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ADMINISTRATIVE AGENCIES:
Arkansas Commission on Law Enforcement Standards

Arkansas Commission on Law Enforcement Standards v. Davis, CA08-1248, 6/3/09

This appeal arises out of an order of the Commission dated November 14, 2006, revoking the certification of Arlanders Davis pursuant to the Commission's Regulation 1010(3)(a)(iv), which provides that the Commission may revoke the certification of any law enforcement officer if he "resigned while he was the subject of a pending internal investigation." Testimony at the Commission hearing indicated that Davis began working as a state police officer on June 20, 1977. At 10:00 a.m. on February8, 2006, Davis was ordered by his employer to submit to a random drug test. The results of the test were positive for cocaine in an amount equal to five times the federal cut-off limit for exposure by passive inhalation.

State's Exhibit One at the Commission hearing included an investigative summary prepared by Sergeant C. A. Beall of the state police internal affairs unit. The summary indicated that on February 10, 2006, Lieutenant Mullins and Sergeant Beall conducted a tape-recorded interview of Davis. Davis said that he did not know why he tested positive for cocaine and that he had never used cocaine, but he suggested that some of the medication he was taking might have caused the positive test result. He also mentioned that he had been to a Super Bowl party recently but

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that he did not know of anyone at the party who was using cocaine.

The next day, Davis called Sergeant Beall at home and told him that he knew where he had been exposed to cocaine. He told Sergeant Beall that on February 7, 2006, he had been riding in his car with a friend, Percy Wilson, and that Mr. Wilson had been smoking homemade cigarettes containing crack cocaine. Davis said that, at the time he was in the car with Mr. Wilson, Davis did not know the cigarettes contained cocaine.

On February 13, 2006, Davis provided Sergeant Beall with results from a drug screen taken by Davis on February 9, 2006, showing a negative result for cocaine. Sergeant Beall showed the negative drug screen to the state police medical review officer, Dr. J. R. Baber, who said that the test, taken twenty-four hours after the initial random drug screen, was "a non-factor because of the rapid manner in which cocaine leaves your system." After reviewing the prescription medications being taken by Davis, Dr. Baber also concluded that none of the medications would trigger a positive test result for cocaine. Finally, Dr. Baber stated that Davis would not have reached the cut-off levels for cocaine, which Davis exceeded, by merely inhaling crack cocaine fumes or vapors second hand.

In a memo to state police headquarters' staff dated March 6, 2006, Lieutenant Mullins recommended that Davis be terminated. On March 10, 2006, a disciplinary review board, convened at state police headquarters to review the internal affairs complaint against Davis, recommended that Davis be terminated. No action was taken.

On March 31, 2006, Davis provided two letters to Major Tim K'Nuckles of the Arkansas State Police. In the first letter, Davis stated in relevant part:

> *Please accept this letter as my formal notification to the Arkansas State Police of my decision to resign from and take early retirement with the Arkansas State Police, conditioned upon the agreed terms arrived at between your office and my attorney, Bryan A. Achorn, which are outlined by Mr. Achorn in his letter to you on today's date. Assuming that the agreed terms are outlined correctly, it is my intention that this resignation be effective immediately.*

Davis testified that Major K'Nuckles called Mr. Achorn's assistant and advised him that the letter was not acceptable and that it needed to state simply that Davis was retiring. Therefore, Davis stated that he sent the second letter to Major K'Nuckles, which provided as follows:

> *The purpose of this letter is to inform you that, effective 5:00 o'clock p.m. on the date of this letter, I am retiring from the Arkansas State Police. Incident to my retirement, I request to be awarded my service revolver.*

On October 12, 2006, the Commission held a decertification hearing for Davis. The Commission issued an order on November 14, 2006, revoking Davis's certification pursuant to its Regulation 1010(3)(a)(iv), finding that Davis had submitted his resignation from the Arkansas State Police while an internal affairs investigation was pending.

After reviewing briefs and hearing oral arguments on appeal, the Jefferson County Circuit Court vacated the Commission's revocation and directed the immediate reinstatement of Davis' certification. The circuit court found that the record lacked relevant evidence that a reasonable mind might accept to support the conclusion that Davis resigned from the state police. The court found that the proof was "so nearly undisputed that fair-minded persons could not reach the conclusion that Davis resigned, as opposed to retired." The Commission brings this appeal from the circuit court's order.

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

"Our review in this case is directed not to the circuit court's decision, but to the decision of the *Commission. Ark. Hearing Instrument Dispenser Bd. v. Vance*, 359 Ark. 325, 327, 197 S.W.3d 495, 497 (2004). Administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts to determine and analyze legal issues affecting their agencies. *Ark. State Police Comm'n v. Smith,* 338 Ark. 354, 357, 994 S.W.2d 456, 458 (1999). We will uphold the agency's decision if it is supported by substantial evidence and it is not arbitrary, capricious, or characterized by an abuse of discretion. *Id.* We give the most probative weight to the evidence in favor of the agency's determination and look to the entire record in making this determination. *Vance,* 359 Ark. at 327, 197 S.W.3d at 497. Substantial evidence means valid, legal, and persuasive evidence such that a reasonable person might accept it as adequate to support the conclusion. *Id.* When an agency's determination is supported by substantial evidence, the decision cannot be arbitrary or unreasonable. *Id.*

"The Commission contends on appeal that substantial evidence supports its decision to revoke Mr. Davis's certification pursuant to Regulation 1010(3)(a)(iv), which provides that the Commission may revoke the certification of any law enforcement officer if he 'resigned while he was the subject of a pending internal investigation.' The questions before us are whether there is substantial evidence that Mr. Davis was 'the subject of a pending internal investigation' and, if so, whether he 'resigned' during the investigation.

"There appears to be no argument that Mr. Davis was the subject of a pending internal investigation. He submitted to a random drug test, the results of which were positive for cocaine. The internal affairs division of the state police initiated an investigation of the matter. A disciplinary review board recommended that Mr. Davis be terminated. Before any action was taken in the matter, Mr. Davis sent a letter to the state police ending his employment. We hold that substantial evidence supports a finding that, at the time Mr. Davis sent his letter; he was the subject of a pending internal investigation.

"The parties dispute whether Mr. Davis resigned or retired. The Commission determined that Mr. Davis resigned within the meaning of Regulation 1010(3)(a)(iv). In reviewing the Commission's decision, the question is not whether the evidence would have supported a contrary finding, but whether it supports the finding that was made. *Ark. Bd. of Examiners in Counseling v. Carlson*, 334 Ark. 614, 618, 976 S.W.2d 934,

936 (1998). Further, it is the prerogative of the Commission to believe or disbelieve any witness and to decide what weight to accord the evidence. Particularly in light of an agency's specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting its agency, we will not substitute our judgment and discretion for that of an administrative agency.

"Mr. Davis testified that he was asked by someone at the state police to replace his first letter, which informed the state police of his decision 'to resign from and take early retirement with the Arkansas State Police,' with another letter stating simply, 'I am retiring from the Arkansas State Police.' First, the Commission could have found Mr. Davis's first letter to be a more accurate and credible statement of his actions—that is, he was resigning from the state police and taking early retirement. This clearly supports the Commission's determination that Mr. Davis 'resigned while he was the subject of a pending internal investigation.'

"However, regardless of which letter the Commission ultimately determined was intended by Mr. Davis to terminate his employment, substantial evidence supports its finding that Mr. Davis resigned within the meaning of Regulation 1010(3)(a)(iv). Both letters indicated in the reference line that they were letters of resignation. 'Resignation' means 'a formal notification of relinquishing an office or position.' *Black's Law Dictionary* 1311 (7th ed. 1999). This is exactly what Mr. Davis's letter accomplished. 'Retirement' is defined as voluntary termination of one's own employment or career, especially upon reaching a certain age. In both letters, Mr. Davis was relinquishing his position with the state police. Mr. Davis has not contended that he terminated his employment because he had reached a certain age. While he had acquired enough years of service to qualify for retirement benefits upon his resignation (as his reference line designated in both letters), he terminated his employment due to the internal-affairs investigation.

"The Commission interpreted its own regulation's language as encompassing Mr. Davis's action, whether he denominated his termination as resignation or retirement. Administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts to determine and analyze legal issues affecting their agencies. *Ark. State Police Comm'n v. Smith,* 338 Ark. 354, 357, 994 S.W.2d 456, 458 (1999). There is substantial evidence that supports the Commission's decision."

CIVIL LIABILITY: Duty to Provide Exculpatory Information to the Prosecutor

Moldowan v. City of Warren,
CA6, No. 07-2115, 7/23/09

On the morning of August 9, 1990, Emergency Medical Service ("EMS") found Maureen Fournier badly injured and lying in the street in the City of Detroit. EMS transported Fournier to St. John's Hospital. The medical forms completed on her admission to the hospital, as well as subsequent medical reports and testimony from her doctors, bear witness to the extreme brutality of the crime. The police determined that Fournier had been abducted from the City of Warren, brutally assaulted and raped, and left on a street in Detroit.

Because Fournier had been abducted from Warren, the matter was turned over to the Warren Police Department ("Department"), and the case was assigned to Detective Ingles. Given the extent of Fournier's injuries, officers had to wait two days before they could interview her regarding the attack. Even then, the extent of Fournier's injuries forced Detective Ingles to write questions on a board, and Fournier responded in kind. During the interview, Fournier reported that she had been abducted from Warren on the night of August 8, 1990, by four Caucasian males, all of whom she knew. Fournier stated that, while she was walking down the street, she was approached by Jeffrey Moldowan, who was her ex-boyfriend, thrown into a white or light-colored van, and brutally beaten and raped by three of the four assailants. Fournier identified her attackers as Michael Cristini, Jim Cristini, Tracy Tapp ("Tapp"), and Moldowan. Fournier's sister, Colleen Corcoran ("Corcoran"), confirmed Fournier's claims that Moldowan previously had assaulted and threatened Fournier. After completing their investigation, the police arrested and charged all four individuals. The police subsequently dropped the charges against Tapp based on his alibi that he had been in Texas for several days prior to the assault, had not returned to Michigan until the evening of August 8, and spent the rest of the night with his girlfriend. Tapp's girlfriend confirmed his alibi.

On September 17-18, 1990, the Macomb County Circuit Court held a preliminary examination to determine whether sufficient evidence existed to proceed to trial. During that hearing, Fournier testified that, prior to the assault, she had dated and lived with Moldowan for more than a year before their relationship ended when he was arrested for assaulting her. Fournier and her sister both testified that, prior to the attack, Moldowan had been abusive toward Fournier and threatened her. In describing the assault, Fournier testified that she had been walking on 11 Mile Road in Warren when a van pulled alongside her. Fournier testified that Moldowan got out of the van, grabbed her, and dragged her into the van, where she was beaten and raped. As a result of the assault, Fournier suffered significant injuries that required extensive abdominal surgery.

Corcoran also testified at the hearing, stating that she received a call from an unidentified male on August 9, 1990, the day Fournier was found in Detroit, inquiring as to Fournier's whereabouts. Corcoran claims that she immediately recognized the caller as Moldowan. She testified that, although she knew her sister was in the hospital, she lied and told Moldowan that her sister was at home with her, and that Moldowan then exclaimed: "No, she's not…She's at the morgue." Corcoran also testified that Moldowan had called her home the previous day looking for Fournier, and he had stated that "he was going to get her." (J.A. 841-42.)

