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## ARREST: Extraterritorial Jurisdiction

*Fuller v. State, CACR 06-1272, 1/9/08 (Unpublished)*

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**I**n *Fuller v. State*, the Arkansas Court of Appeals stated that while it is true that Little Rock police officers generally are not authorized to make an arrest in Saline County when acting on their own, they have the power to do so when acting in concert with law enforcement officers who do have jurisdiction in the territory where the arrest occurs. Ark. Code Ann. § 1681106(c)(3) (Repl. 2005). Here, the Little Rock officers were working in concert with a state trooper who had statewide authority to arrest pursuant to Ark. Code Ann. § 128106(b) (Repl. 2003), and this is sufficient to authorize their extraterritorial arrest pursuant to Ark. Code Ann. 1681106(c)(3). *White v. State*, 41 Ark. App. 170, 850 S.W.2d 34 (1993).

## CIVIL LIABILITY: Deadly Force Standard

*Price v. Sery, CA9, No. 06-35159, 1/22/08*

**O**regon Police Officer Jason Sery and another officer, Sean Macomber were on a routine patrol in the St. John's neighborhood of North Portland on Sunday afternoon, March 28, 2004, when Macomber noticed a white luxury sedan with tinted windows and chrome wheels that struck him as atypical "for cars driven in that working class neighborhood." The officers were aware of local complaints of illegal drug activity, and drove by the car for a closer look. Upon running a registration check and learning that the car was

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registered to a man born in the 1950s, Macomber concluded that the age of the driver did not match. He also felt that the car's two occupants "appeared nervous and did not want to make eye contact."

As the officers drove by, the car remained stopped, leading Macomber to suspect that the driver was waiting to leave the area without being observed by the officers. After passing the car, the officers temporarily lost visual contact with it. When the officers regained sight of the car, the driver was now the sole occupant. The officers witnessed the driver signal and make a right turn into a strip mall parking lot, but it did not comply with Oregon traffic laws requiring vehicles to signal continuously for at least 100 feet prior to executing a turn. Macomber parked behind the parked car, blocking it from any means of exit.

Although what transpired after the officers exited their patrol car and confronted Perez is disputed and awaits determination by a jury, it is undisputed that no more than 25 seconds elapsed from the time the officers left their patrol car until the time that Sery shot Perez. At the time of his death, Perez's seatbelt remained fastened, and he was unarmed.

Gwen Price, on behalf of Perez's estate and his son, and Deborah Perez, sued Sery, Macomber, and the City of Portland under 42 U.S.C. § 1983, alleging that the officers unconstitutionally used deadly force for which the City is liable under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

The use of deadly force by the Portland Police Department is governed by Portland Police Bureau General Order ("G.O.") § 1010.10, which reads in relevant part as follows:

*The Bureau recognizes that members may be required to use deadly force when their life or the life of another is jeopardized by the actions of others. Therefore, state statute and Bureau policy provide for the use of deadly force under the following circumstances:*

*a. Members may use deadly force to protect themselves or others from what they reasonably believe to be an immediate threat of death or serious physical injury.*

*b. A member may use deadly force to effect the capture or prevent the escape of a suspect where the member has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the member or others.*

*c. If feasible, some warning has been given.*

*Members must be mindful of the risks inherent in employing deadly force. A member's reckless or negligent use of deadly force is not justified in this policy or State statute. Members are to be aware that this directive is more restrictive than state statutes.*

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

"Price first contends that, as written, the City's official policy governing the use of lethal force by police officers violates the Fourth Amendment's requirements, as explicated by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). Specifically, Price argues that the City's policy, expressed in G.O. § 1010.10, that an officer 'reasonably believe' a suspect poses an immediate threat of serious physical injury

or death falls short of the ‘probable cause’ requirement set forth in *Garner* and this court’s precedents.

“Both *Garner* and *Graham v. O’Connor*, 490 U.S. 386 (1989) are recognized as the leading Supreme Court cases explicating the requirements for the use of force by law enforcement officers under the Fourth Amendment. In *Garner*, the Supreme Court for the first time considered the constitutionality of the common law rule permitting the use of lethal force to prevent the escape of a fleeing felon (but not of a misdemeanor). The Court held that the Fourth Amendment’s reasonableness standard required ‘probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others’ before using deadly force. *Garner*, 471 U.S. at 11.

“In *Graham*, the question was whether excessive force claims (a broader category than deadly force claims) should be analyzed as substantive due process claims or as Fourth Amendment claims. *Graham*, 490 U.S. at 388. Chief Justice Rehnquist referred in a general way to the Fourth Amendment as requiring an ‘objective reasonableness’ standard—not matching perfectly either the ‘reasonable belief’ or ‘objective probable cause’ formulations.

“The *Graham* Court clarified that the reasonableness inquiry turned upon the circumstances confronting the officer, rather than the officer’s subjective beliefs or intentions: ‘As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard for their underlying intent or motivation.’

“The *Garner* and *Graham* decisions are the Court’s leading cases bringing claims about the use of force—deadly or allegedly excessive—by law enforcement officers under the rubric of modern Fourth Amendment search-and-seizure analysis, rather than under the common law or substantive due process. Both cases focused on the ‘totality of the circumstances’ and the ‘perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’ *Graham*, 490 U.S. at 396; see also *Garner*, 471 U.S. at 9.

“The Supreme Court’s careful discussion of ‘probable cause’ in a recent Fourth Amendment arrest context in *Maryland v. Pringle*, 540 U.S. 366 (2003), is instructive. There, Chief Justice Rehnquist, the author of *Graham*, wrote that the probable-cause standard is incapable of precise definition or quantification into percentages because it deals with the probabilities and depends on the totality of the circumstances and ‘the substance of all the definitions of probable cause is a reasonable ground for belief.’ *Pringle*, 540 U.S. at 371.

“*Pringle* does not address ‘probable cause’ in the context of the use of deadly force by law enforcement officers. Nevertheless, the phrase ‘probable cause’ itself should not mean one thing in one context and something different elsewhere. Rather, what an officer has probable cause to believe dictates the level of force he may justifiably use in a given scenario. In other words a law enforcement officer’s use of force will be justified, or not, by what that officer reasonably believed about the circumstances confronting him.

“The Supreme Court very recently confirmed and clarified this analysis of the relationship between *Garner*, *Graham*, and the Fourth

Amendment's reasonableness requirement in *Scott v. Harris*, 127 S. Ct. 1769 (2007). In considering the reasonableness of a police officer's use of likely deadly force to end a high-speed car chase, the Court noted that *Graham* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular force in a particular type of situation. The Court went on to state that whether or not the police officer's actions constituted application of deadly force, *all that matters is whether the officer's actions were reasonable*. Accord *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007) (holding that, under *Scott*, 'there is no special Fourth Amendment standard for unconstitutional deadly force'); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002) (We now hold that the reason to believe, or reasonable belief standard embodies the same standard of reasonableness inherent in probable cause.)

"We are satisfied that the law does not support Price's contention that 'reasonable belief' is a lesser standard than 'probable cause' in this context. Both standards are objective and turn upon the circumstances confronting the officer rather than on the officer's mere subjective beliefs or intentions, however sincere. Our case law requires that a reasonable officer under the circumstances believe herself or others to face a threat of serious physical harm before using deadly force. The touchstone of the inquiry is 'reasonableness,' which does not admit of an 'easy-to-apply legal test.' The City's policy requires that an officer have a reasonable belief in an 'immediate threat of death or serious physical injury' and thus comports with the requirement."

### CIVIL LIABILITY: **Deadly Force; Shooting Individual Stealing Police Cruiser**

Long v. Slaton, CA11, No. 06-14439, 11/16/07

**I**n May 2005, Dr. Robert R. Long, a medical doctor, went to the Lauderdale County Probate Court seeking to have his son, Bryan Long, committed to a hospital because Long was suffering from a "psychotic episode." Long's father was unable to have Long committed because of a lack of available hospital beds. While returning to his residence, Long's father called the Lauderdale County Sheriff's Department and requested assistance due to Long's psychosis. Upon arrival at his home, Long's father waited in his vehicle for help to arrive.

Deputy Jimmie Slaton responded to the call and arrived at the Long residence shortly thereafter. Deputy Slaton, who was alone, got out of his marked sheriff's cruiser, leaving the keys in the ignition and the driver's door open. Deputy Slaton then spoke to Long's father, who explained his desire that Long be detained due to Long's psychosis. When Deputy Slaton asked Long's father if Long had been physically violent with him, the father responded, "No."

Deputy Slaton then approached Long, who was at the end of the driveway, close to the house. Deputy Slaton pulled out handcuffs and told Long that Deputy Slaton would take Long to jail. Long voiced his disagreement and then ran over to and got inside Deputy Slaton's cruiser and closed the door. Deputy Slaton then ran to the driver's side of the cruiser, pointed his pistol at Long, and ordered Long to get out of the cruiser. Deputy Slaton threatened to shoot Long if Long did not comply. Long then shifted the cruiser into reverse and began backing

away and down the driveway toward the road. Deputy Slaton stepped into the middle of the driveway and fired three shots at Long as the sheriff's cruiser moved away. One shot went through the windshield and struck Long in the chest. The cruiser stopped as it rolled into an embankment, and Long died after about a minute. At the time, backup law enforcement was en route.

This appeal involves deadly force, the Fourth Amendment, and qualified immunity. Deputy Slaton and Sheriff Ronnie Willis appeal the district court's denial of their motion to dismiss on qualified immunity grounds this section 1983 suit arising out of the death of Bryan Long. Dr. Robert Long and Kelly Long allege that Deputy Slaton shot and killed Long in violation of Long's civil rights. Upon review, the Eleventh Circuit Court of Appeals, in part, found as follows:

"We first examine whether Deputy Slaton's use of deadly force was excessive and violated the Fourth Amendment. The standard for whether the use of force was excessive under the Fourth Amendment is one of 'objective reasonableness.' See *Graham v. Connor*, 109 S. Ct. 1865, 1867-68 (1989). '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.'

