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ARKANSAS CRIME INFORMATION CENTER: Expunged Records

Jones v. Huckabee, No. 06-620, 2/15/07

On February 28, 1980, Richard Emmett Jones was arrested for the offenses of keeping a gambling house and violation of the Uniform Controlled Substances Act. Those charges were ultimately dismissed. Fifteen years later, on May 27, 1995, Jones was arrested for the offenses of terroristic threatening and carrying a weapon. Once again, the charges were dismissed.

On February 1, 2001, the Benton Municipal Court entered two uniform “Orders to Seal,” directing that the records of Jones’s February 28, 1980 arrest be sealed pursuant to Act 738 of 1997. Similarly, on February 6, 2001, the Hot Springs Municipal Court entered identical orders directing that the records of Jones’s May 27, 1995 arrest be sealed. Under Act 738, any individual who has been charged and arrested for any criminal offense where the charges are subsequently dismissed is eligible to have all records, petitions, orders, docket sheets, and other documents relating to the case expunged.

The ACIC received a copy of the municipal court orders, which specifically stated that the records were to be sealed to all except those authorized by law to have access. Additionally, each of the orders made a specific finding that the charges against Jones had been dismissed. In compliance therewith, the ACIC immediately sealed the computerized records concerning Jones’s

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arrests in 1980 and 1995. More particularly, the arrest records were electronically segregated and contained language stating that the records were sealed and were only available to criminal justice agencies for criminal justice purposes. Shortly thereafter, the Benton Municipal Court and the Hot Springs Municipal Court entered "Orders to Remove," directing that the information about Jones's arrests and the disposition of the charges be removed from the ACIC records because all charges had been dismissed.

Jones eventually filed an action in 2003 against the ACIC and its director, Charles Pruitt, in his official capacity, Governor Mike Huckabee, in his official capacity, and John Does 1-20, individually and in their official capacities, alleging a violation of his civil rights stemming from the ACIC's "unlawful failure and refusal to follow existing Arkansas Law and other authority governing its conduct, specifically in its failure to destroy records upon court order and to properly restrict access to them prior to destruction." In the action brought under 42 U.S.C. §§ 1983 and the Arkansas Civil Rights Act of 1993, Jones further alleged that "unauthorized parties" had accessed his arrest records through the ACIC and that this access violated his right to privacy under the First Amendment to the Constitution of the United States and the Arkansas Constitution, as well as the ACIC enabling statutes.

With regard to the expungement and sealing of criminal records, Ark. Code Ann. § 16-90-906 provides as follows:

Any individual who has been charged and arrested for any criminal offense where the charges are subsequently nolle

prossed or dismissed or the individual is acquitted at trial is eligible to have all arrest records, petitions, orders, docket sheets, and any other documents relating to the case expunged in accordance with the procedures defined by this subchapter and upon entry of an order of expungement may state that no such charges, arrest, and the resulting trial ever occurred.

Any individual who is eligible to have an offense expunged under section 16-90-906 may file a uniform petition to seal records with the circuit court in the county where the crime was committed.

In that regard, the ACIC is required to adopt and provide a uniform petition and order to seal records that shall be used by all petitioners and by all circuit and district courts in this state. The "clean slate" effect of expungement is not absolute:

An individual whose record has been expunged in accordance with the procedures established by this subchapter shall have all privileges and rights restored and shall be completely exonerated, and the record which has been expunged shall not affect any of his or her civil rights or liberties unless otherwise specifically provided by law. Ark. Code Ann. § 16-90-902(a) (Repl. 2006).

The record in this case includes an affidavit by Richard J. Thomas, the Administrator for the Criminal History Division of the ACIC, in which he explains the procedure by which his agency expunges an arrest record:

Each computerized arrest record is individually reviewed to ensure that it has been properly identified as belonging to the defendant and that it matches the

*“Order to Seal.” A caveat in capital letters reading, “**THIS RECORD IS SEALED *RESTRICTED TO CRIMINAL JUSTICE USE ONLY**” is inserted at the beginning of the computerized record. All arrest information and court information follows. At the end of the record under the heading of “OTHER INFO” is the word “SEALED” and the date the record was sealed. This completes the sealing of one record. Each arrest record is handled the same way. The expunged records are then verified by another employee to ensure data entry was correct.*

All parties agree that the records at issue here were electronically segregated; that is, they were only available to criminal justice agencies for criminal justice purposes.

At issue here is Jones’s argument that the ACIC violated his civil rights when it refused to physically destroy his arrest records despite the court orders directing the removal of his arrest records from the ACIC database. His argument, however, ignores the following statutory definition: “‘Expunge’ shall mean that the record or records in question shall be sealed, sequestered, and treated as confidential...‘expunge’ shall not mean the physical destruction of any records.” Ark. Code Ann. § 16-90-901(a)(1) and (2) (Repl. 2006).

Under review, the Arkansas Supreme Court found as follows: “We hold that the ACIC correctly complied with the municipal courts’ orders to seal the records consistent with the statutory requirements of Ark. Code Ann. §§ 16-90-901 through 16-90-906. With regard to the subsequent ‘Orders to Remove,’ it is clear that any physical removal or destruction of Jones’s arrest records is not contemplated by state law. Jones’s point on this appeal is without merit.

“For his second point on appeal, Jones contends that his privacy rights were violated when ‘someone accessed ACIC in an unauthorized fashion to use the information held there in a political campaign.’ According to Jones, an unknown person illegally accessed his arrest records in the ACIC database and posted the records on the internet.

“With respect to Jones’s civil rights claims against the ACIC, its director, and the governor, arising out of the alleged misuse of the arrest records, the Arkansas General Assembly has provided the remedy of criminal prosecution for any misuse of arrest records: ‘Every person who shall knowingly release or disclose to any unauthorized person any information collected and maintained under this subchapter, and any person who knowingly obtains such information for purposes not authorized by this subchapter, shall be deemed guilty of a Class D felony.’ Ark. Code Ann. § 12-12-1002 (Repl. 2003). The same penalty for similar conduct is set forth in Ark. Code Ann. § 12-12-212 (Repl. 2003). Yet, it does not appear from the record in this case that Jones ever attempted to pursue the available remedy of criminal prosecution. Jones’s second issue on appeals is also without merit.”

CIVIL LIABILITY:

Agency Policy; Internal Investigations

Thompson v. City of Chicago,
CA7. No. 04-3177, 12/19/06

On December 5, 2000, James Thompson died following a struggle with police officers who were trying to handcuff him while taking him into custody after he

led them on a high-speed automobile chase in an attempt to evade apprehension on the west side of Chicago, Illinois. The Cook County Medical Examiner later ruled Thompson's death a homicide, concluding that he died as a result of asphyxia, resulting at least in part from a "choke hold" applied to his neck while officers were attempting to restrain him.

Armed with this information, Lee Thompson and Paulette White-Thompson filed suit in the United States District Court for the Northern District of Illinois against the City of Chicago and the eleven Chicago Police Department ("CPD") officers who were at the scene. In their complaint, Thompson's relatives alleged that the officers violated Thompson's Fourth and Fourteenth Amendment rights by using excessive force while attempting to place him under arrest, see 42 U.S.C. § 1983, and argued that the City and the individual officers should be held liable under the state common-law theory of wrongful death. Following discovery, the City of Chicago and the police officers submitted a motion for summary judgment, which was granted in part, dismissing the suit against four of the officers. Subsequently, six other named officers were voluntarily dismissed by the plaintiffs, leaving only Officer Bradley Hespe (the officer who allegedly placed a choke hold on the arrestee) and the City as defendants.

After a week long trial and a day of deliberations, the jury found in favor of the City of Chicago and Officer Hespe, and judgment was entered on July 21, 2004. The Thompsons filed a motion for a new trial claiming that the district court erred when it barred them from presenting evidence concerning the Chicago Police Department's General Orders pertaining to the appropriate

use of force. They also maintain that it was reversible error for the trial judge to preclude them from eliciting expert testimony from Inspector James Lukas and Sgt. Jackie Campbell of the Chicago Police Department concerning whether or not Officer Hespe used excessive force when he was attempting to subdue and control Thompson.

The Court of Appeals for the Seventh Circuit stated that in this case the text of the Chicago Police Department's General Orders pertaining to the use of force would not have been of any consequence whatsoever and would have failed to advance the inquiry into whether Officer Hespe violated Thompson's Fourth Amendment rights by using excessive force in apprehending him. The Court found as follows:

"In order to establish an excessive force claim under § 1983, plaintiffs must demonstrate that a state actor's use of force was 'objectively unreasonable' under the circumstances. See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). What constitutes 'reasonableness' with regard to an officer's actions in apprehending a suspect under the Fourth Amendment is not capable of precise definition or mechanical application but requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

"The reasonableness of a particular use of force 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' *Graham v. Connor*, 490 U.S. 386, 396 (1989). This calculus

of reasonableness must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation. The fact that excessive force is not capable of precise definition necessarily means that, while the Chicago Police Department's General Order may give police administration a framework whereby commanders may evaluate officer conduct and job performance,

it sheds no light on what may or may not be considered 'objectively reasonable' under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter. Indeed, the Chicago Police Department's General Orders state that they are intended merely to 'provide members guidance on the reasonableness of a particular response option,' when taking a suspect into custody.

"What's more, 42 U.S.C. § 1983 protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices. In other words, the violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been

“The reasonableness of a particular use of force ‘must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. This calculus of reasonableness must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation. ”

established. Whether the officer's conduct was either good police practice or a violation of state law is immaterial to whether he violated the Fourth Amendment.

