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ARKANSAS DEPARTMENT OF HUMAN SERVICES:

Abuse; Central Registry of Child Abusers

Arkansas Department of Human Services v. Holman,
CA05-1197, 10/4/06

In *Arkansas Department of Human Services v. Holman*, the Division of Children and Family Services found that Shelly Holman, the assistant principal at Berryville Elementary School, committed child maltreatment when she caused bruises on "D.B." while disciplining him. Holman requested an administrative hearing. The administrative law judge found that Holman committed child maltreatment while disciplining D.B. and ordered that her name be placed on the Central Registry of Child Abusers.

Holman then sought judicial review. After reviewing the record, the circuit court found that the administrative law judge's opinion was not supported by substantial evidence and ordered that Holman's name be stricken from the Central Registry.

The Arkansas Department of Human Services filed an appeal seeking reinstatement of the administrative decision. The Department argued that there was substantial evidence to support the administrative law judge's finding that Holman committed child maltreatment. The Arkansas Court of Appeals disagreed and affirmed the decision of the circuit court, finding as follows:

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"At a hearing, held on January 25, 2005, it was uncontested that D.B. had been disciplined for fighting at school; that D.B.'s parents were given the choice of a three-day suspension or corporal punishment; that the parents opted for corporal punishment; that the punishment consisted of spanking with a paddle approximately two and one-half inches wide and two feet in length; that both of the parents were present when the punishment was administered, as was the school administrator; that D.B. was wearing jeans during the punishment; that the punishment consisted of three swats with the paddle; that none of the witnesses told appellee to stop or that she was hitting D.B. too hard; that D.B. did not cry out during the punishment; that D.B. expressed no pain to anyone; that D.B.'s mother disagreed with the concept of corporal punishment; that D.B.'s mother photographed D.B.'s buttocks several times approximately ninety minutes after the paddling; that the photographs showed some bruising; that D.B.'s mother took D.B. to a physician for examination two days later; and that the physician was of the opinion that the bruises did not suggest child abuse.

"Pursuant to Arkansas Code Annotated § 12-12-503(2)(a)(v) (Repl. 2003), 'abuse' includes infliction of a non-accidental physical injury by any person who is entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including an agent or employee of a public or private school. However, the *School Discipline Act* authorizes every teacher to hold every pupil strictly accountable for any disorderly conduct in school or on the playground of the school, and provides that any teacher or school administrator in a school district that authorizes use of corporal punishment in the district's written student discipline policy may use corporal punishment against any pupil in order to maintain discipline and order within the public schools, provided only that the punishment is administered in accord with the district's written student discipline policy. Ark. Code Ann. § 6-18-505(b) and (c)(1) (Repl. 1999)."

The Arkansas Court of Appeals stated that based on their review of the record, including the photographs, they concluded that the circuit court correctly reversed the agency's determination of abuse. It is true that photographs taken less than two hours after the paddling display bruising that is clearly visible. However, evidence of bruising, standing alone, cannot be used as a legal litmus test for abuse to the exclusion of all other attendant circumstances.

CIVIL LIABILITY:

Use of Force: Qualified Immunity

Kenyon v. Edwards, CA8, No. 05-3487, 9/7/06

On September 13, 2003, Clayton Edwards, a deputy sheriff for White County, Arkansas, responded to a report of an altercation at a demolition derby being held at the White County fairgrounds. Edwards arrived to see an irritated Stephen Kenyon being restrained by a member of a large crowd that had gathered near the derby pits. Edwards noticed that Stephen looked as though he had been in a fight. Edwards asked what was going on, and Stephen replied, "He hit my mother." Edwards could tell Stephen was indicating that his mother was Shirley Cox, and so Edwards went over to her. Edwards described Cox's nose as being flat against her face, and that she

was bleeding profusely from her nostrils. He noted that he was among a crowd of between one hundred and two hundred people, and described the environment as an "atmosphere of hostility" where weapons of opportunity, such as crowbars and hammers, were readily available. At first, Cox did not respond to Edwards' questions about what had happened because she was in pain. Edwards told Cox that an ambulance was on the way. Eventually, Cox told Edwards that it was David Kenyon who had hit her. Edwards learned that David Kenyon was Cox's ex-husband, and realized he had a domestic battery situation on his hands.

Edwards addressed the crowd around him and asked if there were any witnesses to the events. He also asked where David Kenyon was. No one answered at first, but then someone called out, "There he is." The crowd parted, leaving Kenyon in the middle. Edwards and the other officers on the scene approached Kenyon, and Edwards put his hand on Kenyon's elbow and asked his name. When Kenyon answered, Edwards told him he was under arrest. Kenyon raised his arms in an inquiring gesture and asked, "For what?" Edwards then grabbed Kenyon's wrist and took his arm behind his back. Though precisely what happened next is in dispute, the Court credits Kenyon's version of the facts for purposes of a qualified immunity analysis. According to Kenyon, Edwards threw him onto the hood of a nearby car and pulled Kenyon's arms up high behind his back in order to handcuff him. Kenyon told Edwards that he was hurting his arms, but Edwards persisted until Kenyon was handcuffed. Kenyon resisted because his arms were in pain from the handcuffing, and the officers told Kenyon to stop resisting. Kenyon claims he suffered a torn rotator cuff, requiring surgery, and continues to have pain.

Kenyon filed suit against four police officers, which ended with a jury finding in favor of the officers, save Edwards. The jury was unable to reach a verdict on the excessive force claim against Edwards, and the court declared a mistrial. After the court scheduled a new trial, Edwards moved for summary judgment based in part on qualified immunity. The district court accepted Kenyon's version of the facts as true for purposes of qualified immunity, and found that on those facts, Edwards' actions violated Kenyon's constitutional rights. But the court said it was impossible at the summary judgment stage to answer whether it would be clear to a reasonable officer that Edwards' conduct was unlawful in the situation he faced—that is, whether the constitutional right at issue was clearly established—because it found that a material question of fact remained. The court did not explain at that point what fact remained in dispute, but elsewhere in its opinion, the court stated a material question of fact remained as to whether the force Edwards used was objectively reasonable under the circumstances.

In this case, Edwards filed an appeal of the district court's denial of his motion for summary judgment based on qualified immunity. The Eighth Circuit Court of Appeals found, in part, as follows:

"Excessive force claims are analyzed under the Fourth Amendment's reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 394 (1989). In determining whether the amount of force used is reasonable, courts must balance

the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. This analysis requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Finally, judges must allow for the fact that police officers often make split-second decisions about the amount of force necessary in tense, uncertain, and rapidly changing circumstances.

"Taking the facts as alleged by and in the light most favorable to Kenyon, Edwards threw Kenyon onto the hood of a car and pulled his arms up high behind his back in an 'unnatural' manner in an attempt to arrest and handcuff Kenyon for domestic battery and public intoxication. Kenyon kept asking why he was being arrested, as he continued to resist, albeit because of the pain from the handcuffing. The encounter took place amidst a large crowd of people in an atmosphere of hostility where weapons of opportunity were available. Based on all of the factors in *Graham*, Edwards did not use excessive force. Though the encounter apparently resulted in injury to Kenyon's rotator cuff, we believe under the circumstances that Edwards' use of force was reasonable in order to bring a potentially volatile situation under control."

Because, given the facts as alleged by Kenyon, the Court of Appeals for the Eighth Circuit believed no constitutional violation occurred and, alternatively, that a reasonable officer would not believe the force used here to be excessive. The Court found that Edwards was entitled to qualified immunity.

CIVIL RIGHTS:

Right to Privacy; Law Enforcement Officers' Sexual Contact with Victims and Witnesses

Sylvester v. Fogley, CA8, No. 05-3492, 10/18/06

In January 2003, Sonya Hawkins (Mrs. Hawkins) notified the Arkansas State Police (ASP) that she and her husband (Mr. Hawkins) believed that an employee was embezzling from the company that the Hawkinses' co-owned. Sergeant Steve Clemmons assigned the embezzlement investigation to Corporal Alex Sylvester, a criminal investigator with the ASP.

In August 2003, Mr. Hawkins complained to Clemmons that Sylvester had engaged in an affair with Mrs. Hawkins during the investigation and that the affair hurt the embezzlement case. Clemmons reported the allegations to his supervisor, Lieutenant Doug Fogley, who reported the allegations to his supervisor, Captain Mike Davidson. Fogley assigned Clemmons to investigate the allegations. Fogley also notified Sylvester that the ASP was going to investigate allegations made by Mr. Hawkins in a complaint filed with the ASP claiming that Sylvester had had an affair with Mrs. Hawkins while Sylvester was on duty.

Clemmons interviewed Sylvester and Mrs. Hawkins, who both denied that

they had engaged in sexual relations. In September 2003, a polygraph examination of Sylvester indicated that his denial of a sexual relationship with Mrs. Hawkins was deceptive. When Sylvester was informed of the polygraph results, he admitted that he had engaged in sexual intercourse with Mrs. Hawkins at his residence in April 2003. Sylvester admits that he met Mrs. Hawkins "in the course of his duties as a state police officer." Mrs. Hawkins later corroborated that she and Sylvester had sexual intercourse at Sylvester's house. When asked why she had been at Sylvester's house, Mrs. Hawkins explained that she had called Sylvester during the duty day to ask him questions about her case. Sylvester told her that he needed better copies of three documents. Mrs. Hawkins explained that the documents that Sylvester was requesting were at her office and that she could deliver those documents to Sylvester at his house after work. During Mrs. Hawkins's visit to Sylvester's house, the two had sexual intercourse.

When the state prosecutor learned about Sylvester's conduct, the prosecutor wrote a letter to the ASP that included the following statement:

> *Obviously the State is not in a position to proceed with the prosecution of this case based upon Mr. Sylvester's conduct. Mr. Sylvester's actions were not only grossly improper, but they culminated in the dismissal of a case where a victim was essentially robbed of $300,000.00. The criminal case, in my opinion, had a good likelihood of conviction on several of the charges. This has also caused this office to question the veracity of any investigation or representation made by Mr. Sylvester in the past or future. While that is unfortunate, I am sure you can understand that a prosecutor must trust the investigating officer without question. We trust that his professionalism and willingness to seek justice will override any ulterior motive or personal feeling that may develop in a case. Unfortunately, we cannot assume this is true with this investigator any longer.*

A federal prosecutor had a similar response when he learned about Sylvester's conduct and lies. Shortly after Sylvester learned that Mr. Hawkins had complained about the sexual relationship between Sylvester and Mrs. Hawkins but before Sylvester had admitted to the conduct, Sylvester contacted the federal prosecutor to assure the prosecutor that any allegations that Sylvester had been sexually involved with a witness in the case were untrue. When the prosecutor later learned that Sylvester admitted to having sexual relations with a witness in one of his investigations, the prosecutor advised the ASP "that Corporal Sylvester's credibility was now an issue with respect to future cases because of his conduct and statements to me." The prosecutor further stated that he had decided not to prosecute the embezzlement case.

