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ARREST:

Use of Summons Mandated in Many Misdemeanor Situations

Johnson v. State, ACA, No. CACR 06-775, 4/4/07

Michael Lee Johnson was convicted by a jury for possession of methamphetamine with intent to deliver, and was sentenced to ten years in prison. Johnson argues that his motion to suppress should have been granted because the contraband was obtained as a result of his illegal arrest.

Johnson is the owner of Big J's Quick Stop convenience store and an adjacent automobile detail shop, both located in Texarkana, Arkansas. Paul Reid Davis testified that he was working as an officer with the Texarkana Police Department on July 29, 2003, when he was conducting a traffic stop near Big J's Quick Stop. During that time, he observed a man named James Washington approach the drive-through window, give the clerk some money, receive a brown paper bag and walk away. After completing the traffic stop, Officer Davis located Washington and asked him about the bag, which was stapled shut. Washington permitted Officer Davis to inspect the bag, which contained a small glass pipe, a Brillo pad, and a lighter. Officer Davis recognized these items as paraphernalia used to smoke crack cocaine.

After consulting with his supervisors and the prosecuting attorney's office on the following day, Officer Davis investigated further by speaking to the clerk at Big J's Quick Stop. According to Officer Davis, the clerk explained that the paper bags were

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kept under the counter and out of view, and that her manager and the store's owner, Michael Johnson, had both told her that the contents of the bags were used to smoke crack cocaine. As a result of his investigation, Officer Davis swore out an affidavit stating facts that gave him reason to believe that Johnson had violated Ark. Code Ann. § 5-64-802, which provides:

(a) Any person who conducts, finances, manages, supervises, directs, or owns any part of an illegal drug paraphernalia business is guilty of a:

(1) Class A misdemeanor for the first offense....

Officer Davis's affidavit stated that he observed thirty or forty brown bags under the counter that had been stapled shut with price tags on them. Officer Davis indicated that the store clerk said she sold many of the brown bags each day. Based on the affidavit, a warrant was issued for Johnson's arrest.

On August 8, 2003, Officer John Van Meter conducted a traffic stop of Johnson's vehicle pursuant to the arrest warrant. A woman named Amanda Spencer was driving the vehicle, and Johnson was in the front passenger's seat. Officer Van Meter received consent to search Spencer's purse, at which time she informed him that the purse contained baggies of methamphetamine that Johnson had tossed in her lap and told her to hide. Upon searching the purse, Officer Van Meter found three blue, clear baggies containing methamphetamine, as well as a bag of marijuana and drug paraphernalia. After a canine sniff, the police also found a small amount of marijuana in the console of

the vehicle. Officer Davis came to the scene of the traffic stop to assist, and he testified that Johnson's vehicle had been recently seen leaving his detail shop and that he had made no stops prior to being pulled over.

The Arkansas Court of Appeals stated that Rule 7.1 of the Arkansas Rules of Criminal Procedure provides, in part:

(a) A judicial officer may issue an arrest warrant for a person who has failed to appear in response to a summons or citation.

(b) In addition, a judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other information, it appears there is reasonable cause to believe an offense has been committed and the person committed it.

If the offense is a misdemeanor a summons should issue unless:

(i) the offense, or the manner in which it was committed, involved violence to a person or the risk or threat of imminent serious bodily injury; or

(ii) it appears that the person charged would not respond to a summons.

The warrant for Johnson's arrest was issued for a misdemeanor violation of owning an illegal drug paraphernalia business. Johnson argues that a summons, and not a warrant, should have been issued under Rule 7.1(b) because the offense was a misdemeanor, did not involve violence, and there was no reason to believe that he would not respond to a summons. On appeal, the Court found as follows:

“We agree that the arrest was illegal. Based on the information obtained by the police, there was reasonable cause to believe that Johnson had committed the offense of owning an illegal drug paraphernalia business. However, the problem lies in the fact that this was a misdemeanor offense, for which a summons, and not an arrest warrant, should have issued under Rule 7.1(b)(i).

“While there are two circumstances upon which an arrest warrant should issue for a misdemeanor offense, neither are present here. There was no information tending to show that Mr. Johnson would not respond to a summons. The State contends that subsection (b)(i) is applicable, asserting that there is always the possibility of drugs being linked with harmful events. But be that as it may, the offense of owning a store that sells drug paraphernalia is in itself not a violent offense and does not involve the risk of imminent serious bodily injury, and we cannot agree that this exception to the summons requirement applies.

“The incriminating evidence obtained as a result of the illegal arrest, including the methamphetamine packets found in the purse and Spencer’s statements about appellant’s criminal conduct, were the fruit of the poisonous tree.

Editor’s Note: *The State of Arkansas on appeal argued a good-faith exception in this case noting that Officer Davis consulted with his supervisor and the prosecuting attorney before obtaining the misdemeanor arrest warrant. It was also argued that drug paraphernalia could be linked with the threat of imminent serious bodily injury. The Arkansas Court of Appeals, notwithstanding the normal judicial respect for*

warrants, rejected this argument and mandated that in nonviolent misdemeanors if it does not involve violence to a person, the risk or threat of serious bodily injury or information that a person charged would not respond to a summons, a summons is the only method of bringing charges.

ARREST: Individual at Open Door; Warrant Requirement

McClish v. Nugent,
CA11, No. 06-11826, 4/11/07

In *McClish v. Nugent*, a civil rights case, one of the issues before the court was whether an arrest warrant is needed when an individual opens the door and is grabbed by a law enforcement officer and pulled outside to affect an arrest. Taking the evidence in the light most favorable to the appellants, the essential facts and procedural history are these:

Edmund Holmberg and Douglas McClish lived in a trailer home in Brooksville, Florida. At approximately 4:00 p.m. on October 13, 2001, Deputies Shawn Terry and Clifford Groves of the Hernando County Sheriff’s Office responded to a complaint from McClish and Holmberg’s neighbors, the Padzurs, who said that Holmberg had been screaming profanities at them across the line separating the two properties. The complaint did not mention McClish, who was not home when the deputies first arrived. The deputies met with the Padzurs and then, stepping over a downed fence separating the two properties, informed Holmberg and McClish of the complaint. The underlying conflict between the neighbors seems to have arisen over a property dispute. McClish believed that the neighbors had stolen part of his property, and

a number of the incidents involving threats or profanity shouted across the property line seem to have occurred when Michael Padzur was clearing brush from the disputed area.

Holmberg met the deputies partway between the property line and his home, and McClish arrived home shortly thereafter. McClish reacted angrily to the presence of the deputies on his property. According to Terry, McClish said, “[T]he sheriff’s office is a bunch of Nazis... This is America. A man can have rights on his own property.” After a conversation that Deputy Groves concluded “wasn’t heading anywhere,” the deputies crossed back over the property line to the Padzur residence. The Padzurs described for the deputies a litany of abuse allegedly suffered at the hands of Holmberg and McClish, including threats to kill members of the family, epithets (“F*****g white trash”), and firing guns into the air along the property line. The Padzurs complained that the Sheriff’s Office had failed to respond to multiple requests for help and that they feared for their safety. Statements taken from various members of the Padzur family included remarks such as “Ed [Holmberg] and Doug [McClish] are getting more violent in their actions and words,” “Doug said he wanted to kill us,” and “I also think that Doug stalks us because at night he drives by are [sic] house at night real slow on his golf cart and stares...” McClish denied making any threats towards the family and denied that he or Holmberg ever fired a weapon to harass the Padzurs.

As the deputies spoke with the Padzurs outside the Padzur home, McClish intermittently observed the interaction from his home. At some point during the interview,

McClish got in his car, drove past the Padzur property, and yelled something out the window of his car. Deputy Terry claimed that McClish shouted, “I’m going to kill you, bitch. You’ll see, bitch.” McClish flatly denied this. Rather, McClish said that he yelled, “If they’re telling you some more lies about us, forget it. She’s a liar,” and that this comment was directed at the officers, not at Mrs. Padzur. Deputy Groves testified only that McClish “yelled something from his vehicle,” and said that he did not observe McClish commit any crimes while the officers were present.

Upon returning to the Sheriff’s Office, Deputy Terry reviewed the records of previous calls to the Sheriff’s Office and concluded—on the basis of his conversation with the neighbors and his personal observations of McClish’s behavior—that he had probable cause to arrest McClish for the crime of aggravated stalking. Although Terry decided to arrest McClish before returning to McClish’s home, he did not attempt to obtain an arrest warrant from a magistrate during the six or seven hours separating the two visits, and he conceded that there were no exigent circumstances to justify a warrantless entry into McClish’s home.

Deputy Terry and Deputy Calderone returned to the area at approximately 11:30 p.m. that same day to arrest McClish. They were accompanied by Deputy Martinez, a K-9 handler, and his dog, Magnum. Terry met briefly with the Padzurs to inform them of his intention to arrest McClish before he proceeded to the McClish/Holmberg property. Vehicular access to the McClish/Holmberg home is limited by an electronic gate posted with “No Trespassing” signs. McClish and Holmberg had given their neighbor,

Lanny Baum, a “clicker” for the gate, which Baum was permitted to use in order to make periodic deliveries of fill dirt onto the Holmberg/McClish property. According to McClish, Baum had express instructions never to give the clicker to anyone else. On the night of the arrest, Baum either opened the gate for the deputies or loaned the device to Deputy Terry.

