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## ARREST LAW: Arrest Based on Probable Cause But Prohibited by State Law

*Virginia v. Moore*, No. 06-1082, 4/23/08

**O**n February 20, 2003, two City of Portsmouth police officers stopped a car driven by David Lee Moore. They had heard over the police radio that a person known as "Chubs" was driving with a suspended license, and one of the officers knew Moore by that nickname. The officers determined that Moore's license was in fact suspended and arrested him for the misdemeanor of driving on a suspended license, which is punishable under Virginia law by a year in jail and a fine of \$2,500. The officers subsequently searched Moore and found that he was carrying 16 grams of crack cocaine and \$516 in cash.

Under state law, the officers should have issued Moore a summons instead of arresting him. Driving on a suspended license, like some other misdemeanors, is not an arrestable offense except as to those who fail or refuse to discontinue the violation, and those whom the officer reasonably believes to be likely to disregard a summons, or likely to harm themselves or others. The trial court declined to suppress the evidence on Fourth Amendment grounds. Moore was convicted. Ultimately, the Virginia Supreme Court reversed, reasoning that the search violated the Fourth Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation.

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The U.S. Supreme Court stated that the issue in this case was whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law. They found, in part, as follows:

“The Fourth Amendment protects against unreasonable searches and seizures of (among other things) the person. In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve. See *Wyoming v. Houghton*, 526 U. S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U. S. 927, 931 (1995).

“When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’ *Houghton*, 526 U. S., at 300; see also *Atwater*, 532 U. S., at 346. That methodology provides no support for Moore’s Fourth Amendment claim. In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.

“In *Whren v. United States*, 517 U. S. 806 (1996), this Court held that police officers had acted reasonably in stopping a car, even though their action violated regulations limiting the authority of plainclothes officers in unmarked vehicles. We thought it obvious that the Fourth Amendment’s meaning did not change with local law enforcement practices—even practices

set by rule. While those practices ‘vary from place to place and from time to time,’ Fourth Amendment protections are not ‘so variable’ and cannot ‘be made to turn upon such trivialities.’

“We are convinced that the approach of our prior cases is correct, because an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. *Whren, supra*, at 817; *Atwater, supra*, at 354. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation. See W. LaFare, *Arrest: The Decision to Take a Suspect into Custody*, 177-202 (1965).

“Moore argues that a State has no interest in arrest when it has a policy against arresting for certain crimes. That is not so, because arrest will still ensure a suspect’s appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly. State arrest restrictions are more accurately characterized as showing that the State values its interests in forgoing arrests more highly than its interests in making them, see, e.g., Dept. of Justice, National Institute of Justice, D. Whitcomb, B. Lewin, & M. Levine, *Issues and Practices: Citation Release* 17 (Mar. 1984) (describing cost savings as a principal benefit of citation-release ordinances); or as showing that the State places a higher premium on privacy than the Fourth Amendment requires. A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.

“Even if we thought that state law changed the nature of the Commonwealth’s interests for purposes of the Fourth Amendment, we would adhere to the probable-cause standard. In determining what is reasonable under the Fourth Amendment, we have given great weight to the ‘essential interest in readily administrable rules.’ *Atwater*, 532 U. S., at 347. In *Atwater*, we acknowledged that nuanced judgments about the need for warrantless arrest were desirable, but we nonetheless declined to limit to felonies and disturbances of the peace the Fourth Amendment rule allowing arrest based on probable cause to believe a law has been broken in the presence of the arresting officer. The rule extends even to minor misdemeanors, we concluded, because of the need for a bright-line constitutional standard. If the constitutionality of arrest for minor offenses turned in part on inquiries as to risk of flight and danger of repetition, officers might be deterred from making legitimate arrests. We found little to justify this cost, because there was no ‘epidemic of unnecessary minor-offense arrests,’ and hence ‘a dearth of horrors demanding redress.’

“We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.

“Moore argues that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. We have recognized, however, that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. *United States v. Robinson*, 414 U. S. 218 (1973). We have described this rule as covering

any “lawful arrest,” with constitutional law as the reference point. That is to say, we have equated a lawful arrest with an arrest based on probable cause: ‘A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that *intrusion being lawful*, a search incident to the arrest requires no additional justification.’”

The Court concluded that when officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety. The judgment of the Supreme Court of Virginia was reversed, and the case was remanded for further proceedings not inconsistent with their opinion.

#### CIVIL RIGHTS:

##### **Arrest of Individual Based Solely on His Failure to Identify Himself**

*Stufflebeam v. Harris*, CA8, No. 06-4046, 4/4/08

**N**ear the end of a routine traffic stop in May 2003, Arkansas State Police Officer Jeff W. Harris asked the vehicle’s passenger, Richard M. Stufflebeam, to identify himself. When Stufflebeam repeatedly refused, he was arrested for knowingly obstructing, impairing, or hindering ‘the performance of any governmental function.’ Ark. Code Ann. § 5-54-102(a)(1).

After the criminal charge was nolle prossed, Stufflebeam filed this § 1983 action against Harris in his individual capacity. Stufflebeam claims he was arrested without probable cause in violation of his Fourth Amendment rights. The district court granted Harris’ Rule 12(b)(6)

motion to dismiss. Stufflebeam appeals and the Court of Appeals for the Eighth Circuit reversed.

Stufflebeam's complaint alleged few facts, but the parties agree that additional facts are part of the Rule 12 record because Stufflebeam attached Officer Harris' Incident/Activity Report and the subsequent criminal citation to his complaint.

It is undisputed that Harris stopped the car being driven by Stufflebeam's grandson because it did not display a license plate. After the grandson produced his driver's license, proof of insurance, a bill of sale, and a title document, Harris asked the passenger, Stufflebeam, for his identification. Stufflebeam angrily replied, "You can't do that!" Harris replied that the law permitted him to ask for identification. Stufflebeam again refused, stating, "You either arrest me and take me to jail or I don't have to show you anything!" Harris returned to his vehicle and requested back-up. When two additional officers arrived, Harris asked Stufflebeam to exit the vehicle. He complied but still refused to identify himself "with anger in his voice and expression." Harris then arrested and handcuffed Stufflebeam and removed everything from his pockets, including a wallet containing a driver's license that identified Stufflebeam. Harris placed Stufflebeam in the back of the squad car, searched the vehicle "incident to the arrest" over the grandson's protest, and then released the grandson and drove Stufflebeam to a local jail where he was booked for obstructing governmental operations.

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

"...a warrantless arrest without probable cause violates the Fourth Amendment as applied to state actors by the Fourteenth Amendment. *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005). A state police officer has probable cause to arrest if the facts and circumstances within his knowledge are sufficient to warrant a prudent person, or one of reasonable caution, in believing that the suspect has committed, is committing, or is about to commit an offense under state law. *United States v. Brown*, 49 F.3d 1346, 1349 (8th Cir. 1995).

"Stufflebeam was charged with violating § 5-54-102(a)(1), which prohibits the knowing obstruction of Harris's performance of a 'governmental function,' which in turn is defined as 'any activity that a public servant is legally authorized to undertake on behalf of any governmental unit he or she serves.' Ark. Code Ann. § 5-54-101(6). Stufflebeam's complaint alleges that he 'was not suspected of any criminal activity' and was arrested 'simply because he would not identify himself.' Nothing in the record suggests any obstruction other than Stufflebeam's refusal to identify himself. Thus, the primary question is whether Arkansas law permits a police officer to arrest a person for refusing to identify himself when he is not suspected of other criminal activity and his identification is not needed to protect officer safety or to resolve whatever reasonable suspicions prompted the officer to initiate an on-going traffic stop or *Terry* stop. We conclude it does not.

"To establish the governmental function that is a necessary predicate for this arrest, Harris relies exclusively on Rule 2.2 of the Arkansas Rules of Criminal Procedure. This Rule provides in relevant part:

**Rule 2.2 Authority to request cooperation.**

(a) *A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions...or to comply with any other reasonable request.*

(b) *In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists.*

“By threatening to arrest Stufflebeam if he refused to identify himself, Harris ‘indicated’ to Stufflebeam in no uncertain terms that he was legally obligated to furnish this information. Yet Harris cites no provision of Arkansas law that created a ‘legal obligation’ to cooperate in this manner within the meaning of Rule 2.2(b). As Stufflebeam had no legal obligation to provide the information, his refusal to comply with Harris’s improper demand did not obstruct a *legitimate* ‘governmental function’ within the meaning of § 5-54-102(a)(1). In other words, on these facts, the authority conferred by Rule 2.2 did not provide Harris with probable cause to arrest Stufflebeam for a violation of § 5-54-102(a)(1).

