

CJI Legal Briefs

Volume 12, Issue 3

Fall 2007

A Publication of the Criminal Justice Institute–University of Arkansas System

Edited by Don Kidd

UofA

UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

Contents

- 1 **ATTORNEY-CLIENT PRIVILEGE:**
Perpetrating a Crime
- 1 **CIVIL LIABILITY:** Attorney-Client
Privilege; Police Liaison Officer's
Presence at Meeting
- 3 **CIVIL LIABILITY:** Police Dogs; Bite
and Hold
- 6 **CIVIL LIABILITY:** Unduly Suggestive
Identification Procedure
- 7 **DNA:** Collection by Ruse
- 10 **DRUGS:** Possession of a Controlled
Substance; Trace Amount
- 10 **EMPLOYMENT LAW:** Protected
Speech; First Amendment Retaliation
- 11 **FREEDOM OF INFORMATION ACT:**
Arkansas Public Records
- 13 **INTERROGATION:** The "Edwards
Rule;" The Third Party
- 16 **JURISDICTION:** Arkansas "Hot
Check" Law
- 16 **SEARCH AND SEIZURE:**
Administrative Seizure of Vehicle;
Police Ploy
- 19 **SEARCH AND SEIZURE:** Automobile
Search; Traffic Stop; Dog Sniff
- 21 **SEARCH AND SEIZURE:**
Cohabitant's Consent to Search;
Barricaded Suspect
- 24 **SEARCH AND SEIZURE:** Good Faith
Exception; Police Records Error
- 25 **SEARCH AND SEIZURE:** Pat-Down
Searches; Sports Events
- 26 **SEARCH AND SEIZURE:** Routine
Traffic Stops; Seizure of Passengers
- 30 **SEARCH AND SEIZURE:** Executing
of Search Warrant in "Reasonable
Manner"

ATTORNEY-CLIENT PRIVILEGE:

Perpetrating a Crime

Re: Green Grand Jury Proceedings

CA8, No. 06-3938 and 06-4030, 7/20/07

The Court of Appeals for the Eighth Circuit stated that attorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal fraud or scheme. Further, a client who has used his attorney's assistance to perpetrate a crime or fraud cannot assert the work product privilege as to any documents generated in furtherance of his misconduct. The Court also held that an attorney who does not knowingly participate in the client's crime or fraud may assert the work product privilege as to his opinion work product.

CIVIL LIABILITY:

Attorney-Client Privilege;

Police Liaison Officer's Presence at Meeting

Jenkins v. Bartlett, CA7, No. 06-2495, 4/23/07

On the night of September 19, 2002, Officer Jon Bartlett was on duty with Officer Kurt Lacina. Officers Bartlett and Lacina stopped a black Jeep that they suspected of involvement in drug-related activity. As the officers approached, Larry Jenkins exited the vehicle. Officer Bartlett searched him for weapons and decided to place him in the squad car while the officer completed

DISCLAIMER

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

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

his investigation. Before he could be secured in the car, Jenkins fled on foot and Officer Bartlett, also on foot, pursued him. After a one to two minute pursuit, Jenkins entered an occupied vehicle.

Believing that Jenkins was attempting to car-jack the vehicle, Officer Bartlett drew his service weapon and approached the vehicle from the front. Jenkins now was in the driver's seat behind the steering wheel. The vehicle moved toward Officer Bartlett and struck the officer. Accounts differ as to the speed at which the vehicle was traveling and whether the vehicle swerved to strike him. When the vehicle struck Officer Bartlett, he was thrown onto the vehicle's hood. Officer Bartlett then fired nine shots into the vehicle, seven of which struck Jenkins. Jenkins died of his wounds.

After the shooting, pursuant to Milwaukee Police Department (MPD) policy, Officer Bartlett was taken to MPD detective bureau headquarters, and an investigation was begun immediately by both the criminal and Internal Affairs divisions of MPD. As was department custom, Bradley DeBraska, the police liaison officer for the City and president of the Milwaukee Police Association, was contacted following the shooting.

DeBraska and an attorney appointed by the police officers' association, Jonathan Cermele, met Officer Bartlett at MPD headquarters. Throughout the evening, DeBraska gathered information and advised Cermele as the attorney prepared to represent Officer Bartlett during his interview with Internal Affairs.

The results of the criminal investigation were sent to the Milwaukee County District Attorney's Office. The district attorney found no basis to

file criminal charges against Officer Bartlett. The investigation by Internal Affairs concluded that Officer Bartlett had not violated any MPD policy in the course of the shooting.

Debra Jenkins then brought this action on behalf of Larry Jenkins' estate. She alleged that Officer Bartlett's use of deadly force was excessive and had violated Jenkins' Fourth Amendment rights. Ms. Jenkins, on appeal, claims that it was error for the district court to sustain Officer Bartlett's claim of attorney client privilege with respect to his conversations with Cermele made in the presence of DeBraska, a third party.

On the night of the shooting, DeBraska came to the police station to assist Cermele, Officer Bartlett's attorney, as Cermele prepared to represent Officer Bartlett at his interview with Internal Affairs. DeBraska testified that it had been custom since the 1960s for a person in his position to come to the police station after an officer had been involved in a shooting to assist the officer's attorney in providing legal services to the officer by gathering information and assuring that the attorney's representation followed department rules. Officer Bartlett's testimony was consistent with DeBraska's account of the events of the evening. He stated that DeBraska had been present during his conversations with Cermele in order to facilitate communications between the two.

The district court held that DeBraska's presence during Officer Bartlett's conversations with Cermele did not destroy the attorney-client privilege. The court recognized that, ordinarily, the presence of a third person would destroy the attorney-client privilege, but noted the exception for the presence of an agent assisting the attorney in rendering legal services. Based on the testimony of Officer Bartlett and DeBraska,

the court held that DeBraska was present at the police station on the night of the shooting as an adjunct of Officer Bartlett's attorney. The court found that DeBraska was there to assist Cermele by gathering information and by providing "expert advice on the rules and procedures of the department" to facilitate Cermele's representation of Officer Bartlett. Under these circumstances, the court found that DeBraska "played the same role as would a paralegal in a law office, a secretary, or anyone else connected with the office."

The district court further found as follows:

"The attorney-client privilege protects communications made in confidence by a client to his attorney in the attorney's professional capacity for the purpose of obtaining legal advice. Because the privilege is in derogation of the search for the truth, it is construed narrowly. Thus, ordinarily, statements made by a client to his attorney in the presence of a third person do not fall within the privilege, even when the client wishes the communication to remain confidential, because the presence of the third person is normally unnecessary for the communication between the client and his attorney. However, there is an exception to the general rule that the presence of a third party will defeat a claim of privilege when that third party is present to assist the attorney in rendering legal services. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 183 at 312 (2d ed. 1994).

"Ms. Jenkins recognizes this exception, but insists that it is limited to those individuals who would be considered agents of the attorney under the law of master and servant. Nothing in our case law so limits the exception. This exception applies both to agents of the attorney,

such as paralegals, investigators, secretaries and members of the office staff responsible for transmitting messages between the attorney and client, and to outside experts engaged "to assist the attorney in providing legal services to the client," such as accountants, interpreters or polygraph examiners. Additionally, this exception reaches retained experts, other than those hired to testify, when the expert assists the attorney by transmitting or interpreting client communications to the attorney or formulating opinions for the lawyer based on the client's communications."

To support his claim of privilege, Officer Bartlett and DeBraska testified regarding DeBraska's activities on the night of the shooting as Officer Bartlett prepared to meet with Internal Affairs. Both testified that DeBraska was there solely to assist Cermele as he prepared to represent Officer Bartlett. Ms. Jenkins offered no evidence to contradict this testimony. The district court chose to credit the testimony of Officer Bartlett and DeBraska. Ms. Jenkins has offered no reason why the court should not have credited this testimony, and there is no other basis in the record to find the court's factual findings erroneous.

CIVIL LIABILITY:

Police Dogs; Bite and Hold

Szabla v. Brooklyn Park, Minn.

CA8, No. 04-2538, 5/18/07

At about 1:20 a.m. on August 17, 2000, police officers from the City of Crystal, Minnesota, responded to a report that an automobile had struck a tree near Becker Park. The officers found the car, which had been abandoned, and they saw that the car's windshield had been shattered and there was

an imprint where a person's head had struck the windshield. The officers called the registered owner of the car, who said he had previously sold it. The officers then began to search for the driver, and one of the officers determined that assistance from a police canine would help to find the driver. The Crystal Police Department did not have a canine unit, so the officers requested assistance from the City of Brooklyn Park. Brooklyn Park dispatched one of its canines, Rafco, with his handler, Officer Steven Baker, to the scene.

When Baker and Rafco arrived at the abandoned car, Baker discovered a screwdriver, which he thought could have been used as a burglary tool or weapon, and observed "property" in the back seat of the car, which Baker believed could have been the fruits of a burglary. Baker testified that because officers did not know whether they were looking for a criminal suspect or an innocent injured person, he gave Rafco the command to "track," which is the command for Rafco to apprehend or bite the individual he is tracking. Baker said that he chose not to give Rafco the command to "search," a command that directs the dog to refrain from biting a person, because he was concerned about officer safety in the event the dog led him to a criminal suspect.

Baker began to search Becker Park once Rafco acquired a scent emanating from the crashed automobile. Baker had Rafco on a fifteen-foot leash, but provided the canine with only about a six-foot lead. He did not shout a warning that a police dog was in the area. Rafco led Baker through the park to a shelter within the park. Once Rafco entered the shelter, he bit Szabla, who had been asleep in the shelter. (Szabla slept in the park, which closed at 11 p.m., because it was across the street from a temporary

employment agency that hired workers on a daily basis). Szabla kicked Rafco off, and Rafco bit Szabla a second time. Baker ordered Szabla to show his hands, and Baker instructed Rafco to release Szabla once he complied with the order. The Crystal officers arrived moments later, and they temporarily arrested Szabla. The officers released Szabla within two minutes, after verifying that he was not involved in the automobile accident. Szabla testified that when the officers were walking away, he heard one of them say, "I gave the dog too much leash." Szabla reported that he suffered 23 punctures on his legs and hip.