Shortly before midnight, the deputies drove through the gate to the McClish/Holmberg home. Deputies Terry and Calderone climbed several steps leading to the screened-in porch at the front of the trailer. Deputy Martinez, the K-9 officer, hung back with the dog. Deputies Terry and Calderone entered the screened porch through a sliding screen door and proceeded to the front door of the home. Deputy Terry knocked on the door to the trailer, and at this point the accounts diverge sharply. As the district court characterized the deputies’ version of McClish’s arrest:

Deputy Terry and Deputy Calderone went to the McClish and Holmberg residence to effectuate the arrest of McClish...Deputy Terry...states that he walked onto the front porch and knocked on the front door. McClish opened the door and asked who it was, and Deputy Terry told him that it was the Sheriff’s Office. McClish came out onto the porch and Deputy Terry then placed him under arrest.

Dist. Ct. Order at 5 (emphasis added, citations omitted).

McClish, in contrast, said that he had just gotten out of the shower when he heard a dog barking followed by a knock at the door. He put on a bathrobe, went to the door, and

opened it. McClish averred that Deputy Terry was standing on the porch, directly in front of the open door, and that Terry then reached into the house, grabbed him, and forcibly pulled him out onto the porch. Both Holmberg and McClish unambiguously stated that McClish had been standing completely inside the home at the time.

McClish recounted that after Deputy Terry pulled him out of the trailer, the deputy pushed him down onto a table on the porch and yanked his hands behind his back “quite forcibly.” According to Terry, McClish requested and was denied the opportunity to dress. Terry stated that Holmberg’s exit from the home during McClish’s arrest prevented him from granting McClish’s request to dress, and that he told McClish the county jail would provide clothing. McClish said that Terry then spun him around so that the two men were face-to-face and said, “Remember me?”

After McClish had been handcuffed and was being taken away, Holmberg came outside the home and was subsequently arrested for resisting an officer without violence. Again, the accounts differ. Holmberg claimed that he came out of the home as the deputies were leading McClish to the car and asked McClish what he should do. McClish told him to call a neighbor, Virginia Knight, for help in finding a lawyer. Holmberg added that he had turned around to return to the home and make the call when Deputy Terry told Deputy Calderone to arrest him. Terry and Calderone, by contrast, claim that Holmberg rushed out of the house yelling and screaming, and that he approached them with clenched fists. Deputy Calderone claims that he arrested Holmberg for resisting an officer without

violence only after Holmberg refused several requests to walk away.

The two men were taken to the county jail. Holmberg said that he was sprayed with mace on two occasions, resulting in lasting damage to his eyes, and that he was taunted and baited with a camcorder. McClish recounted that he contracted bronchitis from sitting for hours in a cold cell without any clothes. McClish also claimed, at a deposition taken some four years after the arrest, that he still had scars from injuries suffered during the arrest. Finally, McClish said that the handcuffs were applied too tightly, damaging his wrists and causing him to partially lose function in both hands. McClish's hands and wrists were examined by a doctor, but the study was discontinued because McClish "could not tolerate" the tests. At the time of the arrest, McClish was 75 years old. The charge against McClish was later dismissed. Holmberg entered into pretrial intervention, completed the program, and the charge against him was also dismissed.

On December 17, 2004, Holmberg and McClish sued Hernando County Sheriff Richard Nugent, Deputy Shawn Terry, and Deputy Christopher Calderone in the United States District Court for the Middle District of Florida. The amended complaint contained four counts.

In Count I, McClish and Holmberg sued Sheriff Nugent for state law false arrest and battery.

In Count II, McClish charged Deputy Terry, in his individual capacity, with malicious prosecution, again under state law.

Count III contained McClish's § 1983 claims against Deputy Terry in his individual capacity for unreasonable warrantless arrest under the Fourth Amendment, harassment, arrest without probable cause, and causing his prosecution upon knowingly false testimony in the preparation of the arrest affidavit.

Finally, in Count IV, Holmberg brought a § 1983 claim against Deputies Terry and Calderone alleging harassment, arrest without probable cause, and knowingly using false testimony in the preparation of the arrest affidavit.

On January 20, 2006, the district court entered final summary judgment for Deputy Sheriffs Calderone and Terry on Counts II, III, and IV. The district court also dismissed without prejudice appellants' state law claims against Sheriff Nugent in Count I.

McClish and Holmberg have timely appealed from the order of summary judgment entered on Counts III and IV and the dismissal of the state law claims in Count I under 28 U.S.C. § 1367(c)(3). Upon review, the Eleventh Circuit Court of Appeals found, in part, as follows:

"It is by now clear that an arrest conducted in a public place must be supported by probable cause, but it does not require a warrant. *United States v. Watson*, 423 U.S. 411, 417 & n.6 (1976). An arrest in the home, however, is plainly subject to the warrant requirement; probable cause alone is insufficient. *Payton v. New York*, 445 U.S. 573, 589-90 (1980). McClish does not contest on appeal that Deputy Terry had probable cause to arrest him. Instead, he argues that the arrest was unconstitutional

because Terry was not armed with an arrest warrant when Terry pulled McClish from his home.

“Warrantless entry into the home is unreasonable, subject only to a few jealously and carefully drawn exceptions. Consent provides one exception to the warrant requirement. A second exception to the warrant requirement is made for exigent circumstances, or situations in which the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. Thus, for example, the courts have upheld exigent circumstances entries to break up a violent fight, to prevent the destruction of evidence, to put out a fire in a burning building, to pursue a fleeing suspect, to rescue a kidnapped infant, and to attend to a stabbing victim.

“McClish’s arrest involved neither consent nor exigent circumstances. Viewing the evidence in the light most favorable to McClish, he was pulled from within his home, without warning, as soon as the door was opened. This case simply presents the issue of whether McClish’s rights were violated when Deputy Terry, by reaching through McClish’s open doorway to effect the arrest. when McClish was standing near the doorway but fully within the confines of his home.

“Warrantless entry into the home is unreasonable, subject only to a few jealously and carefully drawn exceptions. Consent provides one exception to the warrant requirement. A second exception to the warrant requirement is made for exigent circumstances, or situations in which the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.”

“Our cases have similarly emphasized Payton’s ‘firm line’ and ‘threshold’ language. In *Knigh v. Jacobson*, 300 F.3d 1272 (11th Cir. 2002), for example, an officer asked the suspect to step outside his apartment and then arrested him. In holding that the arrest did not violate the Fourth Amendment, we applied Payton’s firm line approach in literal and physical terms, not as some literary or metaphorical device. Writing for the panel, Judge Carnes observed:

The rule of Payton is that there is a firm line at the entrance to the house, and absent exigent circumstances that threshold may not reasonably be crossed without a warrant. Officer Jacobson never crossed that threshold or went over the line at the entrance to the house. Payton keeps the officer’s body outside the threshold, not his voice. It does not prevent a law enforcement officer from telling a suspect to step outside his home and then arresting him without a warrant. In that situation, the officer never crosses the firm line at the entrance to the house which is where Payton drew the line.

“In sum, *Payton*, set forth a bright-line rule: warrantless intrusions beyond the ‘zone of privacy’ delimited by the threshold are

presumptively unreasonable. Because Deputy Terry crossed *Payton's* firm line and physically hauled McClish out of his home, the arrest was unlawful. The fact that McClish opened the door does not vitiate the warrant requirement when, as here, McClish remained entirely within the home. McClish neither consented to the arrest, nor were there exigent circumstances involved. In the absence of a warrant, McClish's arrest was, therefore, presumptively unreasonable and in violation of his Fourth Amendment right to be secure in his home."

CIVIL LIABILITY:

Americans with Disabilities Act

Bircoll v. Miami-Dade County,
CA11, No., 3/7/07

In *Bircoll v. Miami-Dade County*, Steven Bircoll, who is deaf, sued Miami-Dade County, Florida, alleging that its law enforcement officers violated Title II of the Americans with Disabilities Act (ADA) and the Rehabilitation Act by discriminating against him because of his disability. Specifically, Bircoll claims that the officers failed to reasonably modify their procedures in order to ensure effective communication with Bircoll. Bircoll is a profoundly deaf individual with no hearing in his left ear and ten percent hearing in his right ear. When wearing his hearing aid, Bircoll has a twenty percent hearing capacity. The case is as follows:

Sergeant Charles Trask, a police officer with the Miami-Dade County Police Department, was in his patrol car and observed Bircoll's car pull forward into the intersection, reverse because of an oncoming car, and

then turn left. Trask pulled Bircoll over at approximately 3:00 a.m. on April 7, 2001. Trask stated that Bircoll failed to stop at both the right turn from the parking lot and at the flashing red light where Bircoll turned left. Trask noted that Bircoll delayed in pulling his vehicle over after Trask activated the overhead lights of his police car.

As Trask approached Bircoll's car, Bircoll rolled down his window. When Trask tried to speak to him, Bircoll informed Trask that he was deaf and had a speech impediment. Either by virtue of his lipreading or hearing aid, or a combination of both, Bircoll was able to respond to Trask during the traffic stop.

Trask asked Bircoll how many drinks he had consumed that night. Bircoll responded that he had not been drinking. When Bircoll spoke, Trask realized that Bircoll had a speech impediment but also noticed that Bircoll responded to sound.

Trask told Bircoll to step out of his car, and Bircoll did. Trask asked Bircoll for his driver's license and registration, which Bircoll provided. Once Bircoll was out of the car, Trask realized that Bircoll smelled of alcohol and had red and watery eyes. Trask offered to communicate by finger spelling in American Sign Language, but Bircoll responded that he did not understand sign language.