"In the context of deadly force, the Supreme Court has set out examples of factors that justify the use of such force:

*Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using*

*deadly force. Thus, if the suspect threatens the officer with a weapon...deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. Tennessee v. Garner, 105 S. Ct. 1694, 1701 (1985).*

"In examining whether an officer's use of deadly force is reasonable, we recognize that 'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' *Graham*, 109 S. Ct. at 1872. So we are loath to second-guess the decisions made by police officers in the field.

"Accepting the facts as alleged in the complaint as true, we conclude that Deputy Slaton's force was objectively reasonable under the Fourth Amendment. Although Slaton's decision to fire his weapon risked Long's death, that decision was not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if Long was allowed to flee in a stolen police cruiser. Under the law, the threat of danger to be assessed is not just the threat to officers at the moment, but also to the officers and other persons if the chase went on. *Pace v. Capobianco*, 283 F.3d 1275, 1280 n.12 (11th Cir. 2002). The question then is whether, given the circumstances, Long would have appeared to reasonable police officers to have been gravely dangerous. Considering the circumstances surrounding the shooting, including the threat posed by Long's condition and behavior, this question must be answered 'yes.'"

"We stress these facts: Long was mentally unstable; and he had taken control of not just any vehicle, but a police cruiser. This police cruiser was marked as a Lauderdale County

Sheriff's patrol car and was equipped with a flashing light bar on the roof, two police radios, and other emergency equipment. Under Alabama law, a motor vehicle is, at least, potentially a 'dangerous instrument'—that is, an instrument 'highly capable of causing death or serious bodily injury.' Ala. Code § 13A-1-2(5). Different from other vehicles, this fully marked and fully equipped police cruiser had an even greater potential for causing—either intentionally or otherwise—death or serious bodily injury.

"Although at the point of the shooting Long had not yet used the police cruiser as a deadly weapon, Long's unstable frame of mind, energetic evasion of the deputy's physical control, Long's criminal act of stealing a police cruiser, and Long's starting to drive—even after being warned of deadly force—to a public road gave the deputy reason to believe that Long was dangerous.

"The Supreme Court also has noted that providing a warning to a fleeing suspect weighs in favor of the reasonableness of using deadly force. See *Garner*, 105 S. Ct. at 1701 (noting the importance of a warning if feasible). Deputy Slaton gave clear warning of the intent to use deadly force before firing his weapon. Under the circumstances, we do not accept that Slaton's use of deadly force to stop Long from fleeing in the sheriff's cruiser was beyond the outside border of constitutionally reasonable conduct.

"Plaintiffs argue that Long's death could have been avoided by using alternative means of apprehending Long such as shooting out the tires of the cruiser, using spike strips, or allowing Long to leave and then tracking the easily identifiable cruiser and arresting Long at a different location.

"We suppose that other means of stopping Long's escape existed that, if used, also might have prevented Long from harming others. But considering the unpredictability of Long's behavior and his fleeing in a marked police cruiser, we think the police need not have taken that chance and hoped for the best. The circumstances made the time to think short. Even if Deputy Slaton's decision to fire his weapon was not the best available means of preventing Long's escape and preventing potential harm to others, we conclude that Slaton's use of deadly force was not an unreasonable means of doing so."

**CIVIL LIABILITY:  
High Speed Pursuits;  
Deliberate Intent to Harm**

*Bingue v. Prunchak, CA9, No. 05-16388, 1/15/08*

**A**t approximately 3:41 p.m., on November 29, 2003, officers with the Las Vegas Metropolitan Police Department (LVMPD) attempted to pull over a stolen Toyota Camry. When the driver refused to stop, a police chase ensued. The chase would last an hour, cover nearly 90 miles, and involve at least a dozen units and a helicopter. Officer Eli Prunchak was at a car dealership "ordering a new door panel for [his] patrol vehicle" when he "heard radio traffic that units were in pursuit of a stolen vehicle...heading southbound on Boulder Highway." Based on the radio traffic, Prunchak "thought that [he] was close enough to the pursuit that [he] had a good chance of catching up to it and assisting other officers in apprehension of the suspects." Ten minutes after LVMPD first attempted to stop the Toyota, it entered the southbound lanes of the U.S. 95, a major north-south freeway. At that point, Prunchak "still thought that [he] was

close enough to help and did not know at the time how many other units were in pursuit.” Calculating that he was “still approximately a half mile to a mile behind the pursuit,” Prunchak, with emergency lights active, entered the left lane of southbound U.S. 95.

At about the same time, Edwige Bingue, and her mother, Marjorie Bingue (collectively “Bingue”) were traveling on southbound U.S. 95 when they saw several police units in pursuit of the Toyota. Bingue moved to the right to avoid those units, and the units safely passed. Minutes later, Prunchak approached—traveling “somewhere around 100 miles per hour” and while rounding “a long, wide, left curve...felt [his] tires slip from underneath [him] and [his] patrol vehicle...drift[ ] into the number-two lane.” Though there were no cars in the number two lane when Prunchak attempted to regain control of his car, he quickly drifted into the number-three lane and sideswiped the driver’s side of Bingue’s Mercedes. Both vehicles spun out of control and came to rest on the divider between the north and southbound lanes of the freeway. Realizing he was not seriously injured, Prunchak immediately moved to assist Bingue, who was “extremely shaken up, but did not appear to have serious injuries.” Shortly after, another unit arrived and relieved Prunchak. Police ultimately stopped the Toyota with spike strips just a few miles from the California border and arrested its three occupants.

Bingue filed suit in state court against Prunchak, LVMPD, and others alleging state law negligence and, pursuant to 42 U.S.C. § 1983, violations of the Fifth and Fourteenth Amendments. The case was removed to federal court, where Prunchak moved, on qualified immunity grounds, for partial judgment on the pleadings on Bingue’s federal claims. The district court denied the

motion in a very short order finding “that the issue of what standard to apply to Bingue’s claims—(1) the ‘intent to harm’ standard or (2) the ‘deliberate indifference’—to determine whether there is a substantive due process violation is a fact-based inquiry that looks at whether deliberation was practical” and that “Bingue has demonstrated substantial questions of material fact as to whether Prunchak had opportunity to deliberate.” Prunchak timely appealed.

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

“...In *Onossian v. Block*, 175 F.3d 1169 (9th Cir. 1999), we applied the Supreme Court’s decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and held that a police officer in a high-speed chase—whether he injures the fleeing suspect or a bystander—is entitled to qualified immunity unless his behavior ‘shocks the conscience’ because it demonstrates an intent ‘to cause harm unrelated to the legitimate object of arrest.’

“The Court stated they were not called upon to consider whether the district court must apply this ‘intent to harm’ standard to *all* high-speed chases, or only those chases that involve ‘emergencies’ or ‘split-second decisions.’ The Court refined its *Onossian* analysis and held, following the Eighth Circuit, that police officers involved in all high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm. See *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001).

“The Court also noted that drawing such an arbitrary distinction between ‘emergency’ and ‘non-emergency’ situations discounts the

split second decisions an officer must make when deciding whether to engage in a high-speed chase. In such circumstances, officers must operate under great pressure and make repeated split-second decisions about how best to apprehend the fleeing suspect in a manner that will minimize risk to their own safety and the safety of the general public. An officer attempting to apprehend a suspect fleeing at high speed does not have the luxury of delay; there is no time for reflection and precious little time for deliberation concerning either the decision to join the chase in the first place or the serial decisions about how best to pursue the suspect. The sheer velocity of a high-speed chase necessarily converts each situation into a genuine ‘emergency.’ Trying to sort high-speed chases into the neat categories of ‘emergency’ and ‘non-emergency’ situations is much like trying to bake a cake and having to distinguish between salt and sugar by sight alone: it is a nearly impossible task that has a high likelihood of producing an unpleasant result.

“Our colleagues on the Eighth Circuit recognized that such a distinction is unsound under *Lewis* because:

*... it gives too little recognition to the Court’s other bases for [its] holding—its historical reluctance “to expand the concept of substantive due process;”*

**“...Trying to sort high-speed chases into the neat categories of ‘emergency’ and ‘non-emergency’ situations is much like trying to bake a cake and having to distinguish between salt and sugar by sight alone: it is a nearly impossible task that has a high likelihood of producing an unpleasant result.”**

*its explicit reliance on Whitley v. Albers, 475 U.S. 312, 320 (1986), which adopted the intent to-harm standard for a two-hour prison riot;*

*its doubt whether “it makes sense to speak of indifference as deliberate in the case of sudden pursuit;”*

*its recognition that police officers confronting high-speed lawlessness are*

*subject to countervailing [law] enforcement considerations;”*

*its concern that any standard less than intent-to-harm “might cause suspects to flee more often, increasing accidents of the kind which occurred here;”*

*and the belief of at least some Justices that the question of police officer liability for reckless driving during high-speed pursuits should be decided by the elected branches of government, 523 U.S. at 864-65.*

“We agree with the Eighth Circuit and decline to try to draw a distinction between ‘emergency’ and ‘non-emergency’ situations involving high-speed chases aimed at apprehending a fleeing suspect. We, therefore, hold that the *Lewis* standard of ‘intent to harm’ applies to all high speed police chases.”

## EQUAL PROTECTION:

**Racial Profiling**

*United States v. Nichols,*  
CA6, No. 06-5862, 1/15/08

**I**n the early morning hours of September 9, 2004, Metro Nashville Police Department Officers Aaron Wigginton and Yannick Deslauriers were on patrol in the West Nashville area near Tennessee State University. Officer Wigginton saw a vehicle that kind of grabbed his attention. There were some men standing around the car who “quickly walked away” as the officer drove by. Officer Wigginton radioed to Officer Deslauriers: “I kind of alerted him that there was a vehicle up here that appeared as the people were kind of standing around it and didn’t want to hang around, they avoided me. I gave him the tag off the car...” Responding to this radio call, Officer Deslauriers then “ran the tag over [his] computer in the car,” which provided information from two systems—the National Crime Information Center (NCIC) and a Tennessee state system. The NCIC system responded first, and “nothing came back as suspicious,” so the officers “moved on” and continued patrolling the area for a few minutes. Officer Deslauriers passed by the location where the vehicle was parked and apparently saw the men trying to avoid him as well.