Szabla brought this action pursuant to 42 U.S.C. § 1983 and Minnesota state law against the cities of Crystal and Brooklyn Park, as well as the individual officers involved. The district court granted the defendants' motions for summary judgment. The district court concluded that Baker had used excessive force against Szabla, in violation of Szabla's Fourth Amendment rights, by commanding Rafco to "track," or bite and hold, without first providing a warning. The court held, however, that Baker was protected by qualified immunity, because the right to a warning was not clearly established at the time of the incident.

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

"We conclude that the City of Brooklyn Park was entitled to summary judgment on the claim of municipal liability. Brooklyn Park's written policy concerning the use of dogs is lawful on its face. Directive 331, promulgated by the chief of police, permits the use of canines in five circumstances, including 'in arresting known dangerous criminals who will, or might offer physical resistance to the arresting

officer or who might attempt to flee or escape custody,' and 'in search and apprehension work for' criminals and suspects who might pose a risk to other citizens. We assume that employment of canines in 'arresting known dangerous criminals' or in 'apprehension work' will sometimes involve using a dog to bite and hold a suspect, but it is not unconstitutional to use dogs for those purposes. Directive 331 also recognizes that the 'use of police dogs may constitute the use of force,' but provides that 'use of police dogs shall be in accordance with use of force statutes and Department Policy,' and another policy, Directive 333, expressly forbids a police officer to use 'unreasonable, unnecessary or unlawful force.' These policies as written are not unconstitutional.

"A constitutional problem may arise based on the manner in which the canines are used. We held in 2004 that 'a jury could properly find it objectively unreasonable to use a police dog trained in the bite and hold method without first giving the suspect a warning and opportunity for peaceful surrender.' *Kuha*, 365 F.3d at 598. We accept *Kuha's* Fourth Amendment holding for purposes of analysis, and assume there is a submissible case that Officer Baker was required to give a warning before using his police dog to bite and hold. But even so, Brooklyn Park's directives do not affirmatively sanction the use of the dogs in an unconstitutional manner. The policy is simply silent concerning the circumstances under which an officer should provide a warning before a canine is directed to bite and hold a suspect. The directives do not reflect a deliberate choice by policymakers to refrain from warning citizens about the use of dogs.

"Indeed, Szabla's principal contention has been that the City's 'failure to have a policy'

giving guidance on the use of canines fostered the use of excessive force, and thus amounted to a constitutional violation. As we have explained, however, a written policy that is facially constitutional, but fails to give detailed guidance that might have averted a constitutional violation by an employee, does not itself give rise to municipal liability. There is still potential for municipal liability based on a policy in that situation, but only where a city's inaction reflects a deliberate indifference to the constitutional rights of the citizenry, such that inadequate training or supervision actually represents the city's 'policy.'

"The evidence presented on this record is insufficient to make a submissible case of deliberate indifference. The evidence does not show that Brooklyn Park had a history of police officers unreasonably using canines to apprehend suspects without advance warning, such that the need for additional training or supervision was plain. So far as the record reveals, this was a one-time incident, and there is no evidence of a pattern of constitutional violations making it obvious that additional training or safeguards were necessary. We agree with the district court that this 'isolated incident' cannot support a claim that the City acted with deliberate indifference by inadequately training its officers on the use of canines.

"In this case, a constitutional requirement that an officer in Baker's situation give advance warning before commanding a canine to bite and hold a suspect was not clearly established as of August 2000. See *Kuha*, 365 F.3d at 602. The need for training or other safeguards relating to warnings, therefore, was not so obvious at the time of this incident that Brooklyn Park's actions can properly be characterized as deliberate indifference to Szabla's constitutional rights.

While a municipality does not enjoy qualified immunity from damages liability that results from a policy that is itself unconstitutional or from an unconstitutional decision by municipal policymakers, we agree with the Second Circuit and several district courts that a municipal policymaker cannot exhibit fault rising to the level of deliberate indifference to a constitutional right when that right has not yet been clearly established.”

CIVIL LIABILITY:

Unduly Suggestive Identification Procedure

Wray v. City of New York
CA2, No. 05-3341, 7/18/07

Three New York City police officers were conducting a stakeout observation from the roof of a Queens restaurant in November 1990 when they saw a man wearing a long black coat and a hat who was pointing a gun at another man and took his jacket. The victim and the robber were each accompanied by another man.

Officers William Weller and James McCavera left the rooftop and apprehended on the street the person who was with the robber (Dennis Bailey). Having learned that the man in the coat and hat had gone inside the restaurant, Officers Weller and McCavera went in, found the stolen jacket, and arrested Raymond Wray, who was wearing a long black coat and a hat.

The victim of the robbery, Melvin Mitchell, and Craig Williams (who accompanied him) were no longer at the scene; but Mitchell was told shortly thereafter by another officer that the robbers had been apprehended and that he should go to the police station. Within hours of the arrests, Mitchell and Williams went to the

station. According to the police, each was taken to look at Wray, who was in a holding cell, and each independently confirmed that Wray was the gunman. Williams later testified that he believed the name of the officer who conducted the showup identification “starts with a W. Wellie” — which could reasonably be found to be Officer Weller.

Raymond Wray alleges that Officer Weller violated his constitutional due process and fair trial rights by conducting the unduly suggestive showup identification, and seeks damages under § 1983 for his conviction and incarceration. Officer Weller argues that he cannot be held liable for Wray’s conviction or incarceration because, even assuming (as the court must on summary judgment) that Officer Weller conducted the suggestive showup identification, superseding acts by both the prosecutor and trial judge broke the chain of causation between Weller’s conduct and the violation of Wray’s constitutional rights.

Upon review, the Second Court of Appeals found as follows:

“We have not held that a suggestive identification alone is a constitutional violation; rather, the constitutional violation is that Wray’s right to a fair trial was impaired by the admission of testimony regarding the unreliable identification: In the context of an identification following a police procedure that was impermissibly suggestive, the due process focus is principally on the fairness of the trial, rather than on the conduct of the police, for a suggestive procedure ‘does not itself intrude upon a constitutionally protected interest.’

“Suggestive procedures are disapproved because they increase the likelihood of misidentification,

and it is the admission of testimony carrying such a 'likelihood of misidentification' which violates a defendant's right to due process. The question is whether Wray can establish a claim against Officer Weller for the erroneous admission at trial of testimony regarding the unduly suggestive identification.

"We agree with the defendants that extending liability to Officer Weller is unprecedented and unwarranted. In the absence of evidence that Officer Weller misled or pressured the prosecution or trial judge, we cannot conclude that his conduct caused the violation of Wray's constitutional rights; rather, the violation was caused by the ill considered acts and decisions of the prosecutor and trial judge."

DNA:

Collection by Ruse

State v. Athan, [Washington Supreme Court]
No. 75312-1, 5/10/07

On November 12, 1982, Seattle police officers found the body of 13-year-old Kristen Sumstad inside a cardboard box in the Magnolia neighborhood of Seattle. Except for a pair of socks, Sumstad's body was nude from the waist down and a ligature was found around her neck. Although no DNA was found under her fingernails, semen was found in Sumstad's vagina and on her leg. An autopsy also revealed microscopic hemorrhaging or

"In the context of an identification following a police procedure that was impermissibly suggestive, the due process focus is principally on the fairness of the trial, rather than on the conduct of the police, for a suggestive procedure does not itself intrude upon a constitutionally protected interest."

bruising in Sumstad's anus, bruising and contusions on Sumstad's face, neck, and legs, and a possible abrasion on her labia. The medical examiner estimated that Sumstad had died between 8 to 24 hours before her body was discovered.

The area where Sumstad's body was found, an alley behind a television store, was a hangout of local neighborhood teenagers,

including the appellant, John Nicholas Athan. Although the police investigated leads related to Athan, he was not charged, and the crime remained unsolved.

Twenty years later, the Seattle Police Department's (SPD) cold case detectives unit reexamined the case and sent preserved biological evidence from the crime scene to the Washington State Patrol Crime Lab. Advances in DNA analysis allowed the lab to isolate a male DNA profile. The profile was tested against state and federal databases, but no match was found. Because Athan had been a suspect at the time of the original investigation, detectives decided to locate his whereabouts and collect a DNA sample for comparison.

The detectives located Athan in New Jersey and also determined, because Athan had family in Greece, he represented a flight risk. The detectives invented a ruse to obtain Athan's DNA without making Athan aware they had resumed investigating Sumstad's murder. Posing as a fictitious law firm, the detectives

sent Athan a letter inviting him to join a fictitious class action lawsuit concerning parking tickets. The letterhead contained the names of the “attorneys,” all of whom were employed by the SPD. Believing the ruse to be true, Athan signed, dated, and returned the enclosed class action authorization form and attached a handwritten note stating, “If I am billed for any of your services disregard my signature and my participation completely.”

Athan’s reply was received by Detective Diaz, one of the “attorneys” listed on the letterhead. Without opening it, Diaz gave the letter to another detective who forwarded it to the crime lab. A lab technician opened the letter, removed and photographed the contents, cut off part of the envelope flap, and obtained a DNA profile from saliva located on the flap. The DNA profile from the envelope matched the DNA profile from the semen found on Sumstad’s body. Based primarily on the results of the DNA testing, the prosecuting attorney filed an information and probable cause statement to secure an arrest warrant for Athan.

The State filed first degree murder charges against Athan. Athan made several pretrial motions, including suppression of the DNA evidence and dismissal of the case. The trial court denied all motions. Athan was found guilty of second degree murder and sentenced to 10 to 20 years. The Washington Supreme Court granted direct review of Athan’s appeal.