Trask contends that he established face-to-face communication with Bircoll, that he spoke loudly, and that Bircoll spoke back in understandable English. Bircoll, however, states that he had difficulty understanding Trask, that there was "little lighting" and it was "almost dark," that Trask was standing five or six feet away, that Trask's heavy

moustache obscured his mouth, and that Trask had to repeat himself “a lot of times.”

Officer Trask administered the Romberg balance exercise, the one leg stand, and the walk and turn tests to Bircoll. Trask concluded that Bircoll was too impaired to drive and arrested him for driving under the influence. Trask told Bircoll he was under arrest for DUI, handcuffed Bircoll, and put him in the police car.

Once Bircoll arrived at the police station, another police officer, Officer Everett Townsend, tried to communicate with him and obtain his consent to take an Intoxilyzer test. Bircoll told Townsend that he was deaf. Townsend sat down on Bircoll’s left side about a foot away. Townsend had two copies of the Intoxilyzer consent form. Townsend read from one form and handed the other form to Bircoll to read. Bircoll does not deny that Townsend read aloud the consent form twice. Bircoll refused to consent to anything.

The Eleventh Circuit Court of Appeals concluded that waiting for an oral interpreter before taking field sobriety tests is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity.

“In DUI stops, as opposed to minor traffic offenses, the danger to human life is high. To protect public safety, Trask had to determine quickly, on the roadside at 3:00 a.m., whether Bircoll was sober enough to drive his car further or whether to impound his car and arrest him. DUI stops involve a situation

where time is of the essence. Forestalling all police activity at a roadside DUI stop until an oral interpreter arrives is not only impractical but also would jeopardize the police’s ability to act in time to obtain an accurate measure of the driver’s inebriation. Moreover, field sobriety exercises are short tests that can be physically and visually demonstrated. DUI stops do not involve lengthy communications and the suspect is not asked to give a written statement. In sum, field sobriety tests in DUI arrests involve exigencies that necessitate prompt action for the protection of the public and make the provision of an oral interpreter to a driver who speaks English and can read lips per se not reasonable.

“What steps are reasonably necessary to establish effective communication with a hearing-impaired person after a DUI arrest and at a police station will depend on all the factual circumstances of the case, including, but not limited to:

(1) the abilities of, and the usual and preferred method of communication used by, the hearing-impaired arrestee;

(2) the nature of the criminal activity involved and the importance, complexity, context, and duration of the police communication at issue;

(3) the location of the communication and whether it is a one-on-one communication; and

(4) whether the arrestee’s requested method of communication imposes an undue burden or fundamental change and whether another effective, but non-burdensome, method of communication exists.

“In many circumstances, oral communication plus gestures and visual aids or note writing will achieve effective communication. In other circumstances, an interpreter will be needed. There is no bright-line rule, and the inquiry is highly fact-specific. Thus, we examine all factual circumstances to ascertain whether Townsend achieved effective communication with Bircoll. As to his abilities and usual communication mode, Bircoll has a twenty percent hearing capacity when using his hearing aid and relies on lip reading to communicate. Bircoll can understand about half of what is said when he is lip reading. He can also read, write, and speak in English.

“The police communication at issue—the consent warning—although important, is short and not complex. Moreover, Bircoll had some knowledge of what Townsend sought to communicate to him. In a deposition, when questioned about the Intoxilyzer test, Bircoll testified that ‘I know that if you fail the sobriety test, you have to do the breathalyzer test, yes.’ Bircoll also already knew that if he refused the Intoxilyzer, he would lose his license for a year.

“The communication at issue was one-on-one, with Townsend sitting next to Bircoll on a bench. Townsend read the consent form aloud to Bircoll twice. Townsend spoke to Bircoll in lighted conditions. Moreover, an effective, non-burdensome method of communication existed as to this short implied consent warning. Bircoll can read English, and Townsend gave him a copy of the form to read. Townsend thus accommodated Bircoll by giving him written material Bircoll’s own failure to read what Townsend provided him does not constitute discrimination.

“We recognize that there are factual issues about whether Bircoll requested an interpreter ‘many times’ at the station and whether Townsend was facing, or turning away from, Bircoll. Nonetheless, Bircoll admits that Townsend read the form aloud twice and gave him a copy. Even assuming the facts most favorable to Bircoll, we conclude that, under all the circumstances here and especially given Bircoll’s admitted prior knowledge, Townsend established effective communication with Bircoll regarding the consent warning and Intoxilyzer test. Accordingly, Miami-Dade did not violate the ADA at the police station.

CIVIL LIABILITY:

High Speed Pursuit

Scott v. Harris, No. 05-1631, 4/30/07

In *Scott v. Harris*, the United States Supreme Court considered whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist’s car from behind. Put another way: **Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist’s flight from endangering the lives of innocent bystanders?**

In March 2001, a Georgia county deputy clocked Victor Harris’ vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that Harris should pull over. Instead, Harris sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding

85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Deputy Timothy Scott heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, Harris pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Harris evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following Harris' shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop. Having radioed his supervisor for permission, Scott was told to go ahead and take him out. Instead, Scott applied his push bumper to the rear of Harris' vehicle. As a result, Harris lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Harris was badly injured and was rendered a quadriplegic.

Harris filed suit against Deputy Scott and others under 42 U. S. C. §1983, alleging a violation of his federal constitutional rights by the use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue

of qualified immunity turns which present sufficient disagreement to require submission to a jury." On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow Harris' Fourth Amendment claim against Scott to proceed to trial. Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee v. Garner*, 471 U. S. 1 (1985), and that the use of such force in this context "would violate Harris' constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated Harris' Fourth Amendment rights." The Court of Appeals further concluded that the law as it existed at the time of the incident was sufficiently clear to give reasonable law enforcement officers fair notice that ramming a vehicle under these circumstances was unlawful. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. The United States Supreme Court granted certiorari and now reverses, finding as follows:

"In resolving questions of qualified immunity, courts are required to resolve a threshold question: 'Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?' This must be the initial inquiry. *Saucier v. Katz*, 533 U. S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, the next, sequential step is to ask whether the right was clearly established in light of the specific context of the case. We therefore turn to the threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

“The first step in assessing the constitutionality of Scott’s actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and Harris’ version of events (unsurprisingly) differs substantially from Scott’s version. There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by Harris and adopted by the Court of Appeals. For example, the Court of Appeals adopted Harris’ assertions that, during the chase, there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle. Indeed, reading the lower court’s opinion, one gets the impression that Harris, rather than fleeing from police, was attempting to pass his driving test. The Court of Appeals stated:

Taking the facts from the non-movant’s viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motor-way had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

“The videotape tells quite a different story. There we see Harris’ vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

“With regard to the factual issue, whether Harris was driving in such fashion as to endanger human life, his version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

“Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and Harris nowhere suggests this was not the purpose motivating Scott’s behavior. Thus, in judging whether Scott’s actions were reasonable, we must consider the risk of bodily harm that Scott’s actions posed to Harris in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that Harris posed an actual and imminent threat to the lives of any

pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. It is equally clear that Scott's actions posed a high likelihood of serious injury or death to Harris—though not the near certainty of death posed by, say, shooting a fleeing felon in the back of the head, see *Tennessee v. Garner*,

471 U.S. 1 (1985) or pulling alongside a fleeing motorist's car and shooting the motorist, see *Vaughan v. Cox*, 343 F.3d 1323, 1326–1327 (CA11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person?

“We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was Harris, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing Harris for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.

“...A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”

“‘But wait,’ says Harris. ‘Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit?’ We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming Harris off the road—was certain

to eliminate the risk that Harris posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to Harris that the chase was off, and that he was free to go. Had Harris looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Given such uncertainty, Harris might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.

“Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses

the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by recklessness. Instead, we lay down a more sensible rule: *A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.*

"The car chase that Harris initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing Harris off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed."

CIVIL LIABILITY:

Vienna Convention Violation; Alien May Sue Under Section 1983

Jogi v. Voges, CA7, No. 01-1657, 3/12/07

In *Jogi v. Voges*, the issue presented was whether a foreign national who is not informed of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations has any individual remedy available to him in a United States court. The Vienna Convention confers on an individual the right to consular assistance following arrest.

The Court of Appeals for the Seventh Circuit concluded that the Vienna Convention, Article 36, confers individual rights on detained nationals. Accordingly, the Seventh Circuit found that a claim can be pursued

under 42 U.S.C. § 1983 for violation of the Vienna Convention notification procedure.

EMPLOYMENT LAW:

Mandatory Retirement

Minch v. City of Chicago,
CA7, No. 05-2702, 5/14/07

In *Minch v. City of Chicago*, the Court of Appeals for the Seventh Circuit stated that a Chicago ordinance compelling city firefighters to retire at age 63 does not constitute age discrimination under the Age Discrimination Employment Act (ADEA), nor does it violate the firefighters' due process rights.

SEARCH AND SEIZURE:

Automobile Search; Belton Search May Proceed Arrest of Vehicle Occupant

United States v. Powell,
DCC, No. 05-3047, 4/17/07

One evening at approximately 9:00 p.m., three Metropolitan Police officers were riding in an unmarked police car in an industrial area, when they saw Ronald Powell and another man standing and urinating to the rear of and a "few feet" from a parked car. The officers pulled their vehicle toward the men and came to a stop. Officers Masalona and Trudy got out and walked toward the two men while Officer Jones, who had seen a third person sitting in the front passenger seat, approached the driver's side of the car. As the officers approached, one of the men outside the car said, "We were just going to a friend's house and we had to go, man. We had to go."