A Disciplinary Review Board (DRB) of the Arkansas State Police found that Sylvester had violated rules prohibiting unprofessional behavior and unbecoming conduct, the DRB recommended that Sylvester receive a letter of reprimand and be transferred from the CID. After reviewing the results of the investigations and the recommendations of the DRB, the Director of the Arkansas State Police discharged Sylvester. Sylvester then

appealed the discharge decision to the ASP Commission, which conducted a hearing. The ASP Commission reinstated Sylvester (without back pay) and transferred him from the CID to the Highway Patrol.

Unhappy with the ASP Commission's decision, Sylvester sued Steve Clemmons and Doug Fogley, contending that they violated Sylvester's constitutional rights. (In particular, "rights to private, intimate sexual activities protected under the liberty clause of the Fourteenth Amendment to the Constitution of the United States as well as the right to privacy as recognized by the Arkansas Supreme Court as being embodied in the Arkansas State Constitution.") Sylvester also sued Don Melton, contending that he violated Sylvester's constitutional rights by failing to train employees on privacy rights. The defendants moved for summary judgment, arguing that Sylvester's constitutional rights had not been violated, but even if they had been, then the defendants were entitled to qualified immunity. Agreeing with the defendants in all respects, the District Court granted summary judgment to the defendants.

The Court of Appeals for the Eighth Circuit concluded that a police force has a compelling interest in precluding a criminal investigator from having sexual relations with witnesses or victims involved in an underlying criminal investigation, finding, in part, as follows:

"The criminal-justice system—a bedrock of our democracy—must maintain the public's respect and trust. The public places special trust in criminal investigators because these officers are responsible for collecting evidence that might deprive a citizen of his life, liberty, or property. Citizens have the right to expect that criminal investigators are impartially investigating crimes as neutral, detached fact-finders and not abusing their positions of trust. Justice cannot be achieved when state agents place their personal interests above the public's trust.

"Citizens have the right to expect that criminal investigators are impartially investigating crimes as neutral, detached fact-finders and not abusing their positions of trust. Justice cannot be achieved when state agents place their personal interests above the public's trust."

"To advance the fair and unbiased administration of justice, criminal investigators must respect the rights of those suspected of committing a crime. A person under investigation would certainly be interested in knowing whether the state's investigator is having sexual relations with the alleged crime victim and chief accuser. If a criminal investigator freely engaged in sexual relations with the victims and witnesses involved in the underlying investigation, claims by criminal defendants of unreliable evidence and false accusations would be plentiful. The investigator's and the victim's or witness's credibility would be impugned by the sexual relations. As demonstrated by the testimony of the ASP officials and the state prosecutor in this case, Sylvester's credibility was damaged in exactly this manner. An employee suspected of embezzling $300,000

from a family-owned business will never be brought to justice because Sylvester's conduct compromised the prosecution.

The police force has another compelling interest in prohibiting sexual relations between criminal investigators and crime victims: victims should be confident that police officers are striving to bring perpetrators to justice and are not exploiting crime victims. A criminal investigator permitted to have sexual relations with crime victims could use his authority to sexually exploit those victims. Even the possibility of such exploitation is intolerable.

"…Sylvester claims that he was constitutionally entitled to be free from an investigation by his employer into his sexual relations with Mrs. Hawkins because the embezzlement investigation had been or was nearly completed at the time. This is an unfortunate and naive view of an investigator's role in the prosecution of a criminal defendant. The state has a compelling interest in ensuring that the integrity of criminal prosecutions is never questioned because an investigator engaged in sexual activity with a witness or victim involved in the underlying criminal investigation."

The Court also concluded that the ASP's investigation of Mr. Hawkins's allegations was narrowly tailored to serve the state's compelling interest in administering a fair and unbiased criminal-justice system.

"The ASP's investigation focused on whether Sylvester had sexual relations with a crime victim while in the process of conducting a criminal investigation involving that victim. The ASP limited its investigation to conduct that could interfere with Sylvester's work performance and that could negatively impact the ASP's mission of providing essential governmental services. The ASP was not interested in learning about Sylvester's private, non-job related sexual activity. The ASP became interested in Sylvester's sexual activity only when a crime victim in an embezzlement case complained that Sylvester's sexual relations with the other crime victim in the same case were damaging the case. The ASP's investigation of this job-related conduct was narrowly tailored to serve the ASP's compelling interest in maintaining the integrity and effectiveness of the criminal justice system."

EMPLOYMENT LAW:
Sexual Harassment; Reassignment of Duties Can Constitute Retaliation

Burlington Northern & Santa Fe Railway Co. v. White, No. 05-259, 6/22/06

Sheila White, the only woman in her department, operated the forklift at the Tennessee Yard of Burlington Northern & Santa Fe Railway Co. (Burlington). After filing a complaint about her supervisor making insulting and inappropriate remarks to her, the supervisor was disciplined for sexual harassment and White was removed from forklift duty and reassigned to standard track laborer tasks.

She filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that the reassignment was unlawful gender discrimination and retaliation for her complaint. Subsequently, she was suspended without pay for

insubordination. Burlington later found that she had not been insubordinate, reinstated her, and awarded her back pay for the 37 days she was suspended.

The suspension led to another EEOC retaliation charge. After exhausting her administrative remedies, White filed an action against Burlington in federal court claiming, as relevant here, that Burlington's actions in changing her job responsibilities and suspending her for 37 days amounted to unlawful retaliation under Title VII of the Civil Rights Act of 1964, which forbids employment discrimination based on "race, color, religion, sex, or national origin," and specifically 42 U. S. C. §2000e-2(a), and its anti-retaliation provision which forbids discrimination against an employee or job applicant who has made a charge, testified, assisted, or participated in a Title VII proceeding or investigation.

A jury awarded White compensatory damages. In affirming, the Sixth Circuit applied the same standard for retaliation that it applies to a substantive discrimination offense, holding that a retaliation plaintiff must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment. The Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Upon review, the United States Supreme Court held there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim:

"Contrary to Burlington's claim, a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. That is presumably why the EEOC has consistently recognized retaliatory work assignments as forbidden retaliation. Here, the jury had considerable evidence that the track laborer duties were more arduous and dirtier than the forklift operator position, and that the latter position was considered a better job by male employees who resented White for occupying it. Based on this record, a jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee."

EMPLOYMENT LAW:

Wrongful Termination

City of Huntington v. Robert Mikles,
CA 06-66, 9/27/06

Robert Mikles was formerly the chief of police for the City of Huntington from late August 2003 to November 2004 when he was terminated. Mikles sued the city in April 2004, first alleging breach of contract regarding his employment agreement with the city and later amending the complaint to add an allegation of wrongful termination after he was fired.

Mikles, a man in his late fifties, testified that he was looking for a job when his wife found an advertisement seeking a chief of police in Huntington, a town about forty miles away from his residence in Magazine. Mikles contacted the mayor, Craig Cotner, and they met for an interview.

When they agreed that Mikles was suited for the job, they negotiated compensation. Mayor Cotner could not offer the per-hour pay rate that Mikles requested. Mikles asked if there was another means to add to the per-hour pay rate to compensate him, such as the use of a city vehicle to drive to and from home, with the attendant gasoline and insurance coverage provided by the city. This was important to Mikles, given the eighty-mile round-trip commute. The mayor agreed with the base hourly rate plus use of the city vehicle, subject to the city council's approval at the next meeting. Mikles' official hiring date was in late August 2003. Mikles drove his own vehicle to work for a couple of days, but shortly thereafter, he was given a city vehicle.

The reviews of Mikles' performance were mixed: the mayor was pleased with the job being done, but a few city council members were not.

In March 2004, a city council meeting was convened and approved a motion to take the city car privilege from Mikles. Mikles filed a breach of contract action in April 2004. Mikles said that relations with four of the six council members "really started to get bad" after he filed suit. Mikles said that the mayor was being pressured to fire him. Mikles did not want to quit, given that he enjoyed his job and was in his late fifties at the time.

By October 2004, Mikles was of the impression that the mayor was "constantly upset...getting phone calls constantly from the city council, the same four, that he needed to get rid of me." At a meeting conducted on October 14, 2004, the council voted four-to-two to terminate Mikles. This had no effect because the council did not have the authority to hire and fire department heads; that authority rested with the mayor. After that meeting, the mayor told Mikles to take three weeks of accrued vacation and not come to town, during which the mayor urged Mikles to find another job. Mikles said he would look for another law-enforcement job but, if no job was available, he would not resign and would have to be fired to leave. When Mikles returned from vacation, the mayor told him he was fired. After that, Mikles added the allegation of wrongful discharge to his complaint. Mikles applied for and received unemployment benefits after his termination.

The jury found in Mikles favor on both counts, awarding him money for breach of contract and wrongful termination, plus costs and attorney fees.

The Arkansas Court of Appeals reversed the breach of contract count regarding use of the police vehicle stating the problem with Mikles' proof was that even though the compensation was agreed upon, "it was not for a time certain."

"No doubt that an employee at will has a right to compensation upon the performance of services. The term or duration of the agreed upon compensation (use of the police vehicle) was not part of the contract, and it was therefore subject to prospective alteration at any time. There is no substantial evidence to support the jury's verdict on the breach-of-contract claim."

The Arkansas Court of Appeals did find there was substantial evidence upon which the jury could base a decision that the reason for Mikles' termination was because he filed a lawsuit against the city.