At the conclusion of the examination, the court dismissed Jim Cristini as a defendant, but bound over Moldowan and Michael Cristini on all counts. A jury trial was held from April 30 to May 10, 1991, during which Fournier and Corcoran offered substantially the same testimony they provided during the preliminary examination. Fournier also testified that she had never been in the Detroit neighborhood where EMS found her, and that she had never frequented a crack house in the area.

In addition, Dr. Alan Warwick, D.D.S., a forensic odontologist and consultant for the Wayne County Medical Examiner's Office and a consultant to Macomb County, Monroe County, and the Michigan State Police, offered expert testimony that bite marks on Fournier's neck were consistent with dental impressions taken from Moldowan, and that bite marks on Fournier's right arm and right side were consistent with Michael Cristini's dentition. In describing his conclusions, Dr. Warnick testified that the "chances are 2.1 billion to 1 that another individual can make those same marks."(J.A. 2544.)

In presenting their defense, Cristini and Moldowan offered alibi witnesses who testified that the defendants were not together on the evening in question. The defense also introduced pizza delivery tickets which documented the location of the pizza deliveries Cristini had made the night of August 8, 1990, seeking to show that Cristini could not have been part of the kidnapping. The defense also presented testimony from a witness who claimed that she observed several males in the street where Fournier was found, and that the males were both Caucasian and African-American. The defense also offered expert testimony from its own forensic odontologists countering Dr. Warnick's testimony concerning the bite-mark evidence.

On rebuttal, the prosecution called Dr. Pamela Hammel, D.D.S., a colleague of Dr. Warnick, who offered testimony corroborating and supporting Dr. Warnick's conclusions.

On May 10, 1991, the jury convicted Moldowan and Cristini of kidnaping, assault with intent to commit murder, and two counts of criminal sexual conduct in the first degree. After sentencing, the court entered an order requiring that "all evidence in the custody of the Warren Police Department, the Macomb County Prosecutor's Office and the Macomb County Circuit Court[,] whether admitted into evidence or not…, be preserved from this date forward until further order of the Circuit Court, Michigan Court of Appeals, or Michigan Supreme Court." (J.A. 2613.)

After trial, a private investigator hired by Moldowan's family located a witness, Jerry Burroughs, who reported that, on the morning of August 9, 1990, he saw four African-American males standing around a naked white female who was lying in the street, and that he saw the four men leave in a light-colored van. Burroughs further recounted that, approximately one week after the assault, he overheard two of those same men talking about the incident and bragging that they had participated in the assault. Burroughs also indicated that he had seen Fournier in that neighborhood several times that summer frequenting a crack house in the area. In addition to this new evidence, Dr. Hammel, after being approached several years later by Moldowan's appellate counsel, also recanted her testimony. Dr. Hammel explained that she initially had trouble matching the defendants' dentitions to the bite marks on Fournier's body, but that Dr. Warnick had reassured her that Dr. Norman Sperber, a highly respected forensic odontologist, had reviewed the evidence and confirmed Dr. Warnick's conclusions. After subsequently determining that Dr. Sperber had never reviewed any evidence in the case, Dr. Hammel surmised that Dr. Warnick "had been deceptive in order to mislead [her] into testifying in support of his

conclusions." (J.A. 2568.) In a sworn affidavit, Dr. Hammel stated that, had she known that Dr. Warnick's representation that Dr. Sperber had reviewed the evidence was untrue, she "would never have agreed to testify as a rebuttal witness in support of Dr. Warnick's conclusions." (J.A. 2568.)

On the basis of this new evidence and discredited testimony, Moldowan again sought review of his conviction. The Michigan Supreme Court eventually reversed Moldowan's conviction, and remanded the matter for a new trial. In particular, the Michigan Supreme Court found that "the prosecutor's two expert witnesses with respect to 'bite-mark' evidence have either recanted testimony which concluded that bite marks on the victim were made by the defendant or presented opinion evidence which has now been discredited." *Moldowan*, 643 N.W.2d at 570. The court also noted that the prosecutor conceded that "it simply is not fair to say that the defendant or defendant's counsel should have known about the problems with the bite-mark evidence prior to trial. The same can also be said with regard to the later-discovered alibi witnesses… Without the bite-mark evidence and with the additional alibi witnesses, the result of the trial could have been different." *Id*. at 571.

On retrial, in February 2003, Moldowan was acquitted of all charges and released. All told, Moldowan spent nearly twelve years in prison.

After his release, Moldowan filed the instant civil action asserting various claims against the City of Warren, the Warren Police Department, Macomb County, the Macomb County Prosecutor in his official capacity, Dr. Alan Warwick, Warren Police Detective Donald Ingles, Warren Police Officer Mark Christian, and Warren Police Officer Michael Schultz.

While there were numerous issues in this case, one of Moldowan's significant claims was that police violated his civil rights by failing to disclose exculpatory evidence.

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

"In *Brady v. Maryland*, 373 U.S. 83 (1963) the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Supreme Court has imposed on the prosecutor a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. In other words, even though the state's obligation under *Brady* is managed by the prosecutor's office, that obligation applies to relevant evidence in the hands of the police, whether the prosecutors knew about it or not, whether they suppressed it intentionally or not, and whether the accused asked for it or not.

"Although the prosecutor is the state's official representative in the prosecution of the case, we have recognized that the police also play an active role in the prosecution. Because the prosecutor's office generally lacks its own investigative machinery, prosecutors often are entirely dependent on the police to turn over the fruits of their investigation. As a result of this interdependence, the police play a

different, but no less significant role in the state's search for truth in criminal trials.

"Where the exculpatory value of a piece of evidence is apparent, the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of whether a criminal defendant or § 1983 plaintiff can show that the evidence was destroyed or concealed in 'bad faith."

"Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime. As a practical matter then, *Brady's* ultimate concern for ensuring that criminal defendants receive a fundamentally fair trial, demands that *Brady's* protections also extend to actions of other law enforcement officers such as investigating officers.

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same.

"Where the exculpatory value of a piece of evidence is apparent, the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of whether a criminal defendant or § 1983 plaintiff can show that the evidence was destroyed or concealed in 'bad faith.' The reason no *further* showing of animus or bad faith is required is that, where the police have in their possession evidence that they know or should know might be expected to play a significant role in the suspect's defense, the destruction or concealment of that evidence can *never* be done in good faith and in accord with their normal practice. Consequently, requiring a criminal defendant or § 1983 plaintiff to show a 'conscious' or calculated effort to suppress such evidence would be superfluous.

Editor's Note: The Sixth Circuit Court of Appeals held that police officers can be held civilly liable for not turning over to prosecutor's exculpatory information in their possessiosn. Further, there is no qualified immunity defense available to law enforcement for such failure to disclose.

CONFRONTATION CLAUSE:
Sixth Amendment;
Certificates of State Laboratory Analysis

Melendez-Diaz v. Massachusetts,
No. 07-591, 6/25/09

In 2001, Boston police officers received a tip that a Kmart employee, Thomas Wright, was engaging in suspicious activity. The informant reported that Wright repeatedly received phone calls at work, after each of which he would be picked up in front of the store by a blue sedan and would return to the store a short time later. The police set up surveillance in the Kmart parking lot and witnessed this precise sequence of events. When Wright got out of the car upon his return, one of the officers detained and searched him, finding four clear white plastic bags containing a substance resembling cocaine. The officer then signaled other officers on the scene to arrest the two men in the car—one of whom was Luis Melendez-Diaz. The officers placed all three men in a police cruiser.

During the short drive to the police station, the officers observed their passengers fidgeting and making furtive movements in the back of the car. After depositing the men at the station, they searched the police cruiser and found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back seats. They submitted the seized evidence to a state laboratory required by law to conduct chemical analysis upon police request.

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized from Wright and from the police cruiser. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags have been examined with the following results: The substance was found to contain cocaine. The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.

Melendex-Diaz objected to the admission of the certificates, asserting that the U.S. Supreme Court's Confrontation Clause decision in *Crawford v. Washington*, 541 U. S. 36 (2004) required analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed.

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The jury found Melendez-Diaz guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him. The Appeals Court of Massachusetts rejected the claim. The Massachusetts Supreme Judicial Court denied review.

The United States Supreme Court granted certiorari and found, in part, as follows:

"The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides that in all criminal prosecutions, "the accused

shall enjoy the right to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004) we held that it guarantees a defendant's right to confront those 'who bear testimony against him.' A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

"Under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial.

"This case involves little more than the application of our holding in *Crawford v. Washington*. The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error."

The United States Supreme Court reversed the judgment of the Appeals Court of Massachusetts and remanded the case for further proceedings not inconsistent with this opinion.

DNA: Post-Conviction DNA Testing

District Attorney's Office for the Third Judicial District v. Osborne, CA9, No. 08-6, 6/18/09

William G. Osborne had been convicted of sexual assault and other crimes in an Alaskan state court. Years later, he filed suit under 42 U.S.C. § 1983, claiming he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. The Federal District Court dismissed his claim but the Ninth Circuit Court of Appeals reversed holding that § 1983 was the proper method for Osborne to pursue his claim. On remand, the District Court granted Osborne summary judgment concluding that he had a limited constitutional right to the new testing under the unique and specific facts presented, i.e., that such testing had been unavailable at trial, that it could be accomplished at almost no cost to the state, and that the results were likely to be material. The Ninth Circuit affirmed, relying on the prosecutorial duty to disclose exculpatory evidence.

On a Writ of Certiorari, the United States Supreme Court reversed. The Court stated that William Osborne was proposing the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. The Court stated that there is no reason to constitutionalism the issue in this way, finding as follows:

"The Court of Appeals below relied only on procedural due process, but Osborne seeks to defend the judgment on the basis of substantive due process as well. He asks that the Court recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude, in the circumstances of this case, that there is no such substantive due process right. 'As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.' *Collins v. Harker Heights*, 503 U. S. 115, 125 (1992). Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and the mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it. *Reno v. Flores*.

"And there are further reasons to doubt. The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response. The first DNA testing statutes were passed in 1994 and 1997. Act of Aug. 2,1994, ch. 737, 1994 N. Y. Laws 3709 (codified at N. Y. Crim. Proc. Law Ann. §440.30(1–a) (West)); Act of May 9,1997, Pub. Act No. 90–141, 1997 Ill. Laws 2461 (codified at725 Ill. Comp. Stat., ch. 725, §5/116–3(a) (West)). In the past decade, 44 States and the Federal Government have followed suit, reflecting the increased availability of DNA testing. As noted, Alaska itself is considering such legislation. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. This Court must therefore exercise the utmost care whenever we are asked to break new ground in this field.
If we extended substantive due process to this area, we would cast these statutes into constitutional doubt and be forced to take over the issue of DNA access ourselves. We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA.

"Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives.

"In this case, the evidence has already been gathered and preserved, but if we extend substantive due process to this area, these questions would be before us in short order, and it is hard to imagine what tools federal courts would use to answer them. At the end of the day, there is no reason to suppose that their answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite.

"DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already. The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it. Federal courts should not presume that state criminal procedures will be inadequate to deal with technological change. The criminal justice system has historically accommodated new types of evidence, and is a time-tested means of carrying out society's interest in convicting the guilty while respecting individual rights. That system, like any human endeavor, cannot be perfect. DNA evidence shows that it has not been. But there is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his §1983 suit seeks to do, and that is the contention we reject."

"DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already. The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it."

EMPLOYMENT LAW: Testing

Ricci v. DeStefano, No. 07-1428, 6/29/09

In *Ricci v. DeStefano*, the United States Supreme Court stated that in the fire department of New Haven, Connecticut—as in emergency service agencies throughout the Nation—firefighters "prize their promotion to and within the officer ranks." An agency's officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates.