"In *Whren v. United States*, 517 U.S. 806 (1996) the Supreme Court addressed the use of police manuals and standard procedures to evaluate what a 'reasonable officer' would do under the Fourth Amendment in the context of a traffic stop. The Court concluded that because police

rules, practices and regulations vary from place to place and from time to time, they are an unreliable gauge by which to measure the objectivity and/or reasonableness of police conduct. Although *Whren* involved the constitutionality of searches rather than excessive force, both inquiries—whether a search is constitutional and whether the officer has used excessive force—involve an evaluation of the 'reasonableness' standard of an officer's conduct under a particular set of facts and circumstances. Accordingly, we are confident that, if confronted with the question of whether police manuals, guidelines or general orders are 'reliable gauges' of the reasonableness of an officer's use of force, the Court would reach the same conclusion that it did in *Whren*.

“Whether Officer Hesper’s conduct conformed with the internal Chicago Police Department General Orders concerning the use of force on an assailant was irrelevant to the jury’s determination of whether his actions on December 5, 2000 were ‘objectively reasonable’ under the Fourth Amendment. It may be that Officer Hesper’s possible violation of the Chicago Police Department’s General Orders is of interest to his superiors when they are making discipline, promotion or salary decisions, but that information was immaterial in the proceedings before the district court and was properly excluded. Instead, the jury in all probability properly assessed the reasonableness of Officer Hesper’s split-second judgment on how much force to use by considering testimony describing a rapidly evolving scenario in which Thompson attempted to evade arrest by leading the police on a high speed chase, crashed his car, and actively resisted arrest.

“The Thompsons also challenge the district court’s exclusion of expert testimony from Inspector James Lukas of the Chicago Police Department’s Office of Professional Standards and Sgt. Jackie Campbell, regarding whether Officer Hesper violated the Fourth Amendment by using excessive force when apprehending Thompson. The trial judge granted the defense motion pursuant to Federal Rule of Evidence 403, stating that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice and that evidence of that nature would pose the danger of unfair prejudice and jury confusion. We agree.

“The question of whether a police officer has used excessive force in arresting a suspect is a fact-intensive inquiry turning on the

reasonableness of the particular officer’s actions in light of the particular facts and circumstances of the situation faced. What is reasonable under any particular set of facts is not capable of precise definition or mechanical application. Accordingly, whatever insight Inspector Lukas and Sgt. Campbell might have had into whether or why Officer Hesper used excessive force would have been of little value except as to possibly causing confusion and a substantial risk of prejudice. The jury, after having heard all of the evidence presented, was in as good a position as the experts to judge whether the force used by the officers to subdue Thompson was objectively reasonable given the circumstances in this case. Introducing two experts to testify that Officer Hesper used excessive force would have induced the jurors to substitute their own independent conclusions for that of the experts. In other words, they would have been induced to decide the case on an improper basis rather than on the evidence presented which is precisely why the evidence should have been excluded.”

CIVIL LIABILITY:
Americans with Disability Act
Sanders v. City of Minneapolis,
 CA8, No. 05-1356, 1/23/07

Alfred Sanders suffered from a bipolar disorder. On October 31, 2000, his friends contacted Minneapolis police in an attempt to have him committed to a crisis center, but the police were unable to locate him. Around 7:00 a.m. the next morning, during his patrol, Josef Garcia, a security guard for Augsburg College, noticed a vehicle (which turned out to be driven by Alfred)

driving on the sidewalk of a street adjacent to the campus. Garcia followed the car and radioed Augsburg dispatch, requesting it to contact the Minneapolis Police Department. Garcia continued to follow the vehicle, which drove erratically, for approximately fifteen to twenty minutes until it pulled into the north end of an alley and parked in a parking space just off the alley. Garcia parked in the middle of the alley and stood by his vehicle, waiting for the police to arrive. Meanwhile, the Minneapolis police dispatched two squad cars to respond to an erratic driver, relaying the vehicle's location from the Augsburg dispatch. One squad, comprised of Officers Matthew Blade and Hien Dinh, had responded to the crisis call the previous day. They reported to the other officers and to dispatch that this call may involve a crisis candidate. The squad cars entered the south end of the alley about two minutes after Alfred parked in the alley, and the officers exited their vehicles. A fifth officer, Steven Manhood of the Minneapolis Park and Recreation Board Police Department, responded to the call as well and reached the scene a few seconds after the other officers. Officer Valorie Goligowski approached Alfred's car, telling him to put his hands where she could see them.

Alfred did not respond, but put his car in reverse and backed into Garcia's security vehicle, next to which Garcia was standing. The officers believed Garcia would be hit by Alfred's car. Alfred then put the vehicle in drive and accelerated down the alley toward Officers Blade and Lupe Herrera, who were on foot. Officer Blade was a few feet directly in front of Alfred's car, and he fired two shots from his revolver through the windshield as Alfred's vehicle drove toward him. Goligowski believed that Blade was trapped

under Alfred's car, and she fired her weapon at Alfred. Alfred's car continued down the alley toward Officer Herrera, who was able to jump out of its path, until it collided with one of the squad cars. Each of the police officers fired at Alfred's car as it passed them and continued down the alley. Alfred was shot 14 times and was pronounced dead at the scene. Each of the officers believed that Alfred was attempting to run over Officers Blade and Herrera, and they feared for their lives or the lives of their fellow officers.

Alison Sanders brought a civil lawsuit against each of the individual officers, their employing agencies, Mr. Garcia, and Augsburg College. Ms. Sanders alleged violations of 42 U.S.C. § 1983; 42 U.S.C. § 1985; and the Americans with Disabilities Act (ADA). The district court granted summary judgment to all defendants on all claims. Ms. Sanders appeals the dismissal of the § 1983 claim and the ADA claim. The Eighth Circuit Court of Appeals found as follows:

"The undisputed evidence reveals that Officer Goligowski told Alfred to show his hands, that Alfred did not respond but instead backed his car into the security guard's vehicle, and that he then accelerated down the alley toward other officers, two of whom were close to his vehicle and directly in its path. Sanders has provided no admissible evidence to contradict the officers' testimony that they each believed Alfred was trying to run over Officers Blade and Herrera. Given the quickly evolving scenario, the officers' actions in shooting Alfred in an attempt to stop him from injuring the officers in his path were objectively reasonable and did not violate Alfred's Fourth Amendment right to be free from unreasonable seizures.

“The fact that Alfred may have been experiencing a bipolar episode does not change the fact that he posed a deadly threat against the police officers. Knowledge of a person’s disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual.

“The ADA provides that ‘no qualified individual with a disability shall, by reason of such disability...be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.’ 42 U.S.C. § 12132. Sanders does not identify the ‘benefits...programs, or activities,’ that were denied to Alfred, but argues that had the City properly trained its officers in how to approach individuals with mental illnesses, the situation would not have escalated to the point of needing to use deadly force. It was not the City’s failure to train its officers, but Alfred’s apparent attempt to run over the officers that precipitated the shooting. The City of Minneapolis did not violate Alfred’s rights under the ADA.”

CIVIL LIABILITY:

False Arrest; Statute of Limitations

Wallace v. Kato, No. 05-1240, 2/21/07

On January 1994, Chicago police arrested Andre Wallace, then age 15, for murder. He was tried and convicted, but the charges were ultimately dropped in April 2002. In April 2003, he filed suit under 42 U.S.C. § 1983 against the city and several of its officers seeking damages for his unlawful arrest in violation of the Fourth Amendment. The Federal District Court granted summary

judgment in favor of the city and the police officers. The Court of Appeals for the Seventh Circuit affirmed this grant of summary judgment ruling that the § 1983 suit was time barred because Wallace’s cause of action accrued at the time of arrest, not when his conviction was later set aside.

The United States Supreme Court held that the statute of limitations for a § 1983 claim seeking damages for false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant was detained pursuant to legal process and not when his conviction was later set aside.

DUE PROCESS:

Personnel Files of Terminated Officers; Name Clearing Hearing

Sciolino v. City of Newport News,
CA4, No. 05-2229, 3/12/07

In *Sciolino v. City of Newport News*, the Newport News Police Department hired Christopher Sciolino as a police officer in May 2002. Sciolino began an 18-month probationary period during which he was not entitled to any departmental grievance rights. On June 26, 2003, the Acting Chief of Police Carl Burt placed Sciolino on administrative duty, asserting that Sciolino had advanced the odometer of his police cruiser by 10,000 miles, ostensibly to get a new car sooner. Sciolino denied these charges. On September 26, Chief of Police Dennis Mook terminated Sciolino’s employment by letter, accusing him of deliberately destroying city property by advancing the odometer. Sciolino alleges that the department placed the letter in his personnel file.

On June 2, 2004, Sciolino brought action against the City and Chief Mook. Sciolino contends that by placing false charges in his personnel file, which “may be available” to prospective employers, the City deprived him of Fourteenth Amendment liberty interests—in his reputation and his ability to obtain future employment—without granting him a name-clearing hearing. The Court of Appeals for the Fourth Circuit found as follows:

“...although Sciolino, as a probationary employee, has no protected ‘property’ interest in his employment with the City, a public employer cannot deprive a probationary employee of his ‘freedom to take advantage of other employment opportunities.’ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972). For this reason, a Fourteenth Amendment ‘liberty interest is implicated by public announcement of reasons for an employee’s discharge.’ *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990). Sciolino’s claim thus arises from the combination of two distinct rights protected by the Fourteenth Amendment: (1) the liberty ‘to engage in any of the common occupations of life,’ (*Roth*, 408 U.S. at 572 (1972)); and (2) the right to due process where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, *Wisconsin v. Constantineau*, 400 U.S. 433, 437.