Officers Masalona and Trudy detained the two men outside the car because “they were going to be placed under arrest” for urinating in public. Meanwhile, Officer Jones leaned through the open window on the driver’s side of the vehicle and shined his flashlight inside the car, where he saw three clear cups containing a yellowish liquid, two in the cupholders of an armrest in the front seat and one in an armrest in the back seat. Based upon the smell, Officer Jones concluded the liquid was “alcoholic in nature.” Upon cross-examination Officer Jones conceded that “a portion” of his “head and...upper body” were inside the vehicle when he first saw the cups.

Officer Jones directed the passenger to get out of the car with the intention of arresting him for possession of an open container of alcohol in a vehicle upon a public way. He then searched the vehicle and found on the back seat a capped cognac bottle with a “small portion” of cognac inside and a backpack. Inside the backpack he found an Intertech 9 semi-automatic pistol with 23 rounds in the magazine and one round in the chamber, as well as a certificate of title for the vehicle and a credit card receipt, both in the name of Ronald Powell. Upon finding the gun, Officer Jones said to Officer Masalona, “Hook him up,” which was the officers’ signal “that something serious is happening right now” and the suspects should be “placed in handcuffs.” The men were taken into custody and variously charged with a firearms violation, possession of an open container of alcohol, and urinating in public. Powell moved to suppress the evidence contending that this could not be a plain view search since Officer Jones did not see the three cups containing alcohol until he leaned through the window and shined his light

inside the car. Powell also contended that this could not be a search of a vehicle incidental to arrest since this exception to the warrant requirement of the Fourth Amendment to the Constitution of the United States does not apply to a search conducted prior either to the announcement of a formal arrest or to the suspect being taken into custody. Upon review, the United States District Court for the District of Columbia found as follows:

“In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Supreme Court held the police may search a suspect whom they have probable cause to arrest if the formal arrest follows quickly on the heels of the challenged search. The Court was quite clear in stating that, assuming such proximity in time, it is not particularly important that the search preceded the arrest rather than vice versa. This court applied the Supreme Court’s clear teaching in *United States v. Riley*, 351 F.3d 1265, 1269 (D.C. Cir. 2003) (where ‘police had probable cause to arrest’ before search, it was “of no import that the search came before the actual arrest.’)

“Applying the teaching of *Rawlings* to the facts of this case, we must uphold Officer Jones’s search of the car. Powell acknowledges the officers had probable cause to arrest him and his companion for urinating in public before they searched his car. Indeed, Officer Jones testified that the officers detained the two men because they were going to be placed under arrest for urinating in public. Immediately following the search, the two were indeed handcuffed and formally placed under arrest for public urination as well as for the firearms violation brought to light by the search. As in *Rawlings*, that is, ‘the formal arrest followed quickly on the heels of the challenged search.’ Therefore, as in *Riley*,

because the police had probable cause to arrest before the search, the search was valid as one incident to arrest.

“Because we conclude the search in this case was ‘incident to an arrest,’ as the Supreme Court has explicated that phrase, we must go on to answer the question whether the officers had reason to believe Powell or his companion was a ‘recent occupant’ of the vehicle. (*New York v. Belton*, 453 U.S. 454 (1981), allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both ‘occupants’ and ‘recent occupants.’) We conclude they did. Although Officer Jones testified he did not ‘know’ Powell or the other man was a recent occupant, a reasonable police officer would have had good reason to believe as much: indeed, the only reasonable inference, upon finding two men urinating at night in an industrial area a ‘few feet’ from a car, the only occupant of which was sitting in a passenger seat, is that the two men were recent occupants of the car.”

**SEARCH AND SEIZURE:
Global Positioning Device;
Tracking Movement of a Vehicle**

United States v. Garcia,
CA7, No. 06-2741, 2/2/07

In this case, the issue before the Seventh Circuit Court of Appeals was whether evidence obtained as a result of a tracking device attached to a car should have been suppressed as the fruit of an unconstitutional search. The case is as follows:

Bernardo Garcia had served time for methamphetamine offenses. Shortly after his release from prison, a known user of meth reported to police that Garcia had brought meth to her and her husband, consumed it with them, and told them he wanted to start manufacturing meth again. Another person told the police that Garcia had bragged that he could manufacture meth in front of a police station without being caught. A store’s security video system recorded him buying ingredients used in making the drug.

From someone else, the police learned that Garcia was driving a borrowed Ford Tempo. They went looking for it and found it parked on a public street near where Garcia was staying. The police placed a GPS (global positioning system) “memory tracking unit” underneath the rear bumper of the Ford. Such a device (which is pocket-sized, battery-operated, and commercially available for a couple of hundred dollars) sends satellite signals that indicate the device’s location. So when the police later retrieved the device (presumably when the car was parked on a public street, as Garcia does not argue that the retrieval involved a trespass), they were able to learn the car’s travel history since the installation of the device. One thing they learned was that the car had been traveling to a large tract of land. The officers obtained the consent of the tract’s owner to search it and discovered equipment and materials used in the manufacture of meth. While the police were on the property, Garcia arrived in a car that the police searched, finding additional evidence.

The police had not obtained a warrant authorizing them to place the GPS tracker on Garcia’s car. The district judge, however,

found they had had a reasonable suspicion that Garcia was engaged in criminal activity, and she ruled that reasonable suspicion was all they needed for a lawful search. Garcia argues that they needed not only probable cause to believe the search would turn up contraband or evidence of crime, but also a warrant. The government argues that they needed nothing because there was no search or seizure within the meaning of the Fourth Amendment. Upon review, the Seventh Circuit Court of Appeals found as follows:

“The defendant’s contention that by attaching the memory tracking device the police seized his car is untenable. The device did not affect the car’s driving qualities, did not draw power from the car’s engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car’s appearance, and in short did not ‘seize’ the car in any intelligible sense of the word. But was there a search? The Supreme Court has held that the mere tracking of a vehicle on public streets by means of a similar though less sophisticated device (a beeper) is not a search. *United States v. Knotts*, 460 U.S. 276, 284-85 (1983). But the Court left open the question whether installing the device in the vehicle converted the subsequent tracking into a search. *Id.* at 279 n. 2; see also *United States v. Karo*, 468 U.S. 705, 713-14 (1984). The courts of appeals have divided over the question. This court has not spoken to the issue.

“If a listening device is attached to a person’s phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search and a warrant is required. But if police follow a car around, or observe its route by

means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search. Well, but the tracking in this case was by satellite. Instead of transmitting images, the satellite transmitted geophysical coordinates. The only difference is that in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.

“There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking. “This cannot be the end of the analysis, however, because the Supreme Court has insisted, ever since *Katz v. United States*, 389 U.S. 347 (1967), that the meaning of a Fourth Amendment search must change to keep pace with the march of science. So the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry was held in *Kyllo v. United States*, 533 U.S. 27, 34 (2001), to be a search within the meaning of the Fourth Amendment. But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally

governed by the Fourth Amendment. The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.

“But while the defendant’s efforts to distinguish the GPS case from the satellite-imaging and lamppost-camera cases are futile, we repeat our earlier point that there is a difference (though not the difference involved in *Kyllo*) between all three of those situations on the one hand and following suspects around in a car on the other. The new technologies enable, as the old (because of expense) do not, wholesale surveillance. One can imagine the police affixing GPS devices to thousands of cars at random, recovering the devices, and using digital search techniques to identify suspicious driving patterns. One can even imagine a law requiring all new cars to come equipped with the device so the government can track all vehicular movement in the U.S. It would be premature to rule that a program of mass surveillance could not possibly raise a question under the Fourth Amendment—that it could not be a search because it would merely be an efficient alternative to hiring another 10 million police officers to tail every vehicle on the nation’s roads.

“Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty first century than they were in the eighteenth. *United States v. Knotts*, *supra*, 460 U.S. at 283-84. There is

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

a tradeoff between security and privacy, and often it favors security. Even at the height of the ‘Warren Court,’ the Court held over a strong dissent by Justice Brennan that the planting of an undercover agent in a criminal gang does not become a search

just because the agent has a transmitter concealed on his person, even though the invasion of privacy is greater when the suspect’s words are recorded and not merely recollected. *Lopez v. United States*, 373 U.S. 427, 439 (1963). Yet Chief Justice Warren, while concurring in the judgment in *Lopez*, remarked ‘that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system.’ These ‘fantastic advances’ continue, and are giving the police access to surveillance techniques that are ever cheaper and ever more effective. Remember the beeper in *Knotts*? Officers installed a beeper inside a five gallon container of chloroform and followed the car in which the chloroform had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper. *United States v. Knotts*, *supra*, 460 U.S. at 278. That was only a modest improvement over following a car by means of unaided human vision.

“Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues that fortunately we need not try to resolve in this case. So far as appears, the police of Polk County (a rural county in northwestern Wisconsin), where the events of this case unfolded, are not engaged in mass surveillance. They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant. Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search. Cf. *Zurcher v. Stanford Daily*, *supra*, 436 U.S. at 566.”