“In *Meadows v. State*, 602 S.W.2d 636 (Ark. 1980), the Arkansas Supreme Court stated that under Rule 2.2 that the word ‘otherwise’ shows beyond question that the officer’s request for information must be in aid of the investigation or prevention of crime. Here, Harris called for back-up and extended the traffic stop in order to demand that a passenger not suspected of criminal activity identify himself. Rule 2.2 as construed in *Meadows* did not support this additional

detention nor the arrest. Accordingly, Harris lacked probable cause to arrest Stufflebeam for obstruction of a governmental function or any other crime under Arkansas law.

“Harris relies heavily on cases establishing that a police officer does not violate the Fourth Amendment by inquiring into the identity of a vehicle’s passenger during the course of a lawful traffic stop, even absent reasonable suspicion that the passenger has committed a crime. *United States v. Slater*, 411 F.3d 1003, 1005-06 (8th Cir. 2005); see *Muehler v. Mena*, 544 U.S. 93, 100-02 (2005). These cases are not controlling, because the issue here is whether the subsequent arrest, not the initial request, violated the Fourth Amendment. Although we decide the probable cause issue by applying the relevant Arkansas criminal statutes and rules as construed by the Supreme Court of Arkansas, it is significant that our conclusion is consistent with the Supreme Court’s recent categorical statement that ‘an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.’ *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 188 (2004).

“Harris also urges us to affirm the dismissal on the alternative ground of qualified immunity, an issue the district court did not address. Qualified immunity protects public officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This standard ‘gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.’ *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Here, Harris acted contrary to the plain

meaning of Rule 2.2(b) and the law of Arkansas as clearly established in *Meadows* by prolonging the detention and then arresting Stufflebeam, a passenger not suspected of criminal activity, because he adamantly refused to comply with an unlawful *demand* that he identify himself. Harris invoked § 5-54-102(a)(1) in circumstances in which no reasonable police officer could believe he had probable cause to arrest this stubborn and irritating, but law abiding citizen. On this record, Officer Harris is not entitled to dismissal of Stufflebeam's claim, either on the merits or based on qualified immunity."

#### CIVIL RIGHTS: Threat to Public Safety

*Mora v. City of Gaithersburg, Md.*,  
CA4, No. 06-2158, 3/4/08

**I**n *Mora v. City of Gaithersburg, Md.*, the question is presented of what emergency preventive action police may take, consistent with the Fourth and Fourteenth Amendments, when they learn of an individual who may well intend a slaughter, but who has neither committed nor attempted any crime.

At 1:02 P.M. on July 23, 2002, Maryland police received a call from a healthcare hotline operator. The operator said that she had just spoken to Anthony Mora, a local firefighter, who told her he was suicidal, had weapons in his apartment, could understand shooting people at work, and said, "I might as well die at work." By 1:03, multiple units were en route to Mora's apartment. By 1:04, police had called one of Mora's co-workers, who confirmed that Mora's threats should be taken seriously; at some point, police also learned that Mora's girlfriend had recently ended her relationship with him. Police arrived to find Mora in the parking lot loading suitcases and gym bags

into a van, and they approached with guns drawn. By 1:13, Mora was handcuffed and on the ground. No warrant had been sought.

At that point, police and Mora began talking, and police began searching—whether with consent or without is disputed. Police first searched Mora's luggage and van, finding one .32-caliber handgun round in a suitcase. Next, taking Mora's keys, they entered his apartment, where they found a large gun safe in the kitchen and every interior door (including bathroom and closets) locked. Mora relinquished the combination under pressure, and inside police discovered twelve handguns, eight rifles, one shotgun, and keys to a second safe. Opening the interior doors, the second safe, and a locked file cabinet, police found guns, ammunition, gun accessories, and what police called "survival literature" in every room but the bathroom.

At that point, two officers drove Mora to a hospital to see a psychiatrist. The other officers re-entered the apartment to seize Mora's weapons. All told, they removed forty-one firearms—some apparently automatic, semi-automatic, or assault-style, and some loaded—as well as five-thousand rounds of ammunition, various accessories, and survivalist publications. The Gaithersburg police department took that property into custody. Again, no warrant had been sought.

Mora was not involuntarily committed, though he voluntarily admitted himself and stayed at the hospital for several days. There were also no criminal charges brought against him based on the day's events, then or at any other time. After his stay in the hospital, Mora returned home, where he discovered that his firearms and associated property were missing.

Mora filed suit in which he alleged that the searches of his luggage, van, and apartment violated the Fourth Amendment; that the initial seizures of his property violated the Fourth Amendment; and that the continued retention of his weapons violated the Due Process Clause of the Fourteenth Amendment.

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

“The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Preventive actions raise somewhat different constitutional questions than the typical backwards-looking criminal investigation or immediate police response to a crime already in motion. When the crime is as extreme and the need to prevent it as great as with potential mass murder, the constitutional questions take on special urgency and a certain novelty.

“As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. In circumstances that suggest a grave threat and true emergency, law enforcement is entitled

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to take whatever preventive action is needed to defuse it.

“The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line. The balance is struck with due deference for the difference in perspective between an officer who must make snap judgments in minutes or seconds, and a judge who has ‘the 20/20 vision of hindsight.’ *Graham v. Connor*, 490 U.S. 386, 396 (1989). And whether the officers’ actions are later reviewed as a matter of the Fourth Amendment

merits or on a defense of qualified immunity, we ask only for objective reasonableness—‘objective’ because we do not try to read an officer’s mind, and ‘reasonableness’ because the term itself implies, above all, real respect for those charged with the front-line protection of human life.

“The chief strength of balancing tests is that they are attuned to individual circumstances. Their chief weakness is uncertainty of guidance. The inevitable imprecision in any balancing equation, however, should not lead to a regime in which officers necessarily face no liability for failing to act, *DeShaney v. Winnebago County*

*Dept. of Soc. Servs.*, 489 U.S. 189 (1989), but who, upon acting, are subjected to the most exacting scrutiny (potentially for damages under 42 U.S.C. § 1983)—a regime of inverted incentives that would ‘inhibit officials in the discharge of their duties,’ *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). For the public interest is ‘not served by a police force intent on escaping liability to the cumulative detriment of those duties which communities depend upon such officers to perform.’ *Gooden v. Howard County*, 954 F.2d 960, 967 (4th Cir. 1992). Inaction, no less than action, has its costs—a failure of response where one is called for permits the blasts of the gunman to shatter those connections that human beings hold most dear.

“Our analysis begins with what the district court called the ‘salient, primary fact’ in this case: the overwhelming justification police had for rushing immediately to Mora’s home and taking him into custody. Mora’s phone call to the hotline operator, as she reported it to the police, showed a man on the edge, a man who was armed, suicidal, and inclined to kill his co-workers on the way out. His last, chilling remark, ‘I might as well die at work,’ was ambiguous to be sure, but it intimates a massacre, and his co-worker confirmed that the threat was serious. The very concept of an emergency was made for this situation, and police responded in emergency mode, dispatching to Mora’s home within one minute of the hotline operator’s call and apprehending him the moment they arrived with guns drawn. Mora does not dispute the legality of this response, nor could he.

“The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat’s scope. When police arrived at Mora’s apartment and handcuffed him, they did not and could not

fully know the dimensions of the threat they faced. They knew only that they faced an emergency of the kind that has traditionally justified warrantless searches, even into a home. As the district court emphasized, Mora might have had a bomb—not an unprecedented thing for men in his state of mind. Or as the commanding officer at the scene pointed out in his report, Mora might have taken hostage the girlfriend who, police knew, had recently broken up with him. In an emergency situation officers are entitled to find out what they are up against, and they often cannot find it out without conducting searches.

“Searching Mora’s bags, car, and home was thus part and parcel of defusing the threat he presented, and just as police had the authority to seize him without a warrant in the course of defusing that threat, so too could they conduct a warrantless search of his surroundings.”

The Court of Appeals for the Fourth Circuit did not address the merits of the Gaithersburg police department’s authority to retain Mora’s weapons. The Court stated it would be ill-advised if not impossible for them to decide whether the Gaithersburg police are without authority to retain Mora’s weapons, because nestled in Mora’s due process claim *are* two state law questions which must be raised in local courts.

The Court stated that Mora’s federal claims are without merit. To hold otherwise would be to cross the line between vindicating personal rights and punishing public officials for nothing more than doing their jobs. As to Mora’s state claims, he can raise those in state court.

CRIMINAL PROCEDURE:  
**Arkansas Rules of  
 Criminal Procedure, Rule 2.2**

*Boldin v. State*, No. CR07-1024, 4/24/08

**I**n *Boldin v. State*, the Arkansas Supreme Court dealt with Arkansas Rule of Criminal Procedure, Rule 2.2, which states:

*(a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, appear at a police station, or to comply with any other reasonable request.*

*(b) In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.*

The Arkansas Supreme Court stated that they had interpreted Rule 2.2 to provide that an officer may approach a citizen much in the same way a citizen may approach another citizen and request aid or information. *Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002). Since the encounter is in a public place and is consensual, it does not constitute a “seizure.”