EVIDENCE:

Character Evidence; Evidence of Other Crimes

Morris v. State, CR 06-287, 10/5/06

On the afternoon of Tuesday, February 10, 2004, L.L. who lived in the Hillcrest area of Little Rock, arrived home from school and, after spending some time at home, left her house to purchase a Coke from the Kroger on nearby Beechwood Street. On her way to and from the store L.L. used a shortcut that lead through an alleyway, which ran between a wall of the Pulaski Heights Methodist Church and a series of backyards. On her way home, while she was cutting through the alleyway, L.L. was stopped by a man who grabbed her arm and asked her to come with him. She refused to accompany him, and the man allegedly said, "Don't make me hurt you," while indicating that he had something concealed in his pocket, which L.L. believed to be a gun. The man pulled L.L. further back down the alleyway into a recess in the wall, and he began asking her questions such as her age, her name, and where she lived. He then forced her to perform oral sex on him, stating that if she complied he would let her go home and that he wouldn't hurt her. After she performed oral sex on him for approximately 10 minutes he released her, and she ran home; he did not ejaculate when he raped her. The assault allegedly occurred around 6 or 7 p.m., and the entire encounter lasted approximately twenty minutes. Upon arriving home, L.L. told her younger sister about the assault and called the police. However, while waiting for the police to arrive, L.L. called a friend and left home; thus, she did not file an official report with the police at that time. She also did not tell her parents what happened that day.

On Sunday, February, 15, 2004, at approximately 1 p.m., L.L. decided to leave her house and walk back to the Kroger in an effort to "face her fears." During her walk, she saw the same man who had assaulted her five days before. The man began following her, slowly gaining on her. When he came within approximately ten feet of her, L.L panicked and walked into the street, hailing a woman in a car, who then took her home. L.L. did not get any contact information from the woman who drove her home and when she arrived home, L.L. ran into the house and told her father what happened. L.L. and her parents then called the police, this time giving a full report of the events of February 10 and 15.

L.L. identified her assailant to police as a tall black male, who was approximately 30 years old with medium skin, full lips, a protruding jaw, and a light mustache and facial hair. L.L. also stated that the man was wearing a hunter-green windbreaker jacket, jeans, and a dark baseball cap. L.L. later picked Willie Morris out of a photo line-up conducted by the Little Rock Police. L.L. was 16 years old at the time of the assault; she was approximately 5 feet tall, weighed 100 pounds, and had blonde hair.

On February 26, 2004, in the Ridge Road area of North Little Rock, A.T. was dropped off at her bus stop and began walking home by her usual route. She crossed paths with a man who showed her a gun and told her to turn around and walk with him. A.T. began walking with the man out of fear, assuming that if she complied with his wishes he would let her go unharmed. While they walked together, the man asked A.T. questions, such as when her parents got home, what her name was, whether she had a boyfriend, and

where she lived. As the two began walking towards A.T.'s house, A.T. noticed that a white "box-like" car was parked near her house. The man asked A.T. to take a ride in the car with him, but she refused and began crying. He told A.T. that if she did not stop crying he would have to take his gun out and, if she just walked another block with him, he would let her go home.

The man then took A.T. to an area behind her house that was not visible from the street. There, he forced her to perform oral sex on him and raped her vaginally. After he was finished, he let A.T. go, telling her if she told anyone what happened, he would return and kill her. A.T. ran home and called her parents, who then reported the assault to the police.

A.T. described her assailant as a very tall, black man, who had slight facial hair. She described the man's clothing as a greenish jacket and khaki pants. The North Little Rock police showed A.T. the same photo line-up that L.L. had seen and she identified Willie Morris as her assailant.

In August 2005, Willie Edward Morris was tried before a jury and convicted of the rape and kidnapping of L.L. At trial, the State was allowed to introduce evidence concerning the rape and kidnapping of A.T. Morris appealed his conviction, raising one point on appeal—that the trial court erred in his trial for the offenses committed against L.L. when it allowed the prosecution to introduce evidence concerning the rape and kidnapping of A.T.

The Arkansas Rule of Evidence allows evidence of other crimes, wrongs, or acts to be admitted for the purpose of showing such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, evidence is not admissible under Rule 404(b) to show a defendant's bad character traits and to show he acted in conformity therewith.

Based upon the degree of similarity between the circumstances surrounding L.L. and A.T.'s rapes, the Arkansas Supreme Court could not say that the circuit court abused its discretion by admitting the evidence of A.T.'s rape. Both victims were close in age and similar in appearance. Morris assaulted both victims near their homes during the hours of 4-6 p.m. Both victims were pulled into an area with low visibility from the road and were asked to perform oral sex. Also, Morris asked both victims similar questions, such as their age, name and where they lived. He also indicated to both L.L. and A.T. that he had a weapon and would harm them if they did not comply with his wishes.

The Court found that the similarities between the rape of A.T. and the case at hand were sufficient to show that Morris not only acted with the motive and intent to rape L.L., but that he also followed a similar plan, preparation and scheme when perpetrating the crimes:

"He assaulted similar victims by accosting them in areas where they frequently traveled and at the same time of the day—the early evening hours, a time period that would ensure that the parents of school-aged girls would not be home from work—while indicating that he had a weapon and that the victims would be harmed if they did not comply with his wishes. We therefore hold that the circuit court did not abuse its

discretion in allowing the State to introduce evidence of Morris's other crimes in the instant case, as proof of motive, intent, preparation, plan and scheme."

INTERROGATION:

Booking Questions

United States v. Washington, CA9, No. 04-5043. 9/6/06

On August 1, 2002, Eric Washington met with co-conspirators to plan an armed bank robbery. According to trial testimony, the conspirators discussed who would carry guns. The conspirators then drove to the United California Bank in Commerce, California. Three of the conspirators entered and robbed the bank while Washington acted as a lookout. Janett Guizar, a bank employee, testified that one of the robbers pointed a gun at her and ordered her to open a teller drawer. There also was testimony that one of the robbers pointed a gun at two other bank employees and ordered them to give him the money from their teller drawers. After the robbery, Special Agent Peter Taglioretti of the FBI obtained a videotape from the bank's surveillance cameras and developed multiple photographs of the robbers. Taglioretti contacted the bank employees and presented them with a six-pack of photospreads of the robbers. Guizar identified Washington from a photospread as the lobby lookout. Another witness also identified Washington from the photospread.

On November 7, 2002, local police arrested Washington for the robbery of United California Bank. Agent Taglioretti and FBI Special Agent Roberto J. Basteris met Washington upon his arrival at the FBI Westwood office. Taglioretti asked Washington a series of background questions, including his name, date of birth, address, medical condition, gang moniker, and gang affiliation.

Agent Taglioretti then explained to Washington the charges pending against him. Agent Taglioretti also advised Washington about the opportunity to cooperate. Washington responded by asking the agents about the source of their information. When Taglioretti told Washington that there were several people cooperating, Washington asked for more information Taglioretti then read Washington his Miranda rights. Washington responded by saying that he was willing to listen to the agents without an attorney present. Taglioretti wrote "agreed to listen w/o atty present" on an advisement form that Washington then signed and initialed.

Taglioretti then showed Washington photographs of individuals in custody for the bank robbery and explained the information that law enforcement had about the robbery. Washington stated, "I can't do no time, but I know I am." Taglioretti proceeded to show Washington bank surveillance photographs, including a photograph of a robber standing outside the bank doors. When viewing one of these photographs, Washington stated, "Anybody can see that's me in the picture." However, when Taglioretti asked Washington if he wanted to talk about his role in the robbery, Washington responded by saying, "That's not me in the picture." Taglioretti commented that the photograph clearly showed Washington, and Washington then grinned and nodded his head in the affirmative.

On February 24, 2003, Washington moved to suppress his post-arrest statements. On May 19, the district court held a suppression hearing. Washington testified at that hearing. He claimed that he did not say anything to the FBI about the photographs. He also gave conflicting testimony about whether he made any statements after he was advised of his Miranda rights. Washington testified that he could not clearly remember the interview because he was under the influence of alcohol and "chronic" at the time of the interview. However, during his testimony, Washington acknowledged he agreed to listen to the agents after they read him his Miranda rights and that he signed a paper which said "agreed to listen without an attorney present."

"A suspect subject to custodial interrogation has the right to remain silent... A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right."

Washington claims that the FBI agents "interrogated" him when they asked him what his gang moniker was. However, the Court of Appeals for the Ninth Circuit found that routine gathering of background biographical information, such as identity, age, and address, usually does not constitute interrogation. The record in the instant case shows that agents routinely obtain gang moniker and gang affiliation information for the United States Marshals and Metropolitan Detention Center in order to ensure prisoner safety. The question regarding Washington's gang moniker therefore was a routine booking question.

Taglioretti testified that, before meeting with Washington, he already had been informed of Washington's name, gang moniker, height, weight, and other background information, but needed to ask Washington this information to ensure that law enforcement's information was accurate.

The Court of Appeals for the Ninth Circuit next addressed Washington's assertion that the FBI agents should have construed his statement, "I agree to listen," to mean that the agents were not permitted to talk to Washington. The Court found as follows:

"A suspect subject to custodial interrogation has the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966). A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right. Washington's statement that he would listen to the agents cannot possibly be construed as a request for the FBI agents not to speak to him or for him to remain silent. He simply did not invoke his right to remain silent. Moreover, even when a defendant has invoked his Miranda rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case. Thus, it was not a violation of Washington's rights for the FBI agents to inform him of the evidence against him, and his self-incriminating comments in response were admissible."

INTERROGATION:

Voluntary Statement; Custodial Setting

Vidos v. State, No. CR 05-898, 9/21/06

In *Vidos v. State*, Christy Vidos appealed her conviction for the murder of her husband, Lloyd Vidos. One of her primary issues on appeal was a statement she made to Boone County Jailer Kenneth Barnes on August 19, 2002 that was later introduced as evidence in the trial. The case is as follows:

Christy Vidos and Lloyd Vidos were married, had two children, and lived in Berwick, Louisiana. After some time, the marriage became strained, and the two separated. Vidos moved back to Boone County with her boyfriend, Leslie Paray, and Lloyd Vidos filed for divorce. Vidos later had a child with Paray, and they were married in Boone County prior to the divorce being finalized.

In July of 2002, Vidos and her parents, Jonny Cris and Sharon Acuff, traveled back to Berwick to collect some of her personal property. Lloyd traveled with Vidos back to Boone County in a U-Haul truck. When they arrived in Boone County, Vidos and Lloyd were supposed to go to the Acuff residence on Daniels Road, but instead, they went to a vacant house on her parents' property on Shake Rag Hollow Road, which is located in an isolated, rural area of Boone County. She left Lloyd there, and she and Paray returned to the vacant house. Vidos' father later picked up his daughter at the vacant house, but Lloyd was not there.