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end, the City took the side of those who protested the test results and threw out the examinations.

Certain white and Hispanic firefighters, who likely would have been promoted based on their good test performance, sued the City and some of its officials. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.,* and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

The United States Supreme Court concluded that race-based action, like the City's in this case, is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The Court further determined that the City cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII.

The Court found, in part, as follows:

"…the Government contends that the structure of Title VII prevents a claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race. This statement turns upon the City's objective—avoiding disparate-impact liability—but it ignores the City's conduct in the name of reaching that objective. Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.

"Examinations create legitimate expectations on the part of those who take the tests. As is the case with any promotion exam, some of the fire fighters here invested substantial time, money, and personal commitment in preparing for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.

"If an employer cannot rescore a test based on the candidates' race, then it follows that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate impact provision.

"Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end. The Court only holds that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

"The City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. The Court offered the opinion that there is no genuine dispute that the examinations were job-related and consistent with business necessity.

"The Court found there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

Justice Kennedy wrote the 34 page majority opinion with Justices Alito, Roberts, Scalia, and Thomas concurring in the majority opinion. Justice Scalia, concurring in the opinion, wrote a separate three page opinion in which he states that the opinion of the Court merely postpones the day on which the Court will have to confront the question: *Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection.*

Justice Alito, with Justice Scalia and Justice Thomas concurring, wrote a thirteen page concurring opinion which focus on the facts leading up New Haven's decision to reject the results of the exam. Justice Alito expressed the opinion that taking into account all the evidence in the summary judgment record, a reasonable jury could find the following: Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation. To achieve that end, the City administration concealed its internal decision but worked—as things turned out, successfully—to persuade the Civil Service Board (CSB) that acceptance of the test results

would be illegal and would expose the City to disparate-impact liability. But in the event that the CSB was not persuaded, the Mayor, wielding ultimate decision making authority, was prepared to overrule the CSB immediately. Taking this view of the evidence, a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.

Justice Ginsburg, with whom Justices Stevens, Souter, and Breuer joined in a 39-page dissent, would hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.

The dissent made some important points in connection with the testing process. Justice Ginsburg wrote that Courts have long criticized written firefighter promotion exams for being more probative of the test-taker's ability to recall what a particular text stated on a given topic than of his firefighting or supervisory knowledge and abilities.

"A fire officer's job, courts have observed, 'involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test.' *Firefighters Inst. for Racial Equality v. St. Louis*, 616 F. 2d 350, 359 (CA8 1980). Interpreting the Uniform Guidelines, EEOC and other federal agencies responsible for enforcing equal opportunity employment laws have similarly recognized that, as measures of 'interpersonal relations' or 'ability to function under danger (e.g., firefighters),' pencil-and-paper tests generally are not close enough approximations of work behaviors to show content validity.

"Given these unfavorable appraisals, it is unsurprising that most municipal employers do not evaluate their fire officer candidates as New Haven does. Although comprehensive statistics are scarce, a 1996 study found that nearly two-thirds of surveyed municipalities used assessment centers ('simulations of the real world of work') as part of their promotion processes. P. Lowry, A Survey of the Assessment Center Process in the Public Sector, 25 Public Personnel Management 307, 315 (1996). That figure represented a marked increase over the previous decade so the percentage today may well be even higher. Among municipalities still relying in part on written exams, the median weight assigned to them was 30 percent—half the weight given to New Haven's written exam.

"Testimony before the CSB indicated that these alternative methods were both more reliable and notably less discriminatory in operation. Considering the prevalence of these proven alternatives, New Haven was poorly positioned to argue that promotions based on its outmoded and exclusionary selection process qualified as a business necessity."

Editor's Note: The City of New Haven hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations at a cost to the City of $100,000.

IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates.

With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position with each test having 100 questions.

IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypothetical's and asked to respond before a panel of three assessors.

IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs , and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three member assessment panels contained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.

The New Haven Fire Department had a collective-bargaining agreement's requiring that sixty per cent of the test score be based upon the written examination and forty percent be based upon the oral examinations.

EVIDENCE: Law Enforcement Officers Testimony Regarding Code Words and Phrases

United States v. Santiago,
CA1, No. 07-1575, 3/19/09

This case began with a year-long investigation into a large-scale heroin distribution operation around Lowell, Massachusetts, starting in summer 2003 and ending with arrests in October 2004. The investigation encompassed five defendants who went to trial and seven others who were indicted but pled guilty. Four of the defendants were Julio Carrion Santiago, Pedro Miranda, Juan Nunez and Jose Rodriguez; the fifth defendant, Carlos Sanchez, was tried but withdrew his appeal.

The investigation was led by the U.S. Drug Enforcement Agency ("DEA") but included state and local police. In its course, agents tracked Santiago's van with a GPS unit and conducted visual surveillance of it; conducted court authorized wiretaps of cell phones of the defendants; tracked and observed transactions among the defendants revealed by cell phone conversations; and ultimately seized Santiago's van (seizing concealed drugs) and searched his residence and those of Rodriguez (seizing drugs) and Miranda (seizing paraphernalia).

In the search of Santiago's residence, officers found a drug press in the hallway between two apartments—one of them Santiago's—and, in the attic above the press, a 9 millimeter gun and an ammunition clip along with heroin, a digital scale, a bag with silencers and a magazine for a smaller weapon. They found additional paraphernalia inside Santiago's apartment. Only in Nunez's case were no drugs or paraphernalia seized.

Nunez, Santiago, Rodriguez, Miranda and eight other defendants were charged with conspiracy to distribute heroin and to possess heroin with intent to distribute, 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1) (2006). Santiago was also charged with possessing firearms in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c) (2006), and by superceding indictment with possession of unregistered firearms, 26 U.S.C. § 5861(d) (2006). A ten day jury trial ensued for the five defendants who declined to plead guilty.

The jury convicted all five on the conspiracy count and found that the conspiracy involved at least one kilogram of heroin, triggering a statutory maximum sentence of life imprisonment. 21 U.S.C. §§ 846, 841(b)(1). Santiago was found guilty on both weapons charges. The district court at sentencing made individualized drug quantity determinations. On his three counts, Santiago was sentenced to 248 months' imprisonment. On the conspiracy count, Rodriguez, Nunez and Miranda were sentenced to 264, 151 and 72 months, respectively.

Santiago claimed that the evidence was inadmissible because the witness was not qualified as an expert. Upon review, the First Circuit Court of Appeals stated that testimony by an undercover officer regarding the meaning of drug code words was properly admitted as lay testimony:

"…Such witnesses may give opinions as long as they are rationally based on the perception of the witness, are helpful to the determination of a fact in issue, and are

not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.which deals with expert opinions. Testimony about coded language—like, for example, testimony about vehicle speed—can be admissible, depending on its content and other circumstances, either as lay or expert testimony.

"Here, Chavez had been involved in the investigation, listened to over 90 percent of the intercepts, learned voices and patterns, and heard and used the coded language in his undercover drug buys relating to the investigation. Testimony based on the lay expertise a witness personally acquires through experience, often on the job, is admissible.

"Further, various of the code word interpretations were borne out by the conduct of the defendants. For example, Chavez's interpretation of Rodriguez's request for '$60 out of the bank' was supported by the seizure of 60 grams of heroin (10 from his person and 50 from his home) shortly thereafter. Far from being speculative, Chavez's interpretations corresponded to locations, drug quantities and the like. There was no error in admitting the testimony."

INFORMANTS: Civil Cases; Disclosures of Informant's Identity

Ladd v. Pickering, [Unpublished]
CA8, No. 07-3806, 8/3/09

In *Ladd v. Pickering*, the Eighth Circuit Court of Appeals discussed disclosure of an informant's identity in a civil case, stating as follows:

"The privilege against disclosing the identity of a confidential informant (CI) is based on public interest in effective law enforcement, but that interest must be balanced by the requirement of fundamental fairness. *U.S. v. Lapsley,* 263 F.3d 839, 842 (8th Cir. 2001); *Roviaro v. United States,* 353 U.S. 53, 59-60 (1957). Where the disclosure of a CI's identity, or of the contents of the CI's communication 'is essential to the fair determination of a cause, the privilege must give way.' *Roviaro,* 353 U.S. at 60-61. In a civil case, the determination of whether a CI's identity is 'essential' is a question of law, and must be determined by balancing the plaintiff's need for the information with the defendant's interest in non-disclosure. An in camera review is the appropriate means for the district court to determine whether the CI's identity and communications are essential to Ladd's claim, while protecting the state's interest in avoiding unnecessary disclosure of the CI's identity. *Westcott v. Crinklaw,* 68 F.3d 1073, 1078-79 (8th Cir. 1995).

INFORMANTS:
Reliability; Probable Cause

United States v. Buchanan,
CA8, No. 08-3515. 7/21/09

In *United States v. Buchanan*, the Eighth Circuit Court of Appeals stated that in determining whether an informant's information is reliable to establish probable cause, they had set forth various factors to consider. They found, in part, as follows:

"In *United States v. Jackson*, 898 F.2d 79, 81 (8th Cir. 1990), we noted that there are indicia of reliability in 'the richness and detail of a first-hand observation.' We have also recognized that statements against the penal interest of an informant typically carry considerable weight in establishing reliability. *United States v. Tyler,* 238 F.3d 1036, (8th Cir. 2001). The circumstances of personal questioning may also enhance reliability and credibility. See *United States v. Robertson,* 39 F.3d 891, 893 (8th Cir. 1994) (stating the reliability of a tip is enhanced when an agent meets personally with the informant to assess his credibility).

"An informant may also be considered reliable if the information he or she supplies 'is at least partially corroborated' by other sources. *Humphreys,* 982 F.2d at 259; see also *Williams,* 10 F.3d at 593 ('If information from an informant is shown to be reliable because of independent corroboration, then it is a permissible inference that the informant is reliable and that therefore other information that the informant provides, though uncorroborated, is also reliable.'); cf. *United States v. Wells,* 223 F.3d 835, (8th Cir. 2000) (holding that without 'suitable corroboration,' information from a single anonymous caller was insufficient to be reliable and establish probable cause). Probable cause can be established when information from one informant is consistent with that of a second, independent informant. See, e.g., *United States v. Fulgham,* 143 F.3d 399, (8th Cir. 1998) (holding that an informant's information was corroborated and reliable when a second informant supplemented the information with 'specific, consistent details'); see also *United States v. Reivich,* 793 F.2d 957, 960 (8th Cir. 1986) (discouraging the technical dissection of tips for corroboration and noting the enhanced reliability of independently consistent stories). 'Even the corroboration of minor, innocent details can suffice to establish probable cause.' *Tyler,* 238 F.3d at 1039.

MIRANDA:
Request for Counsel; Coercion

Osburn v. State, No. CR 08-1146, 6/25/09

On August 27, 2006, the car of seventeen-year-old Casey Crowder was found along the side of Highway 65 in Dumas, Arkansas. Casey's clothed body was later discovered, in Desha County along "forty-three canal" on September 2, 2006, with a black zip-tie around her neck. During the course of the investigation into her disappearance and death, Kenneth Ray Osburn became a person of interest. He voluntarily presented himself for an interview by investigators on September 4, 2006, and consented to searches of both his home and truck. Osburn was later arrested on September 28, 2006, and three separate statements were taken from him on that day, one of which was used as evidence against him at trial.