After a few minutes, the state system in Officer Deslauriers’s patrol car responded and reported that the vehicle was registered to “Elbert Nichols.” Officer Deslauriers “then decided to run Elbert Nichols on our warrant system and it came back with having a robbery warrant on a male black. We had driven by the location and seen that there was two black guys in the yard next to the car.” The officers positioned themselves to watch the vehicle. After a few

minutes, the car started to drive away, and the officers executed a stop by turning on their blue lights. As they approached the vehicle, they could see that the passenger was quite agitated and kept yelling at the driver to “stomp it” or “punch it.” Officer Deslauriers recognized the passenger as Elbert Nichols from the mug shot that had come up on his computer system. The driver made clear that he was not going to try to run, and Officer Deslauriers then took Nichols into custody and placed him in the back of his patrol car. Officer Deslauriers informed Nichols of his *Miranda* rights and advised him he was under arrest for the outstanding robbery warrant. Nichols stated that he understood his rights, but denied that he was Elbert Nichols, even when the officer pointed out his mug shot on the computer system.

Officer Deslauriers then proceeded to search the vehicle and discovered a loaded .38-caliber handgun in the glove box directly in front of where Nichols had been sitting. The glove box was locked, but the officer opened it with a set of keys found at the scene. Officer Deslauriers testified that the search lasted “a couple minutes. Not very long.” After recovering the gun, Officer Deslauriers returned to his patrol car and confronted Nichols with it. Initially, Nichols continued to deny that he was Elbert Nichols. However, as Officer Deslauriers began to do the arrest report, and engaged Nichols in “general conversation about the paperwork,” Nichols soon dropped the charade and admitted his identity, but insisted that the robbery warrants were a mistake. In response to the district court’s inquiry regarding how long the defendant had denied his identity, Officer Deslauriers testified, “Several minutes while I spoke to him initially. Even after I searched the car. He finally admitted—I think he had a mole on his face. Finally he just got tired, I

assume.” Later, as he was being transported back to the police station, Nichols “refused to be interviewed any further.”

On the basis of these facts, the district court refused to suppress any of the evidence. Regarding the alleged equal protection violation, the court held that the defendant had failed to establish a prima facie case that race was a motivating factor in the actions of the officers since the defendant’s evidence was essentially no more than “that [the officers were] white and [were] patrolling in a predominantly black neighborhood...” The court next summarily rejected Nichols’s argument that the search of a locked glove box exceeded the proper scope of a search incident to arrest, citing Seventh Circuit cases holding that such a search was permissible under prevailing Supreme Court precedent. Finally, the district court rejected Nichols’s Miranda argument, concluding that the “Defendant’s repeated denials of his identity were not refusals to answer all police questions. Rather, Defendant wished to, and did, communicate affirmatively with the police officers by making statements to them which he believed furthered his self-interest.” The court therefore concluded that Nichols impliedly waived his right to remain silent.

Having failed in his motion to suppress, Nichols entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2) and appealed to the Sixth District Court of Appeals who found, in part, as follows:

“Nichols first contends that Officer Deslauriers’s decision to run a warrant check on the name ‘Elbert Nichols’ was motivated by race, claiming that Officer Deslauriers presumed Nichols to be black. Nichols relies principally upon *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997),

in asserting this claim. *Avery* involved the surveillance of a young black male by narcotics officers in the Cincinnati airport based on what they perceived to be suspicious behavior. The defendant in that case was eventually discovered to be transporting illegal drugs; he moved to suppress the evidence claiming that the ‘officers targeted, pursued and interviewed him solely due to his race.’ Although the court ultimately determined that there was no equal protection violation, it elaborated on the applicable doctrine in an oft repeated *dictum*:

*We find that citizens are entitled to protection of the laws at all times. If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen’s race, without more, then a violation of the Equal Protection Clause has occurred.*

“*Avery*, in turn, relied on earlier *dicta* in this court’s decision in *United States v. Travis*, 62 F.3d 170, 173-74 (6th Cir. 1995), where the Sixth District Court of Appeals noted that consensual encounters initiated solely on the basis of race may violate the Equal Protection Clause. Although not binding, these cases support the view that checking individuals for outstanding warrants in an intentionally racially discriminatory manner may violate the Equal Protection Clause. *See also Whren v. United States*, 517 U.S. 806, 813 (1996) (noting that the Equal Protection Clause prohibits ‘selective enforcement of the law based on considerations such as race’).

“While we, of course, agree with the general proposition that selective enforcement of the law based on a suspect’s race may violate the Fourteenth Amendment, we do not agree

that the proper remedy for such violations is necessarily suppression of evidence otherwise lawfully obtained. The exclusionary rule is typically applied as a remedy for Fourth Amendment violations, which Amendment does not apply to pre-contact investigatory steps like that presented here (the decision to run a warrant check). Even if the Fourth Amendment were implicated, any challenge to a search or seizure based on legitimate probable cause, but in which it is alleged the officer's subjective motive was discriminatory, is doomed to fail. See *Whren*, 517 U.S. at 813 (unanimously rejecting such a challenge and holding that subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis). Though the Court left open the door to equal protection challenges in the same context, it gave no hint as to what the appropriate remedy would be.

"Since we know from *Whren* that the evidence against Nichols would not be suppressed under the Fourth Amendment (even if the officers were improperly motivated by race), we are reluctant to graft that Amendment's traditional remedy into the equal protection context. Indeed, we are aware of no court that has ever applied the exclusionary rule for a violation of the Fourteenth Amendment's Equal Protection Clause and we decline Nichols's invitation to do so here. Rather, we believe the proper remedy for any alleged violation is a 42 U.S.C. § 1983 action against the offending officers. See, e.g., *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002) (rejecting officer's qualified immunity defense and affirming partial summary judgment in favor of Hispanic motorists who brought equal protection challenge under § 1983).

"The Supreme Court has recently affirmed the adequacy of such suits to vindicate constitutional

rights, and specifically rejected suppression as a remedy, in the context of a violation of the 'knock-and-announce' rule under the Fourth Amendment. See *Hudson v. Michigan—U.S.—*, 126 S. Ct. 2159 (2006). Speaking of the exclusionary rule in broad terms, the Court cautioned that 'suppression of evidence...has always been our last resort, not our first impulse' and emphasized that the rule's 'costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application.' The Court rejected the argument that a civil suit under § 1983 was an inadequate remedy for knock-and announce violations, pointing out the 'greatly expanded' number of public-interest law firms and lawyers specializing in civil rights grievances, and further noted that 'increasing professionalism of police forces, including a new emphasis on internal police discipline' could provide a sufficient deterrent against abuses. *Hudson* reinforces our view that suppression is an extreme remedy, and that—prior to adopting such a remedy—a court must be convinced of the inadequacy of civil suits to safeguard against constitutional violations.

"In contrast to *Hudson*, we note that here there was no intrusion at all on Nichols' personal liberties by the initial actions of the officer. There was no search, no seizure, and only the use of the officer's powers of observation from a place where he had a right to be, and his obtaining of information lawfully in the possession of the state. This contrasts strongly with the more intrusive and constitutionally invalid police actions in *Hudson*, where violation of the 'knock-and-announce' rule still did not lead to the remedy of suppression of the evidence otherwise lawfully obtained. In sum, Nichols offers us no reason why, if civil suits are an adequate remedy for violation of the 'knock-

and-announce' rule, they cannot be for the decidedly less intrusive constitutional violation he alleges.

"Moreover, even if suppression were an appropriate remedy in the abstract, it is clear that it would not be warranted on the facts of this case. In order to prevail on an equal protection claim, it is well established that a defendant 'has the burden of proving the existence of purposeful discrimination.' *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). More specifically, he 'must prove that the decision makers in his case acted with discriminatory purpose.' Because it is often difficult to prove directly the invidious use of race, inferences can be drawn from valid relevant statistical evidence of disparate impact or other circumstantial evidence. Only after the defendant meets this initial burden of establishing a *prima facie* case must the government then articulate a race-neutral reason for its action, or identify a compelling governmental interest in the race-based action.

"We have previously cautioned and reiterate now that the defendant retains the ultimate burden of proving discrimination and that only in rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional violation. Nichols cites no direct evidence of discrimination in his case and only the barest of circumstantial evidence. He asserts that the officer's knowledge boils down to three criteria: early-morning hours, a congregation of men, and black. Had this been a white congregation at 1:15 a.m. near another university [instead of the historically black Tennessee State University], would an officer decide to run a check for warrants? No. Nichols then cites statistical data demonstrating that roughly one third of young black men are under

control of the criminal-justice system. But bald accusations and irrelevant generalized statistics do not even come close to constituting what is necessary to establish a *prima facie* case of an equal protection violation. Nichols, however, states that 'most significantly, in the face of this equal-protection claim, the Government failed to identify any nondiscriminatory reason for undertaking the warrant check. It offered no reason whatsoever.' But absent the defendant establishing a *prima facie* case, the government is not required to offer any reason for its allegedly discriminatory action. Moreover, while it is true that Officer Deslauriers never cited any specific reason in his testimony for requesting the warrant check on Nichols, it is reasonably clear from the entire context of the proceeding that, as the district court found, he did so based on the suspicious behavior of the individuals in attempting to avoid the police officers as they drove by, especially given the late hour and the number of individuals congregating around a vehicle with no apparent purpose. Other than assertion, no argument at all is offered that a black officer would not have taken the same actions, or that a late-night congregation of whites who took evasive action would not have elicited the same response.

