

CJI Legal Briefs

Volume 14, Issue 1

Spring 2009

A Publication of the Criminal Justice Institute–University of Arkansas System

Edited by Don Kidd



UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

Contents

- 1 **ARKANSAS LOCAL POLICE & FIRE RETIREMENT SYSTEM (LOPFI):** Administrative Agency Actions
- 3 **CIVIL LIABILITY:** Qualified Immunity
- 3 **DRUGS:** Useable Amount
- 5 **INTERROGATION:** Alleged Coercive Tactics
- 7 **PROBABLE CAUSE:** Careless Driving
- 9 **PROBABLE CAUSE:** Tandem Driving as Basis for Arrest
- 10 **PROSECUTORS:** Absolute Immunity; Administrative Tasks Which Are Prosecutorial in Nature
- 10 **SEARCH AND SEIZURE:** Arrest; Seizure and Search of Cellular Telephone
- 15 **SEARCH AND SEIZURE:** Emergency Search; Domestic Violence
- 15 **SEARCH AND SEIZURE:** Hotel/Motel Rooms; Occupant Eviction
- 17 **SEARCH AND SEIZURE:** Open Fields; Motion-Activated Video Camera
- 20 **SEARCH AND SEIZURE:** Plain View; Incriminating Nature of Item Seized
- 22 **SEARCH AND SEIZURE:** Protective Sweep; Search Under Mattress Where Suspect is to Sit on Bed
- 24 **SEARCH AND SEIZURE:** Recording Conversations; Police Vehicle
- 25 **SEARCH AND SEIZURE:** Stop and Frisk; Anonymous Tips; Need For Immediate Law Enforcement Action
- 27 **SEARCH AND SEIZURE:** Stop and Frisk; Vehicle Passengers
- 30 **SEARCH AND SEIZURE:** Unlawful Search Based on Police Negligence; Exclusionary Rule
- 33 **SEARCH AND SEIZURE:** Vehicle Stops; Illegal Detention
- 34 **SEXUAL HARASSMENT:** Retaliation

ARKANSAS LOCAL POLICE & FIRE RETIREMENT SYSTEM (LOPFI): Administrative Agency Actions

Eason v. Arkansas Local Police & Fire Retirement System,
No. CA08-493, 2/11/09

Michael Eason served as a Sergeant with the Camden Police Department for approximately ten years until he became disabled with symptoms in the form of chest pain and tightness, left elbow pain, severe headaches, dizziness, fatigue, nausea, blurred vision, and syncope he experienced only while on duty. By virtue of his employment, Eason participated in the Local Police & Fire Retirement System (LOPFI). On July 21, 2003, he applied for duty-related disability retirement benefits through LOPFI, pursuant to the provisions of Arkansas Code Annotated section 24-10-607(c), requesting an effective date of August 1, 2003.

On October 21, 2003, the LOPFI Board of Trustees approved Eason's request, but only for non-duty-related disability retirement benefits, because it determined that Eason suffered from an "underlying cardiac condition." He appealed, and a hearing on the matter was held, after which the LOPFI Board of Trustees upheld the original determination on June 3, 2004. Eason filed a petition for judicial review of the final agency action, pursuant to the Arkansas Administrative Procedure Act with the Ouachita County Circuit Court on January 13, 2005. On January 23, 2008, a judgment was entered by the Ouachita County Circuit

DISCLAIMER

*The Criminal Justice Institute publishes **Legal Briefs** as a research service for the law enforcement and criminal justice system. Although **Legal Briefs** is taken from sources believed to be accurate, readers should not rely exclusively on the contents of this publication. While a professional effort is made to ensure the accuracy of the contents of this publication, no warranty, expressed or implied, is made. Readers should always consult competent legal advisors for current and independent advice.*

You are encouraged to make copies of this publication and distribute them to others in your agency.

Court affirming LOPFI's determination that he was entitled only to non-duty-related disability retirement benefits. Eason filed an appeal.

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

"...administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures, to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. Thus, administrative decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. Substantial evidence is defined as 'valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture.'

"Arkansas Code Annotated section 24-10-607 sets out rules governing disability retirement benefits for LOPFI, in pertinent part:

(c)(1)(A) Any active member who while an active member becomes totally and permanently physically or mentally incapacitated for any suitable duty as an employee as the result of a personal injury or disease that the board finds to have arisen out of and in the course of his or her actual performance of duty as an employee may be retired by the board upon written application filed with the board by or on behalf of the member or former member.