Osburn disputes the circuit court's finding that after Osburn requested counsel, he initiated contact with investigators two separate times and voluntarily waived his rights, thereby rendering the two separate statements admissible. Osburn further claims that any waiver of his *Miranda* rights was the result of intimidation, coercion, deception, and promises of leniency by investigators.

On September 4, 2006, Osburn presented himself at the Southeast Arkansas Law Enforcement Center (SEALEC) and stated that he had heard that investigators wanted to speak with him and examine his truck. He was subsequently interviewed by Special Agent Rick Newton and Special Agent David Chastain of the Arkansas State Police at 2:55 p.m. (hereinafter, "the 09.04.06 2:55 interview"—first interview). The interview was not audio or video recorded, but was recorded via notes taken by Agent Chastain. During the interview, Osburn consented to searches of both his home and truck. In addition, after the agents noticed scratches on Osburn's arms, he permitted the agents to photograph his entire body.

At 11:15 p.m. that same day, Osburn was again interviewed, this time by Special Agent Newton and Agent Boyd Boshears of the Federal Bureau of Investigation, and the interview was audibly recorded (hereinafter, "the 09.04.06 11:15 interview"—second interview). The agents repeatedly attempted to obtain information or a confession from Osburn, to no avail. Osburn denied any involvement in Casey's disappearance and death and eventually stated that he wanted to get a lawyer. Despite that request, however, the interview continued. At the conclusion of the interview, Osburn was not arrested.

On September 28, 2006, however, an arrest warrant was issued for Osburn, and he was taken into custody. According to investigators, in an effort to avoid the media stationed at the SEALEC, Osburn was taken to a metal outbuilding located on the then-sheriff-elect's property near Dumas to be interviewed (hereinafter, "the 09.28.06 4:45 interview"—third interview). Again, Agents Newton and Boshears attempted to obtain a confession from Osburn, and, according to Agent Newton, used various tactics and investigative techniques in an attempt to "change his demeanor." While the transcript and the recording of the interview reveal that at one point Osburn asked the agents to call his lawyer, the interview continued. Nonetheless, upon a subsequent request by Osburn for counsel, the 09.28.06 4:45 interview was terminated.

While Agent Newton was outside of the metal outbuilding making arrangements for Osburn's transportation, a conversation took place between Osburn and Agent Boshears, which was not recorded. During the suppression hearing, Agent Boshears testified that Osburn asked him if he could see his family. Boshears explained that such was not his decision to make and that he would ask. He then explained the process that would take place, including transport and booking, followed by arraignment. Boshears testified that Osburn again asked to see his family and that Boshears assured Osburn that he would ask. At that time, according to Boshears, Osburn stated that he was "in a mess." After suggesting prayer, Boshears testified that Osburn asked him to pray for him and that Boshears responded that he had and he would. At that time, Boshears testified, Osburn became emotional, his

demeanor changed, and he requested to see his daughter. After a brief discussion regarding faith, Boshears asked Osburn if he wanted to "keep talking," to which Osburn replied that he wanted to "do the right thing and talk." Boshears then informed Agent Newton that Osburn "requested to continue our conversation."

Accordingly, the agents again interviewed Osburn (hereinafter, "the 09.28.06 7:25 interview"—fourth interview). While the 09.28.06 4:45 (third interview) was audiotaped, the agents videotaped this interview. Osburn's *Miranda* rights form was reviewed and, at that time, Osburn confessed to his involvement.

Osburn was then taken to the SEALEC. While there, he briefly visited with his mother, daughter, and son. Afterward, Osburn approached then-Sheriff-Elect Jim Snyder, Osburn's friend and former employer, who was standing at the door of the room in which Osburn had met with his family. Sheriff Snyder testified at the suppression hearing that Osburn denied that he "did that to that girl" and told him that he "was outside" himself "watching [himself] do it." Sheriff Snyder testified that he then went to get Agents Boshears and Newton and told them what Osburn had said, to which they responded "we better go back and talk to him." The three of them returned to the room, where Agent Boshears asked Osburn if he wanted to talk. Osburn indicated he did, and a rights form was completed. During the interview (hereinafter, "the 09.28.06 8:55"—fifth interview", Osburn again confessed to his involvement.

Prior to trial, Osburn moved to suppress each of his statements, arguing that they were taken despite his requests for counsel and that he did not knowingly, voluntarily, and intelligently waive his rights. The State responded, and a hearing was held, at the conclusion of which the circuit court took the motion under advisement. The circuit court later entered its order, granting in part and denying in part Osburn's motion to suppress.

Regarding the 09.04.06 2:55 (first) interview, the circuit court found that the proof did not show that Osburn was a suspect at the time of the 09.04.06 2:55 interview and that the proof showed that Osburn was not in custody. It further rejected Osburn's argument that his *Miranda* rights were violated with respect to this interview, finding that it was clear that Osburn was not in custody when the statement was given.

With respect to the 09.04.06 11:15 (second) interview, the circuit court found that, during the latter part of it, "the process and procedure used by the agents became accusatory." It further found that Osburn "unequivocally invoked his 5th Amendment right to counsel" and that he had the right to do so at this time. The circuit court then concluded that:

> *By the time the defendant invoked his right to counsel in this case, the investigators were sufficiently focused on him as a suspect that his right to counsel had attached. Once that right is invoked, questioning must cease. Any statement of the defendant on September 4-5, 2006, after the invocation of the right to counsel is suppressed.*

The circuit court next addressed the 09.28.06 4:45 (third) interview. Noting that this interview was preceded by the admonishment and completion "of a *Miranda* rights and a signed waiver," the circuit court found that the interview occurred after Osburn's arrest for Casey's murder, "so it was custodial without question." It then found that the statement should be suppressed, in that the State made no showing that Osburn had initiated the contact with police leading up to the statement. Specifically, the circuit court found that the officers who took the statement failed to even acknowledge Osburn's prior exercise of his Fifth Amendment right to counsel and proceeded as if it had not occurred.

"When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights...While the accused may initiate further contact with the police, the impetus must come from the accused, not the police. "

As to the 09.28.06 7:25 (fourth) interview, the circuit court reviewed the videotape of the interview and found that Osburn appeared calm and relaxed. It then found that Osburn had initiated further contact with police after invoking his right to counsel:

> *The court finds that the defendant did in this particular statement evince a willingness or desire for generalized discussion about the investigation, when he said to Agent Boshears, "I am in a mess." The further conversation between the defendant and Boshears from that point led eventually to the defendant stating he wanted to talk further about the situation and "do the right thing."*

It further found that the statement was knowingly, intelligently, and voluntarily made and denied Osburn's motion to suppress it. Finally, with respect to the 09.28.06 8:55 (fifth) interview, the circuit court found that Osburn initiated the conversation with then-Sheriff-Elect Snyder and that his statements were knowingly, intelligently, and voluntarily made. For these reasons, the circuit court denied Osburn's motion to suppress with respect to this statement.

At issue here are the two statements that the circuit court refused to suppress, the 09.28.06 7:25 (fourth) interview and the 09.28.06 8:55 (fifth) interview. Upon review, the Arkansas Supreme Court found, in part, as follows:

"…the Fifth Amendment right to counsel attaches during custodial interrogation. See *Edwards v. Arizona,* 451 U.S. 477 (1981). When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated

custodial interrogation even if he has been advised of his rights. Instead, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. While the accused may initiate further contact with the police, the impetus must come from the accused, not the police. See *Metcalf v. State,* 284 Ark. 223, 681 S.W.2d 344 (1984). Because it is undisputed that Osburn invoked his right to counsel at the conclusion of the 09.28.06 4:45 (third) interview, the question initially presented is whether Osburn initiated further communication with the investigators.

"In *Oregon v. Bradshaw,* 462 U.S. 1039 (1983), it was held that the respondent's question, *Well, what is going to happen to me now?* 'initiated' further conversation in the ordinary dictionary sense of that word. Justice Rehnquist observed that while a 'bare inquiry by either a defendant or by a police officer should not be held to initiate any conversation or dialogue,' the respondent's question 'evinced a willingness and a desire for a generalized discussion about the investigation.'

"What is clear from *Bradshaw* is that in order for an accused to initiate, his inquiry or statement must indicate some desire or willingness to discuss the investigation. Here, the interaction between Osburn and Agent Boshears began with Osburn's inquiry as to whether he could see his family before being taken to jail. Agent Boshears, after telling Osburn that that was not his decision, according to his own testimony, began to describe to Osburn what was about to happen and what Osburn could expect. Again, Osburn asked to see his family, and, again, Agent Boshears told him that he would ask.

"It was at that point that Osburn simply made the statement that he was 'in a mess,' which the State claims constituted an initiation of contact with the police. However, we think it is clear that such a statement could have a variety of meanings, as evidenced by Agent Boshears's testimony that he too had found himself 'in a mess':

> *And I explained to [Osburn] that during times that I have, that I would call myself in a mess or tough times, I explained that I rely heavily on my faith and pray a great deal.*

"Here, Osburn's statement simply did not indicate any desire on his part to reengage in a discussion of 'the investigation,' as required by *Bradshaw*. Indeed, the conversation did not turn to the investigation, but instead, according to Agent Boshears's testimony, it turned to prayer, Osburn became emotional, and he again asked to see his daughter. The two began to speak about faith, to which, according to Boshears, Osburn stated that he did not feel worthy 'to keep the faith' or his 'relationship with Christ.' Then, Agent Boshears, according to the circuit court's findings, asked if Osburn wanted to keep talking. It was only at that time that Osburn stated that he wanted to do the right thing and talk, and the statement at issue resulted.

"After examining the totality of the circumstances, as we must, we simply cannot say that Osburn initiated further contact as contemplated by *Bradshaw.* Absolutely

no inquiry or statement made by Osburn evinced any willingness on his part to reengage or reinitiate a conversation relating to the investigation; to the contrary, his inquiries and statements indicated a desire to see his family and expressed his despair. Nor did Osburn's statement that he was 'in a mess' initiate contact with the police. As the Supreme Court of Illinois stated, 'To ascribe such significance to this limited statement would render virtually any remark by a defendant, no matter how offhand or superficial, susceptible of interpretation as an invitation to discuss his case in depth. To do so would amount to a perversion of the rule fashioned in Edwards and articulated more fully in *Bradshaw*.' *People v. Olivera*, 164 Ill. 2d 382, 390, 647 N.E.2d 926, 930 (1995).

"Indeed, the only statement made by Osburn that indicated any willingness to discuss the investigation after his invocation of the right to counsel came *after* Agent Boshears asked him if 'he wanted to keep talking.' Here, counsel was not made available to Osburn, nor did he initiate contact with the police; instead, it appears from the totality of the circumstances that the 09.28.06 7:25 (fourth) interview was the result of a violation of *Edwards.* Accordingly, we hold that because Osburn did not initiate, his Fifth Amendment right to counsel was violated by the 09.28.06 7:25 (fourth) interview, and the circuit court's finding to the contrary was clearly against the preponderance of the evidence.

"We turn then to Osburn's claim that the illegality of the 09.28.06 7:25 (fourth) interview rendered the 09.28.06 8:55 interview 'fruit of the poisonous tree.' The question, then, is whether Osburn's statement from the 09.28.06 8:55 (fifth) interview was an exploitation of the 09.28.06 7:25 (fourth) interview or whether it was sufficiently distinguishable such that any taint was purged.