“To state this type of liberty interest claim under the Due Process Clause, a plaintiff must allege that the charges against him: (1) placed a stigma on his reputation; (2) were made public by the employer; (3) were made in conjunction with his termination or demotion; and (4) were false.

“At this stage, the only element seriously at issue is the second, the requirement that the charges have been ‘made public’—or that there has been a public disclosure. Sciolino alleges that his file ‘may be available’ to prospective employers. A plaintiff must allege more than that his file ‘may be available’ to a prospective employer.

“A plaintiff need not allege that his file has actually been disseminated to particular prospective employers. But, he must allege more than that his file ‘may be available’ to them. We thus hold that an employee must allege (and ultimately prove) a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the file. A plaintiff can meet this standard in two ways. First, the employee could allege (and ultimately prove) that his former employer has a practice of releasing personnel files to all inquiring employers. Second, the employee could allege that although his former employer releases personnel files only to certain inquiring employers, that he intends to apply to at least one of these employers. In either case, he must allege that the prospective employer is likely to request the file from his former employer. The likelihood standard protects the employee’s constitutional liberty interests but does not unduly interfere with the employer’s personnel administration. It imposes no ‘enormous costs,’ because an employer need only grant a name-clearing hearing if it *will* make false damaging charges about a former employee available to those likely to request the information, e.g., future employers to whom the employee will apply.

“Sciolino alleges that it is the practice of the Newport News Police Department to

disseminate former employees' personnel files to local and regional police departments, specifically including, and by way of example, the police departments of the cities of Suffolk and Hampton. Although the complaint does not explicitly state that Sciolino has applied to these particular employers, reading the complaint liberally in favor of the plaintiff, as we must, the complaint must be construed to assert that Sciolino intends to apply to these local and regional police departments. To succeed, of course, Sciolino must *prove* that a prospective employer is likely to inspect the false allegations in his personnel file."

The Court stated that they are simply recognizing a present harm: the failure to provide a name-clearing hearing when an employee faces a restriction on future employment and the sully of his good name as prospective employers learn of false, stigmatizing allegations regarding the reasons for his termination. The meaningful opportunity to be heard to which Sciolino is entitled in these circumstances is not a remedy but a right that due process accords.

To be sure, Sciolino is not entitled to many of the rights afforded some public employees (e.g. those protected by tenure or contract), but when dismissed from public employment even a probationary or at-will employee is entitled to take with him his good name. Long ago the Supreme Court determined that when the State attaches 'a badge of infamy' to the citizen, due process comes into play. Fundamental to due process is an opportunity to be heard—an opportunity which must be granted at a meaningful time. An opportunity to clear your name after it has been ruined by dissemination of false, stigmatizing charges is not "meaningful."

EMPLOYMENT LAW:

Free Speech; Qualified Immunity

Bearden v. Lemon, CA8, No.06-1700, 2/2/07

Michael Bearden, a former deputy of the Cleburne County Sheriff's Department, sued Sheriff Dudley Lemon for reinstatement and damages under 42 U.S.C. § 1983 and under two state law theories. Lemon moved for summary judgment on several grounds including qualified immunity. The district court granted summary judgment as to one of Bearden's state law claims, denied summary judgment as to the remaining state law claim, and denied qualified immunity with respect to Bearden's claim under 42 U.S.C. § 1983. Lemon appealed the district court's denial of qualified immunity. The Court of Appeals for the Eighth Circuit affirmed the district court's decision, finding as follows:

"The facts, as found by the district court, are as follows. Bearden was employed as a jailer and then as a patrol deputy by the Cleburne County Sheriff's Department from June 2000 until his termination in December 2004. During Lemon's 2004 campaign for re-election, it was reported to Lemon that Bearden was telling the public that Lemon had a policy against making arrests for Driving While Intoxicated (DWI) violations, that Lemon had in fact instructed Bearden not to make DWI arrests, and that Lemon had a policy against prosecuting DWI charges. The fact that Bearden made these public statements was at least one of the reasons that Lemon terminated Bearden's employment.

"Lemon denied that he had a policy against the making of DWI arrests or against the

prosecution of DWI charges; however, in 2004, Lemon threatened Bearden's continued employment because of the DWI arrests Bearden had made. Further, during Bearden's tenure, Lemon instructed Bearden to seek the dismissal of two DWI cases, and Bearden complied with these instructions by arranging with the local prosecutor to have the DWI charges dismissed. Finally, Lemon arranged for the dismissal of a third DWI case which arose from one of Bearden's arrests.

"Lemon terminated Bearden's employment by a written notice, stating that he was discharged because he was overzealous in issuing traffic citations, citizens had complained to Lemon that Bearden was spending too much time at a local convenience store, and Bearden was patrolling the city of Heber Springs rather than patrolling the county.

"The termination was upheld by the County Grievance Committee. Bearden filed a complaint in the district court alleging that he was terminated in retaliation for exercising his First Amendment right to free speech, i.e., speaking out about Lemon's policy of not making or prosecuting DWI arrests. The district court denied summary judgment on the issue of qualified immunity finding that the constitutional right allegedly violated was clearly established and that an issue of fact remained as to whether Bearden's public statements were truthful or intentionally false. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding that, absent proof of false statement knowingly or recklessly made, a public employee's exercise of the right to speak on issues of public importance may not furnish the basis for dismissal from public employment).

"A district court's denial of summary judgment based on a public official's claim of qualified immunity may be appealed immediately. *Sexton v. Martin*, 210 F.3d 905, 909 (8th Cir. 2000). In considering such an appeal, the district court's denial of summary judgment the evidence is viewed in the light most favorable to the nonmoving party. *Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998).

"The qualified immunity determination involves a now familiar two-step process. First, we ask whether, taken in the light most favorable to the party asserting injury, the facts alleged show the defendant's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If so, we move to the second inquiry, whether the constitutional right was clearly established at the time the plaintiff was discharged. To be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. If the law claimed to have been violated was clearly established, the qualified immunity defense ordinarily fails, since a reasonably competent public official should know the law governing his conduct.

"Bearden alleges in this action that he was discharged by Lemon in retaliation for his exercise of the right to free speech, and, for purposes of the qualified immunity inquiry, the district court found that Bearden's speech was a basis for the termination. The right not to be terminated for such speech has been clearly established for some time. See *Hartman v. Moore*, 126 S.Ct. 1695, 1701 (2006). The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to

retaliatory actions for speaking out. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) It is clearly established that a State may not discharge an employee on a basis that infringes on that employee's constitutionally protected interest in freedom of speech.

"Rather than argue that Bearden's speech was not protected or that Bearden's right to free speech was not clearly established, Lemon asks this court to determine that he is entitled to qualified immunity because he has proven by a preponderance of the evidence that Bearden was terminated for reasons related to his job performance.

"At the very least, the district court found that a genuine issue of fact exists as to whether Bearden's protected speech was the motivating reason behind his discharge. Accordingly, the issue of whether Lemon has 'proven' that he would have terminated Bearden for a legitimate reason related to his job performance regardless of Bearden's exercise of any protected First Amendment rights is beyond the jurisdiction of this court in this appeal.

"We therefore affirm the district court's judgment that Lemon is not entitled to summary judgment on the issue of qualified immunity."

EVIDENCE:

Chain of Custody

Davie v. State, CACR06-44, 2/7/07

[Unpublished]

In *Davie v. State*, the Arkansas Court of Appeals stated that the purpose of establishing a chain of custody is to

prevent the introduction of evidence that has been tampered with or is not authentic. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997). Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. In addition, it is not necessary that every possibility of tampering be eliminated; it is only necessary that the trial court, in its discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003). The proof of the chain of custody for interchangeable items like drugs or blood needs to be more conclusive than items of evidence that are subject to positive identification. *Crisco*, supra; *Lee v. State*, 326 Ark. 229, 931 S.W.2d 433 (1996).

FORFEITURE

Ridenhour v. State,
CA 06-867, 2/28/07

In *Ridenhour v. State*, Jeffrey Ridenhour appeals a judgment entered by the Scott County Circuit Court granting the State's complaint for forfeiture of Ridenhour's 2004 Dodge pickup truck. For reversal, Ridenhour argues that the evidence was insufficient to support the trial court's judgment ordering the forfeiture. The Arkansas Court of Appeals agreed and reversed and dismissed, finding as follows:

"At the forfeiture hearing, Arkansas State Trooper Shane Meyer testified that he initiated a traffic stop after he observed Ridenhour, driving the truck in question,

fail to stop at a stop sign. After Trooper Meyer confirmed that Ridenhour was the owner of the truck and that his license was suspended, he arrested Ridenhour and called a wrecker service to tow the truck. Before the wrecker service arrived, Trooper Meyer searched the truck and discovered a plastic bag of a green leafy substance in a boot behind the driver's seat. The substance was later confirmed to be marijuana. On the way to the Scott County Jail, Trooper Meyer noticed that Ridenhour "kept playing with his feet." He advised Ridenhour that once they arrived at the jail Ridenhour would be searched. Ridenhour then confessed to having marijuana in his right boot. The total amount of marijuana found in the truck and on Ridenhour was 64.5 grams.