Metz Vidos, the victim's father, notified Louisiana law-enforcement officials that his son was missing. On August 8, 2002, the Berwick Police Department contacted the Boone County Sheriff's Office requesting assistance in locating the victim. His father stated that, in a cell phone conversation on August 3, 2002, his son told him that he was in front of a vacant, white house on the Acuff property. Metz Vidos had not been able to re-establish contact with his son after that phone call. Further, Metz discovered that his nine millimeter handgun was missing.

On August 9, 2002, officers from the Boone County Sheriff's Office conducted a search of the area. That afternoon, Captain Mark Rupp contacted Donna Phillips, a Fayetteville attorney, who told the officer that Scott Acuff, Vidos' brother, told her where the body was located. Phillips described a location on the Acuff property on Shake Rag Hollow Road. Officers responded and located the decomposing body of the victim approximately .6 miles off the road in a hollow amidst rugged terrain. After discovering the body, officers contacted Phillips again and interviewed her. She advised them that Vidos and others were present at the office. Phillips stated that Vidos said that she "stumbled" upon Lloyd's body. According to Phillips, Vidos, after telling her parents, contacted Phillips, and Phillips advised her to contact the Boone County Sheriff's Office and report the information she knew. The officers surmised that it would be unlikely for someone to "stumble" across a body in this particular remote location that was accessible primarily by four-wheel vehicles.

Officers conducted an examination of the scene approximately .2 miles from the residence on Shake Rag Hollow Road and found an area that appeared to be scraped by a front-end loader. They also found a small

round clock with Velcro on the back, as well as a cardboard tag for a pair of work gloves. Officers also noticed that trees had been pushed down by a tractor. Later, near the Acuff's residence on Daniels Road, officers found a tractor with a strip of Velcro that matched the clock and thistles in the radiator of the tractor that matched the thistles in the field where the body was found.

A search warrant was executed on the pickup truck belonging to Vidos' father, which was identified as having been driven by Paray. There, officers discovered work gloves that matched the cardboard tag, and a shovel and other tools, which contained blood, were discovered in the bed of the truck. Officers also discovered a block of wood containing hair or fibers in the truck.

On August 9, 2002, Jonny Cris Acuff, Vidos' father, was interviewed by the Boone County Sheriff's Office and originally denied any knowledge of the murder. However, Acuff later stated that he and Paray drove the tractor, and he saw the scraped area where the clock was found. He saw flies in the area and detected a strong odor. The next day, Acuff talked with his wife, who told him that "it" had been moved. When he asked what "it" was, she replied, "Lloyd's body." Acuff also told officers that his daughter came to him on August 4, 2002, and asked him to teach her to drive the tractor.

On August 10, 2002, Sharon Acuff, Vidos' mother, was interviewed at the Boone County Sheriff's Office. She stated that on August 6, 2002, Vidos and Paray discussed moving Lloyd's body. She also stated that Lloyd had given Vidos a nine millimeter handgun prior to the shooting. She revealed that Vidos told her several different stories, including that Lloyd wished to commit suicide. Acuff further stated that, on August 9, 2002, Paray had told her that he shot Lloyd two times with a nine millimeter handgun and had killed Vidos. Paray told Vidos' mother that he shot Lloyd at the abandoned house on Shake Rag Hollow Road.

On August 15, 2002, Vidos was charged with capital murder and tampering with physical evidence. The State alleged that she acted with Leslie Paray in shooting Lloyd and in hiding his body. Her parents were charged with hindering apprehension or prosecution. The charge against Jonny Cris Acuff was nolle prossed, and Sharon Acuff was placed on probation. Leslie Paray pleaded guilty to first-degree murder and was sentenced to life imprisonment.

While in jail, Vidos made a statement to Boone County jailer, Kenneth Barnes, which was admitted into evidence at the hearing. Barnes recounted the following events:

"Vidos was reading the newspaper about when Leslie Paray went to court. She went on to say that she didn't understand how they could get them for premeditated murder when it 'just happened.' She told me about how Paray was hiding in the weeds as Lloyd Vidos started walking over to the car she was in when Paray shot him in the chest. At this point in time, I said, 'What?' I couldn't believe she was talking openly to me about the murder. I explained to her that she shouldn't talk to me any more about this since I was a jailer. However, she kept going on about how Paray was drunk and had take some Vicodins. She stated Paray wasn't in his right mind. She also said that Lloyd Vidos had molested

her older girl, and that Paray was mad and in a rage about it. She then stated that Paray was hiding when he shot Lloyd Vidos in the chest. She went on to say that Mr. Vidos was suffering as a result of the shot to his chest so Paray shot Mr. Vidos again in the back of his head to end his suffering."

Based upon Barnes' statement, Vidos clearly initiated communication with the police. Vidos, after reading an article about the murder, divulged to Barnes specific facts concerning the murder, specifically that Paray shot Vidos while hiding in the weeds. Barnes testified at the hearing that he did not ask her any questions prior to her outburst. Nor did he make any promises to her.

Since Vidos initiated the communication, this constitutes a waiver and takes it out of the purview of the Fifth and Sixth Amendments. The Arkansas Supreme Court then affirmed the circuit court's ruling to admit the statement of Christy Suzanne Vidos to Kenneth Barnes.

INTERROGATION:

Voluntary Statement Made After Previous Questioning Without *Miranda* Warnings

United States v. Pettigrew,
CA10, No. 05-2187, 7/27/06

In *United States v. Pettigrew*, David Pettigrew, while intoxicated, hit another vehicle causing it to roll over, killing one person and injuring others. Pettigrew drove away from the scene and was later arrested by police.

Without being advised of his Miranda rights, police first asked Pettigrew if he knew what he had done, to which Pettigrew responded, "Yeah, I f****d up my ride, now I got to get a new one." Deputy Ashcroft then told Pettigrew that he might have killed someone in the accident. Pettigrew responded by saying, "I still got to get a new ride."

Pettigrew was then transported to the Shiprock Detention Center, where he voluntarily submitted to a breath-alcohol test. During this time, an officer asked Pettigrew whether he had been drinking that night, to which he responded, "Yes, I was drinking."

Then, while taking the blood-alcohol test, Pettigrew asked the officer why he was arrested and what the charges against him were. The officer informed him that he had been arrested for driving while intoxicated and that he might have been involved in an accident in which people were hurt. Pettigrew volunteered, "I saw it at the last minute. I hit it and took off."

The Circuit Court of Appeals decided that the last unsolicited and volunteered statement made by Pettigrew was admissible notwithstanding that the first two statements obtained from him were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Tenth Circuit Court of Appeals stated that "the admissibility of an unsolicited inculpatory statement, following a voluntary statement made in violation of *Miranda*, turns on whether the inculpatory statement was knowingly and voluntarily made. The Court concluded that the unsolicited inculpatory statement was voluntarily made and admissible against Pettigrew."

PUNISHMENT:

Sentencing; Federal and State Courts
United States v. Branson,
CA10, No. 06-3038, 8/29/06

In *United States v. Branson*, the Court of Appeals for the Tenth Circuit held that a disparity between the federal-court sentence and the sentence that would be imposed for a like offense in state court does not make the sentence unreasonable.

SEARCH AND SEIZURE:

Border Searches
United States v. Romm,
CA9, No. 04-10648, 7/24/06

In *United States v. Romm*, the Court of Appeals for the Ninth Circuit held that an individual who attempts to leave the United States but is turned back is still subject to a warrantless, suspicionless border search of his person and effects. In this case Romm, at the British Columbia airport, attempted to enter Canada but was turned back by both Canadian and United States immigration officials. A subsequent search of his laptop computer revealed images of child pornography.

SEARCH AND SEIZURE:

Canine Alert; Probable Cause
United States v. Zacher,
CA8, No. 06-1652, 10/11/06

In *United States v. Zacher*, the Court of Appeals for the Eighth Circuit found that a dog's positive alert on a Federal Express package is enough to raise a suspicion sufficient to allow the police to seize a package for further investigation, obtain a search warrant for the package, and then make a controlled delivery of the package.

SEARCH AND SEIZURE:

Computers; Off-Site Examination Requires Affidavit Justification
United States v. Hill,
CA9, No. 05-50219, 8/11/06

In *United States v. Hill*, the United States Court of Appeals for the Ninth Circuit had to decide whether it was reasonable under the Fourth Amendment for the police to take all of Hill's computer storage media from his home so they could conduct their search offsite in a police laboratory, rather than carrying out the search onsite and taking only whatever evidence they might find.

The Ninth Circuit Court of Appeals stated that the government does not have an automatic blank check when seeking or executing warrants in computer related searches. Although computer technology may in theory justify blanket seizures, the government must still demonstrate to the magistrate factually why such a broad search and seizure authority is reasonable. There may be cases where the government has no basis for believing that a computer search would involve the kind of technological problems that would make an immediate onsite search and selective removal of relevant evidence impracticable. Thus, there must be some threshold showing before the government may "seize the haystack to look for the needle."

The Court noted that in such cases the affidavit should explain why it was necessary

to seize the entire computer system in order to examine the electronic data for contraband and justify taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis.

The officers' wholesale seizure in this case was flawed because they failed to justify it to the magistrate, not because they acted unreasonably or improperly in executing the warrant. Because the officers were motivated by considerations of practicality rather than by a desire to engage in indiscriminate fishing, the Court could not say that the officers so abused the warrant's authority that the otherwise valid warrant was transformed into a general one, thereby requiring all fruits to be suppressed.

SEARCH AND SEIZURE:

Consent Searches; Cohabitant's Consent Cannot Override Suspect's Refusal

United States v. Hudspeth,
CA8, No. 05-3316, 8/25/06

On July 25, 2002, as part of an investigation into the sale of large quantities of pseudoephedrine-based cold tablets, the Missouri State Highway Patrol and the Combined Ozarks Multi-Jurisdictional Enforcement Team (COMET) executed a search warrant at Handi-Rak Service, Inc. The warrant listed property to be seized including: papers and/or documents related to the stock and inventory of pseudoephedrine based cold tablets, financial statements, payment journals, customer list of clients receiving pseudoephedrine based cold tablets, personnel files, employee sales routes, and the inventory in and out of pseudoephedrine based cold tablets.