"Under the facts of this case, we are simply unable to say that Osburn's statement from the 09.28.06 8:55 (fifth) interview did not come by exploitation of the illegality of the 09.28.06 7:25 (fourth) interview. As the United States Supreme Court observed in *United States v. Bayer*:

> *Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. 331 U.S. 532, 540 (1947).*

"Certainly, where the illegal statement was made at 7:25 p.m. and concluded at 7:35 p.m., and the subsequent confession was taken at 8:55 p.m., just one hour and twenty minutes later, Osburn was in no way free of the psychological and practical disadvantages of having had confessed. In addition, Osburn was in continuous custody between the two statements, and the same two investigators participated in both. While Osburn was taken to a different location between the two statements and was permitted a fifteen-minute visit with his family, he had no consultation with counsel, and, in fact, was ushered into the latter statement by his friend and former employer, the then-sheriff-elect.

"We have held that when the original confession has been made under illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is shown. See *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991). The contrary has not been shown. Accordingly, we hold that the 09.28.06 8:55 interview was a fruit of the earlier 09.28.06 7:25 interview and should have been suppressed.

"The Arkansas Supreme Court also found that Osburn's statements were the result of coercion and in violation of his Fifth Amendment right. Their review reveals that during the 09.28.06 4:45 (third) interview, conducted at a metal outbuilding, the interrogating agents immediately began using Osburn's concern and love for his family to coerce him into making a confession.

"Osburn was repeatedly pressured in a coercive context to provide a confession. Osburn finally succumbed to that pressure, but only after the agents had essentially 'dangled' his ability to see and protect his family in front of him time and time again. We simply cannot ignore the coercive statements in the interview itself, nor the statements by Agent Boshears during his conversation with Osburn following his invocation of the right to counsel and prior to the 09.28.06 7:25 (fourth) interview, which continually suggested to Osburn that he might not be able to see his family or that his daughter might be arrested, unless he confessed.

"Here, it is clear that Osburn's will was overborne by the coercive tactics used during the entirety of the interview process following his arrest. Accordingly, we are of the opinion that the circuit court's finding that Osburn's statement resulting from the 09.28.06 7:25 (fourth) interview was voluntarily made was clearly against the preponderance of the evidence. We further hold that because Osburn's 09.28.06 8:55 (fifth) statement was quite clearly a fruit of the 09.28.06 7:25 (fourth) interview, it too should have been suppressed."

"Again, the two statements were only slightly separated in time, Osburn was transported from the metal outbuilding to the SEALEC by Agent Newton, one of the two investigators involved in the coercive interview, and he was only briefly permitted to visit with his family. He was then further interviewed by the same two agents, as well as his friend and former employer, then-Sheriff-Elect Snyder. Moreover, as we have already stated, Osburn was not free of the psychological and practical disadvantages of having already confessed. With all of these factors in mind, we simply cannot say that the taint of the 09.28.06 7:25 (fourth) interview was in any way attenuated. For these reasons, we hold that the circuit court's findings that Osburn's 09.28.06 7:25 (fourth) and 09.28.06 8:55 (fifth) statements were voluntary were clearly against the preponderance of the evidence, and we reverse and remand Osburn's convictions and sentence."

The decision was written by Justice Paul E. Danielson with Justices Annabelle Clinton Imber, Donald L. Corbin, and Elana Cumnningham Willis concurring. Chief Justice Jim Hannah concurred with the decision but dissented on another aspect of the case. Justices Robert L. Brown and Jim Gunter dissented.

Editor's Note: The decision in *Osburn v. State*, including the concurring and dissenting opinions, runs 52 pages and the foregoing is only a summary of the holding. While the majority's opinion is not well reasoned with respect to *Edwards v. Arizona*, one of the disturbing aspects of this decision is the conclusion that the investigators used coercive tactics in obtaining the confession. The Courts have consistently held that law enforcement officers may utilize psychological tactics in eliciting a custodial statement from the accused so long as the means employed are not calculated to procure an untrue statement, and the accused's free will is not completely overborne. The dissent correctly points out that Agents Newton and Boshears were appealing to Osburn's sympathies when they explained to Osburn that his children may be "embarrassed" and "dragged into" the investigation.

SEARCH AND SEIZURE:
Affidavits for Search Warrant; Inferences

United States v. McArthur,
CA8, No. 08-2799, 7/27/09

On April 1, 2006, Officer Trent Koppel of the Des Peres Police Department was on patrol at the West County Mall in Des Peres, Missouri, when mall security reported that an older, white male was masturbating inside his vehicle in the mall parking lot.

Officer Koppel responded immediately, located the vehicle, and activated her emergency lights. The driver attempted to navigate around the cars in front of him but was unsuccessful. Officer Koppel approached the blocked-in vehicle and ordered the driver to turn off the engine and exit the vehicle. Officer Koppel observed that the driver's penis was exposed. The driver exited the vehicle and handed Officer Koppel his driver's license, which identified the driver as Roderick McArthur. Officer Koppel placed McArthur under arrest for public indecency and transported him to the Des Peres Police Department for booking.

Officers inventoried McArthur's personal property and found in his wallet a laminated photograph of a nude, male child who is looking at and touching an erect, adult penis that is superimposed on the child's body. Officer Koppel advised McArthur of his Miranda rights, which McArthur waived. McArthur stated that he has always had an overactive libido and sometimes could not control his urges. He claimed that he met someone online who agreed to meet him at the West County Mall.

When that person did not arrive, McArthur stated that he drove around the parking lot, became aroused, and began to masturbate. In a written statement, McArthur admitted exposing himself in the vehicle and apologized for his "very inappropriate behavior." McArthur posted bond and was released on the same day as his arrest. Officer Koppel contacted Detective Juan Gomez, then a nine-year veteran of the St. Louis County Police Department with extensive training and experience investigating child pornography offenses, and provided Detective Gomez with information regarding McArthur's arrest. Detective Gomez confirmed McArthur's home address by conducting a utilities check. Detective Gomez also discovered that McArthur was convicted in 1986 for sodomy involving a minor and in 2004 for sexual misconduct

and that McArthur had failed to register as a sex offender. Another St. Louis County officer, Sergeant Adam Kavanaugh, procured the nude photograph found in McArthur's wallet from the Des Peres Police Department. Sergeant Kavanaugh showed the photograph to Detective John Schmidt, a forensic analyst in the Computer Fraud Unit. Detective Schmidt stated that the photograph had been modified using computer software.

On April 4, 2006, Detective Gomez applied for a search warrant for McArthur's residence and any digital data devices found therein for evidence of possession of child pornography. Detective Gomez presented an affidavit in support of the warrant to the Honorable Brenda Stith Loftin, Associate Circuit Judge for the St. Louis County Circuit Court. The affidavit described the property to be searched with particularity, listed Detective Gomez's experience with "subjects known to possess and sell obscene material," detailed the events surrounding McArthur's public indecency arrest (including the discovery of the computer-altered photograph), and stated that "McArthur has been arrested for multiple sex offenses in St. Louis County, Missouri, in the past twenty years but has failed to register as a sex offender as required by law."

Judge Loftin authorized the search warrant at 6:30 p.m. on April 4, 2006. Officers executed the warrant later that evening and seized several digital data devices from McArthur's residence, including a computer containing multiple images that depicted children displaying their genitals and engaging in masturbation, oral sex, and vaginal sex with adults.

McArthur contends that the district court erred in denying his motion to suppress because there was not probable cause to believe that child pornography would be found in his home. He argues that the affidavit Detective Gomez filed in support of the application for the initial search warrant for McArthur's residence contained insufficient indicia of probable cause to believe that McArthur possessed child pornography, in his home or on his computer. Specifically, McArthur asserts that the only averment even remotely connected to child pornography was a single laminated photograph in McArthur's wallet. Thus, according to McArthur, the inference that he kept child pornography in his home or on his computer was speculative and insufficient to support probable cause. The Court of Appeals for the Eighth Circuit disagreed finding, in part, as follows:

"The affidavit chronicled the circumstances surrounding McArthur's public indecency arrest for masturbating in his car in a mall parking lot three days earlier. Most significantly, the affidavit noted that, at the time of his arrest, McArthur possessed a laminated photograph of a nude child that had been modified using computer software. This revelation, standing alone, strongly indicated that child pornography would be found on McArthur's computer. Furthermore, the affidavit revealed that McArthur had been convicted for multiple, prior sex offenses but had failed to register as a sex offender and that Detective Gomez had experience dealing with subjects known to possess and sell obscene material. Finally, other courts have recognized—and Detective Gomez testified at the suppression hearing—that the observation that images of child pornography are likely

to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases. Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to destroy them. Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence. *United States v. Riccardi,* 405 F.3d 852, 861 (10th Cir. 2005) (quoting *United States v. Lamb*, 945 F. Supp. 441, 460 (N.D.N.Y. 1996)).

"Considering the 'totality of the circumstances' and examining the affidavit using a 'common sense' approach, the Eighth Circuit found that the evidence as a whole provided a substantial basis for finding probable cause to support the issuance of the search warrant for McArthur's residence because the affidavit supporting the search warrant set forth facts sufficient to create a fair probability that evidence of possession of child pornography would be found. Therefore, the district court did not err when it denied McArthur's motion to suppress."

SEARCH AND SEIZURE:
Automobile Search; Search Incidental to Arrest; Probable Cause

United States v. Davis,
CA8, No. 08-3536, 7/2/09

On May 4, 2007, Officer Shelby Howard of the Joplin Police Department (Missouri) stopped a 2007 Nissan Altima driven by Uneal Davis for speeding. John Hicks, a deputy with the Jasper County Sheriff's Department, assisted Officer Howard during the traffic stop. Because Officer Howard smelled the odor of marijuana as he approached the vehicle, he asked Davis to exit the vehicle so he could conduct a pat-down search.

During the pat-down, Officer Howard felt a lump that he believed to be a plastic bag in Davis' pocket. After Davis admitted that the lump was a bag of marijuana, Officer Howard arrested Davis and placed him in Deputy Hicks' patrol car. Officer Howard then ordered the three passengers riding with Davis out of the car so that he could search the vehicle. None of the passengers were secured in handcuffs while Officer Howard searched the vehicle. During the search, Officer Howard found a loaded Smith & Wesson 9mm handgun in the center console. Officer Howard also observed opened bottles of beer in the vehicle and arrested one of the passengers, Gregory Harlin, for being a minor in possession of alcohol. The two remaining passengers left in a taxi because they had been drinking.

After his indictment, Davis filed a motion to suppress the handgun on the ground that the search was impermissible under the

decision by the Arizona Supreme Court in *State v. Gant*, 162 P.3d 640 (Ariz. 2007), cert. granted in part, 128 S. Ct. 1443 (2008), which required that officers demonstrate a threat to their safety or a need to preserve evidence in order to justify a warrantless search incident to arrest. The government opposed the motion on three alternative grounds: 1) that the search of the vehicle was a lawful search incident to arrest; 2) that under the "automobile exception" the odor and discovery of marijuana provided probable cause to search the vehicle without a warrant; and 3) that the firearm would have inevitably been discovered during an inventory search of the car after it was impounded. The district court denied Davis' motion on the grounds that both the search-incident-to arrest and automobile exceptions obviated the need for a warrant. It declined to address the government's inevitable discovery argument. After Davis filed this appeal, the Supreme Court affirmed the Arizona Supreme Court's decision in *State v. Gant* limiting the search-incident-to-arrest exception to situations either threatening officer safety or the preservation of perishable evidence. *Arizona v. Gant,* 129 S. Ct. 1710, 1723 (2009).