The first issue faced by the Washington Supreme Court was whether there is a “privacy right” in saliva. The Court found there is no inherent privacy interest in saliva, stating as follows:

“Certainly the nonconsensual collection of blood or urine samples in some circumstances...

invokes privacy concerns. Obtaining the saliva sample in this case did not involve an invasive or involuntary procedure. The relevant question in this case is whether, when a person licks an envelope and places it in the mail, that person retains any privacy interest in his saliva at all. Unlike a nonconsensual sampling situation, there was no force involved in obtaining Athan’s saliva sample here. The facts of this situation are analogous to a person spitting on the sidewalk or leaving a cigarette butt in an ashtray. We hold under these circumstances, any privacy interest is lost. The envelope, and any saliva contained on it, becomes the property of the recipient.

“Athan argues Washington law provides a strong privacy protection of communications between attorneys and their clients...Although the police officers here were not actually attorneys, they held themselves out as attorneys. Athan contends he reasonably relied on the detectives’ representations that they were attorneys, and thus he should be entitled to rely on the attorney-client privilege to protect his communications as a ‘private affair.’

“The State argues the saliva used to seal the envelope was not a communication and therefore not protected by the attorney-client privilege. We need only decide if the saliva on the envelope flap is a ‘communication’ subject to protection by the attorney-client privilege. Because we find saliva is not a communication in this case, we do not need to decide if an attorney-client relationship was even established. We note this case is not about police intercepting mail addressed to someone else. The envelope, its contents, and the saliva contained on it, were addressed to and received by the SPD detectives, albeit through the use of a ruse.

“Athan argues he was entitled to rely on the SPD representation that they were attorneys and thus anything sent to them would be protected by the attorney-client privilege. Athan contends police officers posing as attorneys is a ruse strictly prohibited by both Washington law and the law of evidence in general. We find there is no absolute prohibition of police ruses involving detectives posing as attorneys in the state of Washington. While such a ruse has the potential to gather privileged and confidential information, thereby implicating the concerns raised by Athan, that was not the case here. First, we have already found the saliva on the envelope was not a communication. Second, the letter sent to Athan did not ask Athan to provide additional or confidential information. Thus, the detectives were not seeking a confidential communication and the risk of receiving such a communication was minimal.

“Police officers are allowed to use some deception, including ruses, for the purpose of investigating criminal activity. Generally, ruses are upheld as long as the actions do not violate a defendant’s due process rights. Because we agree with the trial court that the police ruse used here did not violate Athan’s due process rights, we find this ruse permissible.

“Athan contends that persons retain a reasonable expectation of privacy in their saliva after they lick an envelope and place it in the mail. We find no cases or support for such a conclusion. Police may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence, without violating that suspect’s privacy. No case has been cited challenging or declaring this type of police practice unreasonable or unconstitutional.”

“Athan contends that persons retain a reasonable expectation of privacy in their saliva after they lick an envelope and place it in the mail. We find no cases or support for such a conclusion. Police may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence, without violating that suspect’s privacy. No case has been cited challenging or declaring this type of police practice unreasonable or unconstitutional. People constantly leave genetic material, fingerprints, footprints, or other evidence of their identity in public

places. There is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place. Physical characteristics which are exposed to the public are not subject to Fourth Amendment protection. *United States v. Mora*, 410 U.S. 19 (1973). The analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment.

“Athan also contended the police violated a state statute by posing as lawyers. Public policy allows for some deceitful conduct and

violation of criminal laws by police officers in order to detect and eliminate criminal activity. The claimed misconduct in this case does not involve actions similar to those cases which found misconduct warranting dismissal. The police did not induce Athan to commit any crime nor did they attempt to gain confidential information from the ruse. The conduct here is not so outrageous as to offend a sense of justice."

DRUGS:

Possession of a Controlled Substance; Trace Amount

Porter v. State, CACR06-1114, 5/30/07

In *Porter v. State*, law enforcement officers seized three coin-type plastic bags that, as described by one of the detectives, contained an "off white, kind of brownish powdery substance on the inside."

The State's forensic chemist could not weigh the residue because it was stuck to the insides of the small bags. There was no testimony that anyone could or did weigh the residue. Instead, the chemist washed the residue out of all the bags with a methanol solution and tested the resulting mixture. It tested positive for methamphetamine. Neither the chemist nor any other witness testified that the bags contained a usable amount of this controlled substance.

The Arkansas Court of Appeals, citing *Harbison v. State*, 302 Ark. 315 (1990) stated that:

"Possession of a container with a trace amount or residue of contraband that is neither measurable nor usable is not possession of a controlled substance under Ark. Code Ann. § 5-64-401."

EMPLOYMENT LAW:

Protected Speech; First Amendment Retaliation

Davison v. City of Minneapolis,
CA8, No. 06-2368, 6/20/07

Kathy Davison has been employed with the City of Minneapolis Fire Department ("the Fire Department") since 1986 and has held the rank of Captain since 1999. She has been a member of the International Association of Fire Fighters Local 82 ("the Union") throughout her employment, during which Rocco Forte served as the Chief of the Fire Department. During the spring and summer of 2002, in response to budget constraints, Chief Forte proposed a plan to close Ladders 7 and 8 and purchase several quintuple combination pumpers which necessitated laying off firefighters ("the Plan"). Captain Davison actively and publicly opposed the Plan and asserts that she repeatedly was denied promotion to the position of Arson Investigator in retaliation for her outspoken and public opposition.

The Court of Appeals for the Eighth Circuit stated that to establish a prima facie case of retaliation, a plaintiff must allege and prove that: (1) she engaged in activity protected by the First Amendment; (2) the defendant took an adverse employment action against her; and (3) the protected conduct was a substantial or motivating factor in the defendant's decision to take the adverse employment action.

The Court stated that there was sufficient evidence to create a genuine issue of material fact as to whether her protected association and speech activities were a substantial or motivating factor in the chief's decisions not to promote her. There was evidence that the fire chief knew of the protected activities

and expressed displeasure with them. This, in combination with the proximity of three promotion denials, constitutes sufficient evidence to create a genuine issue of material fact as to whether the decisions were at least in part motivated by plaintiff's constitutionally protected activities. There was also sufficient evidence to create a genuine issue of material fact as to whether the chief would have made the same decision in the absence of plaintiff's activity.

FREEDOM OF INFORMATION ACT:
Arkansas Public Records

Pulaski County v. Arkansas Democrat-Gazette, Inc.
 No. 07-669, 7/20/07

Ronald Quillin, former Pulaski County Comptroller and Director of Administrative Services, was arrested on June 4, 2007, for allegedly embezzling approximately \$42,000.00 from Pulaski County. Quillin had terminated employment with Pulaski County on April 30, 2007, and was employed by the Arkansas Department of Health and Human Services at the time of his arrest. On June 5, 2007, the *Arkansas Democrat-Gazette*, through its reporter, Van Jensen, made a written Freedom Of Information Act (FOIA) request to Pulaski County Attorney Karla Burnett asking her to disclose "all e-mail and other recorded communication between former Pulaski County Comptroller and Director of Administrative Services Ron Quillin and employees of Government e-Management Solutions, a software contractor for Pulaski County, from Jan. 2005 to the termination of Mr. Quillin's employment with the county."

Quillin deleted all of the e-mail files contained on his computer prior to his termination. The

e-mail messages were not saved in a central location or backed up on any computer medium. Before the FOIA request was made, Pulaski County had the deleted email files restored. On June 12, 2007, Pulaski County released some but not all of the e-mail correspondence requested by the Appellee under the FOIA, contending that the e-mails not released do not constitute "public records" within the meaning of Ark. Code Ann. § 25-19-103.

On June 14, 2007, the *Arkansas Democrat-Gazette* filed a complaint against Pulaski County and Pulaski County Attorney Karla Burnett pursuant to the FOIA. That same day, a motion to dismiss was filed on behalf of Pulaski County Attorney Karla Burnett. On June 19, 2007, a hearing was held before the Pulaski County Circuit Court. At the hearing, all parties agreed that Pulaski County Attorney Karla Burnett should be dismissed as a defendant in the matter and that Jane Doe, an employee of Government e-Management Solutions, should be allowed to intervene in the matter. The court heard testimony from Jensen, David Bailey, the managing editor of the *Arkansas Democrat-Gazette*, and Dan Davis, a hardware analyst with Pulaski County Information Systems who maintains the network file servers for the county computer system.

The circuit court concluded that the withheld e-mails were public records and ordered them released within twenty-four hours of the entry of its judgment. Pulaski County filed a notice of appeal.

The Arkansas Supreme Court stated that the issue here is whether the e-mails are "public records" pursuant to the Arkansas FOIA. The Court noted that John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act*,

91 and 93 (m&m Press, 4 ed., 2004) specifically address the situation of government employees using their e-mail for both personal and work-related purposes as follows:

On the face of the Arkansas FOIA, this problem should not be difficult to resolve. Public records are limited by definition to “record[s] of the performance or lack of performance of official functions...”

An argument can be made that if an employee is using state computer resources for personal correspondence, that use reflects the “lack of performance of official functions,” either because state computing resources are being misappropriated or because the employee is handling personal matters while on the state clock. With regard to e-mail at least, that argument is a stretch. Given the prevalence of both public and private employees using their office computers for personal correspondence, employees likely will be able to assert a reasonable expectation of privacy in personal e-mail even if it is generated on a public computer. And even absent such a legally defensible interest, a FOIA request for such extracurricular e-mail might be satisfied by providing only email statistics—such as the size and number of personal messages, or even the “to” and “from” fields of messages—which would reflect non-performance of official duties even with the personal content redacted.

The Court discussed the content-driven analysis in determining whether a document is a public record. The Court cited *State v. Clearwater*, 863 So. 2d 149 (Fla. 2003) where the Florida Supreme Court stated the determining factor of whether a document is a public record subject to disclosure is the nature of the record, not its

physical location. The Florida Supreme Court concluded that “‘personal’ e-mails are not ‘made or received pursuant to law or ordinance or in connection with the transaction of official business’” and, therefore, do not fall within the definition of a public record by virtue of their placement on a government-owned computer system.