"Nichols argues that young black men attempting to avoid the police is 'unremarkable' and cites two cases holding that such behavior fails to establish 'reasonable suspicion.' But in deciding to simply run a check for outstanding warrants, an officer is not held to a 'reasonable suspicion' standard. The officer merely is prohibited from his pursuit if he acts based solely on race. Thus, the decision to check for outstanding warrants on Elbert Nichols did not require 'reasonable suspicion'—indeed, it did not require any suspicion at all. All it required was that the decision not be based solely on Nichols's race. To

hold otherwise would be to prohibit police from taking even the most basic initial investigatory steps absent some articulable suspicion, such as when officers simply have a ‘hunch’ or are just following routine procedure—steps which, in this case, led to the apprehension of a dangerous fugitive.

“Given Nichols’s failure to establish a *prima facie* case that Officer Deslauriers acted with discriminatory purpose, and our refusal to adopt his preferred remedy even if he had, his equal protection claim fails.”

**Editor’s Note:** The issue of racial profiling was recently raised in *Johnson v. State*, CACR 07-344, 2/6/08 (Unpublished). The Arkansas Court of Appeals rejected the argument that Johnson was stopped based on race. The Arkansas Court of Appeals noted the only evidence Johnson cites to in his brief for support of that argument are the facts that he is an African American male and was driving alone in a rental car with a California license plate. None of the law enforcement officers, nor any other witness, testified that the traffic stop was racially motivated. No statistical evidence of racial profiling in the Johnson County area was introduced. Based upon the validity of the traffic stop and the absence of evidence supporting the racial profiling argument, the Court cannot say that the trial court’s finding on this issue was clearly against the preponderance of the evidence.

### EVIDENCE: **Expert Testimony; Law Enforcement Officer Testifies to Link Between Guns & Drugs**

*United States v. Gill*, CA8, No. 06-3212, 1/24/08

**T**his case arises from a traffic stop conducted by Iowa State Trooper Kenneth Haas on February 28, 2004, during which Trooper Haas uncovered more than 975 pounds of marijuana and a loaded handgun. Based on these events, a grand jury returned an indictment charging Stephen Gill, the driver of the truck, and Barbara Anne Riley, the owner of the truck and the front seat passenger, with possession with intent to distribute 100 kilograms or more of marijuana (Count 1) and charging Gill with carrying a firearm during and in relation to a drug trafficking crime (Count 2).

After the district court denied their motion to suppress, both defendants entered conditional pleas of guilty to Count 1, reserving the right to challenge the search that uncovered the evidence against them. Gill proceeded to trial on Count 2 and was found guilty. On appeal, Gill and Riley allege the district court erred in denying their motion to suppress and in declining to reopen the suppression hearing record to allow admission of polygraph evidence. The court was also tasked to consider issues related to Gill’s trial on Count 2, including whether the district court erred in allowing certain trial testimony by a Drug Enforcement Administration agent.

During trial, the government presented testimony from DEA Special Agent Donato Sikorski. After recounting his background, experience, and training, Agent Sikorski testified that Interstate 80, a main route east from the West Coast, often presents the opportunity for interdiction of illegal drugs being transported

across the U.S. He explained that one pound of marijuana has an estimated street value of \$900–1200, making \$877,000 a conservative estimate of the value of 975 pounds of marijuana.

Agent Sikorski also testified about the link between guns and drugs. He testified that he has seen individuals possess firearms while transporting large loads of marijuana. He further testified, over objection, that:

*Those involved in drug trafficking realize that their drug-trafficking activities are, No. 1, illegal; No. 2, the amount of drugs that they come into possession of are worth a certain street value and, to a certain extent, if they are not successful in distributing those drugs, if those drugs get lost or get stolen, they're typically responsible for the value of those drugs to a supplier or a customer, et. cetera. Therefore, firearms would be used in protection of the illicit drugs or possibly the proceeds from the sale of such.*

Gill alleges the district court erred in admitting expert testimony by Agent Sikorski about the link between firearms and drug trafficking. The Court of Appeals for the Eighth Circuit stated that the testimony Gill challenges falls squarely within the range of expert testimony it had found to be admissible. Agent Sikorski, who had participated in more than one hundred drug investigations in his five years with DEA, testified based on his training and experience. He testified he had seen individuals possess firearms while transporting large loads of marijuana. He further testified that, based upon his general training and interviews conducted with individuals involved in the drug trade, those involved in drug trafficking possess firearms to protect both their drugs and the proceeds from drug sales.

Because Agent Sikorski's testimony assisted the jury in "understanding the business of drug trafficking," the Court concluded the district court did not abuse its discretion in admitting the challenged testimony.

**INTERROGATION:  
Custodial Interrogation;  
Phone Call Initiated by Jailed Individual**

*Saleh v. Fleming, CA9, No. 04-35509, 1/3/08*

**E**lizabeth Edwards was the manager of the Seattle, Washington, apartment complex in which she lived. On July 9, 1996, she failed to report to work. Edwards's maintenance supervisor, Joel Keller, went to her apartment to check on her and discovered Edwards lying seriously injured on the living room floor. Keller called 911 and soon thereafter the police and paramedics arrived. Edwards had suffered blows to the head and face, two of which left indentations in her skull. Her sinus cavities were crushed and bone fragments were driven into her brain. She died of complications caused by the attack a week later.

After initially suspecting a recent boyfriend of Edwards as the murderer, the police eventually focused their investigation on Edwards's former husband, Habib Saleh. On March 3, 1998, a Seattle Police Detective went to the King County Jail to interview Saleh, who was serving a jail sentence for assaulting his son-in-law.

Detective Ramirez took Saleh to an interview room in the jail and interrogated him after reading him his *Miranda* rights. On March 25, 1998, Detective Ramirez returned to the jail to interview Saleh again. After the detective presented Saleh with a written copy of his *Miranda* rights, Saleh asked for an attorney.

Detective Ramirez asked Saleh what he wanted to do, and Saleh began to cry and said that he wanted the electric chair so he could join Edwards. He also said that he had nothing to do with Edwards's death.

The next day, Saleh placed a collect call from the jail to Detective Ramirez, and the two of them discussed the Edwards case. Saleh again told Detective Ramirez that he wanted the electric chair so he could be with Edwards, and again denied killing Edwards.

The State charged Saleh with first degree murder. At the trial the state wanted to introduce certain statements concerning Saleh's love for Edwards and his desire to be executed. The lower court concluded that the statements made to Detective Ramirez during the phone call that Saleh initiated on March 26, 1998, were admissible.

Saleh argues that the state trial court erred in admitting the statements he made to the police in the March 26, 1998, phone call. The Washington Court of Appeals held that although Saleh was in jail during the phone call, because he initiated the call and was free to end the conversation at any time, it was not "custodial," and thus no *Miranda* warnings were required.

Saleh seemingly does not challenge the state courts' determination that he initiated the March 26, 1998, phone call and that he was free at all times to end it. The Ninth Circuit Court of Appeals therefore concluded that the Washington Court of Appeals' decision was correct.

SEARCH AND SEIZURE:  
**Automobiles; Expectations of Privacy  
in a Borrowed Vehicle**

*United States v. Amaral-Estrada,*  
CA7, No. 06-4332, 12/5/07

**O**n May 9, 2005, agents of the Drug Enforcement Agency ("DEA") were conducting surveillance on 5352 W. Deming Place in Chicago, Illinois in search of Freddy Adan Sosa-Verdeja for whom an arrest warrant had been issued. Sosa-Verdeja was a fugitive wanted in connection with federal drug-related crimes which involved transporting cocaine with cars.

On May 3, 2005, the DEA sought and received a court order from a magistrate judge for the application and use of a pen register and trap-and-trace device, and to determine certain telephone information using the cellular telephone number of Sosa-Verdeja's phone. The DEA's surveillance involved tracking cellular site information on Sosa-Verdeja's cell phone, which turns a cell phone's emitted signal, as it searches for a cell tower, into a tracking device. This surveillance allowed DEA agents to pinpoint the location of the cell phone at one of the three residential units located at 5352 W. Deming Place.

While the agents conducted surveillance on 5352 W. Deming Place on May 9, 2005, DEA Special Agent Christopher O'Reilly was informed by another law enforcement officer that a Chrysler M300 had been seen in the alley north of Deming Place from Long Street and the driver of that car resembled Sosa-Verdeja. The Chrysler M300 was driven by Amaral-Estrada with a male passenger. Amaral-Estrada pulled out of the alley and continued for about a block before parking the car on Drummond Street. Agent

O'Reilly followed Amaral-Estrada from the alley by 5352 W. Deming Place to Drummond Street, where he observed Amaral-Estrada and his passenger get out of the car, look around as if to see if they were being watched or followed, and then proceed to walk back around the block towards 5352 W. Deming Place.

About fifteen minutes after Amaral-Estrada and his passenger had exited the vehicle, Agent O'Reilly parked his car, got out and identified himself as a police officer and requested identification from the two men. Agent O'Reilly detained Amaral-Estrada to conduct a pat-down search of his person, during which Agent O'Reilly removed all of the items from Amaral-Estrada's pockets, including cell phones and a set of Chrysler keys. Agent O'Reilly then inspected the Mexican driver's license and voter registration card provided by Amaral-Estrada, both of which bore the name of Amaral-Estrada, not SosaVerdeja. At this time, Amaral-Estrada stated that he did not speak or understand English, so Agent O'Reilly and the other DEA Agents that had arrived at the scene contacted Spanish-speaking DEA Task Force Officer Mario Elias via a two-way radio so that Officer Elias could translate Agent O'Reilly's questions into Spanish and Amaral-Estrada's answers into English. In answering these questions, Amaral-Estrada replied that he and his passenger were walking around looking for an apartment to rent in the area, and that they came from Bensonville, Illinois. When Agent O'Reilly asked them how they got to Chicago from Bensonville, they could not provide an answer. Amaral-Estrada also denied any knowledge of the Chrysler M300 that Agent O'Reilly saw him driving minutes earlier.