The Arkansas Supreme Court stated further that they have never held that Rule 2.2 specifically requires an officer to inform a person that he is not required to assist the officer; instead, the

rule just prohibits an officer from insinuating that the person is required to do so.

DEATH PENALTY: **Lethal Injection**

*Baze v. Rees*, No. 07-5439, 4/16/08

**I**n *Baze v. Rees*, the United States Supreme Court dealt with a challenge to lethal injection as cruel and unusual punishment.

Lethal injection is used for capital punishment by the Federal Government and 36 States, at least 30 of which (including Kentucky) use the same combination of three drugs: The first, sodium thiopental, induces unconsciousness when given in the specified amounts and thereby ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs, pancuronium bromide and potassium chloride. Among other things, Kentucky’s lethal injection protocol reserves to qualified personnel having at least one year’s professional experience the responsibility for inserting the intravenous (IV) catheters into the prisoner, leaving it to others to mix the drugs and load them into syringes; specifies that the warden and deputy warden will remain in the execution chamber to observe the prisoner and watch for any IV problems while the execution team administers the drugs from another room; and mandates that if, as determined by the warden and deputy, the prisoner is not unconscious within 60 seconds after the sodium thiopental’s delivery, a new dose will be given at a secondary injection site before the second and third drugs are administered.

Petitioners, convicted murderers sentenced to death in Kentucky state court, filed suit asserting that the Commonwealth’s lethal injection protocol violates the Eighth Amendment’s ban

on “cruel and unusual punishments.” The state trial court held extensive hearings and entered detailed fact findings and conclusions of law, ruling that there was minimal risk of improper administration of the protocol, and upholding it as constitutional. The Kentucky Supreme Court affirmed, holding that the protocol does not violate the Eighth Amendment because it does not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death.

Upon review, the United States Supreme Court stated that capital punishment is not prohibited under our Constitution, and that the States may enact laws specifying that sanction. The Court found, in part, as follows:

“The power of a State to pass laws means little if the State cannot enforce them. *McCleskey v. Zant*, 499 U. S. 467, 491 (1991). State efforts to implement capital punishment must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to ‘objectively intolerable risk,’ not simply the possibility of pain.

“Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks of maladministration they have suggested – such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel – cannot remotely be characterized as ‘objectively intolerable.’ Kentucky’s decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment.

“Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge. Our society has nonetheless steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection. The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment. There is no reason to suppose that today’s decision will be any different.

“The judgment below concluding that Kentucky’s procedure is consistent with the Eighth Amendment is, accordingly, affirmed.

#### **DWI: Law Enforcement Officer Providing Expert Testimony**

*Weisenfels v. State*, CACR 07-1121, 4/30/08

**A** jury found Adrian Weisenfels guilty of driving while intoxicated. On appeal, he first contends that the circuit court abused its discretion in refusing to grant a mistrial when a police officer testifying for the State attempted to quantify appellant’s blood-alcohol level based on appellant’s performance of the horizontal gaze nystagmus (HGN) test. Second, he contends that the circuit court abused its discretion in giving a jury instruction on expert-witness testimony when no expert testified at trial.

At the jury trial, the State presented the testimony of Deputy Steven Walker of the Washington County Sheriff's Department and Officer Mike Biddle of the Elkins Police Department. Walker testified that on September 23, 2006, he observed the car driven by appellant "speeding up, slowing down, every time the vehicle would speed up he weaved in his lane a little more, a time or at least one time I noticed that he crossed the center line, in my report I put two feet..." He also testified that appellant at one point was driving thirty-five miles per hour in a fifty-five mile per hour zone and that this was significant because it was a "good indicator that it's possibly a DWI driver." He noted that after turning on his emergency lights, appellant drove for approximately two hundred yards; that rather than pulling off onto the shoulder, appellant stopped his vehicle straddling the fog line; that when appellant exited the car, he stumbled getting out and was unsteady on his feet; that the odor of intoxicants was coming from the inside of the car; and that appellant was asked twice for proof of insurance. When asked, appellant stated that he had not drunk anything in about two hours.

Biddle testified that he arrived at the scene and had appellant perform various field-sobriety tests, including the HGN test. Biddle noted that there were six "clues" in the test. Following Biddle's testimony regarding appellant's performance on this test, the State asked whether there was "a pass/fail or is there a scoring on this test," and Biddle replied, "Yes, there's a pass/fail, four or more of those symptoms indicate a blood-alcohol content of zero point zero eight hundreds for weigh-." Counsel for appellant interrupted and moved for a mistrial, arguing that this "was not proper testimony," that Biddle "was asked about clues, he wasn't asked about blood-alcohol percent,

that's absolutely prohibited," and that "there's a case right on point on that and he cannot testify to any percentage of what the clues indicate the percentage of blood[-alcohol] content." The circuit court stated that the "response was not responsive to the question and if you're requesting an admonition to the jury I will certainly give that." Counsel again moved for a mistrial, which the court denied, and appellant requested an admonition to the jury. The court then instructed the jury to "disregard the last response of the witness, it was not responsive to the question." Biddle then testified that in grading appellant's performance, he observed six "clues."

Biddle also had appellant perform the walk-and-turn test, showing six of eight clues, and the one-leg stand test, showing two of four clues. He also noted that appellant stumbled getting out of his car and had trouble standing in one place; his eyes were red, glassy, bloodshot, and watery; his breath smelled of intoxicants; and his speech was slurred. Appellant admitted that he had two drinks earlier in the day. Biddle found beer and an almost empty vodka bottle in the trunk. Biddle arrested appellant for driving while intoxicated. Appellant was unable to complete a BAC Datamaster test at the police department.

Citing *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989), appellant argues that Biddle's testimony manifestly prejudiced him because it provided the jury with "a gauge by which to quantify the level of alcohol" by using the HGN test when there were no results from any type of chemical testing. In *Middleton*, a police officer testified that appellant's performance on the HGN test "indicated an alcohol rating of .15 or .16." *Id.* at 87, 780 S.W.2d at 583. The *Middleton* court noted that a jury instruction was given

defining the offense of driving while intoxicated as being in control of a vehicle with an alcohol level of .10 or above, and the only evidence of the defendant's alcohol level was the officer's testimony based on the HGN test. The court concluded that any probative value that the HGN test results may have had to show an alcohol level in excess of .10 was substantially outweighed by the potential for unfair prejudice.

In *Weisenfels v. State*, one of the issues before the Arkansas Court of Appeals was whether the trial court abused its discretion in giving the expert-witness instruction. They found, in part, as follows:

"Arkansas Rule of Evidence 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. If some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Mace v. State*, 328 Ark. 536,

**"Arkansas Rule of Evidence 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. If some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony."**

944 S.W.2d 830 (1997). Whether a witness qualifies as an expert is a matter within the circuit court's discretion, and that decision will not be reversed absent an abuse of that discretion.

"Walker, who stopped appellant's car, testified that he had been a certified police officer since September 2001, and after becoming certified, had been employed in law enforcement. He also testified that he went to 'standardized field sobriety school' and was a 'standardized field sobriety instructor' and a drug recognition expert. He further testified that he had made 'about two hundred' stops involving persons

driving while intoxicated. He testified that he pulled appellant's vehicle over because he 'was in fear of other traffic on the road, he might be a danger to them or himself.' He further opined that after observing appellant's driving and appellant's conduct after the stop, appellant was a danger to himself or others on the roadway.

"Biddle, who conducted the field-sobriety tests, testified that he was a certified law enforcement officer, attended the law enforcement training academy and graduated in 1999, had attended a class on standardized field sobriety in 2006, attended a class on the operation of the BAC

Datamaster machine and was a licensed operator of the machine, and had made approximately fifty traffic stops involving persons operating a vehicle while intoxicated by alcohol. Biddle concluded that, after considering the results of the field-sobriety tests, his contact with appellant, and appellant's attempts to take the Datamaster test, appellant 'was a danger not only to himself but to his passengers and other people on the roadway' and could not control a vehicle.

"Both Walker and Biddle testified regarding their respective training regarding field sobriety tests and extensive experience in making traffic stops involving drivers who were driving while intoxicated. The State had to prove that appellant was intoxicated, which required proof that appellant presented a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians. Both officers concluded that appellant was a danger to himself and others on the roadway. There was a reasonable basis from which it can be said the officers had knowledge beyond that of ordinary knowledge, and the officers' specialized training and knowledge aided the jury in determining this fact in issue, that is, whether appellant was a danger to himself and others. Accordingly, the circuit court did not abuse its discretion in giving the expert-witness instruction, as their testimony was admissible as expert testimony. See *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992), holding that an officer's testimony regarding his training that dealt in depth with the HGN test was sufficient to establish him as an expert witness qualified to discuss the details and results of the test."