The Arkansas Supreme Court stated that not all e-mails on Pulaski County computers are public records. It is necessary to examine the facts concerning e-mails on a case-by-case basis. They held that in this particular case, it is necessary to conduct an *in camera* review of the e-mails to discern whether these e-mails relate solely to personal matters or whether they reflect a substantial nexus with Pulaski County’s activities, thereby classifying them as public records. Both parties agree that the definition of “public records” is content-driven. The only way to determine the content of the e-mails is to examine them.

The Arkansas Supreme Court remanded this case to the circuit court with instruction to conduct an *in camera* review to determine if these e-mails “constitute a record of the performance of official functions that are or should be carried out by a public official or employee” thereby making them “public records” pursuant to the FOIA.

In *Pulaski County v. Arkansas Democrat-Gazette, Inc., and Jane Doe*, No. 07-669, 10/4/07, the Arkansas Supreme Court heard an appeal from Pulaski County who argues that the circuit court erred by failing to follow the mandate issued by the Arkansas Supreme Court after it remanded the case on July 20, 2007, for an *in camera* review of the e-mails. Jane Doe argues that the circuit court erred in ordering the release of certain

email messages, as it violates her right to privacy. The Arkansas Supreme Court affirmed the circuit court's order releasing the e-mails and held that Jane Doe has waived her privacy rights in this case, finding as follows:

"Doe argues that disclosure of the e-mails constitutes a violation of her constitutional right of privacy as recognized in an individual's interest in avoiding disclosure of personal matters by government. The trial court ruled that Doe had no expectation of privacy when conversing with Quillin on a county computer or the software vendor's business e-mail. Under the facts of this case, where the messages often contained both business matters and personal issues, Doe, a contractor for the County, waived any right of privacy she may have had.

"The circuit court reviewed each e-mail for content as instructed. Based on the circuit court's order, it is clear to us that the trial court followed our directive, and Pulaski County has put forth no evidence to the contrary. The record simply does not support the County's assertion that the circuit court failed to follow the mandate issued on remand."

INTERROGATION:

The "Edwards Rule;" The Third Party

Van Hook v. Anderson

CA6, No. 03-4207, 5/24/07

In *Van Hook v. Anderson*, the United States Court of Appeals for the Sixth Circuit was required to resolve the legal question of whether a suspect can initiate discussions with police through a third party.

Robert Van Hook went to a Cincinnati bar patronized by male homosexuals in February

1985. He met the victim, David Self, and the two left together for Self's apartment. Once at the apartment, and after Self approached Van Hook in a sexual manner, Van Hook strangled Self to the point of unconsciousness. Using a paring knife from the kitchen, Van Hook repeatedly stabbed Self in the head and abdomen. He attempted unsuccessfully to sever the head from the body. He stabbed so violently that he created a large cavity in Self's body, exposing several internal organs. At one point, he tried to pierce Self's heart. In a final act against Self, Van Hook stuffed several items, including the paring knife, into the gaping cavity and left them there. He proceeded to take several items from Self's apartment and fled.

Van Hook eventually made his way to Ft. Lauderdale, Florida, where he was arrested two months later by local police. The police read him his *Miranda* rights. Although initially agreeing to talk, Van Hook told police, "Maybe I should have an attorney present." The officers, having understood him to be asking for a lawyer, did not further question him about the murder. Later that day, Cincinnati Police Detective William Davis came to Ft. Lauderdale to facilitate Van Hook's extradition and transportation back to Ohio. Van Hook had not yet been provided with counsel. After talking with the suspect's mother, Det. Davis believed that Van Hook might want to talk to police about the murder. On first engaging Van Hook, Det. Davis discussed the matter of extradition and confirmed that Van Hook wished to waive any objection to extradition. The detective then told Van Hook that they "had a lot to talk about," but that they "could not talk unless he himself wanted to make a statement." At that point, Van Hook indicated he had talked to his mother, and that she had told him just to tell the truth, and he wanted to make a statement. After having his

Miranda rights read to him again, and waiving them, Van Hook gave a full and graphic confession.

A grand jury returned an indictment charging Van Hook with aggravated murder and aggravated robbery. Prior to trial, defense counsel moved to suppress the confession. Finding that Van Hook had invoked his right to have counsel present but then had reinitiated discussions with police, the Ohio trial court admitted the confession. At trial, Van Hook never denied killing Self, but instead claimed temporary insanity. A three-judge panel rejected his defense, convicted him of aggravated murder with a death specification and aggravated robbery and sentenced him to death.

Van Hook contends that his confession to the murder of David Self should have been suppressed under *Edwards*. Upon review, the Sixth Circuit Court of Appeals found, in part, as follows:

“The rule of *Edwards*—a suspect who is in custody and has asked for a lawyer must not be subject to further interrogation until a lawyer has been provided or unless the suspect initiates a discussion—is ‘a corollary to *Miranda*’s admonition that if the individual states that he wants an attorney, the interrogation must cease until an attorney is present.’ *Arizona v. Roberson*, 486 U.S. 675, 680 (1988). It is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights. ‘In the absence of such a bright-line prohibition, the authorities through ‘badgering’ or ‘overreaching’—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself.’ *Smith v. Illinois*, 469 U.S. 91, 98 (1984); see also *North Carolina v. Butler*, 441 U.S. 370, 374

(1979) (‘Without proper safeguards the process of in custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.’) Moreover, the rule ‘provides clear and unequivocal guidelines to the law enforcement profession,’ *Roberson*, 486 U.S. at 682, and ‘conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness,’ *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).

“The rule of *Edwards* embodies two independent inquiries:

First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

“It is now argued, under a plain reading of *Edwards*, that only the suspect ‘himself’ can communicate a willingness and a desire to talk with the police (i.e., from the suspect’s lips to the police’s ears). We disagree. There is no sound justification for reading the statement from *Edwards* that the suspect ‘himself’ must initiate a discussion to imply the suspect, and only the suspect, can inform the police he wants to talk. The Supreme Court did not command in *Edwards* that a suspect must directly inform the police he wants to talk, as opposed to informing them through a third party. The propriety of communication through a third party was not before the Court in *Edwards*, nor has the Court taken up the issue since that decision.

“The decisions addressing this issue, while few in number, all support the validity of third-party communications. In *Owens v. Bowersox*, the police had arrested the defendant for murder and counsel had been appointed. 290 F.3d 960, 962 (8th Cir.), *cert. denied*, 537 U.S. 1035 (2002). After his arraignment, a police detective picked up the defendant’s mother and brought her to the police station. During the drive, the mother told the detective that she talked to her son on the phone and persuaded him to tell the police the truth.

“Once at the station, the detective told the defendant that he had been informed by the defendant’s mother that he wanted to talk to police. The defendant confirmed that the information was correct. Before questioning, the detective read the *Miranda* rights to the defendant a second time. The defendant confessed and was convicted of first-degree murder. On appeal, the Eighth Circuit considered whether the defendant’s confession was obtained in violation of his Sixth Amendment right to counsel.

“The state court had earlier found that the defendant did not contact the police himself nor did he ask his mother to have the police contact him. Nevertheless, the state court concluded that the initiation came from the defendant through his mother. The Eighth Circuit Court of

“The Constitution protects a suspect from official coercion—it does not protect a suspect from himself or his mother. Van Hook asked for a lawyer but later changed his mind and wanted to talk with the police, as he had the right to do. Whether he then directly told the police himself that he changed his mind or instead indirectly communicated it through his mother and subsequently confirmed it himself is of no constitutional moment.”

Appeals agreed that there was no constitutional violation. Other courts have also addressed the issue and likewise concluded a third party may communicate a suspect’s desire to initiate a discussion.

“If we were to prohibit a suspect from initiating a discussion with the police through a third-party, we would be crafting an artificial rule not required by the Constitution, as well as imposing an undue burden on our criminal-justice system. As the Supreme Court has recognized, ‘The Fifth Amendment privilege

is not concerned with moral and psychological pressures to confess emanating from sources *other than* official coercion.’ *Connelly*, 479 U.S. at 170; *see also Perkins*, 496 U.S. at 296-97 (‘There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess.’) Suspects have no constitutional protection against friends or family members who convince them to talk with police. *Mauro*, 481 U.S. at 528 (‘We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way.’); *Sneathen v. Nix*, 885 F.2d 456, 457-60 (8th Cir. 1989) (finding no interrogation when a suspect’s mother gained

access to him by telling officers ‘if my son did this, he will tell me,’ and exhorted her son to confess so her other son would not be unjustly punished). The Constitution clearly forbids officials from using their ‘power of the sword’ to coerce a suspect into making self-incriminating statements; it provides no similar protection against third-party cajoling, pleading, or threatening.

“The Constitution protects a suspect from official coercion—it does not protect a suspect from himself or his mother. Van Hook asked for a lawyer but later changed his mind and wanted to talk with the police, as he had the right to do. Whether he then directly told the police himself that he changed his mind or instead indirectly communicated it through his mother and subsequently confirmed it himself is of no constitutional moment. We affirm the district court’s denial of habeas relief to Van Hook on the claim that his statement should have been suppressed.”

JURISDICTION:

Arkansas “Hot Check” Law

Klein v. State, CACR 06-1076, 6/6/07

Mickey Klein wrote a check on June 7, 2005, in the amount of \$1,169.32 to the Southern Oaks Inn in Branson, Missouri, in payment for his stay at the hotel. The check was drawn on Klein’s business account at Arvest Bank in Harrison, Arkansas, but there were insufficient funds to cover payment of the check. The present charge was based on this alleged violation of the Arkansas Hot Check Law.

Klein argues that the State of Arkansas did not have jurisdiction because his wrongful conduct took place in the State of Missouri. The

Arkansas Court of Appeals disagreed stating that a person may be convicted under a law of this State for an offense committed by his own conduct for which he is legally accountable if either the conduct or a result that is an element of the offense occurs within this State. In sum, the Court held that Arkansas had territorial jurisdiction over this matter by virtue of the check being drawn on an Arkansas bank.