At the evidentiary hearing, Amaral-Estrada stated that he never denied driving the Chrysler

M300 and that he simply stated that he did not own the car, but that he told Agent O'Reilly (via Officer Elias's translation) that he had driven the car to Chicago. Amaral-Estrada further explained at the hearing that Sosa-Verdeja had lent him the car about a week earlier and that Sosa-Verdeja had instructed him to drive to a specific Walgreens, go inside, and that while he was inside, someone would enter the back seat of the car and put something in it. AmaralEstrada testified that he did as he was told by SosaVerdeja, and indeed upon his return to the car after visiting Walgreens, a large black duffel bag was in the back seat. Amaral-Estrada also testified that he did not care about the bag in the back seat because it was not his bag and it was not his car.

Returning to the sequence of events of May 9, 2005, Agent O'Reilly detained Amaral-Estrada and his passenger for lying when Amaral-Estrada denied any connection with or knowledge of the Chrysler M300 that he had seen Amaral-Estrada drive, park, and exit prior to stopping him on foot.

Agent O'Reilly placed Amaral-Estrada in the back seat of his police car and drove back to where the Chrysler M300 was parked. Agent O'Reilly then surveyed the Chrysler M300 for about thirty or forty minutes because he suspected that a "drug drop" was underway. When no activity involving the Chrysler M300 occurred, Agent O'Reilly approached the car and saw the black duffel bag on the back seat. Agent O'Reilly admitted that nothing about the exterior of this bag indicated that it was filled with contraband. Using the two-way radio again so that Officer Elias could translate for Agent O'Reilly and Amaral-Estrada, Agent O'Reilly asked about the bag. Amaral-Estrada denied that the bag belonged to him and again

denied that he had ever been inside the car. Using the Chrysler keys obtained from Amaral-Estrada's pocket during the pat-down search, Agent O'Reilly unlocked the Chrysler car door using the remote entry device.

After Amaral-Estrada had again denied any connection to the car, Agent O'Reilly opened the car door and looked inside the duffel bag. The bag contained U.S. currency in an amount later determined to be \$254,947.00. After discovering its contents, Agent O'Reilly removed the bag from the car. Shortly thereafter, Officer Elias arrived at the scene and read Amaral-Estrada his Miranda rights in Spanish.

With Amaral-Estrada in custody, Agent O'Reilly and Special Agents Gerald Dooley and Sam Ginelli returned to the apartment building at 5352 W. Deming Place where the agents decided to do "knock and talks" with the residents to seek consent to search the residential units of the building pinpointed by Sosa-Verdeja's cell phone signal. The agents entered through the unlocked common entrance that led them to the common foyer and staircase. They proceeded down to the basement unit and knocked, but no one answered. The agents then went to the first-floor unit and knocked, but again no one answered. The agents then went to the second floor apartment where, from the hallway, they could hear a television playing inside. Agent O'Reilly knocked on the door, and Maria Leticia Verdeja-Sanchez answered.

From this point on, the testimony of the parties varies greatly. Verdeja-Sanchez says that as soon as she unlocked the apartment door, the agents pushed it open, held her at gun point, handcuffed her, and threw her to the floor. According to the agents, Verdeja-Sanchez opened the door slightly and Agent O'Reilly

asked her if she spoke English, to which she responded "a little."

Agent O'Reilly then asked her if there was anyone else in the apartment, to which she answered "no." Next, Agent O'Reilly showed Verdeja-Sanchez the wallet-sized picture of Sosa-Verdeja and asked if she knew the man in the picture. She again responded "no." In viewing the picture, Verdeja-Sanchez leaned forward to see the picture more clearly and the apartment door was opened wider, providing the agents with a broader view into the apartment. With this broader view, the agents were able to see a person's arm on the couch inside the apartment. Agent O'Reilly then pushed open the door, entered the apartment, approached the man on the couch, and asked him to present identification. That man was Defendant-Appellant Lira-Esquivel, the husband of Verdeja-Sanchez.

At the same time that Agent O'Reilly entered the apartment, Agent Dooley called Sosa-Verdeja's cell phone number that the agents were monitoring to locate Sosa-Verdeja. Immediately, a cell phone on the coffee table in the apartment began to ring. At this point, the other agents entered the apartment and detained Lira-Esquivel and Verdeja-Sanchez so they could conduct a protective sweep of the apartment to determine if anyone else, particularly Sosa-Verdeja, was in the apartment. When they found no one else in the apartment, one of the agents searched the couch area where Lira-Esquivel had been sitting, and discovered a loaded nine millimeter handgun tucked into the cushions.

About twenty minutes later, Officer Elias arrived at the apartment to translate for the agents, Lira-Esquivel, and Verdeja-Sanchez. In Spanish, Officer Elias advised Lira-Esquivel

and Verdeja-Sanchez of their Miranda rights both orally and in writing, and presented them with consent forms to search the apartment. Lira-Esquivel asked if he was required to agree to the search of the apartment; Officer Elias told him in Spanish that he could refuse, but that the agents could seek a search warrant. Lira-Esquivel then agreed to allow the search and signed the Spanish consent to search form. Verdeja-Sanchez also signed the consent to search form, but claims she did so because she was scared.

After receiving consent to search the apartment and conducting a thorough search, the agents recovered about twelve kilograms of cocaine and more than 300 used kilogram wrappings for cocaine from the premises. Several notebooks of drug ledgers and \$20,000 in U.S. currency were also found. Lira-Esquivel and Verdeja-Sanchez were both taken into custody, although Verdeja-Sanchez was later released.

On July 12, 2005, a five-count superceding indictment was filed in the Southern District of Indiana. Count One charged Defendants-Appellants Amaral-Estrada and LiraEsquivel with conspiracy to possess with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Both Amaral-Estrada and LiraEsquivel moved to suppress the evidence obtained during their arrests and the searches of the car and apartment, respectively, alleging Fourth Amendment violations. Specifically, Amaral-Estrada claimed that the DEA agents lacked probable cause to search the car, or stop, question, detain, and arrest him. Lira-Esquivel also argued that the DEA agents lacked probable cause to enter his apartment and to

search and arrest him. He also challenged the government's use of the cell site information to track Sosa-Verdeja's cell phone.

In an unpublished opinion dated June 30, 2006, the district court found that Amaral-Estrada lacked standing to challenge the search of the Chrysler M300 because he did not have a legitimate privacy interest in the car under the facts presented by the parties. The district court also found that the agents had reasonable suspicion to stop and question Amaral-Estrada to determine whether he was Sosa-Verdeja. Based on Amaral-Estrada's failure to present documentation of his legal status in the United States, in addition to his lie to the agents about not having knowledge of the Chrysler M300 they saw him park just moments earlier, the district court concluded that the agents had probable cause to suspect that Amaral-Estrada was illegally in the country and that he had lied to federal agents. The district court held that the agents acted constitutionally when they detained and arrested him.

The district court similarly found that Lira-Esquivel lacked standing to challenge the government's surveillance methods used on a cell phone that was not his. Finally, the district court determined that, based on the totality of the circumstances present at the time of the apartment entry, the agents had probable cause to enter the apartment and search Lira-Esquivel. Specifically, the district court credited the agents' testimony that they saw the arm of another person on the couch shortly after Verdeja-Sanchez had told them that no one else was in the apartment, which again amounted to probable cause for lying to an agent.

After the district court denied their respective Motions to Suppress Evidence, both Defendants-

Appellants entered conditional guilty pleas maintaining their rights to appeal the suppression rulings. They were each sentenced to ninety months' imprisonment.

On appeal, Amaral-Estrada contends that the district court erred in finding that he lacked standing to challenge the search of the Chrysler M300. Specifically, the district court found that because Amaral-Estrada had borrowed the car from Sosa-Verdeja and that Amaral-Estrada knew others would be entering the car while he possessed it, Amaral-Estrada lacked an expectation of privacy in the car. This was evidenced by the Walgreens incident where the duffel bag was placed in the car.

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

"A criminal defendant cannot assert a privacy interest on behalf of someone else. *United States v. Mendoza*, 438 F.3d 792, 795 (7th Cir. 2006). Rather, a defendant charged with a crime of possession can only claim the benefits of the exclusionary rule if his own Fourth Amendment rights have been violated. A driver who borrows a car with the owner's permission may acquire standing to challenge the search of the vehicle only if he can establish that he has a legitimate

**"A criminal defendant cannot assert a privacy interest on behalf of someone else...Rather, a defendant charged with a crime of possession can only claim the benefits of the exclusionary rule if his own Fourth Amendment rights have been violated. A driver who borrows a car with the owner's permission may acquire standing to challenge the search of the vehicle only if he can establish that he has a legitimate expectation of privacy in it or in the area searched. "**

expectation of privacy in it or in the area searched. *United States v. Jackson*, 189 F.3d 502, 508 (7th Cir. 1999). A reasonable expectation of privacy is present when (1) the defendant exhibits an actual or subjective expectation of privacy, and (2) the expectation is one that society is prepared to recognize as reasonable.

"In this case Amaral-Estrada failed to manifest any sort of actual or subjective expectation of privacy. Instead, Amaral-Estrada possessed the car for the purposes of transporting contraband, such as the U.S. currency seized

from the back seat. His expectations while using the car were that others would enter the vehicle, taking and/or leaving items therein. Furthermore, when the federal agents asked Amaral-Estrada about the vehicle, Amaral-Estrada denied any knowledge of the car. Amaral-Estrada also testified that he did not care about the bag in the back seat of the Chrysler M300 because it was not his bag and not his car. Under these facts reasonably relied upon by the district court, Amaral-Estrada failed to exhibit any legitimate privacy interest in the Chrysler M300 and therefore lacks standing to challenge the search of the vehicle."

## SEARCH AND SEIZURE:

**Computer Search; Privacy Expectation of  
Computer Connected to Network***United States v. King,**CA11, No. 07-11808, 12/14/07*

**W**hile serving as a civilian contractor in February 2003, Michael David King resided in a dormitory at the Prince Sultan Air Base in Saudi Arabia. During his stay in the dormitory, King kept his personal laptop computer in his room and connected it to the base network. King understood that as a user of the base network, his activities on the network were subject to monitoring. King also believed that he had secured his computer so that others could not access the contents of its hard drive.