(B) The employee shall be retired only if, after a medical examination of the member or former member made by or under the direction of a physician or physicians designated by the board, the physician reports to the plan in writing that the member or former member is physically or mentally totally incapacitated for the further performance of any suitable duty, that the incapacity will probably be permanent, and that the member or former member should be retired.

"Eason maintains that he satisfies the requirements of section 24-10-607(c)(1)(A) and (B), based upon the assessments of his treating physicians, specifically Mirfat A. Hariri-Bird, M.D., and Asim A. Shah, M.D., as well as licensed psychologist John W. Rago, Ed.D. Eason asserts that each one determined that he is totally disabled from serving as a police officer, due to his duties as such, and that such disability was permanent in nature. After LOPFI received these assessments that were favorable to Eason, they arranged for him to be evaluated by their own consulting physicians for a onetime consultation, whose opinions were inconsistent with the findings of his treating physicians. Eason points out that his treating physicians are specialists and are significantly more familiar with his overall health.

"LOPFI asserts that the evidence in this case is substantial enough for both its board, and later the Ouachita County Circuit Court, to find that Eason's disability was not caused by his duties as a police officer. LOPFI maintains that the opinions of Drs. Brown and Garza, and supported by Dr. Bauman's October 1, 2003 attending physician's statement of disability, indicated that Eason's condition

was not *caused* by his duties as a police officer. As stated by the Ouachita County Circuit Court, the doctors designated by LOPFI appear to have drawn a distinction between ‘caused by’ and ‘aggravated by’ the stress of work.”

Under the standard of review and the particular statutory language in Arkansas Code Annotated section 24-10-607(c)(1)(B) that allows LOPFI to designate the physicians, the Arkansas Court of Appeals held that substantial evidence supports the decision.

CIVIL LIABILITY:
Qualified Immunity

Pearson v. Callahan, No. 07-751, 1/21/09

In *Pearson v. Callahan*, the United States Supreme Court dealt, in large part, with the civil rights procedure mandated in *Saucier v. Katz*, 533 U.S. 194. In *Saucier*, the United States Supreme Court mandated a two-step sequence for resolving government officials’ qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.

Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have criticized the decision in *Saucier*’s on practical, procedural, and substantive grounds.

On reconsidering the procedure required in *Saucier*, the Court concluded that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

DRUGS: **Useable Amount**

Ficklin v. State, CACR08-593, 12/10/08

Michael Ficklin challenged the sufficiency of evidence at his Pulaski County jury conviction of Class-Y felony possession of methamphetamine with intent to deliver and ClassB-felony possession of ecstasy with intent to deliver, specifically claiming that the State did not prove that there was a usable amount of the controlled substances.

Testimony at trial focused upon the execution of a search warrant at a home in Little Rock. Little Rock Police Department detectives testified regarding the details of their respective roles and the inclusion of the SWAT team in this effort. Detective Vincent Lucio testified that he was the officer who applied for the search warrant and the officer in charge of the property being seized from the residence. Surveillance cameras were monitoring the outside of the home. He explained that to provide a tactical advantage for the team in the execution of the warrant, the warrant was executed at night. Sergeant Robert Mourot testified that he saw Ficklin coming out the front door then running back

inside as the team approached the house. He described the area in which Ficklin was detained and restrained within the house as an open living space with the kitchen, dining, and living areas as extending into one another.

Detective Lawrence Welborn testified that he found mail and other documents containing both Ficklin's name and the home's address on the kitchen counter, a loaded .38 caliber revolver on the dining table, and two operating television monitors in the living area on the fireplace that were connected to the outside cameras. He explained that in his experience and training, drug dealers use guns to protect the drugs and use surveillance equipment to see people, particularly law enforcement, coming to the door. Lieutenant David Hudson testified that he found a SAIGA .223 caliber rifle with a magazine containing seventeen live rounds on the living room couch near Ficklin. Detective Ryan Hudson found Ficklin's social security card on the fireplace mantel in the living area and a police scanner in a dining-area cabinet.

Detective Willie Thomas described how he found pills in a plastic bag, labeled exhibit thirteen (13), in Ficklin's pants pocket, and Detective Carrie Mauldin, who searched appellant simultaneously with Detective Thomas, told how she discovered \$737 in one of Ficklin's pockets. Reagan West, an Arkansas State Crime Laboratory forensic chemist, testified that State's exhibit thirteen (13) consisted of twenty-one tablets containing methamphetamine, ecstasy, caffeine and procaine. She explained that she commonly sees mixtures in pills and that "you never know what's going to be in [th]em. They have all kinds of different things

that can be in there." West further explained that she did not measure the amounts of each particular substance in the tablets because it was not standard procedure to quantitate the exact measurements of the substances in pills.