SEARCH AND SEIZURE:

Administrative Seizure of Vehicle; Police Ploy

United States v. Ascension Alvarez-Tejeda
CA9, No. 06-30289

Ascension Alvarez-Tejeda and his girlfriend drove up to a traffic light. As the light turned green, the car in front of them lurched forward, then stalled. Alvarez-Tejeda managed to stop in time, but the truck behind him tapped his bumper. As Alvarez-Tejeda got out to inspect the damage, two officers pulled up in a police cruiser and arrested the truck driver for drunk driving. The officers got Alvarez-Tejeda and his girlfriend to drive to a nearby parking lot, leave the keys in the car and get into the cruiser for processing. Just then, out of nowhere, someone snuck into their car and drove off with it.

As the couple stood by in shock, the police jumped into their cruiser and chased after the car thief with sirens blaring. The police then returned to the parking lot, told the couple that the thief had gotten away and dropped them off at a local hotel. The whole incident was staged. DEA agents learned that one of the leaders of a drug conspiracy was dealing drugs out of his car and deduced from several intercepted calls and direct surveillance that Alvarez-Tejeda,

one of the conspiracy's subordinates, was using the leader's car to transport illicit drugs. The agents decided to stage an accident/theft/chase in order to seize the drugs without tipping off the conspirators. Every character in the incident, other than Alvarez-Tejeda and his girlfriend, was either a DEA agent or a cooperating police officer.

The parties agree that the DEA agents had the right to seize the car without a warrant: "If agents have probable cause to believe that a car is or has been used for carrying contraband, they may summarily seize it pursuant to the federal forfeiture statutes." *United States v. Johnson*, 572 F.2d 227, 234 (9th Cir. 1978); see also *Florida v. White*, 526 U.S. 559, 561 (1999) (police may administratively seize a car without a warrant). The agents had probable cause to believe that the car had been "used for carrying contraband" because they had purchased drugs from inside it as part of their investigation. They also had probable cause to believe the car was carrying contraband on the day of the seizure based on several intercepted phone calls and direct surveillance. The only issue in doubt is whether their unorthodox method of seizing the car was constitutional.

Upon review, the Ninth Circuit Court of Appeals found, in part, as follows:

"An otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner. See *United States v. Jacobsen*, 466 U.S. 109, 124 (1984). To assess the reasonableness of the conduct, a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. While agents have discretion to decide how best to

proceed in conducting a covert operation, they must abide by the general protections of the Fourth Amendment. *Dalia v. United States*, 441 U.S. 238, 257 (1979).

"The benchmark for the Fourth Amendment is reasonableness, which requires us to weigh the government's justification for its actions against the intrusion into the defendant's interests. *Jacobsen*, 466 U.S. at 125. The government here certainly had important reasons for employing this unusual procedure in seizing the car. First, the agents wanted to stop the drugs before they reached their ultimate destination—a patently important goal. Second, they wanted to protect the anonymity of the ongoing investigation—another vital objective. The Supreme Court has emphasized the necessity for some undercover police activity, *Lewis v. United States*, 385 U.S. 206 (1966), and explained that artifice and stratagem may be employed to catch those engaged in criminal enterprises; to reveal the criminal design; or to expose the illicit traffic, the illegal conspiracy, or other offenses.

"Protecting the secrecy of an ongoing investigation is a well recognized consideration in the administrative seizure process. See 18 U.S.C. § 983(a)(1)(D)(v) (providing for an extension not to exceed 60 days for notifying interested parties where more prompt notice would seriously jeopardize an investigation).

"At the same time, the intrusion into Alvarez-Tejeda's Fourth Amendment interests was relatively mild. First, Alvarez-Tejeda argues that the agents were unreasonable in using force to seize the car. While the police may not use excessive force in conducting a search or seizure, See e.g., *Winterrowd v. Nelson*, 480 F.3d 1181, 1184, 1186 (9th Cir. 2007), the force here was minimal. The district court found that

the agent in the truck bumped the stationary car with ‘enough force... so that the *tap* was felt by Defendant to the extent that it caused him to get out of his car and examine his bumper,’ but the truck was moving at only 1 to 2 miles per hour and the tap caused no harm to the couple

and left no scratch on the car. A tap is a use of force, to be sure, but it is hardly excessive. The staged collision involved just enough force to pull off the ‘drunk driver’ ruse, without causing physical injury to the suspects.

“This would be a different case if the government’s tactics created a serious risk of bodily injury or escalation of violence, which might well have outweighed the interest in protecting the investigation. The balance may well be different if the police simulated a car heist by running Alvarez-Tejeda off of the road or staged a car-jacking by holding him up at gunpoint. In this case, however, the use of force and potential for physical harm were within reasonable bounds.

Nor was there anything unreasonable in the agents’ choice of guile to seize the car, rather than taking it outright, as they were entitled to do. While we don’t generally second guess the government’s use of stealth to ferret out criminal activity, see *Dalia*, 441 U.S. at 257, we take a closer look when agents identify themselves as government officials but mislead suspects as to their purpose and authority. This is because people ‘should be able to rely on [the] representations’ of government officials. *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir.

“While the Federal Courts of Appeal are split on this issue, the recommended course of action is to obtain a search warrant prior to placing a GPS tracking device on a suspect vehicle.”

1990). If people can’t trust the representations of government officials, the phrase ‘I’m from the government and I’m here to help’ will become even more terrifying.

“This concern is at its zenith when government officials lie in order to gain access to places

and things they would otherwise have no legal authority to reach. We think it clearly improper for a government agent to gain access to property which *would otherwise be unavailable to him* by invoking the private individual’s trust in his government. This consideration is not implicated by the agents’ actions here because they already had the authority to seize the car and arrest Alvarez-Tejeda; their lies didn’t have the effect of expanding their ostensible authority beyond the scope of their actual authority. The only consequence of their deceit was to treat Alvarez-Tejeda as a victim, rather than a criminal suspect—driving him to a hotel rather than immediately dragging him off to jail—and the only harm he suffered was being misled and subjected to the fright that comes from being the victim of a crime. We find that the agents’ actions in misleading Alvarez-Tejeda were reasonable in light of their vital interest in seizing the drugs and not exposing their investigation.

“That the agents took some of Alvarez-Tejeda’s property that was in the car, including a camera, checkbook and clothing, didn’t make their actions unreasonable. They did return the purse and cell phone, explaining that the thief had thrown them out the window during the pursuit. Had they also returned the rest of

the property, they might have blown the ruse. The delay in notifying Alvarez-Tejeda that his property had been seized, and giving him an opportunity to claim it, was reasonable in light of the government's important objective of protecting the secrecy of its investigation."

SEARCH AND SEIZURE:

Automobile Search; Traffic Stop; Dog Sniff

Davis v. State, CACR 06-1367, 6/6/07

In *Davis v. State*, the Arkansas Court of Appeals stated that as part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks on the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or a warning. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). During this process, the officer may ask routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered. However, after those routine checks are completed, unless the officer has a reasonable articulable suspicion for believing that criminal activity is afoot, continued detention of the driver may become unreasonable. *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995). In the absence of a reasonable, articulable suspicion of some drug-related criminal activity, once the purpose of the traffic stop is completed, the operator of the vehicle should be allowed to proceed on his way, without being subject to further delay by police for additional questioning. See *Sims v. State*, supra; *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997).

In this case, Officer Bradish received information at about 6:00 p.m. on April 8, 2003, that a

car was traveling toward Clay County on Highway 67 at a speed of around 100 miles per hour. Officer Bradish subsequently located a vehicle matching the description given and he followed the car, pacing it at 60 miles per hour. The speed limit was 55 miles per hour, and Officer Bradish conducted a traffic stop for exceeding the speed limit. Officer Bradish was accompanied by another officer in his patrol car, and he also called for backup, which arrived soon thereafter.

Upon approaching the stopped car, Officer Bradish noticed a temporary license tag in the rear window that was issued from McAllen, Texas. He made contact with Mr. Davis, who was driving the car and stated that he was coming from San Antonio, Texas, and driving to his grandmother's funeral. According to Officer Bradish, Mr. Davis stated that he had wrecked his truck and had to rent a car, and that he was heading to Michigan where he would pick up his sister and then drive to the funeral in West Virginia on the following day. Mr. Davis advised that he had dropped off a friend earlier at a bus station in Dallas, Texas, but declined to give the friend's name. Mr. Davis presented a valid Michigan driver's license and a rental agreement. Mr. Davis asked Officer Bradish "if [he] could get on with it because he was in a hurry," and Officer Bradish said he could and asked Mr. Davis to come back to the patrol car.

After exiting the vehicle at the officer's request, Mr. Davis locked the car doors. Officer Bradish thought this was unusual, and Mr. Davis explained that when he gets out of his car he locks the doors out of habit. Officer Bradish asked for consent to search the car, and Mr. Davis refused. Officer Bradish stated that it would not take long for the other officer to

conduct a search, but Mr. Davis again refused. Officer Bradish testified:

I then stated I had a dog with me. I advised him I was a Canine Officer and I had my partner in the rear of the car and pointed back and showed him. He said that was fine, he had already been through two check points and had a dog run twice. I asked where and he said at the border patrol check point a dog went around his car. He explicitly said the dog went around his car three times at the bus station in Dallas. I said okay and we had a seat in my car. Mr. Davis said "go ahead and use your dog, I've been through two check points with dogs already."

While the two men sat in the patrol car, Officer Bradish ran background checks for warrants or violations, which came back clear. Officer Bradish then placed appellant's driver's license above the visor on the driver's side of the patrol car, and advised Mr. Davis to step out of the car for a weapons search. During a pat down of Mr. Davis, Officer Bradish did not find any contraband but did find a large amount of cash. Officer Bradish then walked his canine along the side of appellant's car, and the dog alerted by aggressively scratching on the back passenger door. Officer Bradish retrieved appellant's keys and unlocked the car, and a subsequent search uncovered eight bricks of marijuana concealed in a backpack on the right rear floorboard.

Officer Bradish testified that he did not cite Mr. Davis for speeding, but that at the time he ran his dog along Mr. Davis's car he had not yet decided whether or not to write him a speeding ticket. Officer Bradish further testified that about eight minutes elapsed from the time he initiated the traffic stop until the dog alerted.