On February 23, 2003, an enlisted airman was searching the base network for music files when he came across King's computer on the network. The airman was able to access King's hard drive because it was a "shared" drive. In addition to finding music files on King's computer, the airman also discovered a pornographic movie and text files "of a pornographic nature." The airman reported his discovery to a military investigator who in turn referred the matter to a computer specialist. This specialist located King's computer and hard drive on the base network and verified the presence of pornographic videos and explicit text files on the computer. She also discovered a folder on the hard drive labeled "pedophilia." The folder, however, contained no files. The computer specialist did not employ any "special means" to access King's computer because "everybody on the entire network" could obtain the same access.

The computer specialist then filed a report with the investigator detailing what she had found, and the investigator obtained a search warrant for King's room. During a search of his room, military officials seized King's computer and also found CDs containing child pornography. They then referred the matter to the FBI for investigation and King left Saudi Arabia and returned to Montgomery, Alabama.

Two years later, the government obtained an indictment charging King with possession of child pornography. After his arrest, the government searched his residence pursuant to a search warrant and found additional CDs and hard drives containing over 30,000 images of child pornography.

King contends that the district court denied his motions to suppress based on the erroneous finding that he did not have a reasonable expectation of privacy in his computer files that were remotely accessed over a military computer network, because the search of those files by the computer specialist exceeded the scope of her authority to monitor usage of the base network. King asserts that he sought to protect his computer files through security settings, he never knowingly exposed them to the public, and he was unaware that the files were shared on the network.

King further challenges the district court's alternative finding that the military officials conducted a proper workplace search, arguing that this was a criminal investigation into King's personal computer located in his private dorm room. Finally, King asserts that the subsequent search warrant was invalid, as it was based on information that was obtained improperly through the remote search of his computer files.

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

“The Fourth Amendment’s prohibition against unreasonable searches and seizures protects an individual in those places where he can demonstrate a reasonable expectation of privacy against government intrusion, and ‘only individuals who actually enjoy the reasonable expectation of privacy have standing to challenge the validity of a government search.’ *United States v. Cooper*, 203 F.3d 1279, 1283–84 (11th Cir. 2000). ‘The party alleging an unconstitutional search must establish both a subjective and an objective expectation of privacy. The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that the privacy expectation be one that society is prepared to recognize as reasonable.’ *United States v. Segura-Baltazar*, 448 F.3d 1281, 1286 (11th Cir. 2006). Accordingly, the threshold issue in this case is whether King had a legitimate expectation of privacy in the contents of his personal laptop when it was connected to the base network from his dorm room.

“We have held that tenants of a multi-unit apartment building do not have a reasonable expectation of privacy in the common areas of the building, where the lock on the front door is ‘undependable’ and ‘inoperable.’ *United States v. Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002). We have also held that even though a company has a subjective expectation of privacy in documents that are shredded and disposed of in a garbage bag that is placed within a private dumpster, the company’s ‘subjective expectation of privacy is not one that society is prepared to accept as objectively reasonable’ when the company fails to ‘take sufficient steps to restrict the public’s access to its discarded

garbage.’ *United States v. Hall*, 47 F.3d 1091, 1097 (11th Cir. 1995).

“King has not shown a legitimate expectation of privacy in his computer files. His experience with computer security and the affirmative steps he took to install security settings demonstrate a subjective expectation of privacy in the files, so the question becomes whether society is prepared to accept King’s subjective expectation of privacy as objectively reasonable. “It is undisputed that King’s files were ‘shared’ over the entire base network, and that everyone on the network had access to all of his files and could observe them in exactly the same manner as the computer specialist did. As the district court observed, rather than analyzing the military official’s actions as a search of King’s personal computer in his private dorm room, it is more accurate to say that the authorities conducted a search of the military network, and King’s computer files were a part of that network. King’s files were exposed to thousands of individuals with network access, and the military authorities encountered the files without employing any special means or intruding into any area which King could reasonably expect would remain private. The contents of his computer’s hard drive were akin to items stored in the unsecured common areas of a multi-unit apartment building or put in a dumpster accessible to the public.

“Because his expectation of privacy was unreasonable King suffered no violation of his Fourth Amendment rights when his computer files were searched through the computer’s connection to the base network. It follows that his additional claim that the later search warrant was invalid because it incorporated information obtained from the search of his computer files also lacks merit.”

## SEARCH AND SEIZURE:

**Emergency Search**

*United States v. Collins*,  
CA7, No. 05-4708,  
12/14/07

**I**n *United States v. Collins*, the Drug Enforcement Administration and the Chicago Police Department had strong grounds for suspecting that Gregory McNeal was selling cocaine from his house. A team of DEA officers and uniformed police officers approached the house, carrying a battering ram. They knocked on the front door and heard movement within and a voice say “the police are at the door.” They waited at least 20 seconds after knocking, then broke down the door with their battering ram, handcuffed McNeal, searched the house, and found drugs that were then introduced in evidence against McNeal at his trial. He argues that the evidence should have been suppressed because the officers had no excuse for failing to get a warrant.

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

“Police may not search a person’s home without a warrant unless there is an emergency, *Welsh v. Wisconsin*, 466 U.S. 740, 748-50 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004)—what in legal jargon, because our profession disdains plain speech, are called ‘exigent circumstances.’ The

**“If police hear a crime being committed within a house (and spoliation of evidence is a crime), then they can enter immediately, without knocking; if they do not hear a crime (more precisely, if they do not have probable cause to believe a crime is in progress), they have to get a warrant. ”**

district judge ruled that the officers reasonably believed that there was an emergency—that McNeal or his accomplices were about to destroy evidence.

“The exception for emergencies is important. Suppose that a patrolling police officer hears blood-curdling screams coming from a house. He runs to the door and tries to open it, but it is locked, so he barges in. He could not

have waited till he could get a warrant, even if that would have taken only a few minutes. Nor would he have to knock before entering. *Leaf v. Shelnutt*, 400 F.3d 1070, 1083- 85 (7th Cir. 2005); *United States v. Hardy*, 52 F.3d 147, 149-50, n. 3 (7th Cir. 1995). But an emergency cannot be presumed in every case in which police barge into a person’s home unannounced.

“If police hear a crime being committed within a house (and spoliation of evidence is a crime), then they can enter immediately, without knocking; if they do not hear a crime (more precisely, if they do not have probable cause to believe a crime is in progress), they have to get a warrant. The government has failed to show that in this case the police had probable cause to believe that evidence was being, or was about to be, destroyed when they entered.

“The evidence of drugs found in the house should have been suppressed.”

SEARCH AND SEIZURE:  
**Nighttime Search; Facts Must Be  
 Set Forth To Justify Nighttime Warrant**

*Kelley v. State, CR 07-353, 12/6/07*

**O**n November 7, 2005, the Sherwood Police Department received information from Texas authorities that Eric Wayne Kelley had outstanding arrest warrants, from Dallas County, Texas, for sexual offenses against children. Sherwood police officers were also notified that Kelley was residing in Sherwood, that he was using the alias Melvin Kelley, and that he had allegedly been having sexual relations with an eleven or twelve-year-old boy of Middle Eastern descent.

On November 10 around 6:00 p.m., A Sherwood officer performed a traffic stop on Kelley after he saw Kelley and a child who matched the description of the child Kelley was allegedly having sexual relations with leave Kelley's suspected residence, get into a black Nissan Maxima, and drive away. The officer asked Kelley to exit the vehicle. Kelley could not produce a driver's license, and instead presented an identification card bearing his alias. Kelley told the officer that the passenger was his "nephew." When the officer talked to the child, M.M., alone, he advised the officer that he was Kelley's "friend." The officer placed Kelley under arrest, and Kelley and the child were taken to the police department.

At the police department, M.M. was interviewed with his mother's permission. He provided details regarding sexual relations with Kelly that had occurred over a period of a year and a half and also stated that Kelley had taken nude pictures of him and stored them on the digital camera and computer in Kelley's apartment.

In the early morning hours of November 11, the officers obtained a nighttime search warrant for Kelley's apartment. The affidavit in support of the warrant contained the facts detailed above, and the officers allegedly gave testimony before the magistrate that Kelley had been adamant in asking the officers at the police department to allow him to call his sister so she could retrieve his medicine from his apartment. The officers told the magistrate that they were concerned that Kelley would ask his sister to dispose of the camera and computer while she was in the apartment. However, the testimony was not recorded, and the affidavit did not contain any facts concerning Kelley's insistence on calling his sister. Additionally, with regard to the necessity for a nighttime search, the affidavit only stated that:

*I also request that the warrant be executed anytime during the day or night due to the fact that the objects to be seized are in danger of imminent removal.*

The issue before the Arkansas Supreme Court was whether the circuit court erred in denying Kelly's motion to suppress because the affidavit and warrant did not contain any factual basis to support a nighttime search under the Arkansas Rules of Criminal Procedure.

The Arkansas Supreme Court concluded that the affidavit and warrant lacked any factual basis to support a nighttime search, and the *Leon* good faith exception is not applicable to the facts of this case. They found, in part, as follows:

"The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. This court, however, has recognized a heightened protection of our citizen's right to privacy in their homes. See

*Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). In particular, our court has been in the vanguard of other jurisdictions in protecting our citizens against unreasonable searches and seizures in their homes at night. See *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991); *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002). In addition to the constitutional protections and general rules requiring probable cause to obtain a search warrant, Ark. R. Crim. P. 13.2(c), which was adopted by this court in 1976, expressly provides further protection against unjustified nighttime searches of our citizens' homes. Ark. R. Crim. P. 13.2 (c) (2007).

