testified at the suppression hearing that he ran a registration check on the Texas license plate before approaching the car, which indicated that the car was registered to a Texas resident, Eddie Carter. In addition to Malone, there was one male passenger and one female passenger in the car, neither of whom was Eddie Carter. Officer Wilson testified that, upon his request, Malone promptly provided his identification and proof of insurance on the car, but that the two passengers provided their identification only after Officer Wilson requested the information several more times. No one provided proof of ownership or registration of the car. The proof of insurance stated that the car was insured in the name of the male passenger, Anthony Richardson. After Officer Wilson received identification on all three occupants, he returned to his patrol car to run a check on them. The check revealed that there were no outstanding warrants. Officer Wilson then asked Malone to come back to his patrol

car so that he could issue a warning citation for the defective taillight.

Officer Wilson testified that during the course of writing a warning ticket, he asked Malone where he was going. Malone said he was taking his niece to her aunt’s house. When Officer Wilson asked where she lived, Malone stated that she lived in Arkansas, although he did not know exactly where in Arkansas. Officer Wilson testified that Malone appeared nervous, was shaking uncontrollably, did not make eye contact with him, and answered his questions in a very quiet voice. When Officer Wilson was finished with the paperwork on the warning ticket, he requested permission to search the car. Malone said he did not feel it was right for him to give consent because it was not his car. Officer Wilson then testified that he requested permission from Richardson to search the car. Richardson refused to consent to a search, but he did state, “You might as well get your dog out.” Officer Wilson stated that he then got his drug dog from the back of his patrol car and walked him around Richardson’s car. The dog alerted, indicating that there were drugs in the trunk. Officer Wilson opened the trunk and immediately smelled a strong odor of marijuana. He then found a suitcase and several other bags in the trunk. The suitcase contained a little less than ten pounds of marijuana and two pounds of cocaine, with a combined street value in excess of \$100,000. One of the other bags contained larger-sized male clothing, which appeared to be Richardson’s size, and the other bag contained smaller male clothing that appeared to be too small to fit Richardson.

The question before the Arkansas Supreme Court is whether there was substantial evidence to show that Malone was in constructive possession of the contraband

found in the trunk of the car he was driving. To prove constructive possession, the State must establish that the defendant exercised “care, control, and management over the contraband.” The Arkansas Supreme Court found as follows:

“In this case, there was nothing illegal about the initial traffic stop, which was based on a defective taillight. *See, e.g., Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). We have held, however, that to conduct a canine sniff of a motorist’s vehicle after the legitimate purpose for the initial traffic stop has terminated, Rule 3.1 of the Arkansas Rules of Criminal Procedure requires the officer to possess reasonable suspicion that the person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property. The officer must develop reasonable suspicion to detain *before* the legitimate purpose of the traffic stop has ended. *Burks v. State*, __ Ark. __, __ S.W.3d __ (June 9, 2005) (citing *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004)). Whether there is reasonable suspicion depends upon whether, under the totality of the circumstances, the police have ‘specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity.’

“The State first contends that the canine sniff occurred before the legitimate reason for the traffic stop was completed. Therefore, the State claims, the canine sniff was neither a Fourth Amendment violation nor a violation of Rule 3.1. *See Sims, supra; Illinois v. Caballes*, __ U.S. __ (January 24, 2005) (holding canine sniff *during* traffic stop is not an illegal search under Fourth Amendment). It is not clear from the testimony in this case exactly when Officer Wilson issued the warning citation. However,

we hold that, even if the legitimate purpose of the traffic stop was complete before the canine sniff occurred, Officer Wilson possessed reasonable suspicion to detain Malone under Rule 3.1. *See Ark. R. Crim. P. 3.1.*

“Our review revealed the following facts supporting the State’s contention that Officer Wilson had reasonable suspicion to detain Malone. First, Officer Wilson testified at the suppression hearing that Malone said he was taking his niece to her aunt’s house, but when he asked where she lived, Malone stated that he did not know exactly, somewhere in Arkansas. This answer was evasive at best. Officer Wilson also testified that Malone was nervous, was shaking uncontrollably, did not make eye contact with him, and spoke in a very quiet voice. Finally, Officer Wilson’s registration check on the Texas license plate indicated that the car was owned by a Texas resident, Eddie Carter. However, Mr. Carter was not in the car; no one in the car could produce proof of ownership or registration of the car; the car was hundreds of miles away from the home of its listed owner traveling north; and there was no indication that Mr. Carter had given permission to any of the occupants to possess the car.