On appeal, Mr. Davis does not challenge the legality of the traffic stop. However, he argues that the search was illegal because it was based on the canine sniff, which occurred after the purpose of the traffic stop had been completed.

Mr. Davis maintains that the purposes of the initial traffic stop were completed after the background checks came back clear. However, instead of returning Mr. Davis's driver's license and issuing a citation or warning, Officer Bradish placed the driver's license above his sun visor and continued the detention by running his canine. Because the purposes of the stop were completed, and there was no reasonable suspicion of any criminal activity at that point, Mr. Davis argues that the subsequent search of his vehicle violated his constitutional rights and that the marijuana should have been suppressed.

The testimony of Officer Bradish revealed that although he made no specific request to do so, Mr. Davis encouraged Officer Bradish to "go ahead and use your dog" well within the time limits of the traffic stop. Consequently, Mr. Davis consented to an extension of the traffic stop for the canine sniff before the purposes of the stop had been completed. Therefore, the canine alert and subsequent search were deemed lawful.

SEARCH AND SEIZURE:
Cohabitant's Consent to Search;
Barricaded Suspect

United States v. McKerrell
CA10, No. 06-5209, 7/5/07

In *United States v. McKerrell*, the Court of Appeals for the Tenth Circuit dealt with the issue of a cohabitant's consent to search a home where the other cohabitant had recently barricaded himself. The Court noted that the United States Supreme Court in *Georgia v. Randolph*, 547 U.S. 103, (2006), held that the Fourth Amendment forbids a warrantless search of a shared dwelling for evidence over a physically-present resident's express objection, notwithstanding his or her co-tenant's consent to search. The Court had to decide whether barricading oneself in one's residence, in an unsuccessful effort to avoid a lawful arrest, overrides a co-tenant's subsequent consent to search the residence. The case is as follows:

On February 24, 2006, an anonymous caller informed the Tulsa Police Department that Jack McKerrell had outstanding arrest warrants, used methamphetamine, and possessed an assault rifle and a shotgun. The police investigated this tip and discovered that McKerrell had two outstanding felony warrants from Tulsa County, Oklahoma, for possessing a stolen vehicle, two municipal traffic warrants from Tulsa, Oklahoma, and a four-count felony warrant from Craig County, Oklahoma, for drug and traffic charges. Officers determined McKerrell's address by searching utility-company records.

Less than two weeks later, another caller told the police that McKerrell was working at home in his front yard. In response, several police officers surrounded the residence and announced their

presence. By that time, McKerrell was inside the home with his wife and young child, both of whom also resided at the home. Instead of peacefully surrendering to the officers, however, McKerrell quickly closed the garage door and front door to barricade himself inside.

Within minutes, Mrs. McKerrell exited the home, leaving McKerrell and their young child inside. The police began negotiating with McKerrell by calling a cell phone in the home and requesting, over the course of three or four conversations, that he surrender. Both parties dispute what was said during these conversations and McKerrell's motive for refusing to leave the house. Sergeant Middleton, who spoke with McKerrell on the phone, testified that McKerrell never objected to a search and was concerned solely with being arrested. While Sergeant Middleton could not recall whether McKerrell told him not to enter the residence, the Sergeant clearly remembered that the conversation related entirely to whether McKerrell would allow the officers to execute the several valid arrest warrants. Indeed, he testified that McKerrell never objected to a search.

Sergeant Witt, another officer at the scene, testified similarly: McKerrell did not express an objection to a search either before or after the police arrested McKerrell testified that he expressly informed the police several times that he did not want them inside his home. The district court found that McKerrell never expressly refused to provide his consent to search. Instead, the district court credited the officers' testimony that the subject of these telephone conversations was McKerrell's desire to avoid arrest.

After these three or four conversations, McKerrell decided to surrender peacefully.

The police handcuffed McKerrell immediately. They did not speak to him about searching the residence or prohibit him from speaking with Mrs. McKerrell. They merely placed him under arrest and transported him to the police station about five minutes later. Sergeant Witt testified that the police did not remove McKerrell from the scene to prevent him from influencing Mrs. McKerrell's decision about consenting to a search. More broadly, Sergeant Witt testified that the officers' decision to remove McKerrell from the scene was unrelated to their decision to search the house. Sergeant Middleton confirmed that nothing unusual occurred: "It is not unusual [that we took McKerrell away from the scene so quickly]. Usually, once we make the arrest, we put them in the vehicle and transport them."

After McKerrell had left the scene, Sergeant Witt asked Mrs. McKerrell to speak with him and Sergeant Petree. The district court found no evidence that the police coerced her to do so. Mrs. McKerrell agreed to speak with the officers, and they all entered the home, with Mrs. McKerrell's permission, to begin the conversation.

Sergeant Witt used this conversation as an opportunity to determine how long the McKerrell family had lived at this home (about four years) and the scope of Mrs. McKerrell's authority over the home's interior. Sergeant Witt testified that Mrs. McKerrell "[had] full run of the house," which he inferred from Mrs. McKerrell's statement that she did laundry in the home and was able to access every drawer and closet in the home.

After discussing other questions that Mrs. McKerrell posed, primarily questions about McKerrell's bond, the officers asked Mrs.

McKerrell for her consent to search the home. Sergeant Petree presented Mrs. McKerrell with a consent form and explained its contents, which notified Mrs. McKerrell that she had the right to withhold her consent and the right to stop the search at any time. Mrs. McKerrell orally consented and then signed the form. It is undisputed that McKerrell was absent when Mrs. McKerrell consented to this search. The police then searched the home and found four firearms, which McKerrell possessed illegally.

Ultimately, McKerrell filed a motion to suppress, arguing that the officers violated the Fourth Amendment by searching his residence based on his wife's consent. The district court denied McKerrell's motion because Mrs. McKerrell's consent was sufficient to justify the search in light of McKerrell's failure to object to the search. Specifically, the court found that McKerrell's conduct at the scene—shutting his doors and remaining inside—related solely to his desire to avoid arrest. The district judge found "persuasive the testimony of the officers that defendant did not expressly refuse consent to search his home." Thus, the court distinguished *Georgia v. Randolph* because McKerrell never "articulated 'express refusal of consent to a police search' to officers prior to [Mrs. McKerrell's] consent to search their home."

McKerrell challenges the search's constitutionality on two grounds: first, he says that the search violated the Fourth Amendment because barricading himself in his residence conveyed his objection to the search and therefore precluded the officers from relying on his wife's consent; and second, he argues that the police removed him from the scene to avoid his possible objection to the search.

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

“The Supreme Court in *Randolph* held that ‘a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.’ The factual distinctions between this case and *Randolph* call into doubt *Randolph*’s applicability. McKerrell’s

sole concern was to avoid arrest, not to avoid arrest and prevent the officers from entering his home to search. The evidence supports this finding: McKerrell never told the officers to stay out of his home when they arrived; McKerrell discussed the arrest warrants when speaking on the phone with the police, but never expressed concern over the possibility of a search; and McKerrell never told the officers to stay out of his home after he surrendered and the police arrested him, arguably because his concern about being arrested dissipated upon his arrest.

“While McKerrell asks us to infer that he impliedly refused to consent when he closed his doors to the police, the parties legitimately dispute whether this conduct related to McKerrell’s desire to avoid arrest or to his desire to direct the officers to leave his property and refrain from searching, or both. McKerrell’s

“To have reasonable suspicion based on an anonymous tip, the tip must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. The issue is whether the tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.”

reliance on *Randolph* is misplaced. He never expressly objected to the search. Therefore, *Randolph*’s holding does not apply here. Mrs. McKerrell exercised authority over the common area that she allowed the officers to search, and the district court did not clearly err by finding that McKerrell did not object to the search. In light of these facts, we find no error in the district court’s conclusion that the officers complied with the Fourth Amendment.

“McKerrell also argues that the ‘evidence in this case indicates that removal of the Defendant minutes after his arrest was for the sake of avoiding his protest of a search.’ McKerrell relies on the limitation imposed by *Randolph* that a search might be unconstitutional ‘[if there is] evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection...’ McKerrell infers that this occurred here because ‘any police officer would have had a design to search [McKerrell’s] residence if the legal opportunity developed’ after receiving a tip that McKerrell possessed guns and drugs. In other words, McKerrell argues, the fact that the officers searched his residence demonstrates that the officers planned to search the residence, and this search could occur only after avoiding McKerrell’s potential objection by removing him from the scene.

“McKerrell’s argument begs the question by leaping to its conclusion from the innocuous inference that the police searched McKerrell’s residence because they planned to do so ‘if the legal opportunity developed.’ Despite McKerrell’s speculations, we must ask only whether the evidence shows that the officers removed McKerrell from the scene to avoid his possible objection. And on this point, there is no evidence that the police removed McKerrell for this reason.

“The evidence does show that the police removed McKerrell from the scene and transported him to the police station to carry out a lawful arrest. But McKerrell has not directed our attention to anything suspicious about the procedures that the police employed. Instead, his analysis essentially urges us to accept his unjustified speculations and circumvent *Randolph*’s evidentiary requirement. *Randolph* stated that there must be evidence that the police removed the potentially objecting tenant from the scene to avoid his or her objection. Since there is no evidence that the police prevented McKerrell from objecting to the search when he was at the scene, and since there is no evidence that the officers removed McKerrell for any reason other than completing the arrest, we have no reason to invoke *Randolph*’s admonishment that officers may not remove a defendant from the threshold to silence his or her potential objection.

“McKerrell also argues that the police might invoke the justification that they removed an arrestee to effect his or her arrest every time they arrest a defendant—implying that accepting the officers’ justification would immunize any post-arrest removal and consent search from Fourth Amendment challenge. But this observation does not advance McKerrell’s case. His argument wholly relies on the fact that the

police searched his residence, and therefore would have had the ‘design’ to search, to show that the police arrested and removed him to avoid his potential objection.