"Ridenhour testified that he owned the truck and that he bought it with money he received when his father died. He testified that he had been a marijuana smoker for some time. He denied selling marijuana. On the day in question, he testified that he worked on his farm and then went to the cemetery for a couple of hours with his girlfriend to visit the graves of his father and brother. He admitted to smoking marijuana at the cemetery. He testified that he left with his girlfriend to get something to eat, which is when he was pulled over, and that he planned to smoke

"...the purpose of establishing a chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic... Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law.

more marijuana later that night. Ridenhour claimed that some of his girlfriend's belongings were behind the seat of the truck because she was planning to stay the night with him. At one point he testified that he knew that the marijuana in the boot behind the seat belonged to his girlfriend but did not know she had that much. Later, he testified that he was not aware that his

girlfriend had marijuana on her person or within her control. He denied ownership of the boot in the back of the truck, did not know whose boot it was, and did not know how it got there."

The Court of Appeals stated that all of the evidence presented to the trial court established that Ridenhour was in possession of marijuana. However, mere possession of a controlled substance does not satisfy the requirements set forth in the civil forfeiture statute. The statute requires that the State establish by a preponderance of the evidence that Ridenhour's truck was being used to transport marijuana "for the purpose of sale or receipt." Since there is no such evidence, the judgment of the trial court was reversed and the State's complaint was dismissed.

IMMIGRATION LAW:

Theft Offense

Gonzales v. Duneas-Alvarez,
No. 05-1629, 1/17/07

In *Gonzales v. Duneas-Alvarez*, the United States Supreme Court deal with Immigration law that provides for removal from the United States of an alien convicted of a theft offense for which the term of imprisonment is less than one year. The question in this case was whether the term “theft offense” in the federal statute includes the crime of “aiding and abetting” a theft offense. The United States Supreme Court concluded that it does.

INTERNAL AFFAIRS:

Subpoena for Internal Affairs Records

Re Grand Jury v. United States,
CA4, No. 06-4612, 2/22/07

An individual arrested by the City Police Department filed a complaint with the Department, alleging that a particular officer used excessive force against him in the course of arrest. The complaint resulted in an investigation by the Department’s internal affairs office. During the internal investigation, Department officials interviewed various officers, including the officer identified in the arrested individual’s complaint.

It is Department policy that officers are required to comply fully with internal investigations as a condition of their employment. False testimony or other failure to comply may result in disciplinary action or dismissal. Officers who are questioned as

part of an internal investigation are notified in writing that their responses may not be used against them in criminal proceedings. The Department’s general written policy on internal investigations reiterates this guarantee and further states that material relating to internal investigations will be treated as confidential. The policy goes on to state, “This is not to imply that such files are not discoverable in legal proceedings.”

The United States Attorney’s Office and the Criminal Section of the Civil Rights Division of the United States Department of Justice undertook an investigation of the same incident to determine whether it constituted a civil rights violation under 18 U.S.C. § 242. In connection with this investigation and at the United States’ behest, a federal grand jury issued a subpoena duces tecum requiring the production of documents relating to the Department’s internal investigation.

The City moved to quash the subpoena, claiming that compliance would be “unreasonable” pursuant to Federal Rule of Criminal Procedure 17(c) for two reasons. First, the City argued that compliance would destroy the confidentiality of the internal investigation and would thus severely undermine the Department’s ability to conduct such investigations effectively. Second, the City contended that compliance would be inconsistent with the interviewed officers’ Fifth Amendment rights against self-incrimination. The Fourth Circuit Court of Appeals reviewed the case, finding as follows:

“We address the City’s interests initially. First, the district court permissibly took cognizance of the City’s very real concern that the Police

Department preserve its ability to police itself by maintaining the confidentiality of its investigations. The internal investigation mechanism serves the same purpose as a criminal investigation by the United States Attorney's Office or Department of Justice: to uncover, and ultimately to deter, civil rights violations and other abuses. In many instances, internal investigations may offer the most effective way to pursue those goals. A police department is able to respond to a complaint quickly, while witnesses are still available and memories are still fresh. Perhaps most importantly, a strong and visible internal investigations office is in a unique position to deter misconduct in the first place.

"Yet such investigations face an uphill battle due to the so-called 'blue wall,' the tendency of law enforcement officers to place solidarity above all else and to be less than fully cooperative with investigations of fellow officers. 'Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis.' *Report of the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department* 53 (1994). In such a setting, the confidentiality of internal investigations may be not only desirable but essential. The district court was permitted to recognize that handing the statements over to an outside party or agency, including one involved in criminal investigations, would be perceived by cooperating officers as a serious compromise of confidentiality, notwithstanding the provisions of Federal Rule of Criminal Procedure 6(e).

"Second, the district court recognized the City's concern about the potential for self-incrimination involved in releasing the internal investigation materials. *Garrity* provides that if a governmental employee is compelled to incriminate himself on pain of dismissal or other penalty, the state cannot use his statements against him in a subsequent criminal prosecution. See *Garrity*, 385 U.S. at 500. Thus any self-incriminating information provided by officers in the course of the internal investigation may not be used to prosecute them.

"The Court of Appeals for the Fourth Circuit concluded on these facts that the district court did not abuse its discretion in finding that the City had established that compliance with the subpoena would be unreasonable under Rule 17(c). A reversal on this record would be a declaration that state and local investigations of possible police misconduct were seldom worthy of federal respect."

JAILS AND PRISONS:

Prison Litigation Reform Act

Jones v. Bock, No. 05-7058, 1/22/07

In *Jones v. Bock*, the United States Supreme Court considered consolidated appeals involving the Prison Litigation Reform Act (PLRA). In an effort to address the large number of prisoner complaints filed in federal courts, Congress enacted the PLRA in 1995. Among other reforms, the PLRA mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit.

The Sixth Circuit, along with some other lower courts, adopted several procedural

rules designed to implement this exhaustion requirement and facilitate early judicial screening. These rules require a prisoner to allege and demonstrate exhaustion in his complaint, permit suit only against defendants who were identified by the prisoner in his grievance, and require courts to dismiss the entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint. Other lower courts declined to adopt such rules.

The United States Supreme Court granted certiorari to resolve the conflict and concluded that these rules are not required by the PLRA, and that crafting and imposing them exceeds the proper limits on the judicial role.

JUVENILES:

Questioning; Arkansas Statute § 9-27-317

State v. L.P., 06-990, 2/15/07

In *State v. L.P. III*, the State of Arkansas appeals the order of the Jefferson County Circuit Court granting the motion to suppress custodial statements made by Appellee L.P., III, a minor. For reversal, the State argues that the trial court's interpretation of Ark. Code. Ann. § 9-27-317 (Repl. 2002), that police were required to notify L.P.'s parents prior to interrogating him, was erroneous and, consequently, the trial court erred in suppressing L.P.'s statements. The case is as follows:

On April 19, 2006, school officials at Dollarway Junior High contacted authorities after L.P. threatened to shoot another student, E.M. Detectives Marcus Smith and Phillip Gober, with the Pine Bluff Police Department,

responded to the school's call and took L.P. into custody. L.P. was then taken to the Pine Bluff Police Department and questioned about the alleged threat, as well as a criminal-mischief complaint. L.P. remained in police custody and was transported to the Jefferson County Juvenile Detention Center.

A probable-cause hearing was held in circuit court on April 24, 2006, regarding the allegation of terroristic threatening. At that hearing, a public defender was appointed to represent L.P. The State filed a petition of delinquency against L.P., alleging that he had committed the act of terroristic threatening by threatening to shoot E.M. Four additional petitions alleging delinquency were filed against L.P. on May 2, 2006. Those four petitions alleged that L.P. had committed one count of criminal mischief, one count of breaking and entering, one count of residential burglary, and two counts of theft of property. These charges were filed after authorities conducted a second interview with L.P. on April 27, 2006.

On May 10, 2006, L.P. filed a motion to suppress his custodial statements. Therein, he argued that he was not properly advised of his Miranda rights, that he did not make a knowing, intelligent, or voluntary waiver of his rights, and that his rights under section 9-27-317 were violated because authorities failed to advise him of his rights in his own language and failed to notify a parent prior to taking his statement. L.P. further argued that he was incarcerated and had been appointed counsel when authorities questioned him a second time on April 27 and, therefore, police violated his rights by questioning him outside the presence of his attorney.

In an order entered on June 29, 2006, the trial court determined that L.P.'s statements made on April 19 and April 27 should be suppressed. Initially, the trial court found that L.P. was properly advised of his *Miranda* rights, as evidenced by his initials and signature on the rights forms, and had presented no evidence that his waivers were anything other than knowing, intelligent, and voluntary. The trial court after reviewing section 9-27-317 determined, however, that authorities had an affirmative duty to notify a parent before questioning L.P. and failed to do so in this case and, thus, suppressed his statements.

Upon appeal, the Arkansas Supreme Court found, in part, as follows:

"Section 9-27-317 was amended by Act 1610 of 2001. Pursuant to this amendment, the General Assembly added subsection (h)(2) that requires an officer to attempt to locate a parent or guardian when a juvenile is taken into custody and (i)(2)(A) that requires a juvenile be advised of his rights in his own language. While, there is no emergency clause in Act 1610 to explain legislative intent, the title does offer some insight and states in part:

AN ACT TO REQUIRE LAW ENFORCEMENT OFFICERS TO ATTEMPT TO NOTIFY THE PARENTS OR GUARDIANS OF JUVENILES TAKEN INTO CUSTODY IMMEDIATELY AFTER THE JUVENILE IS TAKEN INTO CUSTODY

"This court has held that even though the title of an act is not part of the law, it may be referred to in order to help ascertain the intent of the General Assembly. According

to the State, the 1994 amendment focused on the fact that the right to waive is solely that of the juvenile and parental consent is not required; thus, it follows that questioning a juvenile who has waived the right to counsel is allowed prior to any attempt to contact a parent.