“This court has recently decided several cases involving the existence of reasonable suspicion justifying the detention of a motorist after the termination of a legitimate traffic stop. In *Lilley, supra*, the police noticed that Lilley was nervous and shaking, despite the heat being on in his car and in the patrol car; that his rental-car agreement was for one-way travel, despite the fact that he planned to return to California after his visit with his mother in Virginia; that the rental was in another person’s name (although Lilley was listed as an alternate

driver); and that the car smelled of air freshener. We held that these facts did not give the police reasonable suspicion to detain Lilley to conduct a canine sniff of his car after the traffic stop was concluded.

“However, in *Burks*, *supra*, we held that police did have reasonable suspicion to detain appellant and conduct a canine sniff after the traffic stop was concluded. The officer testified that Burks appeared anxious and evasive with his answers. A license check revealed that Burks had been arrested for a firearms offense. Finally, Burks was driving a rental car due to be returned the day before that was not to be driven outside of California and Arizona, which we found could have given the officer reason to suspect that the car was stolen. We stated that under the totality of the circumstances, these facts established ‘specific, particularized, and articulable reasons’ that criminal activity was afoot.

“We find that the facts in this case bear more similarities to those present in *Burks* than those in *Lilley*. In this case, Officer Wilson testified that Malone was nervous, evasive, and shaking uncontrollably. He did not make eye contact and whispered his answers to Officer Malone. Finally, Malone was driving a car registered to a Texas resident who was not in the car, with no indication that he had permission from the owner to do so. Particularly coupled with the fact that Malone did not know where he was going, this could have given Officer Wilson reason to suspect that the car was stolen. After reviewing the totality of the circumstances, we conclude that Officer Wilson had specific, particular, and articulable reasons to extend the detention of Malone beyond the initial traffic stop. Therefore, we affirm the circuit court’s denial of Malone’s motion to suppress.”

SEARCH AND SEIZURE: **Investigative Detention; Reasonable Suspicion to Frisk**

United States v. McKoy, CA1,
No. 05-1096, 11/1/05

On a February afternoon in 2003, two plainclothes Boston Police Officers were patrolling Boston’s Grove Hall neighborhood when they spotted a vehicle parked with its front end extending out into an intersection. The vehicle was blocking an access ramp for the disabled and had a license plate improperly displayed inside the windshield. The officers testified that as they approached the vehicle, they made eye contact with the driver, McKoy, and then saw him twice lean and move his arm toward the center console area of the vehicle. Suspecting McKoy might have been reaching for a weapon, one of the officers, Thomas Joyce, asked him to get out of the car and began to pat-frisk him. The frisk revealed marijuana in McKoy’s pocket, at which point Joyce arrested McKoy. A further search of McKoy’s person eventually recovered 5.63 grams of cocaine, and he was ultimately charged with cocaine possession.

McKoy moved to suppress the evidence found during the frisk on the grounds that the frisk violated the Fourth Amendment to the United States Constitution. The District Court for the District of Massachusetts granted the motion, and the government appeals. The First Circuit Court of Appeals found as follows:

“An officer may conduct a brief investigatory stop when he or she has a reasonable, articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Romain*, 393 F.3d 63, 71 (1st

Cir. 2004). After a valid *Terry* stop, a pat-frisk for weapons is also permissible where the officer is justified in believing that the person is armed and dangerous to the officer or others. *Terry*, 392 U.S. at 24. It is insufficient that the stop itself is valid; there must be a separate analysis of whether the standard for pat-frisks has been met. To assess the legality of a protective frisk, a court looks at the totality of the circumstances to see whether the officer had a particularized, objective basis for his or her suspicion.

“The district court found that the two officers were justified in initially stopping McKoy because they had probable cause to believe he had committed two traffic violations. This finding is clearly correct. Thus, our inquiry centers on the validity of the frisk: that is, whether the totality of the circumstances provides a particularized objective basis for the officers’ suspicion that McKoy was dangerous and posed a threat to their safety.

“The government relies on two factors as rationales for the officers’ concern for their safety: (1) the dangerousness of the neighborhood and (2) McKoy’s nervous appearance and movements inside the car. Even taken together, these factors are insufficient to justify the frisk.

“First, the district court found that the officers believed the neighborhood where McKoy was parked to be a high-crime area, given that there had been two recent incidents of people shooting at the windows of private security vehicles. While police are permitted to take the character of a neighborhood into account when assessing whether a stop is appropriate, see *United States v. Stanley*, 915 F.2d 54, 56 (1st Cir. 1990), it is only one factor that must be

looked at alongside all the other circumstances when assessing the reasonableness of the officers’ fear for their safety. Moreover, this is not a case where the police had reason to suspect the presence of firearms based on the type of crime suspected. The only reason for the stop was a parking and license plate violation, from which no assumption about weapons may fairly be drawn. McKoy was the sole occupant of the vehicle and the officers made their approach during daylight hours. The previous criminal incidents in the neighborhood thus lend only weak support to the officers’ perception that McKoy was armed and dangerous.