“Accepting this speculation would come perilously close to adopting a rule that the police must either invite a defendant into the threshold colloquy with the co-tenant or otherwise suspend their normal arrest procedures and await a defendant’s potential objection, however long it might take, before transporting him or her to the station. *Randolph* does not support either approach. As McKerrell concedes, the Supreme Court in *Randolph* expressly rejected the notion that the police may not remove a potential objector from the scene until they ask for the potential objector’s consent to search. *Randolph* did not upset the procedures that may be employed following an arrest; it merely suggested that the Fourth Amendment might prohibit a search when evidence shows that the police removed the defendant from the scene to avoid his or her potential objection to the search. Although evidence that the police used an arrest as a tool to avoid a possible objection might trigger *Randolph*, the bare fact that the police arrested McKerrell and brought him to the police station does not support such a conclusion here.”

SEARCH AND SEIZURE:

Good Faith Exception; Police Records Error

United States v. Herring
CA11, No. 06-10795, 7/17/07

In *United States v. Herring*, the Court of Appeals for the Eleventh Circuit stated that the facts of this case present an interesting issue involving whether to apply the exclusionary rule. Officers in one

jurisdiction check with employees of a law enforcement agency in another jurisdiction and are told that there is an outstanding warrant for an individual. Acting in good faith on that information the officers arrest the person and find contraband. It turns out the warrant had been recalled. The erroneous information that led to the arrest and search is the result of a good faith mistake by an employee of the agency in the other jurisdiction. Does the exclusionary rule require that evidence of the contraband be suppressed, or does the good faith exception to the rule permit use of the evidence?

The parties agree on the central facts. Coffee County officers made the arrest and carried out the searches incident to it based on their good faith and reasonable belief that there was an outstanding warrant for Bennie Herring in Dade County. They found drugs and a firearm before learning that the warrant had been recalled. The erroneous information about the warrant resulted from the negligence of someone in the Dale County Sheriff's Department, and no one in Coffee County contributed to the mistake. The only dispute is whether, under these facts, the exclusionary rule requires the suppression of the firearm and drugs.

The Court of Appeals for the Eleventh Circuit relied upon the U.S. Supreme Court decision in *United States v. Leon*, 468 U.S. 897 (1984), which instructs that whether the exclusionary sanction is appropriately imposed in a particular case must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence. A rule that denies the jury access to probative evidence must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness. That means the exclusionary rule should only be applied to a

category of cases if it will "result in appreciable deterrence." *United States v. Janis*, 428 U.S. 433, 454, 96 S. Ct. 3021, 3032 (1976). Application of the rule is unwarranted where any incremental deterrent effect is uncertain at best. *United States v. Calandra*, 414 U.S. 338, 351, 94 S. Ct. 613, 621 (1974).

The Court stated three conditions that must occur to warrant application of the exclusionary rule. First, there must be misconduct by the police or by adjuncts to the law enforcement team. Second, application of the rule must result in appreciable deterrence of that misconduct. Finally, the benefits of the rule's application must not outweigh its costs. The Court found that while Dade County might have been negligent in its record keeping, this error did not warrant suppression of the firearms and drugs found upon Herring.

SEARCH AND SEIZURE:

Pat-Down Searches; Sports Events

Gordon Johnston v. Tampa Sports Authority
CA11, No. 06-14666, June 26, 2007

On September 13, 2005, the Tampa Sports Authority, at the urging of the National Football League, (the "NFL"), considered enacting a policy to conduct limited above-the-waist pat-down searches of all persons attending Buccaneers football games. The NFL urged the pat-down policy to protect members of the public who attend NFL games. The NFL concluded that NFL stadiums are attractive terrorist targets based on the publicity that would be generated by an attack at an NFL game. The pat-down search policy focuses on the detection of improvised explosive devices ("IED") which might be carried on a person entering a stadium.

Gordon Johnston called the Buccaneers's office before the first game of the 2005 season to discuss the pat-down search policy. Johnston objected to the policy, and claims that he was told that the Buccaneers would not refund the cost of season tickets based solely on his objections. He stated later he would not have accepted a refund even if offered. Having been advised of the policy, Johnston nonetheless presented himself and his ticket at an entrance to the Stadium on three occasions. On each occasion, a screener advised Johnston that a pat-down search would be performed. Johnston verbally objected to the pat-down but allowed it to be conducted so that he could attend the games. After attending the second game Johnston sued the Authority in state court, seeking to enjoin the searches. After suit was filed, Johnston attended a third game, and, after offering his objection, he again submitted to a pat-down search. After the third game the Florida state court enjoined the searches and Johnston attended subsequent games without being subjected to the search.

The Court of Appeals for the Eleventh Circuit stated that this case is not about the wisdom of the pat-down policy, whether the average Buccaneers fan supports or objects to the pat-down searches, or whether a judge believes the pat-downs are wise. The issue in this case is whether Gordon Johnston's Fourth Amendment rights were violated by the pat-down searches.

The Court concluded that Johnston voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pregame notice, and notice at the search point itself. Johnston knew that he would be

subjected to a pat-down search by the Authority if he presented himself at an entrance to the Stadium to be admitted to a Buccaneers game. The Court reversed the decision of the District Court in its preliminary finding that Johnston did not consent to the pat-down searches and that he had a right to attend games that was unconstitutionally infringed.

SEARCH AND SEIZURE:

Routine Traffic Stops; Seizure of Passengers

Brendlin v. California, No. 06-8120, 6/18/07

In *Brendlin v. California*, the U.S. Supreme Court stated that when a police officer makes a traffic stop, the driver is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. The Court held that a passenger is seized as well and so may challenge the constitutionality of the stop.

Early in the morning of November 27, 2001, Deputy Sheriff Robert Brokenbrough and his partner saw a parked Buick with expired registration tags. In his ensuing conversation with the police dispatcher, Brokenbrough learned that an application for renewal of registration was being processed. The officers saw the car again on the road, and this time Brokenbrough noticed its display of a temporary operating permit with the number "11," indicating it was legal to drive the car through November. The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed. Brokenbrough asked the driver, Karen Simeroth, for her license and saw a passenger in the front seat, petitioner Bruce Brendlin, whom he recognized as "one of the

Brendlin brothers.” He recalled that either Scott or Bruce Brendlin had dropped out of parole supervision and asked Brendlin to identify himself. Brokenbrough returned to his cruiser, called for backup, and verified that Brendlin was a parole violator with an outstanding no-bail warrant for his arrest. While he was in the patrol car, Brokenbrough saw Brendlin briefly open and then close the passenger door of the Buick. Once reinforcements arrived, Brokenbrough went to the passenger side of the Buick, ordered him out of the car at gunpoint, and declared him under arrest. When the police searched Brendlin incident to arrest, they found an orange syringe cap on his person. A patdown search of Simeroth revealed syringes and a plastic bag of a green leafy substance, and she was also formally arrested. Officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine.

Brendlin was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of Simeroth’s vehicle, cf. *Rakas v. Illinois*, 439 U. S. 128 (1978), but claimed only that the traffic stop was an unlawful seizure of his person. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him. Brendlin pleaded guilty, subject to appeal on the suppression issue, and was sentenced to four years in prison.

The California Court of Appeal reversed the denial of the suppression motion, holding that

Brendlin was seized by the traffic stop, which they held unlawful. By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California’s concession that the officers had no reasonable basis to suspect unlawful operation of the car, but still held suppression unwarranted because a passenger “is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer’s investigation or show of authority.” The Court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, that a passenger cannot submit to an officer’s show of authority while the driver controls the car, that once a car has been pulled off the road, a passenger “would feel free to depart or otherwise to conduct his or her affairs as though the police were not present.”

The Court found, in part, as follows:

“A person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, ‘by means of physical force or show of authority,’ terminates or restrains his freedom of movement, *Florida v. Bostick*, 501 U. S. 429 (1991) (quoting *Terry v. Ohio*, 392 U. S. 1 (1968)), ‘through means intentionally applied,’ *Brower v. County of Inyo*, 489 U. S. 593 (1989). Thus, an unintended person may be the object of the detention, so long as the detention is willful and not merely the consequence of an unknowing act. *Id.*, at 596; cf. *County of Sacramento v. Lewis*, 523 U. S. 833 (1998) (no seizure where a police officer accidentally struck and killed a motorcycle passenger during a high-speed pursuit). A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without

actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. See *California v. Hodari D.*, 499 U. S. 621 (1991); *Lewis, supra*, at 844, 845.

“When the actions of the police do not show an unambiguous intent to restrain or when an individual’s submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U. S. 544 (1980), who wrote that a seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ Later on, the Court adopted Justice Stewart’s touchstone, see, e.g., *Hodari D., supra*, at 627; *Michigan v. Chesternut*, 486 U. S. 567 (1988); *INS v. Delgado*, 466 U. S. 210 (1984), but added that when a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter,’ *Bostick, supra*, at 435-436; see also *United States v. Drayton*, 536 U. S. 194 (2002).

The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver ‘even though the purpose of the stop is limited and the resulting detention quite brief.’ *Delaware v. Prouse*, 440 U. S. 648 (1979); see also *Whren v. United States*, 517 U. S. 806 (1996). And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes

everyone in the vehicle, not just the driver. See, e.g., *Prouse, supra*, at 653 (‘[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth and Fourteenth] Amendments’); *Colorado v. Bannister*, 449 U. S. 1 (1980) (‘There can be no question that the stopping of a vehicle and the detention of its occupants constitute a ‘seizure’ within the meaning of the Fourth Amendment’); *Berkemer v. McCarty*, 468 U. S. 420 (1984) (‘[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure;’ *United States v. Hensley*, 469 U. S. 221 (1985) (‘[S]topping a car and detaining its occupants constitute a seizure’); *Whren, supra*, at 809-810 (‘Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of [the Fourth Amendment]’).