Upon review, the Court of Appeals for the Eighth Circuit stated that they are faced with the purely legal question of whether the search of Davis' vehicle without a warrant was permissible under the Fourth Amendment. They found, in part, as follows:

"Davis' primary argument is that the *Gant* decision requires suppression because the search of his vehicle was not a valid search incident to arrest. In *Gant*, police officers stopped the defendant's vehicle because he had an outstanding warrant for driving with a suspended license. 129 S. Ct. at 1714-15. The Supreme Court suppressed the evidence because the driver and two of his associates were handcuffed and secured in separate patrol cars before the search of his vehicle, and no evidence of the offense of arrest of driving with a suspended license could possibly be obtained by a search of his vehicle.

"The *Gant* decision confined the applicability of the search-incident-to-arrest exception to two situations. First, police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. The within-reach requirement places the search-incident-to-arrest exception within the boundaries set by the two underlying rationales for the rule set forth in *Chimel v. California*, 395 U.S. 752 (1969)—ensuring officer safety and protecting perishable evidence. In addition to the within-reach requirement, *Gant* also provided that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Gant*, 129 S. Ct. at 1719 (quoting *Thorton v. United States,* 541 U.S. 615, 632 (2004)). Thus, police may validly search an automobile incident to an arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

"Under the *Gant* decision, Officer Howard lawfully searched Davis' automobile. At the time of the search, Officer Howard had

"Thus, police may validly search an automobile incident to an arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

already discovered marijuana in Davis's pocket and placed Davis in custody. The odor of marijuana was wafting from the car. Empty beer bottles lay strewn in the back seat. Three passengers, all of whom had been drinking, were not in secure custody and outnumbered the two officers at the scene. Each of these facts comports with Gant's within-reach requirement and its two underlying rationales as articulated in Chimel. Although Davis had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana. These facts are textbook examples of the safety and evidentiary justifications underlying Chimel's reaching-distance rule. Gant, 129 S. Ct. at 1714; see also id. at 1719 (distinguishing New York v. Belton, 453 U.S. 454 (1981), on the grounds that there a single officer was confronted with four unsecured arrestees, whereas in Gant five officers had handcuffed and secured three arrestees in different patrol cars).

"In addition to his search-incident-to-arrest challenge, Davis also appeals the district court's ruling that the search was permissible under the 'automobile exception' to the warrant requirement. Under the automobile exception, officers may search a vehicle without a warrant if they have probable cause to believe the vehicle contains evidence of criminal activity. United States v. Cortez-Palomino, 438 F.3d 910, 913 (8th Cir. 2006). In Cortez-Palomino, we held that the search of an automobile was supported by probable cause where officers observed packages wrapped in cellophane and detected the odor of masking agents commonly used to obscure the smell of narcotics. If there had been any doubt about whether the smell of smoldering cannabis constituted probable cause to search the vehicle, such doubt was obviated by the discovery of a bag of marijuana in Davis' pocket.

"Consequently, Officer Howard was permitted to search Davis' vehicle without a warrant under the automobile exception."

SEARCH AND SEIZURE:
Consent to Search; Individual in Apparent Control of the Vehicle

Cole v. State, CACR 09-31, 6/24/09

In *Cole v. State*, the Arkansas Court of Appeals noted that the Arkansas Rules of Criminal Procedure, Rule 11.2(b), states in part: *The consent justifying a search and seizure can only be given, in the case of…search of a vehicle, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given.*

The Court held that a police officer may rely on the consent to search given by the driver of a vehicle, even in the presence of the owner

of the vehicle, unless the owner asserts his or her right to refuse consent. When the owner of a car allows another person to drive his or her car, he or she gives that person temporary authority to consent to a search of that car. The consent given to a police officer by the driver is valid, absent an objection from the owner. Nonetheless, the Court expressed the hope that police officers will make an effort to identify the owner of a vehicle before asking for consent to search and to obtain consent from the owner if present.

SEARCH AND SEIZURE: Detention of Package; Guaranteed Delivery Time

United States v. Jefferson,
CA9, No. 08-30067, 5/26/09

On the morning of April 6, 2006, an express mail package addressed to John Jefferson arrived at the United States Post Office in Juneau, Alaska. The package was sent from Oregon on April 5 and delivery was guaranteed by 3:00 p.m. on April 7. The postal clerk processing the package telephoned a postal inspector in Anchorage. The inspector had previously instructed clerks to notify him if any packages arrived that were to be delivered to Jefferson's address. The inspector told the clerk to detain the package overnight.

The inspector arrived in Juneau the morning of April 7 along with a law enforcement team and a narcotics-detection canine. The inspector visually inspected the outside of the package and submitted it to a canine sniff. The canine alerted to narcotics. Law enforcement applied for a search warrant, which the magistrate judge granted at 11:55 a.m. Law enforcement opened the package and discovered 253 grams of methamphetamine. At approximately 1:30 p.m., law enforcement obtained appropriate warrants and placed a beeper inside the package. Around 5:00 p.m., law enforcement made a controlled delivery of the package to Jefferson's address. The beeper soon went off and law enforcement arrested Jefferson.

Jefferson argues that the district court erred in denying his suppression motion because the postal inspector's detainment of his package on April 6 violated the Fourth Amendment.

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

"The Fourth Amendment protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). It has long been established that an addressee has both a possessory and a privacy interest in a mailed package. *United States v. Hernandez,* 313 F.3d 1206, 1209 (9th Cir. 2002).

"Our case law expressly forecloses any assertion by Jefferson that his privacy interests in the package were implicated. The postal inspector's visual inspection of the package did not implicate the Fourth Amendment because what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. Likewise, the postal inspector's use of a well-trained narcotics-detection dog did not implicate legitimate privacy interests.

"Because Jefferson's privacy interests were not implicated, the only constitutional interest potentially implicated is his possessory interest in the package. We have characterized the possessory interest in a mailed package as being solely in the package's timely delivery. In other words, an addressee's possessory interest is in the timely delivery of a package, not in having his package routed on a particular conveyor belt, sorted in a particular area, or stored in any particular sorting bin for a particular amount of time.

"We hold that an addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed. Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment. See *United States v. Gill,* 280 F.3d 923, 932-33 (9th Cir. 2002). ('Investigators may inspect mail as they wish without any Fourth Amendment curtailment, so long as the inspection does not amount to a 'search,' and so long as it is conducted quickly enough so that it does not become a seizure by significantly delaying the date of delivery.') Once the guaranteed delivery time passes, however, law enforcement must have a 'reasonable and articulable suspicion' that the package contains contraband or evidence of illegal activity for further detainment.

"In this case, the post office guaranteed that Jefferson would receive his package by 3:00 p.m. on April 7. Any expectation that Jefferson or the post office may have had that the package could arrive earlier is irrelevant. The postal inspector did not need any suspicion to detain Jefferson's package overnight on April 6 because Jefferson did not yet have a possessory interest in the package. By the time "the constitutional chemistry was altered" at 3:00 p.m. on April 7, law enforcement had already established probable cause to seize Jefferson's package. Thus, law enforcement acted well within the bounds of the Fourth Amendment in detaining, seizing and then searching Jefferson's package."

In sum, the Ninth Circuit Court of Appeals held that a package addressee does not have a Fourth Amendment possessory interest in a package that has a guaranteed delivery time until the guaranteed delivery time has passed. Jefferson had no Fourth Amendment possessory interest in the "timely" delivery of his package until 3:00 p.m. on April 7.

SEARCH AND SEIZURE:
Police/Citizen Encounter; Community Care Taking Function

Dosia v. State, CACR 08-1057, 5/27/09

On the night of February 23, 2007, Officer Kyle Jones of the Nashville Police Department testified that he was in uniform and patrolling in a marked unit. At 9:45 p.m., Jones drove past a closed gas station where he observed two vehicles parked on the parking lot. Jones turned his patrol car around to "check them out."

Jones stated that there were no signs of criminal activity, no moving violations, nor any apparent mechanical difficulty or defective equipment on either vehicle. Jones agreed that he was not aware of any reported criminal activity in that area that night, nor did he suspect it at the time. Jones explained that this was why he did not engage his police lights when he came back to the parking lot.

Although Jones thought it suspicious that one car "shot" out of the parking lot, Jones did not believe it suspicious enough to follow that car. Instead, Jones approached the remaining car, which was then moving around the building, and observed the car stop. Jones pulled his patrol car up along the passenger side. Jones asked the occupants of the vehicle what they were doing. The men responded that they were discussing a dog house and offered to show the officer text messages to prove it. Jones told them he did not want to see the messages.

Jones asked their names. The passenger said his name was Maverick Canaday. Jones recognized the name as associated with drug-buy investigations, but a computerized check revealed no outstanding warrants and a valid driver's license. By this time, Jones was out of the patrol car speaking to the men, who remained in their vehicle. Jones asked the driver, Orlando Dosia, his name, to which Dosia gave his name and date of birth, but said he did not have a valid driver's license. Dosia's license was determined to be suspended. Jones described Maverick as "shaking, very nervous," and Dosia as "a little nervous."

As Jones waited for the computer check to come back, Officer Clinton Tedford arrived to assist. Tedford told Dosia to get out of his vehicle, and Jones asked Dosia what was in the bag under his feet in the floorboard. Dosia offered to let Jones to retrieve it. Instead, Jones told Dosia to retrieve it. At that point, Dosia placed his hands on the top of the car. Tedford then grabbed the bag and smelled it; the bag smelled strongly of marijuana and felt as if it held a substantial amount of the drug. Dosia was arrested, and upon search incident to arrest, more drugs and $1907 in cash were found. This led to the charges and eventual convictions.

The trial judge, when asked to rule on the motion to suppress prior to trial, found that the officers were "doing what they should have been doing in checking things out" but that Dosia was "in the wrong place at the wrong time." The judge thus denied the motion to suppress.

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

"There is no question that upon learning that Dosia was driving on a suspended license, the officers were entitled to detain him. It is the encounter up to the moment that Dosia was asked for his name, date of birth, and driver's license that is at issue. The State asserts that the Rules of Criminal Procedure are not applicable because the police officer's acts here were no more than basic functions of community caretaking. The State asserts further that to the extent that the Rules apply, none were violated.

"Dosia argues that the encounter is governed by our Rules of Criminal Procedure and that this was a clear violation of those Rules, designed to protect a citizen's Constitutional rights. In *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998), our supreme court explained the three types of encounters between the police and private citizens:

> *The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. Because the encounter is in a public place and*

> *is consensual, it does not constitute a "seizure" within the meaning of the fourth amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause.* ***Stewart,*** *332 Ark. at 144; see also* ***Frette v. City of Springdale,*** *331 Ark. 103, 959 S.W.2d 734 (1998).*

"At issue before us today is whether the encounter was impermissible under our Rules of Criminal Procedure and Constitution. See *Lamb v. State,* 77 Ark. App. 54, 70 S.W.3d 397 (2002). If so, then the motion to suppress was erroneously denied, requiring reversal and remand.

"We first dispose of any reliance on Ark. R. Crim. P. 3.1, which permits an officer to stop and detain a person who is reasonably suspected of having committed, committing, or being about to commit a felony or misdemeanor involving danger of injury or property damage. Those requirements are simply not present here, by Officer Jones's candid admission. However, there is a less intrusive interaction permitted between police and citizens, outlined in Ark. R. Crim. P. 2.2 that provides in relevant part:

> *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, to appear at a police station, or to comply with any other reasonable request.*
>
> *(b)…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.*

"Our Supreme Court has clarified that an encounter under Ark. R. Crim. P. 2.2 is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. Stewart, supra. See also *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997); *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997). It is Rule 2.2 that provides authority for a police officer to act in a non-seizure encounter, referring to the first category of police-citizen encounters. See *State v. McFadden*, supra. See also *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990).