“Second, the government emphasizes that McKoy appeared nervous and avoided eye contact as the officers approached his car. McKoy also leaned and reached to his right, toward the center console of the vehicle. The government argues that McKoy’s nervous demeanor and his movements in the car are the kind of alarming gestures that have been cited by courts as justifying a protective search after a *Terry* stop. See, e.g., *United States v. Moorefield*, 111 F.3d 10, 14 (3d Cir. 1997) (holding that police had reasonable suspicion to pat-frisk defendant during traffic stop where defendant failed to keep his hands in view after being instructed to do so). We disagree.

“McKoy’s claimed nervous manner is easily explained. Nervousness is a common and entirely natural reaction to police presence, and the district court found that McKoy knew he was dealing with police officers at least from the time the two officers approached his car.

“Moreover, there was nothing sinister or menacing about McKoy’s reaching movement

toward the center console. Although it is possible that such a movement could be made to get a weapon, the movement is also consistent with reaching for a driver's license or registration, a perfectly lawful action that is to be expected when one is pulled over by the police. The government's proposed standard comes too close to allowing an automatic frisk of anyone who commits a traffic violation in a high-crime area. Although 'we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest,' *Terry*, 392 U.S. at 24, a protective frisk for weapons requires a reasonable inference that the person being searched is armed and dangerous. *Sibron v. New York*, 392 U.S. 40, 64 (1968). It is simply not reasonable to infer that a driver is armed and dangerous because the officers believe that he appears nervous and reaches toward the car's console when approached by police, even in a high-crime neighborhood.

"We fully recognize the risk of harm faced by police officers at any traffic stop. However, as the district court stated in its thoughtful opinion, 'To admit the evidence would be a legal determination that if one commits a traffic violation in a high-crime neighborhood he will be subject to a frisk whenever he appears nervous and moves.' *Terry* does not require that determination, and the Fourth Amendment prevents it."



SEARCH AND SEIZURE:
**Vehicle Impoundment;
Community Caretaking Function**

Miranda v. City of Cornelius, CA9,
No. 04-35940, 11/17/05

On April 10, 2003, Mrs. Miranda slowly drove the Ford Aerostar van of her husband, Mr. Miranda, around the neighborhood as her husband taught her how to drive. Although Mr. Miranda is a licensed and insured driver with valid registration of the vehicle, Mrs. Miranda did not have a driver's license. Officer John Calvert, a police officer with the City, noticed that Mrs. Miranda was driving poorly and at a speed of about ten miles per hour, and suspected that she was impaired or improperly licensed. Officer Calvert activated the overhead lights on his patrol car and followed the vehicle until Mrs. Miranda pulled into the driveway in front of the Mirandas' home.

After learning that Mrs. Miranda did not have a valid drivers license, Officer Calvert cited her for operating a vehicle without a license and also cited Mr. Miranda for permitting the operation of the vehicle by an unlicensed driver. Officer Calvert told the Mirandas that their vehicle would be impounded. On the morning of the next day, April 11, Mr. Miranda appeared at the police station to pay an administrative fee. He retrieved his vehicle at the impoundment lot after paying additional towing charges and impound fees.

The United States Court of Appeals for the Ninth Circuit stated that in their community caretaking function, police officers may impound vehicles that jeopardize public safety

and the efficient movement of vehicular traffic. Whether an impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.

A driver's arrest, or citation for a non-criminal traffic violation as in this case, is not relevant except insofar as it affects the driver's ability to remove the vehicle from a location at which it jeopardizes the public safety or is at risk of loss. But no such public safety concern is implicated by the facts of this case involving a vehicle parked in the driveway of an owner who has a valid license.

In the circumstances of this case, probable cause to believe that there had been a traffic infraction or non-criminal violation was insufficient to justify an impoundment of a vehicle parked in the owner's driveway, in the absence of a valid caretaking purpose.

An impoundment may be proper under the community caretaking doctrine if the driver's violation of a vehicle regulation prevents the driver from lawfully operating the vehicle, and also if it is necessary to remove the vehicle from an exposed or public location. On the other hand, a decision to impound a vehicle that is not consistent with the police's role as "caretaker" of the streets may be unreasonable.

When Officer Calvert issued citations and called for the vehicle to be impounded, the vehicle was already parked in the Mirandas' home driveway. Mr. Miranda was licensed to drive the car. Under these circumstances, the Mirandas' car was not creating any impediment to traffic or threatening public

safety. An officer cannot reasonably order an impoundment in situations where the location of the vehicle does not create any need for the police to protect the vehicle or to avoid a hazard to other drivers.

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