Editor's Note: *While the Federal Courts of Appeal are split on this issue, the recommended course of action is to obtain a search warrant prior to placing a GPS tracking device on a suspect vehicle.*

SEARCH AND SEIZURE:

Probable Cause; Affidavit for Computer Search for Child Pornography

United States v. Kelley,
CA9, No. 05-10547, 3/1/07

Kenneth Kelley's account on America On Line (AOL) was searched in December 2004, and his home computer was searched in February 2005. This appeal concerns the February 2005

search of his computer, but Kelley's problems stem from an investigation by German police officers into the activities of a German citizen, Herman Mumenthaler, in 2002. Executing a search warrant on November 11 of that year, they found 25 outgoing and 450 incoming e-mails on Mumenthaler's computers that contained child pornographic attachments. "Gay1dude" was listed as a recipient on four of these e-mails that had attachments depicting child pornography. It was confirmed that "Gay1dude" was a screen name that Kenneth Michael Kelley used for his e-mail account on AOL. He also used other screen names, including "KKEL924," "Mickeydice," "Rockenwry," "Sirfreelancelot," "Coppalozoeetrope," "HIGH5JIVELIVE," and "K MICHAEL KELLEY." Acting on this information, American authorities sought, and obtained, a warrant that was issued on December 2, 2004, to search the content of Kelley's AOL account. This search revealed 500 images of child pornography that Kelley sent or received. Kelley's motion to suppress evidence obtained in this search was granted June 17, 2005, and that ruling has not been appealed.

Meanwhile, on February 9, 2005, the government applied for a second warrant to search Kelley's residence, including his computer, for child pornography. The affidavit in support was made by a Special Agent with the United States Department of Homeland Security, United States Immigration and Customs Enforcement (ICE), assigned to the office of the Special Agent in Charge, San Francisco, California. It describes the German child pornography investigation involving Mumenthaler and summarizes the contents of Kelley's AOL account from the December 2, 2004 search.

The affidavit also relates details of a separate child pornography trafficking investigation that originated in Wichita, Kansas, involving Ronald D. Hutchings. According to the affidavit, on September 10, 2004, ICE agents served a search warrant on AOL for Hutchings's e-mail accounts, which turned up evidence that Kelley and Hutchings each received five e-mails with 38 attachments from an individual using the screen name "Badatt178" on August 10 and 15, 2004. Of the 38 attachments, 36 were image files (JPEGs) and two were movie files (MPEGs). Each depicted images of child pornography. In addition, the affidavit generally describes how computer connections to the Internet, and e-mail, work. Based on his training and experience, the affiant avers that persons whose sexual objects are minors collect sexually explicit material for their own sexual gratification and fantasy; that they tend to possess and trade this material in a clandestine manner; and that they often assemble lists or addresses of persons with similar sexual interests that may have been generated by personal contact or through advertisements in various publications. The affidavit further states that such persons almost always maintain their material at home or some other secure location where it is readily available, and rarely, if ever, dispose of the collection. Finally, the affidavit explains that the computer has become one of the preferred methods of distribution of pornographic materials.

A magistrate judge authorized the warrant on February 19, 2005. Forensic examination of Kelley's computer turned up numerous images of child pornography, in both picture and movie formats, depicting young boys engaged in sexual acts with adult males.

Kelley again moved to suppress, maintaining that the affidavit accompanying the February 9, 2005 application, without the evidence seized from his AOL account pursuant to the December 2, 2004 warrant, failed to establish probable cause. Although finding it a close call, the district court agreed. The court reasoned that the excised affidavit did not explain how or where the e-mails, originating from unidentified sources, ended up on the computers of two traffickers. It observed that no volitional act is required by the owner of an e-mail account for that account to receive e-mails, and conversely that it is almost impossible to prevent someone else from sending unwanted e-mail. Therefore, the court held, something more than proof of receipt or opening an e-mail is required to establish probable cause that the recipient is in actual possession of contraband contained in an e-mail attachment. As it was unable to conclude that there was a direct connection between Kelley and known traffickers, and evidence of his intent, or solicitation, or actual opening of the attachments was critical, but missing, the court granted Kelley's motion to suppress.

The government appeals, arguing that the district court improperly applied a bright-line rule for what is required to establish probable cause in a case involving possession of child pornography, whereas the totality of the circumstances, which it submits is the proper test, allows the reasonable inference that Kelley wanted to receive the e-mails.

Upon review, The Court of Appeals for the Ninth Circuit reversed concluding that it was fairly probable that child pornography Kelley willingly received would be found on his computer:

“Since the district court’s decision in this case, this court has made clear that probable cause to search a computer for evidence of child pornography turns on the totality of the circumstances, including reasonable inferences. *United States v. Gourde*, 440 F.3d 1065, 1071 (9th Cir. 2006) (en banc). In this case, there is a reasonable inference from facts set out in the affidavit that Kelley was not an accidental recipient of emails with attachments containing illicit child pornography.”

SEARCH AND SEIZURE:

Standing to Object to a Search

Duvall v. State, ACA, No. CACR06-653, 5/2/07,
[Unpublished]

In *Duvall v. State*, the Arkansas Court of Appeals stated that the rights secured by the Fourth Amendment are personal in nature. Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds.

A person who is aggrieved by an illegal search and seizure only through introduction of evidence secured by the search of a third person’s premises or property has not had any of his Fourth Amendment rights violated; his rights are violated only if the challenged conduct invaded his own legitimate expectation of privacy, rather than that of a third party.

SEARCH AND SEIZURE:

Stop and Frisk; Manipulation of Clothing

United States v. Askew,
DCC, No. 04-3092, 4/6/07

In *United States v. Askew*, the United States Court of Appeals for the District of Columbia Circuit stated that when the police have reasonable suspicion that a person committed, is committing, or is about to commit a crime, the officers may forcibly stop that individual. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968). During the *Terry stop*, the officers may briefly take certain reasonable investigative steps—including questioning the suspect and conducting identification procedures such as fingerprinting and “show-ups” (in a show-up, the police have a witness or victim look at the suspect). See *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 185 (2004); *Hayes v. Florida*, 470 U.S. 811, 817 (1985); *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981).

In this case, the police learned that an armed robbery had just occurred on a street in Washington, D.C. Shortly afterward, an officer saw Paul Askew walking on a nearby street. Based on reasonable suspicion that Askew had committed the armed robbery, the officer stopped him. The police then brought the robbery victim to the scene of the stop and conducted a showup. The officers unzipped Askew’s outer jacket during the show-up so that the victim could see Askew’s clothing—that step, the police believed, could assist the witness’s identification. Unzipping the outer jacket ultimately led the officers to discover that Askew was illegally carrying a gun. Askew’s primary argument to the Court is that the initial unzipping of his

jacket was an unreasonable search. The Court disagreed. In a show-up during a *Terry* stop, the Fourth Amendment permits police officers to reasonably maneuver a suspect's outer clothing—such as unzipping an outer jacket so a witness can see the suspect's clothing—when taking that step could assist a witness's identification.

**SEARCH AND SEIZURE:
Stop and Frisk; Anonymous Tip;
Officer's Knowledge of Criminal Activity**

United States v. Lindsey,
CA11, No. 05-11273, 3/27/07

In February 2004, authorities received a 911 call from a person identifying himself as "Davis" who reported that four black males were loading guns and putting them in a large white SUV. The SUV was parked behind a Mobil gas station across from a branch of Wachovia Bank. Detective Jason O. Houston and other members of the West Palm Beach Police Department had been investigating a recent series of armed bank robberies in the area. The robberies involved three to four black males who had entered banks with assault type weapons and who drove large SUV-type vehicles. The police also had knowledge of two robberies committed by two black males using handguns in the parking lot of this very same branch of Wachovia Bank.

Believing that another robbery was imminent, several officers—including Houston and Sergeant Martin Tierney—responded to the 911 call. Tierney, the first officer on the scene, observed a white Ford Excursion (a large SUV) parked behind the gas station. As Tierney pulled into the station, he observed

the SUV pull out of its parked location. Tierney then radioed the other officers that the vehicle was on the move. But instead of leaving the gas station, the SUV pulled around to a gas pump and stopped. Then, four black men, including Anthony Lindsey, exited the vehicle. Three of the men walked toward the station's convenience store, and the fourth opened the hood of the vehicle.

Sergeant Tierney then exited his vehicle and drew his shotgun while yelling at the men to get on the ground. Other officers converged on the gas station and secured the scene. Turning his attention to Lindsey, who had reached the door of the convenience store, Tierney ordered Lindsey to lay down, to which Lindsey responded, "What did I do?" After five to eight seconds, Lindsey submitted to Tierney's request. Officers then handcuffed each of the four men and placed them in police vehicles. Then, officers observed an armored vehicle pulling up to the bank and guards leaving the bank carrying satchels of money. According to Tierney, employees of the gas station told officers that the SUV had been parked behind the building for two hours.

Police then examined the SUV to ensure that no armed persons were inside. After identifying each of the men and checking their backgrounds, the officers learned that all four were convicted felons. Three of the men, however, had no outstanding warrants and were released at the scene. Lindsey was arrested for a parole violation and a subsequent vehicle search by search warrant revealed a .38 caliber pistol and ammunition. Lindsey was convicted of felony in possession of a firearm.

Lindsey specifically maintains that the police lacked reasonable suspicion of illegal activity before stopping and detaining him and failed to make reasonable inquiries to determine whether criminal activity was afoot. He also argues that, under *Florida v. J.L.*, 120 S. Ct. 1375 (2000), the police failed to verify information from an “anonymous” tip before acting on the information.