Roy J. Hudspeth, Handi-Rak's CEO, arrived at Handi-Rak after the search was underway. Missouri State Trooper Corporal Daniel Nash (Cpl. Nash) informed Hudspeth of his Miranda rights. Hudspeth said he understood his rights. Hudspeth then agreed to answer some questions and denied wanting to talk to a lawyer, stating, "I don't think I've done anything wrong and I just want to get this cleared up."

Sergeant Michael Cooper (Sgt. Cooper) of the Missouri State Highway Patrol supervised the COMET team during the Handi-Rak search. Missouri State Highway Patrol Mobile Crime Information Analyst Connie Farrow (Analyst Farrow), who was assigned to search Hudspeth's office, directed Sgt. Cooper's attention to the computer and compact disks (CDs) on Hudspeth's desk. Sgt. Cooper selected a homemade CD with a handwritten label and directed Analyst Farrow to open a folder containing thumbnail images of graphics files. The first image opened appeared to be adult pornography. Sgt. Cooper then rapidly viewed more thumbnails and discovered several images containing obvious child pornography.

Sgt. Cooper informed Cpl. Nash about the discovery of child pornography. After Cpl. Nash obtained Hudspeth's oral and written consent to search the computer, he asked Hudspeth about the images discovered by Sgt. Cooper. Hudspeth said he knew there was "guy stuff" on the computer and CDs, but did not know it was illegal. Hudspeth told Cpl. Nash he downloaded images from the Internet onto his office computer, and then burned the images onto CDs. Hudspeth refused to say whether he had downloaded similar images on his home computer.

Cpl. Nash requested permission to search Hudspeth's home computer. Hudspeth refused to give Cpl. Nash permission. Cpl. Nash had Hudspeth placed under arrest and transported to the county jail.

Based on the totality of the circumstances, Cpl. Nash believed Hudspeth's home computer also contained child pornography. Cpl. Nash and three other officers went to the Hudspeth home. Georgia Hudspeth (Mrs. Hudspeth) was at home with the couple's children. Cpl. Nash introduced himself, showed Mrs. Hudspeth his identification, and identified the men with him as law enforcement officers. None of the officers were in uniform or carrying weapons. Mrs. Hudspeth permitted the officers to enter the house and sent the children to a back bedroom. Cpl. Nash informed Mrs. Hudspeth they had arrested her husband after executing a search warrant at Handi-Rak and finding contraband on her husband's business computer. Cpl. Nash explained his concern that the home computer contained contraband. Cpl. Nash did not tell Mrs. Hudspeth that her husband refused to consent to the search of the home computer.

Mrs. Hudspeth and the officers discussed the family's two computers: one in the children's room and one in the garage. Cpl. Nash asked for permission to search the residence. Mrs. Hudspeth denied permission. Cpl. Nash then requested permission to take the computer in the garage. Mrs. Hudspeth asked Cpl. Nash what would happen if she did not consent. Cpl. Nash told Mrs. Hudspeth he would leave an armed uniformed officer at the home to prevent destruction of the computer and other evidence while he applied for a search warrant.

Mrs. Hudspeth said she wanted to make a phone call, went into the kitchen, and tried unsuccessfully to contact her attorney. After a few minutes, Mrs. Hudspeth returned to the officers and gave her consent to take the computer. Cpl. Nash saw homemade CDs next to the computer similar to the ones found at Handi-Rak and asked Mrs. Hudspeth if he could take the CDs. Cpl. Nash testified Mrs. Hudspeth said yes, and Mrs. Hudspeth testified she did not tell the officers not to take the CDs. The entire visit lasted approximately thirty minutes.

One of the issues before the Court of Appeals for the Eighth Circuit was whether Roy J. Hudspeth's refusal to give consent to a search of his home barred the law enforcement officers from going to his home and obtaining consent for the search from his wife, Georgia Hudspeth.

The Court stated that even though Mrs. Hudspeth's consent was voluntary and not coerced, the consent to the seizure of the home computer was not valid because her consent cannot "overrule" Mr. Hudspeth's denial of consent. The holding here flows from the Supreme Court's jurisprudence regarding co-tenants' ability to consent to searches, as seen in most recently in *Georgia v. Randolph*, 126 S.Ct. 1515 (2006). In this case, the Court asked whether an evidentiary seizure is lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. In *Randolph*, the police asked the defendant for permission to search his house after his estranged wife told officers that there were items of drug evidence" in the house. The defendant unequivocally refused. The police then turned

to his wife for consent. She consented to the search. The Court held that the seizure was not lawful.

"*Georgia v. Randolph* does not directly address the situation present in this case, in which a co-tenant is not physically present at the search but expressly denied consent to search prior to the police seeking permission from the consenting co-tenant who is present on the property. Nevertheless, the same constitutional principles underlying the Supreme Court's concerns in *Randolph* apply regardless of whether the non-consenting co-tenant is physically present at the residence, outside the residence in a car, or, as in our case, off-site at his place of employment. Here Hudspeth was asked for and expressly denied his consent to search. Thus, Mrs. Hudspeth's disputed invitation, without more, gave the police officers no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."

SEARCH AND SEIZURE:

Emergency Search

United States v. Huffman,
CA6, No. 05-2058, 8/30/06

In *United States v. Huffman*, Detroit police officers responded to a 911 call reporting shots had been fired at 5742 Lonyo, a residential address. The officers conducted additional brief, conversation with neighbors who confirmed that shots were indeed fired at the residence. The officers also observed bullet holes in the exterior and interior walls of the house—a house that looked as if occupants presently resided there. The unswept shards of glass on the front porch of the residence, along with the officers' belief that the shots had been recently fired, suggested that the risk of danger was still imminent. All of these facts, taken together, created a set of circumstances in which the Court of Appeals for the Second Circuit stated that the officers were justified to enter the residence without a warrant.

SEARCH AND SEIZURE:

Emergency Search to Protect Informer; 911 Telephone Call to Law Enforcement

United States v. Elder,
CA7, No. 05-3106, 11/1/06

In *United States v. Elder*, a 911 call led to the dispatch of two officers to a farm in Humbolt, Illinois. A caller had told the dispatcher, "I think we got meth out here" and added that "suspicious" people were "flying like quails." The caller hung up, and when the dispatcher called the originating number no one answered. One obvious possibility was that the caller had been injured. Officers saw lights and heard a TV within the farm house, but no one answered knocks on the front or rear doors. The door of a nearby outbuilding was open.

Looking through the doorway, the officers saw what appeared to be a laboratory. They entered in search of the caller and did not find him. But what they saw from outside (and both saw and smelled from inside) provided evidence against Elder, the property's owner. The caller turned out to have been Elder's father, who had not been abducted or injured—though the officers could not have known that without checking, because even if (as Elder maintains) they knew or should have known that the proprietors of

the meth lab were fleeing during the 911 call, the officers could not have known whether they took a hostage (or a life) in the process, or whether some third party was refusing to acknowledge his or her presence, and what danger that person posed (or was in).

"The entry into the outbuilding was reasonable, and a warrant was not essential to make it so. The officers acted sensibly in attempting to assure the caller's safety. The fact that drug dealers often use guns and knives to protect their operations created a possibility that violence had been done, or that someone was still there and lying in wait. So considerations of safety—the caller's and the officers'—made a look-see prudent. See *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006); *Maryland v. Buie*, 494 U.S. 325 (1990). Everything else followed from there, and the evidence was admissible against Elder. His argument that police cannot take steps to protect a caller's safety unless they know the caller's identity and reliability would require them to act unreasonably. Many 911 calls are brief, and anonymous, precisely because the speaker is at risk and must conceal the call. These persons are more rather than less in need of assistance."

SEARCH AND SEIZURE:

Flight as Basis for Reasonable Suspicion; Use of Police Dog to Stop

United States v. Lawshea,
CA7, No. 05-4098, 8/24/06

On October 24, 2004, Danville Police Officer Terry McCord was on patrol in his marked squad car in the Danville Housing Authority's Fair Oaks housing complex with his police dog. His sergeant had requested that he patrol the area because several fights had taken place there recently, including one that involved a stabbing. As Officer McCord drove through Fair Oaks, he saw two men standing very close to each other in a lit courtyard. In his estimation, they were standing closer than he believed two persons would normally stand. When Officer McCord turned toward the courtyard in his squad car, he saw the two men look directly at him. One of the men turned and ran into a nearby apartment. The other man, later identified as defendant Charles Lawshea, turned around and began walking away from Officer McCord's squad car.

When Officer McCord drove his car into the courtyard, Lawshea looked back and began running. Lawshea sprinted around an apartment building three times and McCord followed him in the squad car. After the third lap, Officer McCord stopped his car and twice warned Lawshea that if he did not stop, Officer McCord would release his police dog. Lawshea kept running and Officer McCord released and commanded his dog to apprehend the defendant. The police dog quickly caught up with Lawshea and knocked him to the ground while biting his back. As the police dog continued to bite, Lawshea fought with the dog and attempted to push the dog off. Officer McCord ran up and told Lawshea to stop fighting with the dog and to put his hands out to his sides. Once Lawshea stopped struggling, Officer McCord ordered the police dog to release Lawshea. At that point, Lawshea, who was lying flat on his stomach, began moving again by reaching underneath his stomach. McCord told Lawshea three times to keep his hands out in front or he would release the police dog again. When Lawshea kept

reaching underneath his stomach, Officer McCord again instructed the police dog to apprehend the defendant. After a few seconds of struggling, Lawshea placed his hands away from his body. The dog then released him and Officer McCord restrained Lawshea for about 20 to 30 seconds until backup officers arrived.

Once the backup officers arrived, Officer McCord and the police dog stepped away as the other officers handcuffed Lawshea with his hands behind his back and rolled him over on his side. Officer McCord then saw a small caliber handgun, later found to be loaded with a bullet in the chamber, on the ground where Lawshea's stomach had been and in the exact area where Lawshea had been reaching. After seizing the handgun, the officers determined that Lawshea was a convicted felon; he was then placed under arrest and taken to Provena United Samaritans Medical Center, where he received a tetanus shot and was treated for bites to his back and shoulder.