"The fallacy underlying the State's argument is revealed by examining the legislative history of section 9-27-317 in the context of this court's cases interpreting that section, as one of the rules of statutory construction involves a presumption that the legislature is fully aware of prior legislation and case law.

"The General Assembly passed Act 1610 a little over a month after this court handed down its opinion in *Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001). There, this court interpreted section 9-27-317 and held that a juvenile, charged as an adult, had no right to have a parent present during an interrogation, even when the juvenile requested a parent. In reaching this conclusion, this court recognized that the legislature had provided juveniles with a statutory right to speak to a parent or to have one present during questioning but further pointed out that under section 9-27-317, police officers had no duty to inform a juvenile of this right. This holding was consistent with our previous holding in *Miller v. State*, 338 Ark. 445, 451, 994 S.W.2d 476, 479 (1999), where we stated:

In sum, the legislature has given a juvenile the statutory right to speak to a parent or guardian or to have one present upon the condition that the juvenile makes such a request. The legislature has not, however, imposed upon the police the duty to inform the juvenile of that right, and we cannot

do so where the statute is silent. Although we may question the prudence of giving a juvenile a right without imposing a corresponding duty on the police to inform the juvenile of that right, that is a policy decision properly left to the legislature, and not this court.

“We must presume that when amending section 9-27-317 in 2001 the legislature was fully aware of this court’s interpretation of that section as requiring no parental involvement when a juvenile is taken into custody unless the juvenile specifically invokes his or her right to speak to or have a parent present during questioning. At the very least, law enforcement officers now have a duty to attempt to notify a parent or guardian when a juvenile is taken into custody and if a parent or guardian cannot be located or will not cooperate, counsel must be appointed for the juvenile.

“Under subsection (h)(2)(A), authorities must notify a parent when his or her child has been taken into custody. The parent can then go to the place where the juvenile is being held and under subsection (i)(2)(C), if the juvenile requests to speak to a parent that parent will be present. If, on the other hand, the parent chooses not to go to the place where the juvenile is being detained, counsel is appointed to represent the juvenile. Again, if the juvenile invokes his right to speak to an attorney, then one has already been appointed to represent him. As previously stated, under our rules of statutory construction, we reconcile statutory provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part of a statute.

“Accordingly, we agree with the trial court’s

ruling that authorities were required to attempt to contact a parent prior to questioning L.P. Because the record is clear that no such attempt was made, we cannot say that the trial court erred in suppressing L.P.’s custodial statements.”

**SEARCH AND SEIZURE:
Affidavit for Search Warrant;
Confidential Informants**

United States v. Taylor, CA7, No. 05-3819

On May 14, 2004, Detective John Atteberry of the Bloomington Police Department spoke with a confidential source (“CS 241”) about a marijuana-growing operation run by Richard Taylor out of his home at 909 South East Street in Bloomington, Illinois. According to CS 241, Taylor started the operation fifteen years earlier and grew 150 to 200 plants each year at a property near Quincy, Illinois, resulting in an annual cash value of \$500,000. CS 241 told Detective Atteberry that Taylor was presently growing 160 plants on his property beneath a tarp next to a boat and near a six-foot high fence. CS 241 also gave the detective a physical description of Taylor and his home. Following his conversation with CS 241, Detective Atteberry conducted drive-by surveillance of the property and observed a man matching Taylor’s description walk toward the front of the house. The detective also observed a boat in the back of the home covered by a white tarp. On May 24, 2004, Detective Atteberry watched CS 241 place a phone call to Taylor to confirm that the plants were still present at the property.

That same day, Detective Atteberry appeared before a McLean County judge and presented

a search warrant affidavit that included the above-recited information. The judge issued a search warrant, and Detective Atteberry executed it at Taylor's home while Taylor's wife was present. During the search, another detective, Kenneth Bays, discovered marijuana plants in Taylor's backyard growing out of multiple styrofoam cups that filled four large containers, or flats, that were located between a fence and a boat.

After the plants were removed from the property, Taylor moved to quash the search warrant and suppress the evidence seized from his property on the grounds that Detective Atteberry, deliberately and with reckless disregard for the truth, omitted information from the warrant affidavit regarding informant CS 241's criminal history, probation violations, drug usage, and cash payments from the Bloomington Police Department in exchange for providing information about Taylor's case and others. According to Taylor, these omissions created "a false and misleading impression of CS 241's credibility for the state court judge's consideration of probable cause." Second, Taylor took issue with Detective Atteberry's description of CS 241, a documented informant with the Bloomington Police Department, as a "concerned citizen." Lastly, Taylor complained that the phone call that CS 241 placed to Taylor to confirm the plants' continued presence at his home was unrecorded and not heard directly by Detective Atteberry.

In a hearing, Detective Atteberry, the affiant of the search warrant complaint, stated that when he first met with CS 241 about Taylor's case, he knew CS 241 was a documented informant for the Bloomington Police

Department. Detective Atteberry explained that he had described CS 241 as a "concerned citizen" in a report attached to the warrant affidavit because it was his department's practice to refer to a confidential source as a "concerned citizen" in first interview reports to hide the source's identity. The detective then stated that he did not intend to influence the judge issuing the search warrant by his use of the phrase "concerned citizen" and that he did not use the reference in the actual warrant affidavit.

The district court denied Taylor's motion to suppress. In doing so, the court acknowledged that Detective Atteberry erred in referring to the informant as a "concerned citizen" and admonished the Bloomington Police Department to stop using the term altogether in future affidavits. The court found, however, that the detective did not use the misnomer in an attempt to "mislead" the issuing judge and that reading the affidavit in its totality would not leave the impression that a "concerned citizen" from the community was providing the information to the detective.

The Court of Appeals for the Seventh Circuit reviewed the case, finding, in part, as follows:

"...when an informant, such as CS 241, provides the facts and circumstances used to support a finding of probable cause, the legitimacy of the probable cause finding is determined by assessing the informant's reliability, veracity and basis of knowledge. The inquiry considers whether the informant (1) had firsthand knowledge; (2) provided sufficient details; (3) relayed information which was subsequently corroborated; and (4) testified at a probable cause hearing.

“With respect to the first factor, Detective Atteberry’s warrant affidavit relates that CS 241 had been present at Taylor’s residence on numerous occasions when illegal cannabis sativa plants were present. In addition, the warrant states that CS 241 had last seen the plants on May 20, 2004, four days before the warrant was issued. CS241’s first-hand observation of the marijuana plants at Taylor’s home, which occurred shortly before the execution of the warrant, supports a finding that his information was reliable. See *United States v. Lloyd*, 71 F.3d 1256, 1263 (7th Cir. 1995) (recognizing that an informant’s firsthand observations support a finding of reliability).

“Concerning the amount of detail provided by the informant, the warrant recounts specifics relayed by CS 241 to Detective Atteberry about Taylor and his marijuana growing operation. In the interview, CS 241 provided Taylor’s full name, weight, height, and telephone number, and described the address and color of Taylor’s home as well as the type of car he drove. CS 241 also told Detective Atteberry that during the past fifteen years Taylor had grown 150 to 200 plants each year and that he dried, packaged and sold the plants, yielding an annual cash value of \$500,000. Moreover, CS 241’s information about Taylor’s growing activity was current. Four days before Detective Atteberry obtained the search warrant, CS 241 reported that Taylor was growing 160 plants which were located on his property underneath a tarp next to his boat near the six-foot tall fence; that the plants had grown to four feet in height; and that Taylor routinely removed the tarp each morning to expose the plants to sunlight and air. The considerable detail supplied by CS 241 about

Taylor and his marijuana growing operation bolsters the informant’s credibility.

“Third, the veracity of the statements CS 241 made to Detective Atteberry is further underscored by the detective’s ability to corroborate the majority of the informant’s story. The warrant itself states that Atteberry, during his surveillance of the property, observed a man matching CS 241’s description of Taylor exit a vehicle and walk toward the front of the house. Detective Atteberry testified that he confirmed that Taylor resided at the address given by CS 241 by looking at the water and tax bills for the property. Detective Atteberry also corroborated CS 241’s story about the plants growing on the property by having the informant place a call to Taylor and confirm that the plants were still there on the day the warrant was issued. The corroboration of CS 241’s statements through Atteberry’s independent investigation proves that the informant was truthful.

“Lastly, we consider whether CS 241 testified at the probable cause hearing. In this case, CS 241 did not testify before the issuing judge; however, as it was pointed out in *United States v. Brack*, 188 F.3d 748 (7th Cir. 1999), of the four factors no one factor is dispositive; each is simply a relevant consideration in the totality of circumstances analysis. Therefore, a deficiency in one factor may be compensated for by a strong showing in another or by some other indication of reliability.

“Detective Atteberry testified about CS 241’s previous assistance to the Bloomington Police Department in drug investigations that ultimately led to multiple arrests and convictions. CS 241’s track record of providing useful information to the

authorities is strong evidence that the informant is a reliable source of information. Therefore, Taylor's argument that Detective Atteberry misrepresented CS 241's credibility in omitting information concerning the informant's criminal background and receipt of cash payments from the Bloomington Police Department fails. Furthermore, an informant's criminality does not in itself establish unreliability. Nor is an affidavit's omission of an informant's motive for providing information necessarily essential to a probable cause determination, especially when the informant is sufficiently reliable that probable cause would have been found even if the motive were included. Since Detective Atteberry corroborated CS 241's statements, even if the affidavit included information regarding CS 241's criminal background and payment history, this information would not have detracted from a finding of probable cause.