Detective Michael Terry explained his participation in the search and that he found green pills in a plastic bag, labeled State's exhibit fourteen (14), next to a bag of ammunition shell casings, on top of a china cabinet in the dining area. He also found 634 tablets of various colors, labeled State's exhibit sixteen (16), in a cigar box on the dining table which was located five feet from the living room couch. Detective Tim Stankevitz testified that he found two bullet-proof vests and a hand-held scale in the east bedroom.

The jury was instructed that it could consider the amount of the controlled substances with all the other facts and circumstances in determining the intent for which they were possessed. Ficklin's counsel moved for a directed verdict on the count of possession of methamphetamine with intent to deliver, specifically stating that the chemist did not quantify the amount of methamphetamine in each tablet. After the trial court denied that motion, counsel moved for a directed verdict on the count of possession of ecstasy with intent to deliver, stating that "I would again argue the jury is left to conjecture" regarding Ficklin's intent. While the State argues that Ficklin failed to preserve the challenge on appeal as to the ecstasy conviction, the motion in respect to the ecstasy count referenced counsel's earlier argument in which he asserted that the failure to quantitate the amount of the controlled substance resulted in a failure of proof of possession.

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

“In *Harbison v. State*, 302 Ark. 315, 322, 790 S.W.2d 146, 151 (1990), where the accused possessed a bottle containing a trace amount of dust residue, the Arkansas Supreme Court held that possession of a controlled substance must be of a measurable or usable amount to constitute a violation of Arkansas Code Annotated § 5-64-401 (Repl. 2006). The court reasoned that legislation criminalizing the possession of controlled substances was aimed at preventing use and trafficking of prohibited substances, and then concluded that the possession of a trace or less than useable amount does not contribute to either of those purposes.

“In the wake of *Harbison*, the limits of the concept of a usable amount have evolved with a fair degree of deference to the expertise of chemists and police officers familiar with drug use. In *Buckley v. State*, 36 Ark. App. 7, 816 S.W.2d 894 (1991), this court held that a chemist’s testimony that small chips of crack cocaine were sometimes loaded into a pipe was sufficient evidence for a fact-finder to infer that pieces of that size constituted a usable amount. In *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993), we held that 0.024 grams of cocaine was usable because the cocaine was: (1) capable of quantitative analysis, (2) could be seen with the naked eye, and (3) was tangible and could be picked up. Then, in *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994), we held that a marijuana cigarette dipped in PCP contained a sufficient amount of PCP to be usable where a police detective and a chemist both testified that smoking was the most common method of PCP use. Significantly, in *Williams*, this

court noted that the evidence was substantial even without proof as to the weight of the PCP.

“Following this line of cases, proof of a detectable amount of a controlled substance in a consumable form, such as a pill, is sufficient evidence for a fact-finder to infer that the accused possessed a usable amount of the controlled substance. In the case before us, the methamphetamine and ecstasy were contained in tablet form. The fact that each controlled substance was present in a pill form demonstrates its ability to be consumed and satisfies the usable amount requirement.”

INTERROGATION:
Alleged Coercive Tactics

United States v. Dehghani,
CA8, No. 08-1518, 12/22/08

In January 2006, a Kansas City, Missouri police investigation of child pornography-related messages posted to web sites led to an internet account registered at an address in Belton, Missouri. Detectives Maggie McGuire and Brian Roach visited the Belton address, which belonged to Kamron Dehghani and his wife. During the visit, with Dehghani’s permission, Roach removed a computer from the residence. After a forensic evaluation of the computer revealed child pornography, the detectives contacted Dehghani to arrange an interview. Dehghani originally declined to meet with the detectives, claiming that he suffered anxiety problems when traveling long distances. After the detectives agreed to conduct the interview at a police station close to his residence and at a time when his wife could drive him, Dehghani agreed to be interviewed.

The detectives' interview with Kamron Dehghani began around 6:30 p.m. and ended approximately five and a half hours later. At the beginning of the interview, McGuire read Dehghani his *Miranda* rights from a form. Dehghani read the form back to McGuire and signed it. Dehghani initially denied having any involvement with child pornography. At one point during the interview, Roach slammed his hand on the table and, in a loud tone of voice, told Dehghani that if

he continued denying involvement, he would be arrested. Roach then told Dehghani he needed to get ready for the arrest by taking everything out of his pockets and removing his belt and shoelaces. As Dehghani emptied his pockets, he told the detectives that they were correct when they earlier suggested that some people might be curious about child pornography because they had been abuse victims themselves. Dehghani stated that he was molested by his father and began to cry.