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

“To have reasonable suspicion, an officer conducting a stop must have a reasonable, articulable suspicion based on objective facts that the person has engaged in, or is about to engage in, criminal activity. The reasonable suspicion must be more than an inchoate and unparticularized suspicion or hunch. While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. Also, a reasonable suspicion of criminal activity may be formed by observing exclusively legal activity even if such activity is seemingly innocuous to the ordinary citizen. We examine the totality of the circumstances to determine

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

whether the police had a particularized and objective basis for suspecting legal wrongdoing.

“We also recognize that the police may draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. To have reasonable suspicion based on an anonymous tip, the tip must be reliable in its

assertion of illegality, not just in its tendency to identify a determinate person. The issue is whether the tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.

“The totality of the circumstances in this case demonstrates that the police had more than an inchoate and unparticularized suspicion based on an anonymous tip. The tip was consistent with specific facts already discovered during the ongoing investigation into several bank robberies in the area involving three to four black males driving large SUVs. The police also knew of two armed robberies of patrons committed by two black males outside the very branch of Wachovia Bank that was across from the location of Lindsey’s SUV. This independent knowledge corroborated the 911 caller’s

assertion that the men in the SUV were loading guns into the vehicle across from the bank. In addition, when Officer Tierney's vehicle came into view at the gas station, the SUV's sudden movement from its parked location over to a gas pump gave rise to further suspicion. Thus, rather than reacting to a mere hunch, the officers engaged in a method of investigation that was likely to confirm or dispel their suspicions quickly, and with a minimum of interference, as dictated by a potentially dangerous situation."

SECOND AMENDMENT:

Gun Control

Parker v. District of Columbia,
CADDC, No. 07-7041, 3/9/07

In *Parker v. District of Columbia*, the Court of Appeals for the District of Columbia dealt with an appeal by six residents of the District challenging the District of Columbia Code, which generally bars the registration of handguns, which prohibits carrying a pistol without a license (insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home), and requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device. Shelly Parker, Tracey Ambeau, Tom G. Palmer, and George Lyon want to possess handguns in their respective homes for self-defense. Gillian St. Lawrence owns a registered shotgun, but wishes to keep it assembled and unhindered by a trigger lock or similar device. Finally, Dick Heller, who is a District of Columbia special police officer permitted to carry a handgun on duty as a guard at the Federal Judicial Center, wishes to possess one at his home. Heller applied for

and was denied a registration certificate to own a handgun. Essentially, the appellants claim a right to possess what they describe as "functional firearms," by which they mean ones that could be "readily accessible to be used effectively when necessary" for self-defense in the home. They are not asserting a right to carry such weapons outside their homes. Nor are they challenging the District's authority *per se* to require the registration of firearms. Upon review, the District of Columbia Court of Appeals found as follows:

"The Second Amendment to the United States Constitution reads as follows:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

"We are told by the District that the Second Amendment was written in response to fears that the new federal government would disarm the state militias by preventing men from bearing arms while in actual militia service, or by preventing them from keeping arms at home in preparation for such service. Thus the Amendment should be understood to check federal power to regulate firearms only when federal legislation was directed at the abolition of state militias, because the Amendment's *exclusive* concern was the preservation of those entities. At first blush, it seems strange that the able lawyers and statesmen in the First Congress would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as 'Congress shall make no law disarming the state militias' or 'States have a right to a well-regulated militia.'

“The District’s argument—as strained as it seems to us—is hardly an isolated view. In the Second Amendment debate, there are two camps. On one side are the collective right theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed fighting forces. On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use. To these individual right theorists, the Amendment guarantees personal liberty analogous to the First Amendment’s protection of free speech, or the Fourth Amendment’s right to be free from unreasonable searches and seizures.

“It is asserted that the Second Amendment was written for the exclusive purpose of preserving state militias, and individuals cannot avail themselves of the Second Amendment today. The latter point is true either because, as the District appears to argue, the ‘Militia’ is no longer in existence, or, as others argue, because the militia’s modern analogue, the National Guard, is fully equipped by the federal government, creating no need for individual ownership of firearms.

“Only the Fifth Circuit has interpreted the Second Amendment to protect an individual right. State appellate courts, whose interpretations of the U.S Constitution are no less authoritative than those of our sister circuits, offer a more balanced picture. The U.S. Department of Justice recently adopted the individual right model. See *Op. Off. of Legal Counsel, ‘Whether the Second Amendment*

Secures an Individual Right’ (2004) available at www.usdoj.gov/olc/secondamendment2.pdf. The great legal treatises of the nineteenth century support the individual right interpretation as does Professor Laurence Tribe’s leading treatise on constitutional law. Because we have no direct precedent—either in this court or the Supreme Court—that provides us with a square holding on the question, we turn first to the text of the Amendment.

“In determining whether the Second Amendment’s guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right—‘the people.’ That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation. We also note that the Tenth Amendment—‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people’—indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between ‘the people,’ on the one hand, and ‘the states,’ on the other. The natural reading of ‘the right of the people’ in the Second Amendment would accord with usage elsewhere in the Bill of Rights.

“The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone’s observation, which had influenced thinking

in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government.

"We think the Second Amendment prefatory language announcing the desirability of a well regulated militia—even bearing in mind the breadth of the concept of a militia—is narrower than the guarantee of an individual right to keep and bear arms. The Amendment does not protect 'the right of militiamen to keep and bear arms,' but rather 'the right of the people.' The operative clause, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. Again, we point out that if the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. We therefore take it as an expression of the drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit—and thus the most appropriate to express in a political document.

"To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of

a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.

"The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ('[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech...'). Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law. We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable "to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror..." *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921). And as we have noted, the United States Supreme Court has observed that prohibiting the carrying

of concealed weapons does not offend the Second Amendment. Similarly, the Court also appears to have held that convicted felons may be deprived of their right to keep and bear arms. See *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). These regulations promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised.

"Reasonable restrictions also might be thought consistent with a 'well regulated Militia.' The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society also make someone unsuitable for service in the militia. (It is noted that the militia excluded from duty 'idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime' from duty). On the other hand, it does not follow that a person who is unsuitable for militia service has no right to keep and bear arms. A physically disabled person, for instance, might not be able to participate in even the most rudimentary organized militia. But this person would still have the right to keep and bear arms, just as men over the age of forty-five and women would have that right, even though our nation has traditionally excluded them from membership in the militia. As we have explained, the right is broader than its civic purpose.

"The District of Columbia Code § 7-2502.0218 prohibits the registration of a pistol not registered in the District by the applicant prior to 1976. The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them. Indeed, the pistol is the most preferred firearm in the nation to 'keep' and use for protection of one's home and family. And, as we have noted, the Second Amendment's premise is that guns would be kept by citizens for self-protection (and hunting).

"D.C. Code § 22-450420 restricts separately the carrying of a pistol. Appellant Heller challenges this provision and a companion provision, § 22-4506, insofar as they appear to ban moving a handgun from room to room in one's own house, even if one has lawfully registered the firearm (an interpretation the District does not dispute). In order to carry a pistol anywhere in the District (inside or outside the home), one must apply for and obtain an additional license from the Chief of Police, whom the Code gives complete discretion to deny license applications.

"Heller does not claim a legal right to carry a handgun outside his home, so we need not consider the more difficult issue whether the District can ban the carrying of handguns in public, or in automobiles. It is sufficient for us to conclude that just as the

District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised—i.e, self-defense. Finally, there is the District's requirement under D.C. Code § 7-2507.02 that a registered firearm be kept 'unloaded and disassembled or bound by trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia.' This provision bars Heller from lawfully using a handgun for self protection in the home because the statute allows only for use of a firearm during recreational activities. As appellants accurately point out, § 7-2507.02 would reduce a pistol to a useless hunk of 'metal and springs.' Heller does not appear to challenge the requirement that a gun ordinarily be kept unloaded or even that a trigger lock be attached under some circumstances. He simply contends that he is entitled to the possession of a 'functional' firearm to be employed in case of a threat to life or limb. The District responds that, notwithstanding the broad language of the Code, a judge would likely give the statute a narrowing construction when confronted with a self-defense justification. That might be so, but judicial lenity cannot make up for the unreasonable restriction of a constitutional right. Section 7-2507.02, like the bar on carrying a pistol within the home, amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, we hold it unconstitutional.

"The judgment of the district court is reversed and the case is remanded. Since there are no material questions of fact in dispute, the

district court is ordered to grant summary judgment to Heller consistent with the prayer for relief contained in appellants' complaint."

Editor's Note: *The full text of this case consists of 58 pages, which does not include the dissent, detailing a great deal of historical research regarding the origin and meaning of the Second Amendment and the concept of "the militia." This case has been appealed to a full panel of the Court of Appeals for the District of Columbia. Whatever their decision, this issue will assuredly be appealed to the United States Supreme Court.*

**VEHICLE STOPS:
Questioning That Does Not
Prolong Detention**

United States v. Stewart,
CA10, No. 05-4255, 1/19/07

In *United States v. Stewart*, a traffic stop of Adrian Stewart's car in Heber City, Utah, led to the discovery under his seat of a loaded .9 mm pistol with the safety off and a package of methamphetamine hidden in a rollerblade. Mr. Stewart moved to suppress this evidence, arguing that the officer's question that led to the discovery of the gun, and the subsequent search of his vehicle, violated his Fourth Amendment rights. The district court denied his motion, and a jury convicted him of methamphetamine possession. The government dismissed the gun charge. Stewart now appeals from the district court's denial of his suppression motion. He contends that Sergeant Winterton violated his Fourth Amendment rights by asking about the presence of weapons or contraband. Upon review, the Tenth Circuit Court of Appeals found as follows:

“The Supreme Court has held that the content of police questions during a lawful detention does not implicate the Fourth Amendment as long as those questions do not prolong the detention. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). In light of *Muehler*, we have held that as long as the questioning does not extend the length of the detention, there is no Fourth Amendment issue with respect to the content of the questions. The correct Fourth Amendment inquiry (assuming the detention is legitimate) is whether an officer’s traffic stop questions ‘extended the time’ that a driver was detained, regardless of the questions’ content.