"Rule 13.2(c) mandates that a warrant for a nighttime search be supported by evidence that there is *reasonable cause* to believe that one of the following conditions exists:

- (i) *the place to be searched is difficult of speedy access; or*
- (ii) *the objects to be seized are in danger of imminent removal; or*
- (iii) *the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.*

"As early as two years after our adoption of the Criminal Rules of Procedure, in *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), this court was asked to determine the validity of a warrant served at night where the warrant lacked any indication that it could be served either day or night. Finding that the warrant was invalid, we emphasized that good cause must exist to authorize entry into a citizen's privacy in the nighttime and remarked that this is a safeguard justified by centuries of abuse.

"Two years later, we were asked to decide whether the issuance of a warrant based upon an affidavit that detailed the facts concerning a controlled buy of marijuana from the defendant's home but that contained a conclusory statement about 'having found reasonable cause to believe that the substance described herein could be removed unless the search is conducted immediately,' was in violation of the defendant's constitutional rights. *State v. Broadway*, 269 Ark. 215, 216, 599 S.W.2d 721, 721 (1980). This court expressed its shock that the magistrate issued a nighttime search warrant based upon the conclusory statement in the affidavit concerning the removal of evidence and clarified the purpose behind including a detailed factual basis in an affidavit to secure a nighttime warrant, by stating 'an affidavit should speak in factual and not mere conclusory language. It is the function of the judicial officer, before whom the proceedings are held, to make an independent and neutral determination based upon facts, not conclusions, justifying an intrusion into one's home.' The Broadway court then concluded by holding that the magistrate's issuance of a nighttime warrant based upon the conclusory affidavit was a substantial violation of the legal requirements for a nighttime search of the defendant's home.

"After the U.S. Supreme Court's decision in *United States v. Leon*, supra, our court considered whether the *Leon* good faith exception could be applied to save a deficient warrant in *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990). In that case, the affidavit did not contain any facts supporting a nighttime search, and, although the affiant gave testimony that indicated the necessity of a nighttime search, the testimony was not recorded. Recognizing our longstanding rule that testimony given before the issuing magistrate must be recorded

in order to be considered upon review, this court concluded that nothing in the affidavit indicated reasonable cause to believe that a nighttime search was warranted under Rule 13.2(c).

“The *Hall* court concluded that the *Leon* good faith exception did not apply because officers with reasonable knowledge of what our rules of criminal procedure prohibit would know that a nighttime search made pursuant to the deficient warrant was illegal. For a similar result, see *State v. Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991). In *Garner v. State*, supra, we were asked once again to consider whether the *Leon* good faith exception would cure an invalid warrant for a nighttime search when, much like in *State v. Broadway*, supra, and the instant case, both the warrant and affidavit contained conclusory language that simply mirrored the language of our criminal rule.

“While the court did acknowledge that the good faith exception could apply in some nighttime search cases, we reiterated that the *Leon* court recognized four instances in which the good faith belief of the executing officers would never save an invalid warrant:

1. *Where the officers misled the issuing judge with information they knew was false or would have known as false, except for reckless disregard of the truth.*
2. *Where the issuing judge abandons the judicial role of neutrality and detachment and becomes an adjunct law enforcement officer.*
3. *Where the officers’ affidavit is so lacking in indicia of probable cause as to render official belief as to its existence unreasonable.*

4. *Where the search warrant is facially deficient in failing to identify the places to be searched or things to be seized.*

“The *Garner* court pointed out that even though the executing officers might have given oral statements to the municipal judge, which were unrecorded, and the officers may have subjectively believed that they were complying with the law, objectively the affidavit and warrant were lacking in any indicia of reasonable cause. This court acknowledged that no oral statements to the magistrate were recorded and hence could not be considered on review. Under such circumstances, going outside the affidavit and warrant to the subjective knowledge of the officers was impermissible.

“In short, we concluded that the *Leon* good faith exception could not be used to cure a warrant and affidavit that were so blatantly lacking in reasonable cause for a nighttime search. Additionally, in *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999), this court again followed our past holdings and concluded that when an affidavit contains only conclusory statements to justify a nighttime search and only repeats the boilerplate language of Rule 13.2(c), the *Leon* good faith exception does not apply. More recently, in *Davis v. State*, 367 Ark. 330 (2006), we reiterated that when there is no recorded testimony given in support of an affidavit, this court does not look to facts outside of the affidavit to determine probable cause for a nighttime search.

“In the instant case, the affidavit and warrant only contained the conclusory statement that the objects to be seized were in danger of imminent removal without providing any facts or explanation in support of such a statement. Thus, the affidavit lacked all indicia

of reasonable cause to justify a nighttime search, and, under our objective standard, the officers should have known that an affidavit not stating facts that support a nighttime search was in violation of our rules. Accordingly, the *Leon* good faith exception does not apply here.”

**SEARCH AND SEIZURE:  
Reasonable Suspicion to Stop;  
Anonymous Tip**

*United States v. Reaves,  
CA4, No. 06-5973, 1/8/08*

**O**n December 7, 2005, around 10:30 a.m., an anonymous female called a 911 operator in Arundel County, Maryland, stating that she wanted “to report someone traveling in a car with a gun.” The caller described the driver as a black male and the car as a plum-colored S430 Mercedes with temporary tags. When the caller also reported that there were drugs in the car, the operator asked the caller whether she knew the “kind of drugs” involved. The caller replied that she had been sitting in her car near a local bar and saw the driver of the Mercedes engage in a transaction involving “a bag of something...a big sandwich bag of stuff.” The caller also reported seeing a small gun with a black top as she witnessed the event. The caller did not know the driver of the Mercedes, and she twice emphasized that she wanted to stay anonymous. A heightened concern about remaining anonymous and not getting in any kind of trouble led the caller to express the wish that the police not approach the driver by saying, “We heard you got a gun in your car.”

When the anonymous caller contacted 911, she was following the Mercedes on Pioneer Drive in Anne Arundel County, not far from the Baltimore-Washington International Airport.

The 911 operator immediately opened a line to the police dispatcher, passing on the tip and the route information received from the caller as she followed the Mercedes. The dispatcher, in turn, radioed officers on patrol in the area, initially alerting them that an anonymous caller had reported a drug transaction involving a black gun and that a male suspect was in the vicinity of Pioneer Drive and Reece Road, driving a plum colored S430 Mercedes with temporary tags.

Detective Charles Jones heard the dispatcher’s message and took up the hunt for the Mercedes. The detective was guided by information—passed through the 911 operator and the dispatcher—from the anonymous caller, who followed the Mercedes for several blocks and contemporaneously reported its location. The caller thus reported that the Mercedes left Pioneer Drive and turned north on Reece Road toward the intersection of Route 174 and 170; at the intersection the vehicle turned onto Route 170 in the direction of Baltimore. The caller, who was on the way to the market, reported that the Mercedes was still proceeding on Route 170 when she exited onto Route 100 toward her market destination.

Shortly thereafter, and approximately five minutes after the dispatcher’s first message, Detective Jones spotted the plum-colored Mercedes and followed it for a short distance before conducting a traffic stop. The detective stopped the car solely on the basis of the dispatcher’s message. Detective Jones walked up to the Mercedes and identified himself. The driver, Torico Reaves, asked why he had been stopped. The detective advised Reaves that the police department had received a complaint that he possibly had a handgun. Reaves immediately raised his hands in the air and said, “I have a

gun, man. I have a gun right here in my pocket. Don't shoot me." Next, the detective ordered Reaves out of the vehicle, conducted a pat-down search, and placed him in handcuffs. During this process Detective Jones noticed a black handgun on the driver's seat. It turned out to be a loaded Beretta. When the Mercedes was searched, \$2000 in currency was found in the back seat.

In a one-count indictment returned in the District of Maryland, the government charged Reaves with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g). Reaves filed a motion to suppress the evidence—gun, ammunition, currency, and his statements to Detective Jones—obtained as a result of the vehicle stop that had been triggered by the anonymous 911 call. Reaves asserted that the call did not provide the reasonable suspicion required to justify a forcible stop. The district court denied the motion, concluding that the call provided "self-authenticating detail," which was "a sufficient basis for the stop." Reaves appeals. He argues that the district court erred in ruling that the police had reasonable suspicion to stop him.

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

"The Fourth Amendment's protection against unreasonable seizures extends to investigatory stops made by the police. An officer 'may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when he has a reasonable articulable suspicion that criminal activity is afoot.' *Illinois v. Wardlaw*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). When the police rely on an anonymous tip to support reasonable suspicion, the tip 'must be accompanied by some corroborative

elements that establish its reliability.' *United States v. Perkins*, 363 F.3d 317, 323 (4th Cir. 2004). In other words, 'there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop.' *Florida v. J.L.* 529 U.S. 266, 270 (2000). At bottom, the tip must 'be reliable in its assertion of illegality' to protect against mischief and harassment by an 'unknown, unaccountable informant.' We consider the totality of the circumstances in assessing the reliability of an anonymous tip.

"The government argues that three factors provide sufficient corroboration to make the anonymous tip reliable in this case. First, the government contends that the 911 caller provided accurate predictive information about Reaves's route. Specifically, the government says, 'By following the suspect's vehicle in transit, the caller provided a continuing stream of predictive information—that is, the caller was able to provide the police with specific, updated information as to where the suspect was going.' This argument must depend on *Alabama v. White*, 496 U.S. 325 (1990), where an anonymous tipster correctly *predicted* in specific detail the future movements of a woman who, according to the tipster, was in possession of drugs. Under these circumstances the Supreme Court held that it was reasonable for the police, once they corroborated the tipster's predictive information, to credit his allegations of illegal conduct. 'What was important,' the Court emphasized, 'was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information—a special familiarity with the suspect's affairs.' The Court continued: 'Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access

to such information is likely to also have access to reliable information about that individual's illegal activities.'

"This case is the opposite of *White* because the caller here did not make any predictions whatsoever about the suspect's (Reaves's) future behavior. She simply followed Reaves's Mercedes for a few blocks on public roads, giving the 911 operator a running account of the vehicle's location until she had to leave the trail and head to the market. Although the caller's reports of her contemporaneous observations of Reaves's location were accurate and readily confirmable by the police, they did not show that the caller had reliable information about any criminal activity on Reaves's part.