After the detectives resumed questioning, Dehghani continued to deny his involvement with child pornography until the detectives confronted him with evidence from his computer, at which point he confessed. The detectives then prepared a statement

“A statement is involuntary if the totality of the circumstances show that ‘pressures exerted by the authorities overwhelmed the defendant’s will.’ However, an interrogation of a suspect will always involve some pressure because its purpose is to elicit a confession. A lengthy interrogation, a raised voice or deception do not render a confession involuntary unless the overall impact of the interrogation caused the defendant’s will to be overborne.”

reflecting Dehghani’s answers to their questions, which Dehghani signed, and they allowed Dehghani to go home.

On appeal, one of Dehghani’s arguments was that his statement to the detectives was involuntary and should have been suppressed. Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

“A statement is involuntary if the totality of the circumstances show that ‘pressures

exerted by the authorities overwhelmed the defendant’s will.’ *United States v. Martin*, 369 F.3d 1046, 1055 (8th Cir. 2004). However, an interrogation of a suspect will always involve some pressure because its purpose is to elicit a confession. A lengthy interrogation, a raised voice or deception do not render a confession involuntary unless the overall impact of the interrogation caused the defendant’s will to be overborne.

“In support of his argument that his statement was involuntary, Dehghani contends that the detectives overcame his will by physically intimidating him, promising that he would not be jailed if he confessed, and questioning him after he had an emotional breakdown. The magistrate

judge's report and recommendation, adopted by the district court, made several factual findings that rebut Dehghani's claims. The court found that although Roach slammed his hand on the table and raised his voice, he did not physically intimidate Dehghani by, for example, raising his fists or using profanity. The court also found that the detectives never told Dehghani he would not be arrested if he confessed. The court additionally found that although Dehghani cried, he did not cry uncontrollably or appear disoriented. He did not confess immediately after crying; instead, he continued to deny involvement with child pornography until the detectives confronted him with evidence from his computer. None of these findings of fact are clearly erroneous in light of the detectives' testimony.

"Furthermore, there is no evidence that Dehghani was particularly susceptible to the detectives' pressure. Dehghani appeared to be of at least average intelligence because his answers to questions were coherent, if not always truthful, and he displayed some understanding of the internet and file-sharing programs. *United States v. LeBrun*, 363 F.3d 715, 726 (8th Cir. 2004) (en banc) (noting that when a defendant possesses at least 'average intelligence,' his inculpatory statements are less likely to be compelled). Moreover, the court found that Dehghani had at least nine years of education, an amount that does not render his confession involuntary per se. *United States v. Makes Room*, 49 F.3d 410, 415 (8th Cir. 1995) (explaining that a defendant's eighth grade education, among other factors, did not make his confession involuntary where he clearly understood his rights). Additionally, although Dehghani argues that he was affected by certain medications he had taken on the day of the interview, the

court found that there was no evidence that Dehghani's medication impaired him in any way. This finding is not clearly erroneous in light of the detectives' testimony that Dehghani did not appear impaired and that he gave clear, responsive answers to the detectives' questions. See *Martin*, 369 F.3d at 1056 (finding no clear error in the district court's determination that the defendant did not suffer mental impairment as a result of medication). Finally, the interrogation lasted approximately five and a half hours, which is not sufficient to render the confession involuntary per se. See *Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir. 1993) (questioning of a suspect for six to seven hours was not "per se unconstitutionally coercive.")

"Other factors also weigh in favor of a finding that Dehghani's confession was voluntary. First, the detectives advised Dehghani of his *Miranda* rights orally and in writing. Dehghani waived those rights orally and in writing, and he never invoked any of his *Miranda* rights. See *United States v. Mendoza*, 85 F.3d 1347, 1350 (8th Cir. 1996). In addition, the interview was conducted at a time and location convenient to Dehghani. Considering the totality of the circumstances, we find that the district court did not err in denying the motion to suppress because the detectives' actions did not overcome Dehghani's will and Dehghani confessed voluntarily."

PROBABLE CAUSE: Careless Driving
Stokes v. Arkansas, No. CR08-86, 1/22/09

Linda Stokes and a passenger, Amy Howard, were traveling along Interstate 40 on July 31, 2007, when Officer Eric Lee noticed that the vehicle was traveling

below the speed limit at 60 miles per hour. Officer Lee testified that once he got behind the vehicle, it made a hasty exit off of the interstate into Plumerville. Officer Lee could see Stokes and the passenger watching him out of the mirrors.