“We have come closest to the question here in two cases dealing with unlawful seizure of a passenger, and neither time did we indicate any distinction between driver and passenger that would affect the Fourth Amendment analysis. *Delaware v. Prouse* considered grounds for stopping a car on the road and held that Prouse’s suppression motion was properly granted. We spoke of the arresting officer’s testimony that Prouse was in the back seat when the car was pulled over, see 440 U. S., at 650, n. 1, described Prouse as an occupant, not as the driver, and referred to the car’s ‘occupants’ as being seized, *id.*, at 653. Justification for stopping a car was the issue again in *Whren v. United States*, where we passed upon a Fourth Amendment challenge by two petitioners who moved to suppress drug evidence found during the course of a traffic stop. Both driver and passenger claimed to have been seized illegally when the police stopped

the car; we agreed and held suppression unwarranted only because the stop rested on probable cause.

“The State concedes that the police had no adequate justification to pull the car over, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop.

We resolve this question by asking whether a reasonable person in Brendlin’s position when the car stopped would have believed himself free to ‘terminate the encounter’ between the police and himself. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

“A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on ‘privacy and personal security’ does not normally (and did not here) distinguish between passenger and driver. *United States v. Martinez-Fuerte*, 428 U. S. 543 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will

“An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. ”

reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. Cf. *Drayton, supra*,

at 197-199, 203-204 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).

“It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland v. Wilson*, 519 U. S. 408 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk; cf. *Pennsylvania v. Mimms*, 434 U. S. 106 (1977) (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. *Wilson, supra*, at 414 (quoting *Michigan v. Summers*, 452 U. S. 692 (1981)). What we have said in these opinions probably reflects a societal expectation of unquestioned police command at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter

any other way, without advance permission. *Wilson, supra*, at 414.

“Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of ‘roving patrols’ that would still violate the driver’s Fourth Amendment right. *See, e.g., Almeida-Sanchez v. United States*, 413 U. S. 266 (1973) (stop and search by Border Patrol agents without a warrant or probable cause violated the Fourth Amendment); *Prouse, supra*, at 663 (police spot check of driver’s license and registration without reasonable suspicion violated the Fourth Amendment).

“Brendlin was seized from the moment Simeroth’s car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.”

SEARCH AND SEIZURE: Executing of Search Warrant in “Reasonable Manner”

United States v. Ankeny
CA9, No. 05-30457, 6/19/07

On October 21, 2003, Michele Rayley reported to the Portland police that Kelly David Ankeny, with whom she has an 18-year-old son, had choked and kicked her. The altercation with Ankeny took place when Rayley went to the house where their son was living and found that Ankeny was living there. She confronted Ankeny about her belief that he was supplying drugs to their son, at which point Ankeny became angry and attacked her. He then ran to another floor of the house and returned waving a semi-automatic handgun. Rayley told police that she believed Ankeny was using methamphetamines and that he might flee or shoot at police. The case was referred to Officer Rhodes of the Domestic Violence Reduction Unit. In ongoing conversations, Rayley reported to Rhodes that several other people, including an infant and a prison associate of Ankeny, also were living in the house. Rayley told Rhodes that, on October 31, 2003, she and Ankeny had another argument during which he displayed a handgun.

Officer Rhodes conducted a background check on Ankeny and found that he had several outstanding arrest warrants and an extensive criminal history, including convictions for possession and delivery or manufacture of controlled substances, attempting to elude a police officer, escape, felon in possession of a firearm, and robbery. He also had been charged with, but not convicted of, assault on a police officer and aggravated assault.

The police considered various options for how to proceed, including arresting Ankeny during a traffic stop, and ultimately decided that it was necessary to arrest Ankeny at the house. The police believed that a street arrest would pose a risk to public safety because Ankeny had a lengthy record of violence and hostility toward the police. Further, the police believed that an arrest outside the house would be risky because there was evidence of drug and firearm activity inside the house, in addition to the presence of a prison associate of Ankeny.

A warrant was authorized on November 18, 2003, and executed on November 20, 2003, at around 5:30 a.m. The house was dark, and there was no noise or movement from within. The Special Emergency Reaction Team ("SERT") led the operation. Thirteen officers were assigned to enter the home and, in total, 44 officers participated in the execution of the warrant.

Officer Stradley yelled "police, search warrant" while pounding on the door and, about one second later, officers used a battering ram to break open the door. Officer Wilcox entered and directed a light-mounted weapon into the house. Ankeny had been sleeping on a recliner near the front door; he stood up as the officers broke down the door. Officer Wilcox instructed Ankeny to show his hands and get down.

Officer Forsyth then threw a flash-bang device into the center of the room. Officer Forsyth testified at the suppression hearing that he heard Officer Wilcox tell Defendant to show his hands; he did not recall hearing him tell Ankeny to get down. The flash-bang device had a fuse delay of one to one and-a-half seconds. Officer Forsyth stated that Ankeny went down to the floor during that delay, and the device exploded near his upper body. Because of his

proximity to the flash-bang device when it exploded, Ankeny suffered first and second-degree burns to his face and chest and second degree burns to his upper arms. Meanwhile, officers stationed outside the house shot out the second-story windows with rubber bullets. Officers securing the second level of the house threw a second flash-bang device into an open area. A man and a woman were lying in bed in that area, and the explosion caused the bed to catch fire. After attempting to extinguish the fire, officers threw the mattress and box spring out of a window.

Extensive damage was done to the house during the entry. The police shot out approximately ten windows, kicked in many doors, burned carpet, and made holes in the walls and ceilings with the rubber bullets.

Thereafter, the police recovered a 9mm semiautomatic handgun from the crack between the arm and the bottom cushion of the chair in which Ankeny was sitting when the police entered the house. They also recovered a semiautomatic handgun on an adjacent chair. The police found a 12-gauge sawed-off shotgun and a .22-caliber long rifle in a closet in an upstairs bedroom and another .22-caliber rifle in the basement of the house. The police seized approximately \$3,000, ammunition, and suspected drugs and drug paraphernalia.

Ankeny was indicted on four counts of being a felon in possession of a firearm and one count of possession of an unregistered sawed-off shotgun. He entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress. Ankeny contends that the evidence found in the house should have been suppressed because the police failed to knock and announce their presence, a failure not

justified by exigency, and because the extent of force used by the police rendered the search unreasonable.

Upon review, the Ninth Circuit Court of Appeals noted the following:

Manner of Entry

“Defendant contends that the police’s manner of entry violated the Fourth Amendment. He urges us to hold that the overall violence and destructiveness of the officers’ actions were unreasonable and, thus, that suppression is warranted.

“It is true that ‘the manner in which a warrant is executed is subject to later judicial review as to its reasonableness.’ *Dalia v. United States*, 441 U.S. 238, 258 (1979). Unnecessary destruction of property or use of excessive force can render a search unreasonable. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004); *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997). Deciding whether officers’ actions were reasonable requires us to balance ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.’ *Graham v. Connor*, 490 U.S. 386, 396 (1989)

“Whether this entry and search were conducted reasonably is a close question. The police had legitimate concerns about their safety in entering and searching the house. Defendant had a substantial criminal record, which included violent crimes; there was reliable evidence that he was armed and aggressive; there were several other people in the house, including a former prison inmate; and certain physical characteristics of the house made it difficult to secure.

“Officers testified at the suppression hearing that the element of surprise was very important due to those factors and that they used the battering ram, rubber bullets, and flash-bang devices in order to surprise and distract the occupants of the house. Thus, the destruction of property and use of force arguably were necessary to carry out the search safely and effectively. The fact that a gun was found stuffed into the cushions of the chair in which Defendant was sitting when the police entered suggests as much: if officers had entered more gently, perhaps Defendant would have had a chance to draw his weapon and injure or kill an officer or be injured or killed himself.

“Further, the search did not exceed the scope of the warrant, which weighs in favor of a conclusion of reasonableness. See *United States v. Penn*, 647 F.2d 876, 882 n.7 (9th Cir. 1980). (‘A warranted search is unreasonable if it exceeds in scope or intensity the terms of the warrant.’) The warrant authorized officers to search the house for guns, ammunition, and associated documents and paraphernalia, and they did just that. See *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991) (holding that, where warrant authorized search of the defendant’s premises, it was reasonable for officers to use a jackhammer to break up a concrete slab in the backyard in order to search for evidence underneath).

“On the other hand, the extent of the property damage, and particularly the use of two flash-bang devices, one of which seriously injured Defendant, weigh in favor of a conclusion of unreasonableness. The record is unclear with respect to whether and why it was necessary to shoot out so many windows and break down so many doors. Cf. *San Jose Charter of the Hell’s Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974 (9th Cir. 2005) (holding that it was

unreasonable for officers to cut a mailbox off its post, jackhammer the sidewalk, and break a refrigerator); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000) (holding that it was unreasonable for officers to break down doors that they already knew were open). And in *Boyd*, 374 F.3d at 779, we held that, 'given the inherently dangerous nature of the flash-bang device, it cannot be a reasonable use of force under the Fourth Amendment to throw it 'blind' into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury.' It is not clear that the officers took all appropriate and available measures to reduce the risk of injury here. For instance, Officer Forsyth testified at the suppression hearing that he was trained to deploy the flash-bang device away from the outer walls of rooms and away from furniture and curtains that could catch on fire, so he aimed for the center of the room. Although his concern for fire safety was valid, Forsyth threw the flash-bang close to Defendant.

"Ultimately, we need not determine whether the entry was unreasonable because we agree with the district court that suppression is not appropriate in any event. The alleged Fourth Amendment violation and the discovery of the evidence lack the causal nexus that is required to invoke the exclusionary rule.

"Here, the discovery of the guns was not causally related to the manner of executing the search. The police had a warrant, the validity of which is not questioned, and the guns, money, and other contraband were not hidden. Even without the use of a flash-bang device, rubber bullets, or any of the other methods that Defendant challenges, 'the police would have executed the warrant they had obtained,

and would have discovered the [evidence] inside the house.' *Hudson*, 127 S. Ct. at 2164; cf. *United States v. Hector*, 474 F.3d 1150, 1155 (9th Cir. 2007) (holding that suppression was inappropriate where '[t]he causal connection between the failure to serve [a] warrant and the evidence seized is highly attenuated, indeed non-existent'). Accordingly, we affirm the district court's denial of Defendant's motion to suppress the evidence."