### INTERROGATION: **Custody;** **Volunteered Noncustodial Statements**

*Jones v. State*, CACR 07-352, 2/6/08

**O**n the night of October 1, 2005, Michael Blevins, a North Little Rock police officer, was dispatched to investigate an anonymous call regarding loud music at the 2500 block of North Berkley. He arrived at the location in his police car and saw two cars parked on the side of the street. He made contact with the occupants of the rear car and then made contact with those in the second car. Michelle Logan Jones was in the driver's seat of the second car with the windows down; there was also a passenger in the front seat. Officer Blevins testified that he asked Jones if she was playing loud music, to which she responded, "No." Officer Blevins testified that he then asked both Jones and her passenger if they "had anything illegal inside the car." Jones responded, "Yes, sir, I have marijuana in my car."

Officer Blevins asked them to step out of the car. He then asked Jones where the marijuana was, and she said it was in the passenger side door. Officer Blevins testified that Jones then told him to look in the glove compartment, where he found another bag of marijuana. At that point Jones told Officer Blevins that there was more marijuana under the driver's seat. When he found a plastic baggie with marijuana, Jones said, "That's not all. Look in the brown paper bag." Officer Blevins found the majority of the marijuana with some scales and a marijuana pipe in a paper bag under the driver's seat. He arrested Jones and took her to the Levy substation where Detective John Nannen took her statement. In her statement, Jones admitted purchasing marijuana and possessing it with the intent to deliver.

Jones contends that the questioning by Officer Blevins when he asked whether there was anything illegal in the car was not constitutionally permissible.

The Arkansas Court of Appeals stated that Officer Blevins had authority under Rule 2.2 to approach Jones' car to investigate a complaint of loud music:

"After approaching her car, he asked her if she was playing loud music to which she responded, 'No' and then asked her and her passenger if they 'had anything illegal inside the car.' There is no evidence that Officer Blevins was any more overbearing or intimidating when he asked this particular question than when he asked his first question about the music. Indeed, he testified that it was merely a routine question that he always asked. Accordingly, we do not find Officer Blevins's additional inquiry to be outside the scope of Rule 2.2 of the Arkansas Rules of Criminal Procedure or to have caused the encounter to rise to the level of a seizure."

#### INTERROGATION:

##### **Invoking Right to Remain Silent**

*Robinson v. State*, No. CR07-887, 4/24/08

**O**n October 17, 2006, Brian Wilbanks and Cheryl Crow arrived at a residence, which she shared with Brian Edward Robinson. As Crow and Wilbanks sat in Wilbanks' pickup truck, Robinson confronted the couple. An argument ensued, and Robinson shot Wilbanks. Robinson then fled the scene in his vehicle. Robinson's flight escalated into a police chase. The chase ended when a patrol car was hit by Robinson's car. Robinson ran from his car and was apprehended by Randolph County officers in the woods.

After the pursuit on foot, Sheriff Brent Earley took Robinson into custody and read Robinson his *Miranda* rights from a pre-printed card. Robinson indicated that he understood his rights. Earley asked, "Why are you running from the police?" Robinson responded, "I don't want to say anything right now." Earley then took him down the hill and asked Robinson why he would "shoot somebody over a woman." Robinson replied that "this goes back a lot further than what you understand." Winded from the chase, Earley turned Robinson over to a couple of deputies and went back into the woods to look for additional evidence. The officers put Robinson in the passenger seat of a patrol vehicle at the scene of Robinson's arrest.

Special Agent Wendall Jines confirmed with Robinson that he had been given his *Miranda* rights and that he understood those rights. According to Jines's testimony, he approached Robinson and said, "I need to talk to you about what happened. Okay? Do you understand your rights as the sheriff advised you earlier?" Robinson replied, "No," at first but added, "Yes, sir. Yes, sir. I have." Jines then taped Robinson's statement while the two individuals sat in the patrol vehicle at the scene. Jines further testified that once Robinson gave his statement, he never requested an attorney and never attempted to end the conversation. Robinson then gave a second statement later that morning at the Randolph County Sheriff's Department.

Robinson was convicted in a jury trial of first-degree murder. In his appeal, Robinson argues that the circuit court erred in refusing to suppress his statement to the Arkansas State Police. Specifically, Robinson contends that Sheriff Earley and Special Agent Jines violated Arkansas Rules of Criminal Procedure, Rule

4.5 (2007) by improperly refusing to cease interrogation.

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

“A person subject to custodial interrogation must first be informed of his right to remain silent and right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966). ‘Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.’ *Miranda*, 384 U.S. at 473-74; see also Ark. R. Crim. P. 4.5 (2007). An indication that a defendant wishes to remain silent is an invocation of his *Miranda* rights. Once the right to remain silent is invoked, it must be ‘scrupulously honored.’ *State v. Pittman*, 360 Ark. 273, 276, 200 S.W.3d 893, 896 (2005); *Whitaker v. State*, 348 Ark. 90, 95, 71 S.W.3d 567, 570 (2002) (citing *Miranda*, 384 U.S. at 479). The meaning of ‘scrupulously honored’ was discussed in *James v. Arizona*, 469 U.S. 990, 992-93 (1984):

*To ensure that officials scrupulously honor this right, we have established in **Edwards v. Arizona**, [451 U.S. 477 (1981)], and **Oregon v. Bradshaw** the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused (1) “initiates” further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel under the [waiver] standard of **Johnson v. Zerbst**, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), and its progeny. See **Solem v. Stumes**, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984).*

“Unwarned statements or statements improperly taken after the invocation of the right to remain silent or the right to counsel must be excluded from the State’s case in chief to ensure compliance with *Miranda*’s dictates. See *Michigan v. Harvey*, 494 U.S. 344 (1990). In *Standridge v. State*, 329 Ark. 473, 479, 951 S.W.2d 299, 301 (1997), we noted that we see no distinction between the right to counsel and the right to remain silent with respect to the manner in which it must be effected. *Id.* at 479, 951 S.W.2d at 301. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Miranda*, 384 U.S. at 475. This high bar on the State’s burden of proving waiver of the right to remain silent is best understood as a result of the view that courts are to indulge every reasonable presumption against waiver of fundamental constitutional rights. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

“Robinson argues that, pursuant to Rule 4.5, the circuit court should have suppressed his statement to Earley because he invoked his right to remain silent when he indicated, ‘I don’t want to say anything right now.’ Thus, once a defendant is read his or her *Miranda* rights, the relevant inquiry is whether (1) a defendant’s initial response ‘indicated in any manner’ under *Miranda* and Rule 4.5 is an invocation of the right to remain silent or an invocation of the right to counsel; and (2) the interrogation must immediately cease whenever a suspect states that he or she wants counsel, *Miranda*, 384 U.S. at 474, or when he or she invokes the right to remain silent, pursuant to *Miranda* and Rule 4.5.

“Robinson’s response was an invocation of his right to remain silent and an initial indication that he did not wish to be questioned. Having invoked his *Miranda* rights ‘in any manner’ under both *Miranda*, supra, and our Rule 4.5, law enforcement was obligated to ‘scrupulously honor’ his assertion of his rights and should have refrained from continuing to ask Robinson about the crime. Any additional questioning by Jines should have taken place only if Robinson had initiated discussion with the police and had knowingly and intelligently waived his rights. See *Otis v. State*, 364 Ark. 151, 161, 217 S.W.3d 839, 844 (2005).

“Therefore, under these circumstances, we hold that, under *Miranda* and Rule 4.5, the officers should have ceased his interrogation after Robinson stated, ‘I don’t want to say anything right now.’”

**INTERROGATION: Right to Counsel;  
Separate Sovereigns Doctrine**

*United States v. Burgest*,  
CA11, No. 06-11351, 3/13/08

**A** federal grand jury indicted Earl Burgest on two counts of possession with intent to distribute at least five grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii). Burgest, through counsel, filed a pre-trial motion to suppress, arguing that statements he made to federal agents during an interrogation should be suppressed because the State of Florida had formally charged him with possession of cocaine, and he was represented by counsel for the state charge when federal agents interrogated him regarding the federal drug possession counts. Burgest asserted that his written waiver of his *Miranda* rights was insufficient to overcome an attached Sixth

Amendment right to counsel. The Government responded that Burgest’s right to counsel was not violated when the federal agents interviewed him regarding his drug possession charges because the state and federal charges violated the laws of separate sovereigns and were thus not the same offense. The state charge was for possession of cocaine and the federal charges were for possession of crack cocaine with intent to distribute.

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

“In this case, there is no question that Burgest’s Sixth Amendment right to counsel had attached to the state drug charge at the time the federal agents interviewed him. Because the Sixth Amendment right to counsel is offense specific, Burgest’s prior invocation of his right to counsel for the charged state offense did not attach to Burgest’s uncharged federal drug offenses if the federal offenses are separate offenses from the state drug offense. We hold that where conduct violates laws of separate sovereigns, the offenses are distinct for purposes of the Sixth Amendment right to counsel. Accordingly, Burgest’s right to counsel did not attach to his federal charges at the time federal agents questioned him.