"Taylor next takes issue with Detective Atteberry's use of the descriptor 'concerned citizen' to refer to CS 241 in the affidavit. Considering that the phrase 'concerned citizen' appears only once and in an attachment to the warrant affidavit, and CS 241 is first identified in the body of the affidavit as a 'confidential informant/source,' it is unlikely that Detective Atteberry's use of the phrase unduly misled the judge's probable cause determination, especially in light of the corroborated information regarding Taylor's illegal activity that appears throughout the affidavit.

"CS 241's reliability as an informant has been convincingly demonstrated through the informant's first-hand observation of Taylor's illegal activity, detailed statements

to Detective Atteberry that the detective was able to later corroborate, and past involvement with the police in numerous investigations that resulted in arrests and convictions of the targeted suspects. Because we find that the search warrant was supported by probable cause, the district court's denial of Taylor's motion to suppress the evidence of the marijuana plants was proper and is affirmed."

**SEARCH AND SEIZURE;
Affidavit For Search Warrant—
Good Faith Exception**

United States v. McPhearson,
CA6, No. 05-5534

In *United States v. McPhearson*, the affidavit for a search warrant contained the following facts:

Investigator Mathis, who makes oath that he has probable cause for believing and foes believe that Martedis M. McPhearson is in possession of the following described property, to wit: Illegal controlled substances, particularly crack cocaine, records, ledgers, tapes, electronic media and other items which memorialize drug trafficking or proceeds there from contrary to the laws of the State of Tennessee.

His reason for such belief and the probable cause for such belief are that the Affiant has: Investigator Mathis and Wiser, received information from Officer A. Willis that Martedis McPhearson was wanted for simple assault. Officer Willis located McPhearson's vehicle at 228 Shelby Street. Inv. Mathis and Wiser went to 228 Shelby Street and knocked on the door. A black male

answered the door and identified himself to be Martedis McPhearson. Investigators informed McPhearson that they were taking him in custody on the simple assault warrant. McPhearson was searched prior to being placed in the police car for transport to booking. Investigator Wiser discovered in McPhearson's right front pocket a clear plastic bag containing a white chalky substance that is consistent with, and appeared to be crack cocaine. The substance was field tested by Inv. Mathis. The field test showed positive for the presence of cocaine. The substance weighed 6.4 grams. E-911 records revealed that 228 Shelby is the residence of Martedis McPhearson.

A search warrant was obtained and a search of the residence at 228 Shelby Street uncovered distribution quantities of crack cocaine and firearms. McPhearson moved the district court to suppress the evidence seized in the search of his residence. After a suppression hearing, the district court granted the motion, focusing on the affidavit sworn by Mathis and its deficiencies. From the bench, the lower court judge said:

"There are cases that have held that when the defendant is arrested at his residence with a large quantity of drugs, then that is an indication that there may have been drug paraphernalia in the house.

"There are cases that hold that a person who is arrested at his home and gives deceptive answers to the policemen at the time of the arrest about where he had gotten the drugs or where he had been—deceptive answers along with an arrest with drugs in his pocket might be enough for probable cause.

"The problem in this case though is that there's none of that in the affidavit. All the affidavit says, and I've read it carefully several times, basically, is that McPhearson was arrested on a simple assault warrant. He was taken into custody on that warrant. He was searched prior to being placed in the police car, and they discovered in his right front pocket a clear plastic bag containing crack cocaine, which weighed 6.4 grams. And this residence was the residence of McPhearson. And that's all. So I don't have these other issues that the other courts have held to be sufficient.

"The more difficult issue in the *Leon* good-faith exception is where the supporting affidavit was nothing more than a bare-bones affidavit, so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. My reading of this affidavit indicates that it is a bare-bones affidavit. It doesn't offer any indication that drugs or drug paraphernalia were inside the house or that the officer had any reason to believe that they were inside the house. Perhaps if the affidavit had said that based on this officer's experience in drug law enforcement, drug dealers often keep drug paraphernalia in their home, and one with 6.9 grams of crack cocaine likely had it for resale, and I, therefore, think there's something in the house—but none of that's here. It's a bare-bones affidavit; therefore, it's my judgment that the *Leon* good-faith exception does not apply."

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

"The affidavit failed to establish a nexus between McPhearson's residence

and evidence of wrongdoing that would support a finding of probable cause. However, the failure to establish probable cause is not dispositive of whether the affidavit could support a reasonable belief in the validity of the search warrant for purposes of the exclusionary rule.

“We previously found the *Leon* good-faith exception applicable in cases where we determined that the affidavit contained a minimally sufficient nexus between the illegal activity and the place to be searched to support an officer’s good faith belief in the warrant’s validity, even if the information provided was not enough to establish probable cause. The minimal nexus required to support an officer’s good faith belief was not present in this case. The only connection in the affidavit between 228 Shelby Street and drug trafficking was that Jackson police arrested McPhearson at his residence and found crack cocaine in his pocket in a search incident to the arrest. This connection cannot establish the minimal nexus that has justified application of the good-faith exception in cases where the nexus between the place to be searched and the evidence to be sought was too weak to establish probable cause.

“We previously found the *Leon* good-faith exception applicable in cases where we determined that the affidavit contained a minimally sufficient nexus between the illegal activity and the place to be searched to support an officer’s good faith belief in the warrant’s validity, even if the information provided was not enough to establish probable cause. The minimal nexus required to support an officer’s good faith belief was not present in this case.”

“The affidavit did not allege that McPhearson was involved in drug dealing, that hallmarks of drug dealing had been witnessed at his home, such as heavy traffic to and from the residence, or that the investigating officers’ experience in narcotics investigation suggested to them that 6.9 grams of crack cocaine was a quantity for resale. Nor did the affidavit allege anything else tying McPhearson or his home to any criminal activity other than personal possession of crack cocaine (and the simple assault for which he was arrested). Instead, the evidence

in the affidavit connecting the crime to the residence was so vague as to be conclusory or meaningless.. Therefore, we conclude that the district court properly refused to apply the good-faith exception to validate the search because the affidavit was so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable.”

SEARCH AND SEIZURE:
Consent Search – Consent of Co-Tenant

United States v. Parker,
CA7, No. 05-3330, 12/1/06

On November 16, 2004, police officers were called to a house located at 629 East Haney Street in South Bend, Indiana in response to an armed disturbance. The South Bend Police Department had received at least one report of a firearm discharge outside of the house. Upon arrival, officers observed John E. Parker leaving the house. Officer Christopher Bortone, who was not the first officer to arrive at the scene, took Parker into custody and placed him in a squad car. Other officers then conducted a protective sweep of the house but found no one present.

Officer Bortone spoke with Linda Johnson, who was standing across the street from the house. Johnson lived with Parker at 629 East Haney and shared the house with him. According to Officer Bortone, Johnson was very upset. She was shaken and crying but rational. She told Officer Bortone that as she was leaving the house, she heard Parker fire a gunshot. (Johnson had not seen Parker fire the shot because her back was turned to him.) When she heard the gunshot, she turned and saw Parker standing behind her with a sawed off shotgun.

Johnson told Officer Bortone and the other officers that she wanted the gun out of the house and gave the officers permission to search the house for the weapon. Officer Bortone and the other officers searched the house but did not find the shotgun. Johnson then returned to the house with the officers

and instructed them to search the furnace in the basement. In the furnace, the officers discovered a bag containing a Westinfield 30/30 rifle with its butt removed. The officers also found a 12-gauge shotgun shell casing in the kitchen trash can.

Parker does not challenge the fact that Johnson was Parker's co-tenant or that she consented to the search; rather, he asserts that a co-tenant's consent cannot override the objection of a co-tenant who is either present or who is prevented from objecting due to an unlawful arrest. Upon review, the Seventh Circuit Court of Appeals found as follows:

"There is no evidence that Parker was asked for his consent to search the house and that he refused or that he objected in any way to a search of the house. The absence of such evidence removes this case from the purview of the Supreme Court's recent decision in *Georgia v. Randolph*, ___ U.S. ___, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006).

"In *Randolph*, the Supreme Court held that a warrantless search with the permission of one co-tenant is unreasonable and invalid as to a co-tenant who is physically present at the scene and expressly refuses to consent to the search. Both the physical presence of the defendant and his express refusal to consent to the search distinguished *Randolph* from the Court's decision in *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), in which it held that a consent to a warrantless search by someone with common authority over the premises is valid as against an absent, non-consenting person with whom the authority is shared. The Court recognized in *Randolph* the fine line that it was drawing between its holding in that case and its

holding in *Matlock*: ‘If a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.’ *Randolph*, 126 S.Ct. at 1527.

“Here, as in *Matlock*, the police had taken Parker into custody and removed him from the premises before asking a co-tenant for her consent to search the property. Parker conceded the propriety of the police officers conducting a protective sweep of the house and taking Parker into custody, as the officers had arrived at the house in response to a report of a gunshot and needed to ensure the safety of anyone who was in the house.

“Again, as in *Matlock*, Parker was nearby but not invited to take part in the inquiry as to whether the officers could search the house. The officers asked Johnson for her consent, which she gave. The officers then conducted a search of the house pursuant to her consent. Parker does not argue or point to anything in the record that even hints at the possibility that the police had taken him into custody as a mechanism for coercing Johnson’s consent. So Johnson’s consent to the search was valid as against Parker.