"There is nothing in the Constitution that prevents officers from addressing questions to any individual. *Baxter v. State,* 274 Ark. 539, 626 S.W.2d 935 (1982). However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existing circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. What must be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances of the encounter. *Id.* Rule 2.2 authorizes police action provided that the approach does not rise to the level of a

'seizure' and provided that the information and cooperation sought is in aid of the investigation or prevention of crime. *State v. McFadden, supra.*

"Similar to the fact scenario in *Stewart, supra*, the police officer here was not investigating a nearby crime or a tip from an informant at the time of the encounter. Under these circumstances, we cannot say that the encounter was permissible under Rule 2.2. Moreover, while not necessary to our disposition, we believe that reasonable persons under the same circumstances would not have felt free to leave the encounter, particularly when the requests for identification and computer verification checks were commenced.

"There is nothing in the Constitution that prevents officers from addressing questions to any individual. However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existing circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom."

"The State focuses its brief on justifying this encounter under a general community care-taking approach by the officer. This 'community care-taking' argument was never presented to the trial court. However, the cases cited by the State for that proposition support such care-taking approaches if a driver appears to be in distress or injured, *Blakemore v. State,* 25 Ark. App. 335, 758 S.W.2d 425 (1988), or if there is abandoned property in a dangerous or high-crime area, *Adams v. State,* 26 Ark. App. 15, 758 S.W.2d 709 (1988). Such an initial approach was approved in *Swan v. State,* 94 Ark. App. 115, 226 S.W.3d 6 (2006), where an officer on routine patrol approached a vehicle at approximately 4:00 a.m. in a parking lot on the back side of a motel specifically to check on the three occupant's well-being. The officer in *Swan* also testified that upon approach, he observed Swan moving in a manner suggesting he was concealing an object in the seat. The evidence to suggest that community care-taking was the reason for the initial encounter in Blakemore, Adams, and Swan is not present in the case we consider today. Compare *Cady v. Dombrowski,* 413 U.S.433 (1973); *Winters v. Adams,* 254 F.3d 758 (8th Cir. 2001) (explaining community care-taking function).

"Because the initial encounter and resulting detention were impermissible, the Arkansas Court of Appeals reversed the trial court's denial of the motion to suppress stating it was clearly against the preponderance of the evidence."

SEARCH AND SEIZURE:
Reasonable Suspicion; Mistake of Fact

United States v. Grove,
CA7, No. 07-2227, 3/17/09

A man fired multiple shots into an occupied South Bend, Indiana home, and eyewitnesses told police that Devon Groves was the shooter. After further investigation and consultation with a prosecutor, the lead investigator issued a "crime information bulletin" for Groves indicating he should be picked up if found; the prosecutor had given the go-ahead for the "pickup," and the officer understood that the prosecutor would be seeking an arrest warrant. About a month after the shooting, an anonymous tipster called 911 and reported that she had just seen Groves and he was "probably" carrying a gun. The caller described Groves's clothing, location, and the car he was in, and patrol units were dispatched to the area to look for him. The dispatcher passed along the information from the tip and also advised responding officers that Groves was wanted on a warrant.

Corporal Christopher Slager soon saw Groves riding in a car that matched the description provided by the tipster. Slager initiated a traffic stop, ordered Groves and the other occupants out of the car, and saw a handgun under the seat where Groves had been sitting. Groves was charged under 18 U.S.C. § 922(g)(1) with being a felon in possession of a firearm and ammunition. He moved to suppress the gun. As it turned out, the dispatcher had been mistaken about the warrant; in fact, there was no warrant for Groves' arrest, only the "crime information bulletin."

The district court denied the suppression motion, and a jury convicted Groves on both counts. On appeal, Groves renews his challenge to the admission of the gun. The Court of Appeals for the Seventh Circuit rejected his arguments and affirmed the conviction, finding as follows:

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"Although an anonymous tip is generally insufficient to support an investigative stop, *Florida v. J.L.*, 529 U.S. 266 (2000), there was more supporting this stop than just an anonymous tip. Under *United States v. Hensley*, 469 U.S. 221 (1985), police may conduct an investigative stop of a suspect based on a 'wanted flyer' or 'bulletin' like the one at issue in this case. The bulletin issued for Groves was supported by ample reasonable suspicion that he was involved in the earlier shooting, and this in turn was sufficient to justify the stop. A complication is that the dispatcher told responding officers there was a warrant for Groves' arrest, not just a pickup 'bulletin.' But this mistake did not undermine the preexisting reasonable suspicion for the stop. Moreover, to the extent that the error had any effect on the validity of the stop, suppression was not required. The Supreme Court has just held that a negligent mistake by police personnel regarding the existence of a warrant does not require application of the exclusionary rule. *Herring v. United States*, 129 S. Ct. 695 (2009)."

SEARCH AND SEIZURE:
Reasonable Suspicion;
Search of Luggage at Bus Station

United States v. Alvarez-Manzo,
CA8, No. 08-2647, 7/6/09

The Nebraska State Patrol (NSP) Drug Commercial Interdiction Unit (CIU) targets hubs of interstate transportation of persons and parcels to detect criminal activity, including the Omaha Greyhound Bus Depot. NSP Investigator Eberle is assigned to the CIU. On October 31, 2007, Investigator Eberle and other members of the CIU, NSP Investigator Rasgorshek, NSP Investigator Lutter, NSP Investigator Scott, Sergeant Elliott, and Drug Enforcement Administration Special Agent Orduna, were at the Greyhound Bus Depot. A bus arrived at the terminal around 5:30 a.m., and the officers engaged in their usual routine of watching the passengers. Passengers proceeding on to another destination ("through passengers") are required to get off the bus and enter the terminal while the bus is cleaned and refueled. Passengers whose destination is Omaha may carry luggage with them off the bus or obtain luggage from the undercarriage cargo area of the bus. The officers observed luggage in the cargo area which the bus driver had opened to allow passengers and baggage handlers to obtain luggage.

The cargo area was not full. It contained approximately five to seven bags Investigator Eberle's attention was drawn to a newer black Swiss bag. He used his flashlight to view the bag and its baggage check tag. Investigator Eberle saw that the tag indicated that the bag was coming from St. Louis, Missouri, and was destined for Dayton, Ohio. Investigator Eberle testified that this route caught his attention because it was not consistent with a bag coming to Omaha. Investigator Eberle noted the words "Indianapolis, IL" were handwritten on the baggage check tag. He testified that this was the first bag he had seen where the computer-generated tag had a different destination in handwriting. Investigator Eberle also noted that the bag had an aftermarket padlock affixed. At that point, Investigator Eberle took possession of the bag, removing it from the cargo area.

Subsequent inquiry by Investigator Eberle revealed that the luggage belonged to Christian Alvarez-Manzo. Subsequently, Investigator Eberle then retrieved his drug detection canine, Rocky, from his vehicle and took the canine to the baggage room of the bus terminal where Rocky performed a sniff of the black bag. Rocky gave a positive indication for the presence of narcotics. Following Rocky's alert, the bag and Alvarez-Manzo were transported to the NSP traffic office in Omaha. At the NSP traffic office, an officer, who was fluent in Spanish, was called in to interview Alvarez-Manzo, but Alvarez-Manzo declined to make a statement. The bag was transported to the Douglas County Sheriff's Office and subjected to a scan from a GE Vapor Traser II, an ion scanner, which indicated the presence of heroin on the exterior of the bag. Investigator Eberle applied for a search warrant from a Douglas County judge. The search warrant application detailed the events which had transpired at the Greyhound Bus Depot, the canine sniff, and the ion scan. A search warrant was issued for the bag and Alvarez-Manzo's person. The search warrant was executed, and various items were seized, including ten kilograms of cocaine.

The district court concluded that Investigator Eberle's removal and possession of Alvarez-Manzo's bag was a seizure within the meaning of the Fourth Amendment, and the seizure violated Alvarez-Manzo's Fourth Amendment rights because Investigator Eberle lacked reasonable suspicion to justify the seizure of the bag.

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

"The Supreme Court held in *United States v. Jacobsen,* 466 U.S. 109 (1984), that a Fourth Amendment seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. In *United States v. Va Lerie,* 424 F.3d 694, 700 (8th Cir. 2005) this court applied Jacobsen in the context presented by this case– property entrusted to a third-party common carrier. *Va Lerie* presents similar facts, and, thus, this case turns on whether *Va Lerie,* in which the concluded that a seizure did not occur, is distinguishable from this case.

"In *Va Lerie,* Investigator Eberle (the same investigator in this case and the *Va Lerie* case) asked a fellow law enforcement officer to remove Va Lerie's luggage from the bus and take it to a room inside the rear baggage terminal of the Greyhound Bus Depot. After summoning Va Lerie to the bus station ticket counter, Investigator Eberle told Va Lerie that he was a law enforcement officer and explained to Va Lerie that he was not under arrest or in trouble. Va Lerie agreed to speak with Investigator Eberle and follow him to the room where Va Lerie's luggage was being held. There, Investigator Eberle explained that he was a narcotics investigator who was watching for people who might be transporting illegal drugs. Investigator Eberle then asked Va Lerie for consent to search the bag, and Va Lerie gave consent. The search of Va Lerie's bag produced five vacuum-sealed bags containing cocaine.

"In *Va Lerie*, this court determined that law enforcement's detention of property entrusted to a third-party common carrier constitutes a Fourth Amendment seizure only when the detention does any of the following: (1) delays a passenger's travel or significantly impacts the passenger's freedom of movement, (2) delays the checked luggage's timely delivery, or (3) deprives the carrier of its custody of the checked luggage. The *Va Lerie* Court concluded that none of the factors were present and, as a result, held that no Fourth Amendment seizure occurred when law enforcement officials removed *Va Lerie's* bag from the bus and took it to a room inside the Greyhound Bus Depot's baggage terminal. Alvarez-Manzo concedes that this case turns on the third *Va Lerie* factor, whether law enforcement deprived Greyhound of custody of Alvarez-Manzo's bag.

"With respect to the third *Va Lerie* factor, this court stated that, in order to test the breadth of the carrier's custodial rights, we ask whether the government's actions go beyond the scope of the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody. Applying this test to the facts before it, the *Va Lerie* Court determined,

> *Va Lerie's possessory interests in his checked luggage certainly included an expectation that Greyhound-or others at Greyhound's request-would remove the luggage from the lower luggage*

> *compartment.* ***The NSP would have preferred to bring Va Lerie to the bus in the refueling area to seek permission to search, but Greyhound asked the NSP not to bring passengers to that area.*** *Thus, the NSP removed Va Lerie's checked luggage from the lower luggage compartment to a room inside the terminal* ***at Greyhound's request****. In doing so, the NSP never deprived Greyhound of its custody of Va Lerie's checked luggage.*

The Va Lerie Court also observed:

> *Here, the NSP never deprived Greyhound of custody of the checked luggage, at least not until Va Lerie consented to a search that unveiled cocaine. Indeed, the NSP adopted the policy of removing the luggage from the bus to present to the owner to seek consent to search* ***at Greyhound's prompting****.*

"Here, in removing Alvarez-Manzo's bag from the bus's cargo area to the bus's passenger seating area to locate the bag's owner, Investigator Eberle was not acting at Greyhound's direction. The government does not dispute this. Rather, the government argues that, if taking a bag to a room inside the bus station was not a seizure in *Va Lerie*, then taking a bag into the passenger section of the bus cannot constitute a seizure in this case. However, this characterization of *Va Lerie* ignores this court's discussion of the third factor which did not turn on *where* law enforcement took the bag but *at whose direction* law enforcement acted when it did so. In *Va Lerie,* law enforcement acted at Greyhound's request in taking Va Lerie's bag from the cargo area of the bus to a room inside the bus station. Therefore, *Va Lerie* provides that law enforcement did not deprive Greyhound of its custody of Va Lerie's bag because, although law enforcement had physical possession of the bag, Greyhound was directing the action in terms of what law enforcement could do with Va Lerie's bag.