“A federal offense and a state offense do not constitute the same offense under the Sixth Amendment—even if the offenses are identical in their respective elements—because they are violations of the laws of two separate sovereigns. Therefore, Burgest’s prior invocation of his right to counsel for his state drug charge did not attach to the uncharged federal drug offenses when the federal agents interviewed him.”

OUTRAGEOUS  
GOVERNMENTAL CONDUCT:  
**Informant's Use of Unauthorized Drugs**

*United States v. Nieman,*  
CA8, No. 07-2717, 4/2/08

**I**n early April 2006, officers with the Iowa Division of Narcotics Enforcement (DNE) began working with Jill Siems pursuant to a cooperation agreement. She agreed to assist law enforcement in gathering evidence of illegal drug activity against David Nieman and three other men. Her cooperation agreement specified she could not use drugs or otherwise break the law.

Under the direction and surveillance of Iowa Division of Narcotic Enforcement (DNE), Siems attempted two controlled drug buys from Nieman in early April 2006, but was unsuccessful. He knew she had criminal charges pending and was reluctant to sell her any drugs. She made a third attempt to buy drugs from him on May 3, 2006. At that time, Siems used drugs with Nieman, and he gave her a small quantity of drugs to take with her. She informed DNE officers of use of drugs with Nieman, explaining the use of drugs with Nieman was part of their history together, and felt she needed to use drugs with him before he would sell her drugs. The officers decided not to terminate Siems' cooperation agreement, despite her violation of one of its terms. They reminded her not to use drugs. The following week, Siems met with Nieman on two occasions. On May 13, 2006, the second occasion, he sold her an eightball of methamphetamine for \$350.00.

On May 14, 2006, DNE officer John Graham applied for a search warrant to search Nieman's residence. The application included his sworn

affidavit, which related information about Nieman's drug activity received from five separate, reliable, confidential informants (CIs), including Siems. None of the CIs were anonymous. The affidavit specifically stated Officer Graham or other law officers had spoken with the informants directly and were able to assess their credibility. The CIs' statements corroborated each other's statements. At least three CIs had provided information in other cases, some testifying before a grand jury.

Officer Graham obtained and executed the warrant the following day. Law enforcement officers seized approximately five ounces of methamphetamine, over \$6,000.00 in cash, documents showing a large number of cash expenditures, a digital scale, drug use and distribution paraphernalia, several firearms and ammunition. Officers found, but did not seize, a large number of vehicles, snowmobiles, motorcycles, expensive tools, car parts, and other assets. Later that day, Officer Graham applied for and obtained a second search warrant for the purpose of seizing those additional assets.

After a grand jury's initial indictment, Nieman filed two pre-trial motions. The first was a Rule 12(b) motion to dismiss the indictment on the ground of outrageous government misconduct. The second was a motion to suppress the evidence on the ground it was obtained through an illegal search and seizure.

The grand jury subsequently returned an eight count superseding indictment charging Nieman with: conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846, three counts of distribution of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§

841(a)(1) and 841(b)(1)(A), being an unlawful drug user in possession of firearms in violation of 18 U.S.C. § 922(g)(3), possession of firearms in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c), and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956.

The district court accepted the recommendation of the magistrate judge and entered an order denying Nieman's motion to dismiss and motion to suppress. A jury found him guilty of all charges except one count of distribution of methamphetamine (Count 3). The district court sentenced him to 295 months imprisonment.

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

"While there may be circumstances in which the conduct of law enforcement agents is so outrageous that due process bars the government from invoking the judicial process to obtain a conviction, the level of outrageousness needed to prove a due process violation is quite high, and the government's conduct must shock the conscience of the court. We have previously held, 'where a person is predisposed to commit an offense, investigative officers and agents may go a long way in concert with the defendant without being deemed to have acted so outrageously as to violate due process.' *United States v. Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989).

"Nieman argues DNE officers expressly or implicitly authorized Siems to use drugs in order to buy drugs from him. He cites the officers' failure to terminate her cooperation agreement as proof they condoned such illegal activity. The district court rejected this argument and found the government did not condone

Siems's use of methamphetamine. Nothing in the record indicates the district court erred in its factual findings. The cooperation agreement specifically prohibited her from engaging in drug use. Moreover, the officers testified when she self-reported this violation, they discussed termination of her cooperation agreement before deciding to give Siems a second chance. They again gave her explicit instructions, which she subsequently followed, never to use drugs with Nieman again.

"Thus, the relevant inquiry is whether the government's failure to terminate Siems's cooperation agreement on the basis of her single, unauthorized use of drugs, constitutes government misconduct 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.' *Russell*, 411 U.S. at 431-32. We conclude it does not. We have recognized 'the use of unsavory informants is quite often the nature of the beast in police investigations.' *King*, 351 F.3d at 868. In this case, the government did not direct or encourage Siems's drug use; her misconduct can not be attributed to the government. See *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir.1991) ('Due process is not violated unless the conduct is attributable to and directed by the government.'). We hold the government did not violate the defendant's right to due process when it allowed its informant to continue assisting narcotics investigators after she engaged in illegal drug use."

## SEARCH AND SEIZURE:

**Protective Sweep**

*United States v. Mata,*  
CA5, No. 06-40957, 2/11/08

**I**n *United States v. Mata*, Immigration and Customs Enforcement (“ICE”) agents uncovered a tractor-trailer containing marijuana after a Pharr, Texas, business notified police of suspicious behavior. The drugs were hidden within twenty wooden pallets containing Mexican pottery.

The ICE agents learned from the bill of lading that the pottery was destined for Chicago and decided they would attempt to make a controlled delivery to “Jim,” the contact person named on the bill of lading. Undercover agents from the Pharr police department drove the truck to Illinois, and Chicago and Illinois police installed transmitting beacons within four of the pallets and parked the truck at a state police facility overnight.

The following morning, the undercover officers drove the truck to the address listed on the bill of lading, which was a Wal-Mart. The undercover officers called “Jim” at approximately 10:00 a.m. to ask for further instructions. “Jim” told the officers to wait. Soon after, the police surveillance team observed two vehicles approach the truck. The occupants exited and instructed the undercover officers to follow them to the delivery site, Ray’s Auto and Truck Repair, owned by Raymond Mata and his wife. The undercover officers arrived at Mata’s business at approximately 12:25 p.m. Undisputed testimony described Mata’s business as a small lot enclosed by a cyclone fence with barbed wire and a gate, secured by a lock and chain. The lot contained numerous parked automobiles and

a brick building with a door and garage door large enough to accommodate trucks.

The truck was admitted to the premises, and Mata and others assisted the undercover officers in unloading the truck inside Mata’s garage. Mata signed the bill of lading, and the undercover officers left about 30 minutes after arriving. By this time, approximately twenty-five ICE agents and local police surrounded and surveilled Mata’s garage. For approximately two hours, officers watched as numerous vehicles and unknown individuals came and went. Mata left his garage at approximately 2:00 p.m., after the controlled delivery was completed.

Between 2:30 and 2:45 p.m., police officers observed a white box truck preparing to leave Mata’s garage. Officers testified that they believed the truck, which had been loaded in the garage, contained some or all of the marijuana. As the truck left Mata’s business, the police, fearing the large amount of marijuana could be lost, gave the “take down” signal, quickly blocked traffic, turned on their emergency lights, identified themselves as police, and ordered the individuals standing outside the gate to stop. As the police approached, at least two men fled down the street and two more fled to the rear of the lot. The ICE agents and police were able to detain these fleeing individuals and arrested 7-10 men in total.

Immediately after the raid, Special Agent Glen Comesanas ordered a “safety personnel sweep” of the garage. At the suppression hearing, Comesanas testified that he was concerned that other suspects, who might be a danger to officers and passers-by, remained inside, but he admitted he had “no idea” one way or the other. At trial, Comesanas testified that roughly five to six officers entered the building to sweep

likely hiding spaces. During the sweep, the officers did not find any individuals, but they saw substantial amounts of marijuana and firearms in plain view. After the sweep, the officers left the building, secured the perimeter, and awaited a formal search warrant.

Mata contends that the district court erred in denying his motion to suppress evidence observed during the officers' protective sweep.

The Court of Appeals for the Fifth Circuit first considered the initial sweep of Mata's garage that discovered marijuana and weapons in plain view immediately after the 7-10 individuals were arrested outside the gate leading into the premises. The Court found, in part, as follows:

"There are three variations of the post-arrest exception potentially applicable to the officers' 'safety personnel sweep.' First, incident to an arrest, law enforcement officers may contemporaneously search areas within the arrestee's immediate control to prevent the destruction of evidence or procurement of a weapon. Second, officers may search areas immediately adjoining the place of arrest, such as closets and other spaces, from which a surprise attack could occur. Probable cause or reasonable suspicion is not necessary for these first two variations. Third, officers may also perform cursory 'protective sweeps' of larger areas if they have articulable facts plus rational inferences that allow a reasonable officer to suspect that an individual dangerous to the officers is within the area to be searched.