“Here, Mr. Stewart concedes that it certainly can’t be said that Sergeant Winterton’s question in and of itself appreciably extended the duration of the stop. This admission ends our inquiry. We therefore affirm the district court’s ruling that Winterton’s query—even though it sought information about any weapons or contraband in the vehicle—was constitutional.”

VEHICLE STOPS:

Questioning that Prolonged Detention;

Detention for Extra 30 Seconds

United States v. Olivera-Mendez,

CA8, No. 06-1910, 5/4/07

On the afternoon of January 13, 2005, Trooper Chris Kolz of the South Dakota Highway Patrol was on duty with his police dog, Ajax, who was trained in drug detection. Trooper Kolz observed a red Isuzu Trooper traveling east on Interstate 90. Reyes Fabian Olivera-Mendez was driving with a passenger in the vehicle. At approximately 3:14 p.m., Kolz stopped Olivera-Mendez for

traveling 71 miles per hour in a 65 mile-per-hour zone. Kolz asked Olivera-Mendez for his license and registration, and while standing outside the passenger door, Kolz noticed the strong smell of an air freshener coming from the vehicle. Because it was an extremely cold day, Kolz instructed Olivera-Mendez to sit in the patrol car while Kolz issued him a warning ticket for speeding.

Once in the patrol car, Kolz questioned Olivera-Mendez about the details of his trip and about his license, his registration, and his vehicle’s title. Olivera-Mendez informed Kolz that he was traveling from Washington State to his home in Indiana. His car had temporary license plates from Illinois, but it was registered in Washington. The registration and a photocopy of the vehicle’s title listed the owner of the vehicle as Daniel Garcia, a third party who was not present at the stop. The title also appeared to be incomplete. In Kolz’s experience, this type of document is usually two-sided, with the back side listing transfer of title, but Olivera-Mendez’s photocopy included only the front side. Olivera-Mendez also provided Kolz with a photocopy of a temporary driver’s license from Washington.

It took Trooper Kolz several minutes to sift through this information. First, Kolz questioned Olivera-Mendez about why the car had Illinois license plates, although Olivera-Mendez stated he lived in Indiana. Next, Kolz attempted to confirm that Olivera-Mendez owned the vehicle, even though both the title and registration listed a different owner. Kolz initially transmitted information about the Illinois license plates to a dispatcher, but when the dispatcher could not locate a matching record in the database, Kolz tried to use the vehicle identification

number. Approximately twelve minutes into the stop, Kolz confirmed that Olivera-Mendez was indeed the owner of the Isuzu. At this point, Kolz suspected that Olivera-Mendez might be transporting drugs, based on his conflicting documents, the non-present third party who was listed as the vehicle's owner, and the strong smell of air freshener coming from the vehicle. Kolz asked Olivera-Mendez whether there were any illegal drugs in the Isuzu and whether the drug dog would alert to the exterior of the vehicle, and Olivera-Mendez answered "no" to these questions. Kolz then questioned OliveraMendez about the photocopy of his temporary driver's license and used his radio to request a driver's license check.

While Kolz waited for the dispatcher to respond with the results of the driver's license check, he took his drug dog Ajax out of the patrol car and walked the dog around the Isuzu's exterior. Ajax alerted to the area around the rear passenger door of the car. The dog sniff lasted less than one minute, and Ajax alerted at the same time the dispatcher responded with the information about Olivera-Mendez's license. This occurred just over fifteen minutes after the stop began.

Based on Ajax's alert, Kolz searched the Isuzu twice at the roadside. These searches discovered several new pieces of evidence: an air freshener in the rear cargo area, two strips of Bondo on the floor, and some mismatched paint. This evidence heightened Kolz's suspicions that the car housed a hidden compartment containing drugs.

Kolz called his supervisor and received permission to have the Isuzu towed to the Highway Patrol garage, where Kolz could

conduct a more extensive search of the vehicle. The Isuzu arrived at the garage at about 5 p.m., and Kolz and several other troopers searched the vehicle continuously for approximately four hours. At 9:04 p.m., about six hours after the original traffic stop, the troopers obtained a search warrant to drill into the rear bed of the vehicle. The drill bit located a white powdery substance that field-tested positive for cocaine, and police eventually discovered a hidden compartment in the floor of the back cargo area that contained fifteen kilograms of cocaine.

Olivera-Mendez was indicted and moved to suppress the cocaine, claiming that both the initial traffic stop and the subsequent searches of the Isuzu violated the Fourth Amendment. After a hearing, a magistrate judge recommended denial of the motion, concluding that Trooper Kolz "had enough reasonable suspicion to expand the scope of the traffic stop," and that the subsequent searches of the vehicle were supported by probable cause. The district court adopted the magistrate judge's report and recommendation, with supplemental comments, and denied the motion to suppress. The district court reasoned that the seizure "might have been an unreasonably long detention," but that "final determination cannot be made on this record." The court explained that the record was not "further developed on this point" because the motion was denied "on the basis of the probable cause [sic] to extend the scope of the traffic stop as found by Judge Simko." (R. Doc. 138, at 3]. The court then accepted Olivera-Mendez's conditional guilty plea and sentenced him to 120 months' imprisonment and five years of supervised released.

Olivera-Mendez appealed the denial of his motion to suppress. Upon review, the Court of Appeals for the Eighth Circuit found as follows:

“A traffic stop can become unlawful if it is ‘prolonged beyond the time reasonably required’ to complete its purpose. Olivera-Mendez does not dispute that Trooper Chris Kolz stopped him for speeding, and it is well-established that a police officer who observes a traffic violation has probable cause to stop the vehicle and its driver. *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam); *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 646 (8th Cir. 1999). When police stop a motorist for a traffic violation, an officer may detain the occupants of the vehicle while the officer completes a number of routine but somewhat time-consuming tasks related to the traffic violation. These may include a check of driver’s license, vehicle registration, and criminal history, and the writing of the citation or warning. While the officer performs these tasks, he may ask the occupants routine questions, such as the destination and purpose of the trip, and the officer may act on whatever information the occupants volunteer.

“Olivera-Mendez contends that Trooper Kolz, desiring to conduct a canine sniff of the vehicle, extended the traffic stop

“Whether a particular detention is reasonable in length is a fact-intensive question, and there is no per se time limit on all traffic stops. When there are complications in carrying out the traffic-related purposes of the stop, for example, police may reasonably detain a driver for a longer duration than when a stop is strictly routine. ”

beyond the period reasonably necessary to complete it, but lacked reasonable suspicion to do so. Whether a particular detention is reasonable in length is a fact-intensive question, and there is no *per se* time limit on all traffic stops. When there are complications in carrying out the traffic-related purposes of the stop, for example, police may reasonably detain a driver for a longer

duration than when a stop is strictly routine. See *United States v. Sharpe*, 470 U.S. 675, 685-87 (1985). With one possible exception, the length of this detention was not unreasonable.

“Several circumstances caused Trooper Kolz’s stop of Olivera-Mendez to take longer than a usual ‘routine’ traffic stop. Olivera-Mendez presented Kolz with information that his car was registered in one state, but licensed in a second, and that Olivera-Mendez was living in a third. Both the license plate from Illinois and the photocopied driver’s license from Washington were temporary. The photocopied owner’s certificate appeared to be incomplete, and it listed someone other than Olivera-Mendez as the owner. Kolz’s attempts to sort through Olivera-Mendez’s conflicting information involved Kolz in the legitimate and sometimes time-consuming tasks of a traffic stop. These tasks took longer than normal because Olivera-Mendez presented unusual circumstances and incomplete documentation.

“The one wrinkle here is that Kolz did pause during the stop to ask Olivera-Mendez whether he was carrying illegal drugs. This took about twenty-five seconds in the midst of questions about Olivera-Mendez’s temporary driver’s license. Some of our cases appear to say that merely asking an off-topic question during an otherwise lawful traffic stop violates the Fourth Amendment, *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *United States v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993), but this view does not survive *Muehler v. Mena*, 544 U.S. 93 (2005). In *Muehler*, the Supreme Court reiterated that ‘mere police questioning does not constitute a seizure,’ *id.* at 101 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)), and rejected the suggestion that questioning on a matter unrelated to the purpose of a detention constituted a ‘discrete Fourth Amendment event.’ Where the initial detention was not prolonged by questioning on unrelated matters, ‘there was no additional seizure within the meaning of the Fourth Amendment.’ *Id.* at 101. See also *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993).