On February 24, 2005, Lawshea filed a motion to suppress the seizure of the gun, claiming that his actions were not the type of unprovoked flight that would create a reasonable suspicion for a stop. The district court held an evidentiary hearing on June 9, 2005. Lawshea argued that when the officer released his police dog to apprehend Lawshea, the Terry stop was transformed into a custodial arrest that lacked probable cause. Lacking probable cause to arrest the defendant, Lawshea urged, the evidence should to be suppressed. The district court denied Lawshea's motion to suppress in its entirety. Lawshea then entered a conditional guilty plea and now appeals.

Lawshea first argues that the officer did not have reasonable suspicion to conduct a Terry stop. Next, he contends that the use of a police dog to conduct the Terry stop rendered it an unconstitutional arrest. The Seventh Circuit Court of Appeals found as follows:

"We have consistently held that officers may conduct an investigatory stop of a person when they have a reasonable, articulable suspicion that criminal activity is afoot. *United States v. Breland*, 356 F.3d 787, 791 (7th Cir. 2004) ((citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). While 'reasonable suspicion' is a hard term to define precisely, the Supreme Court has held that it is a commonsense, non-technical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent people act. When determining whether an officer had reasonable suspicion, courts examine the totality of the circumstances known to the officer at the time of the stop, including the experience of the officer and the behavior and characteristics of the suspect.

"Here, Lawshea's flight from Officer McCord in a high crime area just before midnight gave the officer a reasonable suspicion to stop Lawshea. Recent fights, including a stabbing, triggered Officer McCord's patrol that evening. When he saw two men standing suspiciously close to each other, he approached them in his patrol car. Once Lawshea began sprinting from Officer McCord, the officer had reasonable suspicion to stop Lawshea and investigate further. Flight from a law enforcement officer gives that officer reasonable suspicion to pursue a suspect and conduct a *Terry* stop. *Illinois v. Wardlow,* 528 U.S. 119 (2000).

"In this case, Lawshea not only ran away from the officer, but he sprinted around the same building three times and refused to stop when Officer McCord twice ordered him to stop. Such flight gave Officer McCord reasonable suspicion to conduct a *Terry* search when Lawshea failed to stop after Officer McCord twice directed him to do so, Officer McCord's suspicions were further increased. Officer McCord's eight years of experience with the Danville Police Department, combined with the fact that Lawshea's flight took place in a high-crime area with several recent fights and a stabbing are also considerations.

"When determining whether an officer had reasonable suspicion, courts examine the totality of the circumstances known to the officer at the time of the stop, including the experience of the officer and the behavior and characteristics of the suspect."

"The Supreme Court recognized these circumstances, explaining that the characteristics of a location and the factors at play surrounding it, including whether the stop occurred in a 'high crime area,' are among the relevant contextual considerations in a *Terry* analysis. Since Wardlow, we have made it clear that when a suspect attempts to flee from the police, the officers have reasonable suspicion to pursue the suspect in order to conduct a *Terry* stop.

"Lawshea next argues that the use of the police dog transformed the *Terry* stop into an unconstitutional custodial arrest that required probable cause. We have long held that once police have the reasonable suspicion required to justify an investigatory stop, they may use reasonable means to effectuate that stop. *United States v. Felix-Felix*, 275 F.3d 627, 636 (7th Cir. 2001). Furthermore, the defendant's own actions in resisting an officer's efforts may be considered when a reviewing court analyzes whether an investigatory stop has transformed into an arrest.

"In Lawshea's case, had he stopped his flight the first or second time Officer McCord ordered him to stop, the use of the police dog would have been unnecessary. Lawshea's own actions prompted McCord to release the police dog to apprehend Lawshea and conduct a *Terry* stop. We agree with the district court that the use of a police dog may have been the best alternative use of force to apprehend the fleeing suspect and conduct the *Terry* stop. The use of the police dog, released only after Lawshea ignored two orders to stop his flight, did not transform the *Terry* stop into an arrest requiring probable cause."

SEARCH AND SEIZURE:

Knock and Talk; Advice of Refusal to Consent

Burroughs v. State, CACR05-1169, 10/11/06

In *Burroughs v. State*, the Arkansas Court of Appeals reversed the conviction of Jason Wayne Burroughs for manufacturing methamphetamine.

When Hot Springs and Arkadelphia officers went to a residence to arrest Burroughs, a female answered the knock on the door. An officer explained that they had a warrant for the arrest of some individuals, and he asked for her identification. She informed him her name was Alice Ashmore, and he again asked her for identification. He testified that she then said, "Come in, I'll get it out of my purse." The female went to her purse, got her identification, and gave it to him; that he ran it through ACIC and NCIC; and that it showed there was an outstanding warrant for her through another agency.

The officers made a protective sweep of the premises, observed items associated with the manufacture of methamphetamine, and then obtained a search warrant for the premises. The Court of Appeals reasoned that the officers were at the residence to determine if the persons on whom they wanted to serve arrest warrants were actually at the residence. Accordingly, they determined that "the situation falls in the category of a 'knock and talk' because the officers were 'searching' for individuals for whom they had arrest warrants. They were not sure that those persons were actually located at 247 Glade Street. Therefore, they approached the address to 'knock and talk' their way to finding the persons for whom they had arrest warrant."

The Arkansas Court of Appeals concluded that the facts of this case fit more in the category of a "search" than in the straight service of arrest warrants.

"The only sufficient consent would have been consent preceded by advice of the right to refuse consent, as explained in *State v. Brown*, 356 Ark. 460 (2004), which was not done here. A search by any other name is still a search, and this search of the dwelling should have been preceded by advising Ms. Ashmore that she did not have to give consent."

SEARCH AND SEIZURE:

Police Pursuit not a "Seizure"

United States v. Taylor,

CA8, No, 05-4324, 8/31/06

In *United States v. Taylor*, Minneapolis Narcotics Investigator Kurt Radke instructed a marked unit to stop a specific red Pontiac with Illinois plates. A squad car going the opposite direction passed the Pontiac and "flipped around." The Pontiac turned at the next intersection. Deputy Sheriff Eric Flek, in an unmarked car, followed the Pontiac and saw it stop about three-fourths of a block ahead. With the Pontiac's engine running, Flek saw the driver exit the car, grab a black bag from the trunk with his right hand, and run into an alley with a small black object in his left hand. The driver disappeared behind a garage, reemerged seconds later without the black bag, and continued down the alley, making an "under-arm-type throw" with his left hand before disappearing between two garages.

Police searched the alley and adjoining yards. They saw boots sticking-out from beneath a woodpile beside a garage in the alley, forcibly pulled driver Larry Taylor from the woodpile when he would not come out, and handcuffed him. Other officers, assisted by a drug dog, found Taylor's black bag containing 986 grams of cocaine in a backyard and a loaded Glock 9 mm handgun in another backyard near the alley. Another officer secured the

Pontiac, finding a cell phone lying on the street near the open driver's door and a digital scale with cocaine residue on the front passenger's seat.

On appeal, Taylor argues that the district court erred in denying his motion to suppress, presenting a single Fourth Amendment issue. He argues that the police initiated an unlawful investigative stop of the Pontiac without reasonable suspicion and thereby "impermissibly created their own exigent circumstances and probable cause." Therefore, all physical evidence obtained after this unlawful investigative seizure must be suppressed.

The Court of Appeals for the Eighth Circuit stated this contention has a simple and well-established answer—police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

"Taylor was not seized when he stopped the Pontiac and fled on foot. The marked squad car had been ordered to make an investigative stop and presumably turned around to do so. But Taylor driving the Pontiac turned the corner and eluded the stop. Deputy Flek was still well behind the Pontiac when Taylor stopped the car and ran into the alley. Thus, he had not been seized when he dropped the cell phone in the street and threw the black bag and the gun into different back yards. This evidence, when found by the police, had been abandoned."

SEARCH AND SEIZURE:

Search by Private Person;
Parent's Home Searched by Son

United States v. Ginglen

CA7, No. 06-1074, 11/6/06

Between November 10, 2003, and July 12, 2004, William A. Ginglen robbed several central Illinois banks at gunpoint, netting a total of $56,382. On August 19, one of his three sons, Jared, who works as an officer for the Peoria Police Department, read an article about a serial bank robber in the area. The article caught his attention because the description of the perpetrator—five foot eight, two hundred pounds, and a male in his late fifties— sounded a lot like his father, and a description of the get-away car matched one owned by his parents. The article said that surveillance camera photographs of the perpetrator could be viewed on the Internet, so Jared went online to test his suspicions. Sure enough, Jared recognized the person in the photographs as his father.

He called his older brother, Garrett (who also lived in Peoria) to tell him about the website, and Garrett agreed that the person in the photographs was their father. Garrett told Jared that he was going to drive the thirty-five miles to Lewistown, where their parents lived, and Jared said that he wanted to go as well. He told Garrett to pick him up at his house so that he could change out of his police uniform. After Garrett picked up Jared, he called their younger brother, Clay, and told him about the website. Clay also recognized their father in the photographs.

The three brothers met at the Lewiston Fire Department to discuss what to do next. They agreed that for their father's safety and the

safety of the people in their community, the robberies had to be stopped immediately. For this reason, they decided to go to their parent's house, confront their father, and convince him to turn himself in. If he refused, they planned to take him in forcibly.

The brothers proceeded with their plan. Jared wore a bulletproof vest and brought his gun and police badge. He wore the vest because he knew that his father was armed and did not know his father's state of mind. Clay first entered the unlocked house, followed by Garrett and then Jared. Garrett looked for his father on the first floor, and Clay and Jared searched upstairs, but their father was not home. During the course of the search, Jared and Clay saw a pair of shoes, pants, and a shirt that matched those worn by the robber in the photographs.

The brothers called the Lewiston Chief of Police and arranged to meet him at Clay's house. Police used the brothers' observations in their father's home to obtain a search warrant. The search uncovered the clothes matching those worn by the robber as well as cards and journals, which revealed that Ginglen was cheating on his wife and spending the robbery proceeds on his mistress.

All three brothers testified that they were raised in the home that they entered on August 19, 2004, and that they had the consent of their parents to enter it at any time. They said that they had entered the home uninvited several times in the past and that their parents never precluded them from going in certain rooms.