"The officers' search of Mata's business does not meet the first variation, a search incident to an arrest to prevent the destruction of evidence

or procurement of a weapon. Likewise, the officer's search does not meet the second exception, a search of immediately adjoining areas to prevent surprise attacks. Under the third variation, a protective sweep of a larger area may be lawful if other circumstances are present. This court has identified several requirements for a valid protective sweep. First, the police must have entered legally and for a legitimate law enforcement purpose. Second, the officers must have a reasonable, articulable suspicion that the area to be swept contains a person posing a danger to those on the scene. Third, the protective sweep must be limited to a cursory inspection of only those spaces where a person may hide; it is not a full search of the premises. Finally, officers must conclude the sweep once they have dispelled their reasonable suspicion of danger, and they may not continue the sweep after they are no longer justified in remaining on the premises.

"Mata contends that the officers lacked a reasonable, articulable suspicion that the area to be swept contained a person posing a danger to those on the scene. Mata makes specific mention of Agent Comesanas's testimony that he had 'no idea' who was inside, and thus he felt the sweep was necessary to protect the officers; Mata also notes that the district judge predicated his decision on his finding that 'the officers had no idea as to whether there were other individuals with weapons inside.' But while the officers might have lacked articulable facts as to the specific identity of any individual within the building, the trial court found and testimony supported a reasonable, articulable suspicion that the area to be swept contained a person posing a danger.

"First, the officers did not merely suspect that the individuals might possess contraband;

the officers knew with absolute certainty. Undercover police working with the officers had only hours before made a controlled delivery of 1,283 kilograms of marijuana. Throughout the surveillance, Mata acknowledges and the testimony demonstrated that numerous cars and individuals entered and exited the lot, which meant that at any given time the officers might have lacked an accurate count of suspects present. Second, the testimony also revealed that individuals were conducting counter-surveillance—keeping an eye out for law enforcement—while the marijuana was inside Mata’s garage. When the police gave the ‘take down’ signal, at least four individuals ran in different directions, including two behind Mata’s building.

“Given this court’s precedent, the standard of review, and the district court’s factual findings, we cannot say that the district court erred in upholding the protective search and in denying the motion to suppress evidence of the marijuana and firearms found in plain view during that sweep.”

#### SEARCH AND SEIZURE:

##### **Reasonable Suspicion; Drug Sniff**

*State v. Harris*, CR 07-436, 2/28/08

**O**n May 2, 2006, Namon Harris was stopped by officers of the Jonesboro Police Department and officers of the Second Judicial Drug Task Force (DTF) on U.S. Highway 63. The officers were acting on a confidential informant’s tip that Harris was carrying cocaine and marijuana in his truck from Texarkana into Jonesboro. Officer Lane, a Jonesboro police officer and also a member of the DTF testified that he received the information at approximately 8:00 a.m. from an informant

whom Lane knew, but who wished to remain anonymous. The informant described Harris as a black male, approximately forty years of age, five foot, eight inches tall, and approximately 180 pounds. The informant described Harris’ vehicle as a tan-colored Chevrolet extended cab pickup truck with a yellow construction light. Lane testified that the informant also described some other possible vehicles that could be following Harris.

After receiving this information, Lane contacted the DTF officers and advised them of the informant’s tip. After contacting these officers, Lane, along with Agent John Redman, got into an unmarked vehicle and began traveling on U.S. Highway 49 in the direction of Little Rock to try to intercept Harris’ vehicle. As they were traveling on Highway 49, Lane noticed a vehicle matching the description given to him by the informant. As Lane turned around and attempted to catch up with the vehicle, Redman ran the vehicle’s license plate through Arkansas State Police headquarters. The vehicle was registered to Harris. Lane then passed the vehicle to see the driver of the vehicle and noticed that the driver matched the description given by the informant.

Lane contacted Jonesboro police officer Lieutenant Ancel Jines, who was in the area of Highway 49, and informed him of the information. Lane advised Jines that he had reasonable suspicion that the vehicle was carrying a large amount of a controlled substance, and requested that Jines conduct a traffic stop on the vehicle. Jines pulled out behind Harris’ vehicle and informed Lane that the vehicle’s window tint appeared to be illegal. Jines then contacted K-9 Officer John Shipman and requested that Shipman conduct a stop on the vehicle.

Shipman stopped Harris' vehicle on U.S. Highway 63, just east of U.S. Highway 49. Harris provided Shipman with a Texas driver's license identifying himself as Namon Harris from Texarkana, Texas. Shipman handed the license and vehicle information to Jines to check Harris through the ACIC/NCIC system. While Jines was checking the license, Shipman assisted his canine partner with a perimeter sniff of the exterior of the vehicle. Shipman testified that his canine gave a positive alert for the odor of illegal narcotics being present in the vehicle. Upon a search of the vehicle, the officers found a large trash bag in the rear seat that contained two large plastic containers that contained approximately sixty to seventy pounds of marijuana. Jines then placed Harris under arrest for possession of a controlled substance with the intent to deliver. The officers continued the search of the vehicle and found a loaded .357 Smith & Wesson hand gun. The officers had the vehicle towed to the Craighead County Sheriff's Office to continue the search. While at the Sheriff's office, Agent John McGee located approximately 2.2 pounds of cocaine and a box of .357 hand-gun ammunition inside the driver's side rear door.

Harris was charged with possession of cocaine with intent to deliver; possession of marijuana with intent to deliver; and simultaneous possession of drugs and firearms. Harris filed a motion to suppress the evidence. The Craighead County Circuit Court filed its order granting Harris' motion to suppress ruling that, although

**“Whether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person may be involved in criminal activity.”**

the police officers had reasonable suspicion to stop Harris' vehicle for an investigatory stop, the sole purpose of stopping the vehicle was to conduct a canine sniff to develop a basis to search the vehicle. The State filed a notice of appeal, stating that the order granting Harris' motion to suppress substantially prejudices the prosecution of its case.

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

“This case provides this Court with an opportunity to address the issues of when a dog sniff is justified and the legal basis necessary to support such a search.

“Reasonable suspicion is defined as ‘a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.’ *Dowty v. State*, 363 Ark. 1, 210 S.W.3d at 850 (2005) (citing Ark. R. Crim. P. 2.1 (2004)). Whether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person may be involved in criminal activity.

“In addition, the Arkansas legislature has codified factors to be considered when determining whether an officer has grounds to

'reasonably suspect' a person is subject to detention pursuant to Rule 3.1. These factors include, but are not limited to, the following:

- (1) The demeanor of the suspect;
- (2) The gait and manner of the suspect;
- (3) Any knowledge the officer may have of the suspect's background or character;
- (4) Whether the suspect is carrying anything, and what he or she is carrying;
- (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;
- (6) The time of the day or night the suspect is observed;
- (7) Any overheard conversation of the suspect;
- (8) The particular streets and areas involved;
- (9) Any information received from third persons, whether they are known or unknown;
- (10) Whether the suspect is consorting with others whose conduct is reasonably suspect;
- (11) The suspect's proximity to known criminal conduct;
- (12) The incidence of crime in the immediate neighborhood;
- (13) The suspect's apparent effort to conceal an article; and
- (14) The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

"Harris asserts that the facts in this case are insufficient to justify the stop because the information that was used came from an

anonymous individual. The above factors include 'any information received from third persons, whether they are known or unknown.' In *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995), a confidential informant told a detective that two males driving a black 1989 Ford Ranger pickup with Oklahoma tags were selling crack cocaine and told the detective where the vehicle was parked. We said that while there was minimal evidence to show the reliability of the informant in that case, the detective had been able, in the past, to confirm the veracity of some of the information provided and was aware that the informant had worked with other detectives on cocaine cases. We held that this evidence of reliability, combined with the accuracy of the informant's information and the detective's testimony regarding the area's reputation for drug traffic, was enough to give the officers 'specific, particularized and articulable reasons indicating the person or vehicle may be involved in criminal activity.' We further held that the information provided by the informant was sufficiently detailed that, when combined with all other factors, it gave the officers a legal basis for the stop.

"Here, Officer Lane testified that he knew the informant; therefore, the tip was not anonymous. Lane testified that he first had contact with the informant in 2002, and found the information he had received at that time had been accurate and truthful. Further, the information given to Lane by the informant in the instant case matched the descriptions of Harris and his vehicle. Therefore, the evidence of the informant's reliability combined with the accuracy of the informant's information was enough to give the officers specific, particularized and articulable reasons indicating the person or vehicle may be involved in criminal activity. In reviewing the totality of the circumstances, we hold that the

officers had reasonable suspicion, and therefore a legal basis, to stop Harris' vehicle.