"Second, the government argues that this case's tip about a drug deal (and gun) gains reliability because the caller was willing to stay on the line with the 911 operator to report Reaves's direction of travel. The caller's running account of Reaves's movement was of considerable assistance to the police in locating and stopping him. And while a tipster's running account from her automobile may contribute to the presence of reasonable suspicion, it may not,

**"When an unidentified tipster provides enough information to allow police to readily trace her identity, thereby subjecting herself to potential scrutiny and responsibility for the allegations, a reasonable officer may conclude that the tipster is credible...Here, the caller studiously avoided providing information that would have allowed her identity to be traced, and the fact that she conversed with the 911 operator for a few blocks of travel time did not provide the police with sufficient means to test the credibility of her allegation of illegal activity."**

by itself, serve to validate the underlying tip here. As the Supreme Court observed in *J.L.* a suspect's location and appearance is reliable in the limited sense that it will help the police correctly identify the person whom the tipster means to accuse, but it 'does not show that the tipster has knowledge of criminal activity.' 529 U.S. at 272. The caller here was adamant about remaining anonymous. She twice emphasized her desires in this regard and otherwise made clear that she wanted no further involvement in the matter. By remaining anonymous, the caller did not put herself in a position where her reputation could be assessed or she could be held responsible if her allegations of illegal conduct turned out to be fabricated.

"When an unidentified tipster provides enough information to allow police to readily trace her identity, thereby subjecting herself to potential scrutiny and responsibility for the allegations, a reasonable officer may conclude that the tipster is credible. *See, e.g., State v. Rutzinski*, 623 N.W.2d 516, 525-26 (Wis. 2001) (unidentified informant, who reported suspect's erratic driving, held to be reliable when informant reported their exact location to police dispatcher and pulled

to the side of the highway and waited as officer stopped the suspect; informant exposed him or herself to being identified, and officer could reasonably have concluded that the informant knew they potentially could be arrested if the tip proved to be fabricated.) Here, the caller studiously avoided providing information that would have allowed her identity to be traced, and the fact that she conversed with the 911 operator for a few blocks of travel time did not provide the police with sufficient means to test the credibility of her allegation of illegal activity.

“Third, the government asserts that the tip was reliable because the caller made a nearly contemporaneous report of her observation of a transaction involving a big sandwich bag and a handgun, which she assumed to be a drug deal. Here, the government relies on *Perkins*, where we concluded that the tipster’s basis of knowledge—a contemporaneous viewing of the suspicious activity—enhanced the tip’s reliability. 363 F.3d at 322. This particular conclusion was based on the Supreme Court’s longstanding recognition of ‘the usefulness of verifying an informant’s basis of knowledge.’ Neither the Supreme Court nor our court, however, has held that an anonymous tipster’s unconfirmed, blow-by-blow assertion of the basis of her knowledge is sufficient by itself to make the tip reliable. Some corroboration is required because a fraudulent tipster can fabricate her basis of knowledge.

“*Perkins* is instructive because several corroborating factors, apart from the contemporaneous observation, were present. There, the officer making the automobile stop reasonably assumed that the unidentified caller who gave the tip was, because of her location, a particular informant who had previously

provided reliable information about criminal activity in her neighborhood, a high-crime area; the reported incident (pointing rifles) occurred in the yard of a duplex known as a drug house; and when the officer arrived in time to see the suspects leaving in a car, he recognized one as a drug user. These corroborating factors led us to conclude that the tip in *Perkins* was reliable.

“We recognize here, as we did in *Perkins*, that the caller’s disclosure of her basis of knowledge—essentially contemporaneous observation—registers positively on the reliability scale. The problem, however, is that there is not sufficient corroboration to make the tip credible or reliable in its assertion of illegality. As we have already noted, the caller did not predict Reaves’s future movements, which might have indicated that she had inside information about his illegal activities; and she insisted on remaining anonymous, which meant that she could not be held accountable for her tip. Moreover, the officer did not know Reaves, and Reaves did not engage in any suspicious activity or commit any traffic violations in the short distance he was followed by the officer. Finally, the stop was not made in a high crime area, and there is no evidence that the transaction reported by the caller occurred in a high-crime neighborhood.

“In sum, the circumstances do not permit us to conclude that the tip was sufficiently reliable. Accordingly, because the officer did not have reasonable suspicion to stop Reaves, the evidence obtained as a result of the stop should not have been admitted at trial.”

SEARCH AND SEIZURE:  
**Vehicle Stops;**  
**Ordering the Driver Back into the Vehicle**

*United States v. Sanders,*  
*CA8, No. 07-1407, 12/20/07*

**A**t 6:30 p.m. on January 23, 2006, Officer Toni Uredi of the Jackson County, Missouri, Sheriff's Department observed Donald Wilson driving a Plymouth Acclaim in Kansas City, Missouri. Aware that Wilson's driver's license was suspended, Officer Uredi began following the car. Officer Uredi radioed in the car's license plate information and was told that the license plate number was not registered to a Plymouth Acclaim. Officer Uredi activated his lights and initiated a traffic stop. The car stopped in a parking lot next to an apartment building in what Officer Uredi considered a high-crime area. Before Officer Uredi could approach the car, Sanders, who was a passenger in the front seat, got out. Officer Uredi immediately ordered Sanders to reenter the car, which he did after Officer Uredi repeated the order two more times. Officer Uredi then approached the driver's side of the car to speak with Wilson. As he neared the car, Officer Uredi saw a black pistol grip protruding from Sanders's left front pocket. Officer Uredi radioed for assistance. After other officers arrived, Sanders was forcibly removed from the car, and a semiautomatic pistol was removed from his pocket.

Sanders was arrested and charged with unlawful possession of a firearm under 18 U.S.C. § 922(g)(1). Sanders filed a motion to suppress evidence of the gun on the ground that he was unlawfully seized when Officer Uredi ordered him to reenter the car, making evidence of the gun found on his person the so-called "poisonous fruit" of the seizure. Following

an evidentiary hearing, the magistrate judge recommended that the motion to suppress be denied. The District Court adopted the magistrate judge's recommendation and denied the motion. Sanders entered a conditional plea of guilty, reserving the right to appeal the denial of his motion to suppress. He now appeals the evidentiary ruling.

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

"While the Supreme Court has not addressed this particular issue, it has decided the closely analogous question of whether a police officer may order a passenger in a vehicle to *exit* the vehicle during a lawful traffic stop. *Maryland v. Wilson*, 519 U.S. 408, 410 (1997). Applying Fourth Amendment jurisprudence, the Court balanced the 'public interest' in police officer safety with the right of passengers to be 'free from arbitrary interference by law officers. On the public interest side of the balance, the Court deemed police officer safety a 'weighty interest.' The Court cited statistics of assaults and killings of police officers during traffic pursuits and stops, and it noted that when there is more than one occupant in a vehicle, 'the possible sources of harm to the officer are increased.' On the personal liberty side of the balance, the Court considered that passengers might have a stronger liberty interest than drivers but noted, as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. This intrusion on passengers is 'minimal,' according to the Court.

"We hold that Officer Uredi did not violate the Fourth Amendment when he ordered Sanders to

reenter the car. When Officer Uredi stopped the car, he faced the same safety concerns discussed in Wilson. He was unassisted in a high-crime area, it was dark, and he was outnumbered by the occupants in the car. Officer Uredi testified that it is his usual practice at traffic stops to order all occupants to remain in the vehicle until the completion of the stop. He does this out of concern for his safety because he does not want somebody to get out of his sight.

“In contrast, the intrusion on Sanders’s liberty interest was ‘minimal.’ As a passenger in a car that was pulled over by police, Sanders was seized as soon as the car stopped. By ordering Sanders to reenter the car, Officer Uredi simply reinstated the status quo; the only change in Sanders’ circumstances was that he was inside of, rather than outside of, the stopped car. As soon as Sanders was back inside of the car, Officer Uredi approached and saw the pistol grip protruding from Sanders’s pocket. The amount of time that Sanders was detained, without reasonable suspicion that he had committed a crime, was minimal. We find this minimal intrusion on Sanders’s personal liberty far outweighed by the safety concerns of Officer Uredi.

“Because Officer Uredi’s detention of Sanders was reasonable under the Fourth Amendment, the gun found in Sanders’s pocket was not the product of an illegal search. Sanders’s motion to suppress was properly denied.”

## SENTENCING GUIDELINES:

### **Crack and Powder Cocaine**

*Kimbrough v. United States,*

*No. 06-6330, 12/10/07*

**I**n *Kimbrough v. United States*, the United States Supreme Court held that district court judges are free to disregard the U.S. Sentencing Guidelines 100:1 crack-to-powder ratio and to impose a sentence below the guidelines.

The United States Supreme Court noted that crack and powder cocaine are two forms of the same drug. Powder cocaine, or cocaine hydrochloride, is generally inhaled through the nose; it may also be mixed with water and injected. Crack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is divided into single-dose “rocks” that users smoke. The active ingredient in powder and crack cocaine is the same. The two forms of the drug also have the same physiological and psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high.

Although chemically similar, crack and powder cocaine were handled very differently for sentencing purposes. The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. This disparity meant that a major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack.

## SEXUAL OFFENDER:

**Failure to Register; Knowledge***Christie v. State, CACR07-425, 1/9/08**(Unpublished)*

**I**n *Christie v. State, CACR07-425, 1/9/08* (Unpublished), Lonnie Burl Christie was found guilty of failure to register as a sex offender and sentenced him to a three year term in the Arkansas Department of Correction. He challenges the sufficiency of the evidence, contending that the State failed to prove that he knowingly failed to register. The Arkansas Court of Appeals held that because the crime of failing to register as a sex offender has no culpable mental state, the State was not required to present proof of such to support the conviction.