“*Muehler* does not address whether questions unrelated to the initial purpose of a detention may constitute an unlawful seizure if they extend *the length* of the detention. Three circuits have held that where a seizure of a person is based on probable cause to believe that a traffic violation was committed, an officer does not violate the Fourth Amendment by asking a few questions about matters unrelated to the traffic violation, even if this conversation briefly extends the length of the detention. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1259 (10th Cir. 2006); *United States v. Burton*, 334 F.3d 514,

518-19 (6th Cir. 2003); *United States v. Childs*, 277 F.3d 947, 951-54 (7th Cir. 2002) (en banc); *but cf. United States v. Pruitt*, 174 F.3d 1215, 1220-21 (11th Cir. 1999). The rationale for this conclusion was stated most thoroughly by the en banc Seventh Circuit, which reasoned that in contrast to the constraints applicable to a stop based merely on reasonable suspicion, see *Terry v. Ohio*, 392 U.S. 1 (1968), the Fourth Amendment does not require the release of a person seized with probable cause at the earliest moment that step can be accomplished, and that questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. *Childs*, 277 F.3d at 953-54. See *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984) (‘We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.’) The police here had probable cause to seize Olivera-Mendez for driving at an excessive speed, and we do not think Kolz effected an unreasonable seizure simply by asking three brief questions related to possible drug trafficking amidst his other traffic-related inquiries and tasks.

“Assuming for the sake of argument, however, that it was unreasonable for Kolz to extend the stop by twenty-five seconds unless he had reasonable suspicion to ask questions about drug-related activity, we hold alternatively that evidence seized from Olivera-Mendez should not be suppressed. Evidence should not be excluded from trial based on a constitutional violation unless the illegality is at least a but-for cause of obtaining the evidence. *Hudson v. Michigan*, 126 S. Ct. 2519, 2164 (2006); *Segura v. United States*, 468 U.S. 796, 815 (1984). There is no

basis on this record to conclude that Kolz's brief and fruitless inquiries about drugs during the course of an otherwise lawful traffic stop led to discovery of the cocaine.

"The canine sniff took place during a period while Trooper Kolz was waiting for a response from a dispatcher on a traffic-related inquiry. This interval, and the accompanying canine sniff, would have occurred with or without the twenty-five second period dedicated to drug-related questions, and the use of the dog did not 'change the character' of the stop. The drug dog Ajax was present at the scene and immediately available to conduct a sniff. Kolz's suspicions of drug smuggling were aroused prior to the questioning about drugs, and Olivera-Mendez said nothing in response to these few questions that heightened the suspicion of drug trafficking or prompted Kolz to conduct the sniff. In short, that portion of the seizure attributable to drug-related questioning, if unlawful, did not contribute to the discovery of the cocaine, and it was not a but-for cause of the seizure of that evidence. Accordingly, the conduct of the traffic stop provides no cause to exclude the evidence, whether or not there was reasonable suspicion for the trooper to believe before the canine sniff that criminal activity was afoot."

VEHICLE STOPS:

Questioning that Extends Detention Through the Development of Additional Reasonable Suspicion

United States v. Lyons,
CA8, No. 06-3292, 5/16/07

On September 5, 2005, Trooper Wendy Brehm of the Nebraska State Patrol

stopped a white Dodge Caravan for speeding on Interstate 80 in Hamilton County, Nebraska. Trooper Brehm approached the vehicle on the passenger side and advised the driver, Kelvin Lyons, that he was speeding. Lyons admitted that he had been speeding, and provided Trooper Brehm with his driver's license and a copy of the rental agreement for the van, which showed that he had rented the van in Phoenix three days earlier. Trooper Brehm later testified that she saw several large suitcases in the backseat area of the vehicle during this initial contact.

Lyons accompanied Trooper Brehm to her patrol car where Brehm inquired about his travel plans. Lyons stated that he had been in Phoenix for three days visiting friends at Arizona State University, and that he and his passenger, Elma, were traveling home to Ohio. Upon further questioning about his friends' class status at Arizona State, Lyons told Brehm that his friends did not attend the university, but merely lived in Tempe. Trooper Brehm asked Lyons how he and Elma had traveled to Phoenix, and Lyons responded that they flew to Phoenix but decided to drive back to Ohio. Trooper Brehm then asked about the notation on the rental agreement showing the van was due to be returned in Chicago, and Lyons explained that he and Elma planned to return the car in Chicago, visit Elma's cousin for a day, and then rent a different car for the return trip to Ohio.

Trooper Brehm issued Lyons a warning citation for speeding and asked him "Can you just wait here a minute while I go talk to [Elma]?" Lyons responded, "Sure." Lyons remained in the patrol car while Trooper Brehm spoke with Elma, who was still in the

van. Elma told Trooper Brehm that he came to Arizona to visit a friend in Tucson, and that he and Lyons were headed back to Ohio and did not plan on making any stops. When Trooper Brehm asked Elma if he knew where the van was to be returned, Elma told her that it was to be returned in Illinois, but that he did not know why, and that he thought that he and Lyons were going to fly home to Ohio from Illinois.

Trooper Brehm returned to her patrol car and asked Lyons if she could search the vehicle. Lyons declined, and Trooper Brehm requested a K-9 unit.

Sergeant Andrew J. Duis and his dog, Capone, arrived twenty-five minutes later, and Trooper Brehm told him that the front windows of the van were open. Sgt. Duis gave Capone the search command, and they walked around the vehicle. Sgt. Duis later testified that during this initial trip around the van, Capone alerted several times and nearly indicated to the presence of narcotics. On the second lap around the van, Capone stuck his head through the open passenger-side window and then sat down beside the front passenger door, his indication that he had found the strongest source of the odor of narcotics. The officers searched the van based on Capone's indication of the presence of narcotics and found 106 pounds of marijuana and \$29,685 in cash.

Lyons and his passenger were arrested and charged with possession with the intent to distribute less than fifty kilograms of marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1). The government sought forfeiture of the cash pursuant to 21 U.S.C. § 853. Lyons filed motions to suppress. A magistrate judge

recommended the denial of the motions, and Lyons filed objections to his report and recommendations. After de novo review, the district court adopted the report and recommendations and dismissed the motions to suppress. Lyons pled guilty and agreed to forfeit \$25,650, but reserved his right to appeal the denials of their suppression motions. Both Lyons and his passenger appealed. Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

"...It is well established that a traffic violation—however minor—creates probable cause to stop the driver of a vehicle. *United States v. Barry*, 98 F.3d 373, 376 (8th Cir. 1996). When an officer makes a routine traffic stop, the officer is entitled to conduct an investigation reasonably related in scope to the circumstances that initially prompted the stop. *United States v. McCoy*, 200 F.3d 582, 584 (8th Cir. 2000). The officer also may detain a motorist while the officer completes certain routine tasks related to the traffic violation, such as writing a citation and completing computerized checks of a driver's license, vehicle registration, and criminal history. *United States v. \$ 404,905.00 in United States Currency*, 182 F.3d 643, 647 (8th Cir. 1999)

"Once the officer decides to let a routine traffic offender depart with a ticket, a warning, or an all clear, 'the Fourth Amendment applies to limit any subsequent detention or search.' *United States v. Alexander*, 448 F.3d 1014, 1016 (8th Cir. 2006). The officer cannot continue to detain a motorist after the initial stop is completed unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot. See *United States v. Beck*, 140 F.3d 1129, 1134 (8th Cir. 1998). If, during a traffic stop, an officer

develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has justification for a greater intrusion unrelated to the traffic offense. *United States v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994)...

“Trooper Brehm testified at a suppression hearing about several facts she learned during the traffic stop that raised her suspicion: (1) Lyons’ unusual itinerary, which involved flying to Phoenix from Ohio, staying three days in Phoenix, then renting a van in Phoenix and driving to Chicago, then dropping off the van and renting a different car to drive back to Ohio; (2) Lyons’ contradictory descriptions of the friends that he had just visited, whom he first said were students at Arizona State University, but later said that they did not attend the university but merely lived in Tempe; and (3) the large amount of luggage for a trip lasting a short duration. The termination of the traffic stop did not effectively erase the objectively reasonable suspicion developed by Trooper Brehm during the traffic stop...

“Trooper Brehm called for the nearest available drug dog immediately after she developed a reasonable suspicion of narcotics possession and was denied permission to search. The nearest dog was assigned to Sgt. Duis, who was not yet on duty when he got the call. Sgt. Duis arrived thirty-one minutes after Trooper Brehm gave Lyons the warning ticket, and twenty-five minutes after Brehm requested the K-9 unit. There is no evidence that Trooper Brehm or Sgt. Duis were dilatory in their investigation or that there was any unnecessary delay. The officers acted diligently in pursuit of their investigation, and the thirty-one minute wait was not excessive under the circumstances.”

Editor’s Note: *The Federal courts have taken the position that when a driver has produced a valid license and proof of entitlement to operate the vehicle and appropriate radio checks have been conducted, an officer may issue a citation, but then must allow the driver to proceed without further delay or questioning. Two exceptions to this general rule exist. An officer may question the driver further if (1) the officer has an objectively reasonable and articulable suspicion that the driver is engaged in illegal activity, or (2) the driver voluntarily consents to further questioning. *United States v. Patten*, 183 F.3d 1190 (10th Cir. 1999).*

Ms. Amber Roe, Deputy City Attorney, Springdale, Arkansas, wrote about this issue in *C.A.L.L. (City Attorney Law Letter)*, Volume 07-2:

“Once the legitimate basis for a traffic stop has ended and the officer has returned the license and other necessary paperwork to the driver, the officer can not then continue to detain the driver merely based on the reasonable suspicion that was the purpose of the traffic stop. The officer must articulate another sufficient basis of reasonable suspicion to further detain the driver. The officer in a traffic stop should make inquiries while performing the routine tasks associated with a traffic stop, i.e., running the tags and the license. Remember once the traffic stop has ended, it is too late to make further inquiries to attempt to gain reasonable suspicion.”