"A pretextual stop does not violate federal constitutional law. See *Harmon v. State*, 353 Ark. 568, 113 SW 3d 75 (2003). Further, this court has never held a valid traffic stop to be unconstitutional because of a police officer's ulterior motives. See *Harmon, supra* (citing *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994)). We have also said that an otherwise valid stop does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity. Unlike pretextual arrests, our common-law jurisprudence does not support invalidation of a search because a valid traffic stop was made by a police officer who suspected other criminal activity.

"The use of a drug dog during a traffic stop does not constitute an illegal search under the federal constitution. *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005) (citing *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834 (2005)). We have held that a canine sniff of the exterior of a vehicle is not a Fourth Amendment search. Where there is no 'search' within the meaning of the Fourth Amendment, no reasonable suspicion is necessary to justify having a dog smell Harris' vehicle. According to our case law, if police have a reasonable suspicion to detain a vehicle, no separate suspicion is required to conduct a canine sniff.

"Because the officers in this case had reasonable suspicion to stop and detain Harris' vehicle pursuant to Rule 3.1, we hold that any pretext on the part of the officers is irrelevant, and that the officers did not need any additional reasonable suspicion to justify the canine sniff. Accordingly, we hold that the circuit court erred

in suppressing the evidence, and we reverse and remand for further proceedings."

## SEARCH AND SEIZURE:

### Scope of the Warrant

*United States v. Rogers*,  
CA1, No. 06-2532, 3/25/08

**I**n 2004, Detective James Skehan of the Houlton, Maine Police Department began investigating Roy Lewis Rogers' relationship with a fourteen-year-old child ("DW"), whose mother was a friend of Rogers. Based on the information he learned during his investigation, Skehan believed that Rogers had subjected DW to unlawful sexual advances. Skehan also believed that Rogers had communicated with DW via e-mail and that DW's mother had given Rogers several photos of DW.

On July 21, 2004, based on a lengthy affidavit summarizing his investigation, Skehan requested a warrant to search Rogers' apartment. A state justice of the peace issued the warrant (the "first search warrant"). Although Skehan had sought permission to search for a variety of computer equipment and electronic-data-storage devices, the issued warrant simply authorized a search for a "Computer belonging to Roy Rogers. (Unk Brand, Color, Serial Numbers etc). Also any photos of [DW]." Appendix ("App.") at 26.

While executing the search warrant, the officers (including Skehan) saw in Rogers' bedroom two unlabeled videotapes lying on the table next to his computer. Also on the table, about a foot away from the videotapes, was a piece of paper with DW's name on it. The officers seized the videotapes and the computer. During the search the officers saw, but did not seize, other

videotapes, a video camera, DVDs, computer floppy disks and other electronic-data-storage devices.

After Skehan returned to the police station, he and an Assistant District Attorney watched one of the videotapes. It showed Rogers having sexual intercourse with a nine-year-old relative (Child A) and also showed the child engaging in other sexually explicit conduct at Rogers' direction. Based on that evidence, on July 22, 2004, Skehan sought and obtained a search warrant (the "second search warrant") to search Rogers' apartment for:

1. Video recorders, videotapes, cameras, photographs, negatives, letters, and any recording media that could be used to record sexual encounters, or to duplicate or transmit or distribute recordings of sexual encounters, including but not limited to:

A) Any computers and electronic data storage or retrieval devices found at the residence as described in section 1, above;

B) Any computer records or data, whether in electronic or printed form, that are evidence of possession, ownership or control of the property/items to be seized, or that are evidence of the identity of any person(s) who possessed, owned or controlled such property/items;

All of which are evidence of the crimes of Gross Sexual Assault (17-A M.R.S.A. § 253), and which may also be evidence of the crimes of Dissemination of Sexually Explicit Materials (17 M.R.S.A. § 2923) and Sexual Exploitation of a Minor (17 M.R.S.A. § 2922), or other similar

State or Federal Offense.

2. Bedding depicted in the video including a blue floral comforter.

3. Clothing depicted in the video including blue, polka-dotted underwear, slit on the sides.

The police executed the second warrant immediately.

Later that same day, the police questioned Rogers. Confronted with the contents of the videotape of Child A, he made several incriminating statements, including that his computer contained child pornography downloaded from the Internet. The police then searched Rogers' computer and the other seized items. They discovered a videotape showing another minor child (Child B) engaged in sexually explicit conduct with Rogers present and recovered 57 images of child pornography from Rogers' computer.

In *United States v. Rogers*, it was argued that the seizure of a videotape exceeded the scope of the warrant which allowed for the seizure of photographs of DW. Rogers argues that warrant's reference to "photos of DW" should be read as limited to developed print photographs.

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

"In the instant case, the critical question is whether it is reasonable to believe that a videotape could contain 'photos of DW.' Rogers argues that the term 'photos'—at least in this case—clearly means 'developed print photographs' and, therefore, that it was not

reasonable for the officers to search the videotape for 'photos of DW.' The government responds that given the current state of technology, the term 'photos' reasonably includes images captured on videotapes or by a digital camera

"We are persuaded that the government's argument must prevail. As the magistrate judge pointed out, given the state of technology, a videotape is a plausible repository for a photo. To adopt the narrowest definition of 'photos,' as Rogers proposes, would, we believe, ignore our obligation to read the warrant and affidavit in a common sense manner and avoid hypertechnical definitions. The affidavit submitted in support of the warrant application stated that DW's mother 'said that [Rogers] has several photos of [DW] at his apartment' and that 'he had asked her for copies of the ones she had.' Based on that information, the warrant authorized the seizure of all 'photos of DW.' Given these facts, we conclude that it is reasonable to believe that in the circumstances here the two seized videotapes could contain 'photos of DW.' Accordingly, the seizure and subsequent search of the videotape did not exceed the scope of the first search warrant. It follows that there is no basis for suppressing any of the evidence discovered thereafter. Accordingly, we conclude that the district court did not err in denying Rogers' motion to suppress the videotape."

**SUBSTANTIVE LAW:  
"Hatchet Handle" as a Club**

*Johnson v. State*, CACR 07-659, 2/27/08,  
[Unpublished]

**I**n *Johnson v. State*, the issue before the Arkansas Court of Appeals was whether a hatchet handle (without the blade) fell

within the definition of a club. The Court stated that a "club" is defined in section A.C.A. § 5-73-120 as "any instrument that is specially designed, made, or adapted for the purpose of inflicting serious physical injury or death by striking, including a blackjack, billie, and sap." Ark. Code Ann. § 5-73-120(b)(1). A hatchet handle is not specifically listed as an example of a "club" in the statute. Therefore, the court had to interpret the statute to determine whether a hatchet handle meets the definition of a "club."

The Court in holding that the hatchet handle fell within the definition stated the statute defines a "club" as an instrument specially *designed, made, or adapted* for the purpose of inflicting serious physical injury or death by striking. And while a hatchet may not be specially designed as a weapon, a hatchet handle, without the blade, can be an instrument specially adapted as a weapon.

**TREATIES: Vienna Convention on  
Consular Relations; (Article 36(1) (b))**

*Medellin v. Texas*, No. 06-984, 3/25/08

**J**osé Ernesto Medellín, a Mexican national, has lived in the United States since preschool. A member of the "Black and Whites" gang, Medellín was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers. On June 24, 1993, 14-year-old Jennifer Ertman and 16 year-old Elizabeth Pena were walking home when they encountered Medellín and several fellow gang members. Medellín attempted to engage Elizabeth in conversation. When she tried to run, Medellín threw her to the ground. Jennifer was grabbed by other gang members when she, in response to her friend's

cries, ran back to help. The gang members raped both girls for over an hour. Then, to prevent their victims from identifying them, Medellín and his fellow gang members murdered the girls and discarded their bodies in a wooded area. Medellín was personally responsible for strangling at least one of the girls with her own shoelace.

Medellín was arrested at approximately 4 a.m. on June 29, 1993. A few hours later, between 5:54 and 7:23 a.m., Medellín was given *Miranda* warnings; he then signed a written waiver and gave a detailed written confession. Local law enforcement officers did not, however, inform Medellín of his Vienna Convention right to notify the Mexican consulate of his detention. Medellín was convicted of capital murder and sentenced to death; his conviction and sentence were affirmed on appeal.

Medellín first raised his Vienna Convention claim in his first application for state post conviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review. The trial court also rejected the Vienna Convention claim on the merits, finding that Medellín had failed to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. The Texas Court of Criminal Appeals affirmed.

Medellín then filed a habeas petition in Federal District Court. The District Court denied relief, holding that Medellín's Vienna Convention claim was procedurally defaulted and that Medellín had failed to show prejudice arising from the Vienna Convention violation. While Medellín's application for a certificate of appealability was pending in the Fifth Circuit,

the Internal Court of Justice (ICJ) issued its decision in *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U. S.), 2004 I. C. J. 12 (*Avena*). The International Court of Justice (ICJ) held that the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations (Vienna Convention or Convention) by failing to inform 51 named Mexican nationals, including petitioner Medellín, of their Vienna Convention rights. The ICJ found that those named individuals were entitled to review and reconsideration of their U. S. state-court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. In *Sanchez-Llamas v. Oregon*, 548 U. S. 331—issued after *Avena* but involving individuals who were not named in the *Avena* judgment—this Court held, contrary to the ICJ's determination, that the Convention did not preclude the application of state default rules. The President then issued a memorandum stating that the United States would “discharge its international obligations” under *Avena* “by having State courts give effect to the decision.”