“Moreover, Johnson’s consent to the search, the consent of a third party with authority over the premises being searched, was sufficiently attenuated from Parker’s arrest to render the search valid. That Parker was not asked for his consent and did not have an opportunity to object to the search does not render invalid Johnson’s voluntary consent. The district court properly denied Parker’s motion to suppress.”

SEARCH AND SEIZURE; INVESTIGATIVE DETENTION: Development of Probable Cause

United States v. Nanos,
CA8, No. 06-1797, 12/13/06, [Unpublished]

In *United States v. Nanos*, the Court of Appeals for the Eighth Circuit stated that law enforcement officers may briefly detain an individual for investigative purposes if they have a reasonable and articulable suspicion of criminal activity. *United States v. Davis*, 457 F.3d 817, 822 (8th Cir. 2006). In this case, the investigating officer, Christina Nunez, had been told by a Wal-Mart loss-prevention employee that Johnnie Dethrow and a female companion had split up after shopping together and selecting for purchase pseudoephedrine, hydrogen peroxide, and coffee filters—three items Nunez knew to be methamphetamine precursors. Thereafter, Nunez observed: (1) Dethrow and his female companion leave the store separately; (2) Dethrow and his female companion talking on cell phones as Dethrow left the store; (3) Dethrow pacing outside the front doors of the store despite very cold conditions; (4) Dethrow’s female companion taking an extremely long time to check out at a self-check-out register while constantly looking around; and (5) Dethrow and his female companion reuniting at a vehicle parked outside of Wal-Mart; Dethrow was in the driver’s seat and Nanos in the backseat.

Given the totality of the circumstances, the Court stated that Nunez had an objectively reasonable and articulable suspicion of criminal activity sufficient to justify an investigatory stop. See, e.g., *United States v. Ameling*, 328 F.3d 443, 448 (8th Cir. 2003)

(concluding stop of suspect's vehicle was justified after officer learned from reliable source or observed: two suspects who had entered store together split the purchase of four boxes of pseudoephedrine, known to the officer to be a methamphetamine precursor, the suspects did not leave the store together but reunited at one of the suspect's vehicles, and the suspects went to another store and purchased lithium batteries, also known to the officer to be a methamphetamine precursor).

The Court found as follows:

"As part of the investigatory stop, Nunez was entitled to conduct an investigation 'reasonably related in scope to the circumstances which justified the interference in the first place.' *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Nunez acted properly in securing the keys to the vehicle (for officer and bystander safety), in asking Dethrow and his female companion to keep their hands in plain sight (for officer and bystander safety), in calling the vehicle license number in to the police dispatch center (to dispel her suspicion of criminal activity), and in removing Dethrow's female companion from the vehicle and conducting a pat-down search after she refused to keep her hands in plain sight during the brief investigation despite being directed to remain still on two prior occasions (again for officer and bystander safety). See *United States v. Navarrete-Barron*, 192 F.3d 786, 790 (8th Cir. 1999) (During a *Terry* stop, officers can check for weapons and may take any additional steps that are reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.

"The officers had probable cause to arrest Nanos and Dethrow. Coupled with the information provided by reliable sources (trained loss-prevention employees) and their own pre-arrest observations, Nunez and another officer developed probable cause to arrest the occupants of the car after smelling a heavy chemical odor—familiar to the officers as the odor of methamphetamine manufacturing—as Dethrow's female companion exited the vehicle. See, e.g., *United States v. Clayton*, 210 F.3d 841, 845 (8th Cir. 2000) (finding officer developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production)."

SEARCH AND SEIZURE; NO-KNOCK ENTRY:

Video Surveillance Camera

Hart v. State, CR06-412, 12/7/06

In *Hart v. State*, the Arkansas Supreme Court dealt with a circuit court ruling that held that the time passing between the knock and entry was not sufficient but justified the entry on the basis of exigent circumstances.

Judy Hart's home was searched on June 6, 2005, pursuant to a warrant. She was arrested and released on bond on June 8, 2005. A second search warrant was issued and her home was again searched on July 12, 2005, resulting in her arrest for additional drug violations. While the Judgment and Commitment Order in the record reflects convictions for offenses committed on both dates, only the search and convictions arising from events on June 6, 2005, are at issue on this appeal.

Prior to June 6, Officer Tracy Powell obtained information about Hart from a confidential informant. In her affidavit offered in support of the request for the warrant, Powell stated that the confidential informant had been used in the past leading to seven felony drug arrests. Powell additionally stated that police had previously checked information provided by this confidential informant and found it to be true and correct.

The confidential informant told Powell that he had been in Hart's home within the previous twenty-four hours, and that Hart showed him a white powdery substance she represented to be methamphetamine. He also saw electronic scales and large sums of money. He further told Powell that Hart informed him that she was in the business of providing methamphetamine in exchange for property or money. The search warrant was issued based on this affidavit.

Prior to the search, police photographed Hart's home and determined that there were video cameras providing observation of the area outside the residence. At least one camera was pointed toward the door, and the surveillance allowed observation of persons coming to the home. Police had no knowledge of whether the video cameras were functioning or whether there were monitors inside the house. Although photographs of the residence revealed the cameras, the officers executing the search warrant were not told of the cameras prior to executing the warrant.

The warrant was executed at about 4:25 p.m. The windows and doors to the house were blocked so that one could not see in the house. According to Powell, the officers

parked their vehicles a couple of houses down, approached the door as quickly as possible, knocked, and said "Police, search warrant." When police arrived at the door, it was closed, but unlocked.

Officer Wayne Barnett testified that he and the other officers arrived, parked about a half a block away, and they started to the house in a "really quick jog." Barnett testified that he saw the camera as he hit the front door stating:

As soon as I got there I yelled 'Camera,' and one of the other detectives reached over and started to grab it. About that time, or at the same time the door was opened, we had knocked and yelled, 'Police, search warrant,' the camera was coming down and pretty much simultaneous with that the door was unlocked. So, we just went inside.

According to Barnett, when they saw the camera, police felt like they had been compromised.

Further, according to Barnett, about two or three seconds passed between the announcement and entry. Officer Eric Williams testified that the time between announcement and entry was "from a few seconds or so. We were compromised due to the camera." He was concerned that the occupants could be preparing for the police entry or disposing of evidence.

Hart's daughter Jamie Beck testified that, "[t]hey said, 'Fort Smith Police,' and then they knocked three times. They said, 'we have got a warrant,' and they came in immediately." According to a timing experiment performed in court, Beck determined that from announce

to entry was almost the same time. Beck testified that there was not enough time to respond to the announcement. According to her, no one in the house stood up before police entered.

Upon review, the Arkansas Supreme Court found as follows:

“In analyzing whether a no-knock entry was permissible, this court considers the totality of the circumstances. Where the analysis reveals exigent circumstances, the requirement of knock and announce may be excused. The facts of this case are that police obtained information through a reliable informant that Hart was in the business of selling methamphetamine. The evidence from the informant was that he recently saw significant amounts of powdered substance that Hart claimed was methamphetamine. She told him that she was selling it, and he saw a scale and large sums of money. Based on that information, Officer Tracy Powell sought and obtained a search warrant. Upon arrival, police discovered that a video camera was present that appeared to allow occupants of the home to view the front door and approaches to the house. According to Barnett, upon seeing the camera, he felt immediate concern for his safety and the safety of the other officers. Officer Williams expressed concern about the occupants disposing of evidence. Given placement of the camera to allow observation of avenues of access to the home, along with the knowledge that a drug operation was occurring within the home, the blocked windows and door of the home, as well as the condition and location of the home, police were justified in feeling concern for their safety and the disposal of evidence.

“The State argues that the mere presence of the video camera constituted an exigent circumstance allowing the no-knock entry. A blanket holding that the presence of a video camera always provides an exigent circumstance to allow a no-knock entry would be overbroad. Such a holding ignores our duty to examine the totality of the circumstances on a case-by-case basis. Careful judicial review is justified in search and seizure cases to assure that the exigencies of the situation made it imperative that police break and enter a home against the will and knowledge of the occupant.

“Under the totality of the circumstances in this case, we cannot say that the circuit court’s decision was clearly against the preponderance of the evidence.”

SEARCH AND SEIZURE:

Protective Sweep of Barn

United States v. Davis,
CA8, No. 06-1055, 12/28/06

An arrest warrant was issued for Kevin Davis on February 24, 2005, on methamphetamine and marijuana charges. A federal Drug Enforcement Agency (DEA) tactical team, working in conjunction with Iowa law enforcement officers, executed the arrest warrant at Davis’s Iowa farmhouse the morning of March 15, 2005. For approximately two hours prior to execution, officers conducted surveillance of Davis’s house and barn from a vantage point approximately one-quarter of a mile from the house. The officers observed Davis make two trips between his house and barn (which was located approximately 100 yards from the house) on an all-terrain vehicle;

one trip lasted approximately thirty to forty minutes, and the other trip lasted only a few minutes. The officers also noted that three to four vehicles and a small trailer were on the property. The officers had prior intelligence suggesting that other persons could be inside the house and/or barn and that Davis was in possession of firearms.

In executing the warrant, a team of five officers knocked and announced their presence at Davis's front door three times, but received no response. While waiting for a response, one team member shouted the word "compromise," which was the team's code word to indicate that a person had been seen or heard inside the house. At this point, the team broke into the house and conducted a sweep of the house. At the same time the team was entering the house, Davis was exiting the house through the kitchen door—apparently not in an attempt to escape, but rather to cooperate. Davis was immediately spotted and arrested by other officers stationed outside of the house. The team that entered and swept the house was not aware that Davis had exited the house, been spotted by other officers, or been arrested.