Ginglen moved to suppress the evidence found in his home contending that his sons were acting not as private persons but as government agents since his son, Jarad, was a law enforcement officer. The Seventh Circuit Court of Appeals found, in part, as follows:

"The Fourth Amendment's purpose is to protect citizens against unreasonable searches and seizures by the government. It does not apply, however, to searches or seizures performed by private individuals. To determine whether an individual was acting as a private party or as an 'instrument or agent' of the government, we examine whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends.

"In this case, the brothers acted to protect their father and others from further harm, not to assist law enforcement. The brothers' actions in entering the home are consistent with concerned sons attempting to prevent a misguided father from engaging in continued destructive behavior. Particularly noteworthy, they did not notify police before searching the home, they did not act to obtain a reward, and they did not collect evidence of the crimes while inside the home. The brothers may ultimately have intended to turn their father in to the authorities, but their primary objective was to protect the community from harm, not to assist law enforcement.

"Ginglen attempts to avoid this conclusion by pointing to the fact that Jared wore a bulletproof vest and brought a police badge and gun to Ginglen's home. He argues that these facts definitively establish that Jared acted in his capacity as a police officer. We

disagree. Jared testified that he always carries his gun and police badge and that he brought the bulletproof vest because he knew that his father owned guns. Jared's testimony is wholly consistent with a non-police-related motivation for entering his father's home.

"A second factor weighs in finding that the brothers acted as private individuals. There is no indication that the government encouraged or acquiesced in the brothers' decision to enter their parents' home. Ginglen maintains that Garrett and Clayton were encouraged by the government insofar as Jared, an off-duty police officer, participated in the search. Jared, however, was acting, not in his capacity as a police officer, but as a concerned son. The Ginglen home was outside of Jared's jurisdiction, and he had no authority to arrest his father absent exigent circumstances. Furthermore, Jared took off his police uniform before driving to Lewiston, did not inform any of his superiors—or any other police department—that he intended to search the home, and did not instruct his brothers in how to carry out the search. These facts further support a conclusion that Jared was not acting as a police officer.

"In this case, Jared did not attempt to collect evidence while inside his father's home. He discovered circumstances indicating that a family member was in serious danger and acted, as a responsible son would, by calling the police. His uniquely personal motivation requires us to conclude that he—and his brothers—acted as private citizens, and not as a government agents, when they entered their parents' home."

SEARCH AND SEIZURE:

Stop and Frisk; Reasonable Suspicion

United States v. Long,

CA6, No. 05-5692, 10/2/06

On November 20, 2000, an unknown citizen called the Knoxville County 911 shortly after 4:50 p.m. reporting a burglary occurring at a neighboring residence on Kenilworth Lane. The caller told the 911 operator that the lady of the house was addicted to drugs; that drug dealers had been removing items, including vehicles, in payment for a drug debt; and that the police had been to that house two or three times in the past week. The neighbor stated that he had just spoken with the husband who lives in the house and that the husband, who was in Tampa, asked him to call the police because the items were being taken against the woman's will. The caller stated that two black males and one white male were removing pictures and other items from the house and placing them into two pickup trucks. The caller described the pickup trucks as a red S-10 and a black and gray Ford Ranger with an extended cab. The vehicles left the house and the caller suggested that they would be heading towards Cherry Street to get out of the neighborhood.

The issue in this case was whether the police had reasonable suspicion to pull over and stop the defendant Long.

The Court of Appeals for the Sixth Circuit stated that the call was sufficiently reliable, because even though the caller did not give his name, he identified the street and house where he lived, the dispatcher was aware of his address, and the police actually pulled up in front of his house before he got off

the phone with the 911 operator. The caller counted as a known citizen as opposed to an anonymous tipster.

Although in some cases, police knowledge of an address from where an otherwise anonymous call is made might not be enough to render the call reliable, the reliability of this call is strongly supported by the facts. If the caller turned out to have been lying, the police could have confronted him immediately. Whether or not the authorities were aware of the caller's name in this situation added little to the reliability determination.

SEARCH AND SEIZURE:

Search Warrants;
Neutral and Detached Magistrate
Davis v. State, CR 05-1257, 9/28/06

In *Davis v. State*, one of the issues on appeal was that the Lonoke County Circuit Court erred in denying a motion to suppress because the judge who signed the search warrant was not a neutral and detached magistrate. At the time Judge Joseph Svoboda issued the warrant, Judge Svoboda also was an Assistant Attorney General for the State, in the criminal division, handling state and federal habeas corpus matters.

In *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), the United States Supreme Court stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

The Supreme Court has carved out two main ways in which a magistrate can deviate from his judicial role of neutrality and detachment: (1) when he has a substantial pecuniary interest in the outcome of the case, or (2) when he is acting in a law enforcement capacity.

The Arkansas Supreme Court held that in the present case, Judge Svoboda is both a part-time district judge and an assistant attorney general. Davis has presented no evidence, besides the nature of Judge Svoboda's employment with the State, that the judge was not neutral and detached. Specifically, no evidence was presented that Judge Svoboda actively involved himself in the investigation. Therefore, the circuit court did not err in finding that the judge was a neutral and detached magistrate.

SEARCH AND SEIZURE:

Special Needs Doctrine
MacWade v. Kelly, CA2, No. 05-6754, 8/11/06

In *MacWade v. Kelly*, the Second Circuit Court of Appeals was asked to decide whether the government may employ random, suspicionless container searches in order to safeguard mass transportation facilities from terrorist attack. The precise issue before the Court was whether one such search regime, implemented on the New York

City subway system, satisfied the special needs exception to the Fourth Amendment's usual requirement of individualized suspicion. The Court of Appeals for the Second Circuit held that it did satisfy the requirements. The case is as follows:

In 2004, terrorists killed over 240 people by using concealed explosives to bomb commuter trains in Madrid and Moscow. On July 7, 2005, terrorists—again using concealed explosives—killed more than 56 people and wounded another 700 individuals by launching a coordinated series of attacks on the London subway and bus systems. Two weeks later, on July 21, 2005, terrorists launched a second but unsuccessful wave of concealed explosive attacks on the London subway system.

That same day, the New York City Police Department (NYPD) announced the Container Inspection Program (the Program) that is the subject of this litigation. The NYPD designed the Program chiefly to deter terrorists from carrying concealed explosives onto the subway system and, to a lesser extent, to uncover any such attempt. Pursuant to the Program, the NYPD establishes daily inspection checkpoints at selected subway facilities. A "checkpoint" consists of a group of uniformed police officers standing at a folding table near the row of turnstiles disgorging onto the train platform. At the table, officers search the bags of a portion of subway riders entering the station.

In order to enhance the Program's deterrent effect, the NYPD selects the checkpoint locations "in a deliberative manner that may appear random, undefined, and unpredictable." In addition to switching checkpoint locations, the NYPD also varies their number, staffing, and scheduling so that the "deployment patterns…are constantly shifting." While striving to maintain the veneer of random deployment, the NYPD bases its decisions on a sophisticated host of criteria, such as fluctuations in passenger volume and threat level, overlapping coverage provided by its other counter-terrorism initiatives, and available manpower. The officers assigned to each checkpoint give notice of the searches and make clear that they are voluntary. Close to their table they display a large poster notifying passengers that "backpacks and other containers [are] subject to inspection." The Metropolitan Transportation Authority, which operates the subway system, makes similar audio announcements in subway stations and on trains. A supervising sergeant at the checkpoint announces through a bullhorn that all persons wishing to enter the station are subject to a container search and those wishing to avoid the search must leave the station. Although declining the search is not by itself a basis for arrest, the police may arrest anyone who refuses to be searched and later attempts to re-enter the subway system with the uninspected container.

Officers exercise virtually no discretion in determining whom to search. The supervising sergeant establishes a selection rate, such as every fifth or tenth person, based upon considerations such as the number of officers and the passenger volume at that particular checkpoint. The officers then search individuals in accordance with the established rate only.

Once the officers select a person to search, they limit their search as to scope, method,

and duration. As to scope, officers search only those containers large enough to carry an explosive device, which means, for example, that they may not inspect wallets and small purses. Further, once they identify a container of eligible size, they must limit their inspection "to what is minimally necessary to ensure that the…item does not contain an explosive device," which they have been trained to recognize in various forms. They may not intentionally look for other contraband, although if officers incidentally discover such contraband, they may arrest the individual carrying it. Officers may not attempt to read any written or printed material. Nor may they request or record a passenger's personal information, such as his name, address, or demographic data.

The preferred inspection method is to ask the passenger to open his bag and manipulate his possessions himself so that the officer may determine, on a purely visual basis, if the bag contains an explosive device. If necessary, the officer may open the container and manipulate its contents himself. Finally, because officers must conduct the inspection for no "longer than necessary to ensure that the individual is not carrying an explosive device," a typical inspection lasts for a matter of seconds.

The Second Circuit held that the New York Police Department search of subway riders' belongings program is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a special need; (2) that need is weighty; (3) the program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree.

SEARCH AND SEIZURE:

Stop and Frisk; Show-up; Policy on Patting Down Anyone Placed in Police Vehicle

United States v. McCargo,

CA2, No. 05-4026, 9/13/06

On July 28, 2003, Dustin L. McCargo was stopped by the Buffalo, New York Police six blocks from a reported attempted burglary. The officers decided to take McCargo back to the scene of the alleged crime to see if the victim could identify him. Because the officers planned to transport him in the back of their patrol car, they frisked him for weapons in accordance with a departmental policy. During the frisk, the officers discovered a handgun. McCargo was arrested and later charged in federal court with possession of a firearm by a convicted felon.

After McCargo moved to suppress the gun as the product of an unconstitutional search, the motion was referred to a magistrate judge who found that the police had reasonable suspicion to stop McCargo, based on his location near the scene of the crime in a high-crime area very soon after the 911 call. The magistrate judge determined, however, that the pat-down was unconstitutional because the officers had no suspicion that McCargo was armed and recommended that the gun be suppressed. Upon review, the Second Circuit Court of Appeals found as follows:

"While we have already held that the police may require a person temporarily detained under Terry to move to another place, the question is whether this transportation was reasonable. On the government's side of the scale is the strong interest in crime prevention and detection. It was reasonable

for the officers to believe that the victim might be able to identify the perpetrator. Taking McCargo to the crime scene could have immediately confirmed or dispelled whether he was a suspect. The fact that the victim had not seen any of the perpetrators was unknown to the officers. Having located a suspect and having good reason to think that he might have something to do with the crime, we think it reasonable for the police to decide to extend the Terry stop briefly to transport McCargo to the crime scene to see whether he could be identified by the victim. The inconvenience of doing so to McCargo, for the short time it would have taken, would present only a limited Fourth Amendment intrusion on McCargo's rights.