Relying on *Avena* and the President's Memorandum, Medellín filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ, concluding that neither *Avena* nor the President's Memorandum was binding federal law that could displace the State's limitations on filing successive habeas applications.

The U.S. Supreme Court held that neither the International Court of Justice's *Avena* decision

nor the President's Memorandum constitute directly enforceable federal law which pre-empts state law in state courts. The Court noted that while a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis. The *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources—the Optional Protocol, the U.N. Charter, or the ICJ Statute—creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.

The Court also noted that the President's Memorandum—a directive issued to state courts that would compel those courts to reopen final criminal judgments and set aside neutrally applicable state laws—is not supported by a "particularly longstanding practice." The Executive's limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch this far. Medellín's argument that the President's Memorandum is a valid exercise of his power to "Take Care" that the laws be faithfully executed, U. S. Const., Art. II, §3, fails because the International Court of Justice's decision in *Avena* is not domestic law.

Editor's Note: *Sanchez-Llamas v. Oregon* was discussed in CJI Legal Briefs, Fall 2006, p 31. While law enforcement officers should advise arrested foreign nationals of their right to consult with consular officials and should advise the appropriate consular mission of the arrest, there exists no legal authority for enforcement of the International Court of

Justice's *Avena* decision in United States courts. While the Medellín decision is a lengthy 40 page discussion of this issue, one commentator summoned in up as a combination of "Don't tread on me" and "Don't mess with Texas." Also see, *Gikonyo v. State*, CACR07-00609, 4/30/08, where the Arkansas Court of Appeals stated that pursuant to the Supreme Court's decision in Medellín, they need not address whether appellant was Gikonyo was "detained" at the time his statement was made because the Vienna Convention on Consular Rights is not domestically enforceable.

**VEHICLE IMPOUNDMENT:  
Lack of Standardized Procedure; Police  
Discretion in Impounding Vehicle**

*United States v. Smith,*  
CA3, No. 06-3112, 4/9/08

**O**n June 8, 2004, Lancaster, Pennsylvania, police officers Christopher Laser and Richard Heim observed Devon Monroe Smith sitting in the passenger seat of an automobile that Danny Santiago was operating. Heim recognized Smith and was aware that there was an arrest warrant outstanding for him. The officers stopped the vehicle and arrested Smith. Subsequently, Laser and Santiago got into an altercation during which Smith fled the scene. After additional officers arrived the police recaptured Smith and rearrested him. They also arrested Santiago at the scene of the stop.

The police did not know who owned the vehicle for neither Smith nor Santiago claimed to own it. Moreover, Santiago said he did not know who the owner was, its registration papers were not available, and Santiago did not know the location of the registration papers. Furthermore, inasmuch as the police arrested both men

neither could drive the vehicle which had no other occupants. Moreover, there was no one else available at the scene to take its possession. These circumstances created a problem for Laser and Heim because they believed that they should not leave the vehicle at the place where they stopped it inasmuch as the conditions in the area led them to believe that if they did so the vehicle might be damaged, vandalized, or stolen. Therefore, Heim impounded the vehicle and drove it to the police station.

At the station during a routine warrantless inventory search of the vehicle, Laser found a loaded semi-automatic handgun in its glove department. He then interrupted the search which he resumed after he obtained a search warrant for the vehicle. Subsequently, on the same day, in a statement that he has not renounced as untruthful, Smith told police detectives that he had loaded the weapon and placed it in the glove department. He also told them that he knew that he was a convicted felon and was aware that because of that status he was not lawfully permitted to possess the weapon.

On November 8, 2005, Smith entered a conditional plea of guilty to the indictment but preserved his right to appeal from the denial of his motion to dismiss. Smith appeals making the following argument:

*The decision by a police officer to impound a vehicle must be exercised pursuant to standardized criteria or the seizure is unconstitutional. The testimony presented in this case established that Officer Heim was exercising his discretion when he opted to impound the vehicle and that there were no standard policies or procedures which circumscribed or otherwise limited that discretion. The district court thus clearly*

*erred when it found as a fact that the officer was acting pursuant to a standardized routine when he decided to impound the vehicle. Accordingly, the evidence obtained as a result of the unconstitutional seizure of the vehicle should have been suppressed.*

In this case, there is a sharp dispute of facts with respect to whether Heim was acting pursuant to a standardized routine when he decided to impound the vehicle. On the one hand, the government contends that, as the District Court held, the police followed a standardized routine in impounding the vehicle. On the other hand, Smith contends that Heim, rather than following a standard impoundment routine, simply exercised his discretion when impounding the vehicle as the Lancaster Police Department did not have standard policies or procedures which circumscribed or otherwise limited that discretion.

The Court of Appeals for the Third Circuit stated that they would decide the case on the premise on which Smith presents it, i.e., the Lancaster Police Department did not have a standard policy regarding the impoundment and towing of vehicles when Heim impounded the vehicle. The Court found, in part, as follows:

*“Smith primarily relies on Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987). In Bertine, a police officer arrested Bertine for driving his van under the influence of alcohol. After the arrest but before a tow truck arrived at the scene a second officer acting in accordance with standard local police procedures made an inventory search of the vehicle and found narcotics. The Supreme Court rejected Bertine’s argument which it described and disposed of as follows:*

*Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. Nothing prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.*

“Smith also relies on *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996). In *Duguay* the court of appeals stated that the police impounded the vehicle even though Duguay's girlfriend who had driven the vehicle to the place of his arrest, and remained at the scene, had possession of the keys, and was prepared to remove the car from the street. Moreover, another son of the title holder, Duguay's brother, also was present at the time of the arrest. These circumstances led the court to indicate that the impounding of a vehicle for caretaking purposes without regard to whether the defendant can provide for its removal is patently unreasonable and that if the purpose of impoundment is not investigative, in the absence of probable cause it did not see what purpose denying possession of the car to a passenger, a girlfriend, or a family member could possibly serve.

“The adoption of a standardized impoundment procedure merely supplies a methodology by

which reasonableness can be judged and tends to ensure that the police will not make arbitrary decisions in determining which vehicles to impound. These reasons for the adoption of a standardized impoundment procedure are compatible with the views of the Court of Appeals for the First Circuit which it set out in *United States v. Coccia*, 446 F.3d 233 (1st. Cir. 2006). The Court of Appeals for the First Circuit stated that under *Bertine* ‘an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment.’ Conversely, it should follow that a decision to impound a vehicle contrary to a standardized procedure or even in the absence of a standardized procedure should not be a per se violation of the Fourth Amendment.

“In *Coccia* the court described the community caretaking exception as recognizing that the police perform a multitude of community functions apart from investigating crime. In performing this community caretaking role, police are expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety. The court of appeals pointed out that courts frequently have held that impoundments of vehicles for community caretaking purposes are consistent with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances.

“We think that the *Coccia* outcome is correct. Here the police stopped a vehicle with two occupants both of whom they then arrested and thus who could not drive the vehicle. The area in which they stopped the vehicle was one in which parked vehicles were subject to being damaged, vandalized, or stolen. Neither

occupant owned the vehicle and the police did not know who did own it and, unless the police moved the vehicle, they would have had to leave it where they stopped it in a dangerous area and, accordingly, the vehicle would have been subject to being damaged, vandalized, or stolen. Indeed, Laser was so concerned about the situation that he explained that he believed the police had a 'duty' to take care of the vehicle.

"In view of the circumstances here we believe that it hardly would be possible to make a plausible argument that Heim acted unreasonably in impounding and removing the vehicle. Indeed, while we will not go so far as to suggest that the police would have been irresponsible if Heim had not removed the vehicle, we recognize that a legitimate argument could be made that they would have been.

"In reaching our result we have not overlooked that it may be desirable that the police execute impoundments for community caretaking purposes pursuant to standardized procedures because the requirement that they do so will tend to encourage the police to avoid taking arbitrary action. Therefore, we certainly do not suggest that police departments should not adopt standard impoundment policies. But the Fourth Amendment cannot be the foundation for an equal protection requirement that the police must have standardized impoundment procedures because the amendment does not have an equal protection component. Thus, a reasonable impoundment does not become unreasonable merely because the police do not impound all vehicles found in similar circumstances any more than an unreasonable impoundment becomes reasonable merely because all vehicles in similar circumstances are impounded.

"Overall we think that it is best that we judge the constitutionality of a community caretaking impoundment by directly applying the Fourth Amendment which protects people against unreasonable searches and seizures. Inasmuch as the impoundment here was reasonable we will affirm the order denying the motion to suppress."