"In this case, the government concedes that Investigator Eberle took Alvarez-Manzo's bag into the passenger section of the bus of Investigator Eberle's own accord and *not* at the direction of Greyhound. Because Investigator Eberle, not Greyhound, was directing the action with respect to Alvarez-Manzo's bag, this case is distinguishable from *Va Lerie.* In sum, Officer Eberle's actions deprived Greyhound of its custody of Alvarez-Manzo's bag. Thus, law enforcement seized Alvarez-Manzo's bag within the meaning of the Fourth Amendment. Such a seizure must be supported by reasonable suspicion. See *United States v. Zacher,* 465 F.3d 336, 338 (8th Cir. 2006) ('A law enforcement officer must have reasonable suspicion before he or she may seize a package for investigatory purposes.') The district court determined that law enforcement lacked reasonable suspicion to justify the seizure of the bag. The government does not challenge the district court's conclusion in this appeal. By failing to do so, the government has waived review of the reasonable suspicion issue. Accordingly, we hold that the seizure of Alvarez-Manzo's bag, without reasonable suspicion, violated his Fourth Amendment rights."

SEARCH AND SEIZURE:
School Searches

Safford Unified School District v. Redding,
No. 08-479, 6/25/09

In Safford Unified School District v. Redding, the issue before the United States Supreme Court was whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, the Court held that the search did violate the Constitution, but because there was reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability.

The events immediately prior to the search in question began in 13-year-old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savanato the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit against Safford Unified School District #1, Wilson, Romero, and Schwallier for conducting a strip search in violation of Savana's Fourth Amendment rights. The individuals (hereinafter petitioners) moved for summary judgment, raising a defense of qualified immunity. The District Court for the District of Arizona granted the motion on the ground that there was no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed.

A closely divided Circuit sitting en banc, however, reversed. Following the two-step protocol for evaluating claims of qualified

immunity, see *Saucier v. Katz,* 533 U. S. 194, 200 (2001), the Ninth Circuit held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey v. T.L.O.,* 469 U. S. 325 (1985). The Circuit then applied the test for qualified immunity, and found that Savana's right was clearly established at the time of the search: these notions of personal privacy are "clearly established" in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches. The upshot was reversal of summary judgment as to Wilson, while affirming the judgments in favor of Schwallier, the school nurse, and Romero, the administrative assistant, since they had not acted as independent decision makers.

The United States Supreme Court granted certiorari, and affirmed in part, reversed in part, and remanded the case for further proceedings, finding, in part, as follows:

"The Fourth Amendment 'right of the people to be secure in their persons…against unreasonable searches and seizures' generally requires a law enforcement officer to have probable cause for conducting a search. Probable cause exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed, *Brinegar v. United States*, 338 U. S. 160, 175–176 (1949) (quoting *Carroll v. United States*, 267 U. S. 132, 162 (1925)), and that evidence bearing on that offense will be found in the place to be searched.

"In *T.L.O.*, supra, we recognized that the school setting requires some modification of the level of suspicion of illicit activity needed to justify a search, and held that for searches by school officials a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause. We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, and have held that a school search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction,

"A number of our cases on probable cause have an implicit bearing on the reliable knowledge element of reasonable suspicion, as we have attempted to flesh out the knowledge component by looking to the degree to which known facts imply prohibited conduct, see, *e.g., Adams v. Williams,* 407 U. S. 143, 148 (1972); the specificity of the information received, see, e.g., *Spinelli v. United States,* 393 U. S. 410, 416–417 (1969), and the reliability of its source, see, e.g., *Aguilar v. Texas,* 378 U. S. 108, 114 (1964). At the end of the day, however, we have realized that these factors cannot rigidly control, *Illinois v. Gates*, 462 U. S. 213, 230 (1983), and we have come back to saying that the standards are 'fluid concepts that take their substantive content from the particular contexts' in which they are being assessed. *Ornelas v. United States*, 517 U. S. 690, 696 (1996).

"Perhaps the best that can be said generally about the required knowledge component

of probable cause for a law enforcement officer's evidence search is that it raise a fair probability, *Gates,* 462 U. S., at 238, or a substantial chance, *id*., at 244, n. 13, of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.

"In this case, the school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy. A week before Savana was searched, another student, Jordan Romero (no relation of the school's administrative assistant), told the principal and Assistant Principal Wilson that certain students were bringing drugs and weapons on campus, and that he had been sick after taking some pills that he got from a classmate. On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

"Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

"In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa answered, 'I guess it slipped in when she gave me the IBU 400s.' When Wilson asked whom she meant, Marissa replied, 'Savana Redding.' Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any follow up questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

"Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline indicated that the pill was a 200-mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

"It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this contraband, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from

Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

"This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office,was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

"Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants. Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

"Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.

"The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*, that the search as actually conducted be reasonably related in scope to the circumstances which justified the interference in the first place. The scope will be permissible, that is, when it's not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

"Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

"Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that students hide contraband in or under their clothing, and cite a smattering of cases of students with contraband in their underwear. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But non-dangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

"In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

"In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what Jordan Romero had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.

"We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

"A school official searching a student is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.A number of judges have read *T.L.O.* as the en banc minority of the Ninth Circuit did here. The Sixth Circuit upheld a strip search of a high school student for a drug, without any suspicion that drugs were hidden next to her body. *Williams v. Ellington,* 936 F. 2d 881, 882–883, 887 (1991). And other courts considering qualified immunity for strip searches have read *T.L.O.* as 'a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other,' *Jenkins v. Talladega City Bd. of Ed.,* 115 F. 3d 821, 828 (CA11 1997) (en banc), which made it impossible 'to establish clearly

the contours of a Fourth Amendment right in the wide variety of possible school settings different from those involved in *T.L.O.*' itself. See also *Thomas v. Roberts*, 323 F. 3d 950 (CA11 2003) (granting qualified immunity to a teacher and police officer who conducted a group strip search of a fifth grade class when looking for a missing $26).

"We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.

"The strip search of Savana Redding was unreasonable and a violation of the Fourth Amendment, but petitioners Wilson, Romero, and Schwallier are nevertheless protected from liability through qualified immunity. Our conclusions here do not resolve, however, the question of the liability of petitioner Safford Unified School District under *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978), a claim the Ninth Circuit did not address. The judgment of the Ninth Circuit is therefore affirmed in part and reversed in part, and this case is remanded for consideration of the *Monell* claim."

SEARCH AND SEIZURE:
Stop and Frisk; Police Show of Authority by Drawing Firearms

United States v. Waterman,
CA3, No. 08-2543, 6/24/09

Although this case presents multiple Fourth Amendment issues – probable cause for an arrest, consent to search, and the admissibility of unwarned inculpatory statements – the Court of Appeals for the Third Circuit's inquiry is confined to the sole issue decided by the District Court: whether the defendant was "stopped" under *Terry v. Ohio,* 392 U.S. 1 (1968). Their findings, in part, are as follows:

"The District Court held that police effected a *Terry* stop, that reasonable suspicion for the stop was lacking, and that contraband discovered thereafter must be suppressed. The government urges that the District Court should have determined, based on *California v. Hodari D.*, 499 U.S. 621, 627 (1991), that Waterman was not 'seized' within the meaning of the Fourth Amendment. The Court concluded that they were required to reverse the District Court based upon *Hodari D.,* and will remand for further proceedings.

"The scene is properly set by the District Court's findings of fact, which are not challenged by the parties on appeal. Officers Nowell and Ashe responded to a dispatcher's report that an anonymous informant had observed a "subject" with a gun at 1009 West Seventh Street in Wilmington, Delaware. The dispatcher did not indicate the tip's reliability. Officers Nowell and Ashe responded to the call in a marked police

vehicle. As the pair proceeded down West Seventh Street, they observed the silhouettes of five people standing on the front porch of a house. Turning on a spotlight, Officer Ashe confirmed that the address of the house was 1009, and that two females and three males were on the porch. Waterman was standing in the middle of the group, near the front door to the residence. Getting out of the police cruiser, Officer Ashe positioned herself 8-10 feet from the residence, while Officer Nowell approached the house. Ashe did not observe any weapons but ordered the individuals on the porch to place their hands in the air for safety reasons. All complied except Waterman, who kept his hands in his jacket pockets. The District Court found the following events ensued:

> *From her vantage point, Ashe had an unobstructed view of defendant. Ashe did not see a weapon in defendant's hands; however, based on her training, Ashe suspected that defendant might have been armed because he had moved his hands toward his waistband. Ashe and Nowell drew their firearms as Ashe repeatedly commanded defendant to put his hands in the air. Defendant did not comply; he moved one of his hands behind his back and turned the doorknob of the front door. The door didn't open. Ashe thought the door was locked. Ashe continued, unsuccessfully, to order defendant to show his hands. Ashe and Nowell maintained their weapons in a drawn position, aimed at the individuals standing on the porch.*
>
> *Just then, Deborah Waters opened the door and stepped onto the porch. As Deborah Waters exited, defendant entered the residence. Nowell, standing near the porch, thrust his leg into the doorway to prevent the door from being shut.*

"The District Court concluded that Waterman was effectively 'stopped' when Officer Ashe commanded everyone on the porch to put their hands in the air. Hence, what transpired next—Waterman's 'failure to follow Ashe's command,' the officers' 'drawing their weapons,' and Waterman's 'suspected conduct in the residence'—could not 'cure this initial unconstitutional violation.' Based on the unlawful 'seizure' on the porch, the Court suppressed a gun and drugs subsequently discovered in the residence.

"In *Hodari D.*, the Supreme Court held that an arrest requires either physical force or, where that is absent, submission to the assertion of authority. The Court explained that the concept of physical force necessary for a 'seizure' does not consist merely of the show of authority, but, rather, requires the application of force or 'laying on of hands.'

"With respect to 'submission,' the Court noted that compliance with police orders to stop should be encouraged. This would seem to require something more than a momentary pause or mere inaction. The Court did not differentiate between an 'arrest' and a *Terry* stop, and we have universally looked to the requirements set forth in *Hodari D.* to determine whether a police encounter with a citizen constitutes a 'seizure' within the meaning of the Fourth Amendment.

"Here, there was no application of physical force. The police drew their guns in a 'show of authority. While this act definitely constituted a display of force, we conclude that it fell short of the physical force required under Hodari

D. Similarly, there was no 'submission' by Waterman.

"While the others on the porch raised their hands in compliance with the officers' directive, Waterman failed to do so. Instead, he moved his hands toward his waistband, and ultimately retreated into the house.

"It will be of little comfort to Waterman that we agree with the District Court that, had police effected a 'seizure' on the porch, Waterman's rights would have been violated because the anonymous tip did not provide officers with a reasonable suspicion that he was armed. However, the absence of either element required for a 'seizure' under Hodari D. is fatal.

"Accordingly, the Court of Appeals for the Third Circuit reversed the Order of the District Court suppressing the evidence and remanded for further proceedings."