During the team's sweep of the house, officers observed several drug-related items in plain view, including: grow lights; water hoses; boxes of plant food and fertilizer; planting pots and blocks; drying shelves; marijuana clippings; and a homemade rifle. During the sweep, Iowa State Patrolman Chad Peters broke into a closet that was padlocked from the outside and discovered rifles and handguns. Davis alleged that another officer opened a toolbox and observed a scale during the sweep, but the government contended that the toolbox remained unopened until

execution of the subsequently issued search warrant.

At the same time the team was entering the house, three officers, including Agent Tony Peterson of the Iowa Division of Narcotics Enforcement, conducted a sweep of the barn. These officers swept the barn for approximately thirty seconds and then went to the house. By that point, Davis had been arrested and the house sweep had been completed. During the barn sweep, the officers observed an item they believed was an HCl generator, but was identified as a weed sprayer after the subsequent search.

After the arrest and sweeps, the officers obtained a search warrant for Davis's property. The affidavit in support of the search warrant contained details of the sweeps, including statements that the firearms in the closet were "observed in plain view" and that officers observed an HCl generator in the barn. Suppression Hr'g Ex. A. The affidavit also contained prior intelligence information indicating Davis's involvement with the growth and sale of marijuana. The affidavit was signed by DEA Special Agent Tyson Hodges, who was not present during the arrest. Agent Peterson had dictated the sweep information to Agent Hodges over the phone; and Agent Peterson had, in turn, received the information that the firearms were observed in plain view from Patrolman Peters.

At trial, the government presented several witnesses who testified about their roles in the operation to manufacture and distribute large quantities of methamphetamine between 2002 and 2004. According to the witnesses, this operation involved the mass

purchase of pseudoephedrine pills that were given to various individuals, including Davis, who in turn manufactured methamphetamine for resale by a seller. Under this arrangement, Davis, with the assistance of another individual, manufactured methamphetamine on at least three separate occasions, each time producing quantities that required the consumption of 10,000 pseudoephedrine pills. After each manufacture, Davis provided the seller with two ounces of methamphetamine while retaining the remaining amounts (Davis also sold methamphetamine directly to several individuals). Davis told one individual that he manufactured four-and-one-half to five ounces of methamphetamine per 5,000 pseudoephedrine pills.

Davis also assisted other individuals in the manufacture of methamphetamine for the seller, either directly or by providing his barn for use as a lab. These manufacturers would pay Davis with methamphetamine or anhydrous in exchange for use of the barn. Additionally, Davis directly purchased between 40,000 and 54,000 pseudoephedrine pills for the manufacture of methamphetamine, which he paid for with either money or methamphetamine. One manufacturer saw Davis in possession of approximately one-quarter pound of methamphetamine on one occasion.

The same witnesses also testified about their roles in the manufacture and distribution of marijuana between 2000 and 2003. According to the testimony, Davis harvested large quantities of marijuana and employed two individuals to trim the marijuana. In return for these services, Davis provided these two individuals with marijuana. Davis harvested between eighty and one hundred

pounds of marijuana during the fall of 2001. Additionally, Davis grew approximately 800 marijuana clone plants per year between 2000 and 2003 and sold them to three sellers in exchange for harvesting services. Finally, Davis sold marijuana to several individuals out of his home.

DEA agents testified that Davis's barn was the type of vented space commonly used to manufacture methamphetamine and that the items found in Davis's house could be used to manufacture marijuana. The government introduced phone records showing calls between the co-conspirator witnesses and Davis. Davis's friends testified that they used methamphetamine and marijuana at Davis's house. A neighbor testified about the high volume of traffic at Davis's house for short periods during the day and night. The jury returned a guilty verdict on all counts.

Davis argues that the protective sweep of his barn was invalid. Because the barn did not immediately adjoin the place of arrest, the question on appeal is whether the officers conducting the sweep possessed a reasonable belief, based on specific and articulable facts, that the barn harbored an individual who posed a danger to the officers. The Eighth Circuit Court of Appeals found as follows:

"We hold that the officers' actions were justified. The protective sweep of the barn was justified by several articulable facts and resulting rational inferences that created a reasonable suspicion that accomplices could pose a threat to the safety of the arresting officers. These facts and inferences include:(1) the surveillance officers observed Davis going to and from his barn twice in two hours, from which they could infer that he had contact

with an accomplice (or accomplices); (2) three to four vehicles and a trailer were parked on the property, which could indicate the presence of accomplices; (3) the officers had prior intelligence of individuals coming to the property to manufacture methamphetamine; (4) prior intelligence indicated that Davis possessed firearms, which could indicate a danger to officer safety; (5) the officers had been informed that Davis associated with dangerous and violent persons, which also could indicate a potential danger to officer safety; and (6) surveillance cameras were attached to the house, which could indicate the heightened possibility of a surprise attack.

“These facts and inferences, especially when considered in the aggregate, would have led a reasonable officer to conclude that individuals posing a legitimate threat to his safety could be lurking in Davis’s barn. While it is true that the barn did not immediately adjoin the area of arrest, the barn was not so far removed from the house that a reasonably prudent officer could dismiss the potential danger. Considering that Davis had made two trips to the barn in two hours and that multiple vehicles were present on the property, the officers could reasonably conclude that accomplices were inside the barn. Combined with the information that Davis possessed firearms, that he associated with violent persons, and that surveillance cameras were mounted outside of the house, it was reasonable for the officers to conclude that their safety was threatened and that a protective sweep of the barn was permissible.”

SEARCH AND SEIZURE; Protective Sweep—Locked Closet

United States v. Davis,
CA8, No. 06-1055, 12/28/06

Another issue presented in *United States v. Davis* was the protective sweep of the home of Davis. During the sweep, Iowa State Patrolman Chad Peters broke into a closet that was padlocked from the outside and discovered rifles and handguns. Davis alleged that another officer opened a toolbox and observed a scale during the sweep, but the government contended that the toolbox remained unopened until execution of the subsequently issued search warrant.

While upholding the protective sweep, the Court stated that breaking into the locked closet exceeded the scope of a lawful protective sweep. The officer who broke the lock acknowledged that nothing he observed indicated that anyone was hiding in the closet and that if someone were actually hiding inside, the individual would have been locked in the closet. Regarding the toolbox, there was conflicting testimony as to whether the officers opened a toolbox containing a scale during the house sweep or whether they waited until after obtaining a search warrant. Opening a small toolbox would exceed the scope of a lawful protective sweep; however, the District Court was not persuaded that the officers did in fact prematurely open this toolbox, therefore the Eighth Circuit Court of Appeals did not state that their finding was erroneous.

SENTENCING:

Sentence Disparity*United States v. Akers,*

CA8, No. 06-2804, 2/9/07, [Unpublished]

In *United States v. Akers*, Celeste Akers, a former federal corrections officer, pleaded guilty to smuggling powder cocaine into a Bureau of Prisons (BOP) correctional facility. On appeal, she now argues her sentence is unreasonable because the sentence creates an unreasonable disparity between defendants convicted of smuggling drugs into correctional facilities versus defendants convicted of selling drugs on the street.

In determining the sanction to be imposed in this matter the court has considered the nature and the circumstances of this offense. It was most disturbing given the fact that Akers was working for the federal government, a prison facility where there are many defendants who need constructive assistance, and here she served as a source for supplying drugs to defendants.

The court considered the following factors: the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense and the need to send a message to others in society who might be inclined to indulge in similar activity.

Two defendants may be convicted of selling/delivering like quantities of drugs, but a defendant who smuggles drugs into a federal correctional facility—especially one who is a federal corrections officer—is guilty of conduct markedly different from selling

drugs on the street. Drug dealing, in all its forms, creates a serious risk of potential harm to individuals and society. When it involves smuggling drugs into a correctional facility, however, additional and unique risks of harm to inmates and corrections staff arise. For obvious reasons, the ability to control inmates and maintain order in a correctional facility is detrimentally affected when prisoners use illegal drugs. Additionally, when a corrections officer facilitates drug smuggling it negatively impacts the perception inmates and society have of corrections staff and the correctional system—thus undermining its overall ability to function effectively. The district court did not act unreasonably when it concluded Akers’s conduct was more egregious than that of a dealer of drugs on the street.

SENTENCING:

Sentence Elevation*Cunningham v. California,*

No. 05-6551, 1/22/07

In *Cunningham v. California*, the United States Supreme Court dealt with California’s Determinate Sentencing Laws. These laws assign to the trial judge, not the jury, authority to find the facts that expose a defendant to an elevated “upper term” sentence. The facts so found are neither inherent in the jury’s verdict nor embraced by the defendant’s plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt.

The question presented was whether California’s Determinate Sentencing Laws, by placing sentence-elevating fact finding within the judge’s providence, violates a defendant’s right to trial by jury safeguarded by the Sixth

and Fourteenth Amendment. The United States Supreme Court held that it does.

SENTENCING:

Former Police Officer

United States v. Austin,
CA5, No. 05-30602, 2/13/07

In *United States v. Austin*, Emil Schullo argued at sentencing that he should receive a lower sentence because “life in prison for a police officer [he is a former police chief of Cicero]...is very difficult,” as the other criminals don’t like police. The Court of Appeals for the Fifth Circuit agreed with the trial judge who rejected the argument, saying that the sad lot of a policeman inmate “is not something that in my view should be considered by way of reducing the sentence that would otherwise be appropriate. There should be no favorable treatment of a dishonest policeman simply because his prison time might be harder than average.”

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