"Permitting a limited frisk for weapons before placing a suspect in a police car, pursuant to an established policy, reflects an appropriate balancing of the interests at stake. Because the suspect is placed in the rear of the car—a location where, were he armed, he would expose the officers to peril—we think the most reasonable, and least intrusive, solution is to permit a pat-down for weapons. The possibility of danger to the officers can be eliminated simply by ensuring that the suspect does not have a weapon that can be used against them.

"The justification for the pat-down is not that the suspect is reasonably suspected of being armed; it is rather a matter of sound police administration: police officers should be certain before transporting members of the public, whom they do not know, that none of them is armed. The administrative nature of the search is evidenced by the existence of the Buffalo Police's department-wide policy that requires the pat-down whenever a person is transported in a police car. The fact that the policy is administrative and universally applied to all who are transported eliminates any selective-use concern."

SEARCH AND SEIZURE:

Vehicle Stop Based on License Information

United States v. Ellison,

CA6, No. 04-1925, 9/5/06

The central issue in this case is whether the Fourth Amendment is implicated when a police officer investigates an automobile license plate number using a law enforcement computer database. While on routine patrol, Officer Mark Keeley of the Farmington Hills (Michigan) Police Department pulled into a two-lane service drive adjacent to a shopping center. Keeley testified that a white van, with a male driver inside, was idling in the lane closest to the stores, in an area marked with "Fire Lane" and "No Parking" signs. Keeley did not issue the van a citation for being illegally parked, nor did he request that the driver move the van. Rather, he moved into a parking spot to observe the van and entered the vehicle's license plate number into his patrol car's Law Enforcement Information Network ("LEIN") computer. The LEIN search revealed that the vehicle was registered to Curtis Ellison, who had an outstanding felony warrant. Following standard procedure, Keeley radioed for back-up and continued observing the van. After two minutes, another male got into the van, and it drove away. Officer Keeley followed the van until his back-up was nearby, and then activated his lights and stopped the van.

Officer Keeley approached the driver's-side window as his back-up arrived. He advised

the driver that he was being stopped for parking in a fire lane and asked for license, registration and proof of insurance. The driver, identified as Edward Coleman, stated that he had only stopped in front of the store to wait for the passenger. At this time the passenger stated that he was the registered owner of the vehicle. Keeley verified the passenger's identity as Curtis Ellison and moved to the passenger side of the van. Keeley notified Ellison that he was being arrested on the outstanding warrant. Ellison stepped out of the van, and during the routine safety pat-down, two firearms were found. Coleman was released with a warning about parking in a fire lane.

Ellison was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Prior to trial, he made a timely motion to suppress the firearm as the fruit of an illegal search. After holding a hearing, the district court made a factual finding that the van was not parked illegally, and thus, the officer did not have probable cause to run the LEIN check of Ellison's license plate. The court issued a Memorandum Opinion and Order granting the motion to suppress under the "fruit of the poisonous tree" doctrine.

In *United States v. Ellison*, the government appealed the case to the Court of Appeals for the Sixth Circuit, who found as follows:

"Although the district court did not expressly state that Ellison had a reasonable expectation of privacy in the information contained on his license plate, such a conclusion was necessarily implied by the court's ruling that a Fourth Amendment violation occurred. Thus, the district court could only find that the LEIN search violated the Fourth Amendment if it first concluded that Ellison had a 'constitutionally protected reasonable expectation of privacy' in his license plate number.

"This court has not previously addressed in a published opinion the question of whether an individual has a reasonable expectation of privacy in his license plate. In two unpublished decisions, however, this court has agreed with the other circuits that have decided this issue by holding that no such privacy interest exists. The reasoning of these opinions, as well as that of the Supreme Court in related cases, leads us to agree that a motorist has no reasonable expectation of privacy in the information contained on his license plate under the Fourth Amendment.

"The very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others. There is no case law indicating that there can be any reasonable expectation of privacy in license plates which are required by law to be displayed in public on any vehicle on a public street. It is apparent that when a vehicle is parked on the street or in a lot or at some other location where it is readily subject to observation by members of the public, it is no search for the police to look at the exterior of the vehicle. Thus, so long as the officer had a right to be in a position to observe the defendant's license plate, any such observation and corresponding use of the information on the plate does not violate the Fourth Amendment."

SEARCH AND SEIZURE:

Vehicle Stop Based on Parking Offense

United States v. Choudhry,
CA9, No. 05-10810, 8/25/06

In *United States v. Choudhry*, two San Francisco police officers, upon observing a vehicle parked illegally, performed an investigatory traffic stop of the vehicle, in which Azim Choudhry was a passenger. During a subsequent search of the vehicle, the officers discovered a gun under the front passenger seat. Choudhry was indicted for possession of a firearm by a felon, a violation of 18 U.S.C. § 922(g). Alleging that the search and seizure violated the Fourth Amendment, Choudhry filed a motion to suppress the gun.

In challenging the lawfulness of the stop, Choudhry argued that a civil parking offense that is enforced through an administrative process could not, standing alone, justify an investigatory stop. Choudhry also argued that the other circumstances surrounding the stop were insufficient to support a finding of reasonable suspicion and that the stop therefore violated the Fourth Amendment. The Court of Appeals for the Ninth Circuit stated that because parking infractions constitute traffic violations under California's Vehicle Code and local laws enacted pursuant to the Vehicle Code, and because the officers had the authority to enforce the particular violation at issue, a civil parking violation under California's Vehicle Code falls within the scope of the Supreme Court's decision in Whren v. United States, 517 U.S. 806 (1996). Accordingly, the Court held that the parking violation provided the officers with reasonable suspicion to conduct an investigatory stop of the vehicle.

SEARCH AND SEIZURE:

Vehicle Stop Without Reasonable Suspicion; Passenger in Vehicle

United States v. Mosley,
CA3, No. 05-1519, 7/21/06

On the night of October 28, 2003, Robert Mosley went to a nightclub in Philadelphia with his nephew Jerome Small, who drove. While they were at the club, Small received a telephone call from a romantic acquaintance, and told Mosley that he was leaving the club to go meet her. Not wanting to leave Mosley without a ride home, Small introduced Mosley to his friend Julian Hayes, who agreed to drop Mosley off on his way home. At around 1:30 a.m., Mosley left the club with Hayes and Erica Scott, a dancer at the club. Hayes and Scott got in the front seat of Hayes' vehicle, a green Suzuki SUV, and Mosley got in the back.

At about the same time, a police radio call went out advising officers to be on the lookout for a black man with dreadlocks driving a green SUV. The source of the information relayed in the radio call is not reflected in the record. Police officers on patrol in the neighborhood of the nightclub heard the call and shortly thereafter saw Hayes' SUV, a green SUV with a black driver, as it was pulling away from the nightclub. They immediately pulled the car over. Upon approaching the car, the responding officers observed a gun on the floor under the driver's seat. They then ordered Hayes, Scott, and Mosley to get out of the car, and searched it, recovering a second gun from the front seat, two from the floorboards of the back seat area, and one from the back seat itself. Hayes and Mosley were arrested and charged with gun possession.

The Court of Appeals for the Third Circuit noted that the United States Supreme Court has held that anonymous tips do not provide sufficient justification for an investigatory stop, see *Florida v. J.L.*, 529 U.S. 266 (2000), and the officers did not observe Hayes committing any traffic violation that would have justified the stop under *Whren v. United States*, 517 U.S. 806 (1996).

The government conceded that the stop was illegal, and dropped all charges against Hayes. The government proceeded, however, with the gun possession case against Mosley, arguing that because he was a passenger in the vehicle, he could not seek to suppress the guns, notwithstanding the illegality of the stop. Mosley contended that insofar as he had been illegally seized by the traffic stop, he should have the same suppression claim as Hayes. The District Court agreed with the government, and admitted into evidence the guns found in the back seat of the vehicle. Mosley was convicted under 18 U.S.C. § 922(g) for possessing a firearm following a felony conviction.
The Court of Appeals for the Third Circuit reversed the conviction holding that when a vehicle is illegally stopped by the police, no evidence found during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged. The entire vehicle is linked to the illegality of the stop and the Fourth Amendment right extends to all of the occupants.

The Third Circuit Court of Appeals stated that the government would have had to establish one of the traditional exceptions such as inevitable discovery, independent source, or some intervening act or event sufficient to purge the taint of the illegal stop before it could introduce the seized weapon. The government raised no such exception at trial, and raised none on appeal. Therefore the guns were illegally seized and must be suppressed.

SUBSTANTIVE LAW: Duress

Dixon v. United States, No. 05-7053, 6/22/06

In *Dixon v. United States*, Keshia Dixon was charged with receiving a firearm while under indictment in violation of 18 U. S. C. §922(n) and with making false statements in connection with the acquisition of a firearm in violation of §922(a)(6). She admitted at trial that she knew she was under indictment when she purchased the firearms and knew that doing so was a crime, but claimed that she was acting under duress because her boyfriend had threatened to harm her and her daughters if she did not buy the guns for him. Bound by Fifth Circuit precedent, the District Court declined her request for a jury instruction placing upon the Government the burden to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that petitioner had the burden to establish her defense by a preponderance of the evidence. She was convicted, and the Fifth Circuit affirmed.

The United States Supreme Court affirmed the conviction as well, stating that the Government bears the burden of proving beyond a reasonable doubt that Davis knew that she was making false statements and knew that she was breaking the law when she acquired a firearm while under indictment. The Government does not bear the burden of disproving Davis' duress defense beyond

a reasonable doubt. The long-established common-law rule places the burden of proving the duress defense on the defendant.

SUBSTANTIVE LAW:

Value of Item Stolen; Sales Tax

Russell v. State, CR 06-180, 11/2/06

In *Russell v. State*, the Arkansas Supreme Court was faced with the issue in theft cases of determining whether or not the sales tax paid on the item should be included in determining the value of the stolen item. The Court concluded the sales tax is a cost imposed on the transaction. It does not in any way increase or enhance the "value" of the property. Therefore, sales taxes are not properly considered a component of the value of an item of stolen property.

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