According to Lee, “the vehicle turned left and went North on Highway 92 to Plumerville.” He followed the vehicle and it eventually came to a complete stop in the road. He testified that it seemed like they were looking for a place to turn, which piqued his interest. The vehicle continued on Highway 92 and turned left on Ballpark Road. Lee’s interest was piqued again because Ballpark Road is an all-black neighborhood with a dead-end street and the occupants of the vehicle were two white females. He ran the vehicle’s tag and discovered that it was registered in Arizona. He continued down Highway 92 past Ballpark Road and observed in his mirror that the vehicle was backing down Ballpark Road. He turned around and the vehicle began driving down the road again. Lee then got behind the vehicle and initiated a traffic stop for careless driving because the vehicle had backed down a city street.

Subsequent investigation by Officer Lee revealed that Linda Stokes was driving on a suspended driver’s license and that the rental vehicle was not to be taken outside of Arizona. Since neither Stokes nor the passenger had a valid driver’s license, a tow truck was called. An inventory of the vehicle revealed marijuana.

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

“Lee testified that he pulled the car over for careless driving. Arkansas Code Annotated § 27-51-104 (Supp. 2007) covers careless and prohibited driving, stating in pertinent part:

(a) It shall be unlawful for any person to drive or operate any vehicle in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, vehicular or otherwise, or in such a manner as to evidence a failure to maintain proper control on the public thoroughfares or private property in the State of Arkansas.

“The State contends that Stokes violated subsection (a) because she operated the vehicle ‘in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, vehicular or otherwise...’ by driving her car in reverse down the street.

“With regard to whether backing down a street was careless, Officer Lee testified, ‘I don’t believe any cars were coming. There were no cars behind me. There is always a danger. In the absence of any other vehicles around, I wouldn’t say there necessarily was a danger.’ Based on Officer Lee’s testimony that there were no other vehicles around, and there was not ‘necessarily a danger,’ we cannot say that the facts or circumstances within the officer’s knowledge were sufficient to permit a person of reasonable caution to believe that Linda Stokes failed to keep a proper lookout for other traffic by backing down the road.

“The State contends that, even if Lee did not have probable cause to stop Stokes for careless driving, he did have probable cause to stop her for violating Ark. Code Ann. § 27-

51-1309(a)(Supp. 2007), which provides that the driver of a vehicle shall not back a vehicle upon any roadway, unless the movement can be made with reasonable safety and without interfering with traffic. Once again, we cannot say that the facts within the officer's knowledge were sufficient to permit a person of reasonable caution to believe that the vehicle could not be backed down the road 'with reasonable safety and without interfering with traffic.'"

The Arkansas Supreme Court concluded that there was no probable cause to believe that Stokes was committing a traffic violation and that the circuit court therefore erred in denying Stokes' motion to suppress.

PROBABLE CAUSE:

Tandem Driving as Basis For Arrest

United States v. Rodriguez-Rodriguez,
CA10, No. 07-2214, 12/23/08

Jose Cruz Rodriguez-Rodriguez ("Rodriguez") was observed by a Santa Clara Police Officer as he drove his red Nissan just ahead of a brown pickup truck along a lightly traveled New Mexico highway. Upon stopping the brown pickup truck, the officer discovered that it was carrying a substantial amount of marijuana. He then radioed County Sheriff's Deputies and requested an interception of Rodriguez's car. The call resulted in Rodriguez being taken into custody, whereupon he admitted to working in conjunction with the driver of the brown truck in the transport of marijuana.

On direct appeal, Rodriguez argues that his traffic stop violated the Fourth Amendment because it was not supported by

reasonable suspicion. He also argues that his investigative detention amounted to an illegal arrest because it exceeded the scope of any arguably permissible stop, and officers lacked probable cause to believe he had violated the law.

Upon review, the 10th Circuit Court of Appeals found, in part, as follows:

"Sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle.

"There is considerable objective evidence that the brown pickup and red Nissan were driving in tandem. Officer Marquez testified that the two vehicles traveled a mere two car lengths apart on a highway in very light traffic during the predawn hours of the morning, and as they did so, Rodriguez repeatedly swerved to better observe Officer Marquez's vehicle as it traveled behind the truck. Moreover, Rodriguez abruptly sped off when Marquez stopped the pickup, and the pickup seemingly waited for Rodriguez's vehicle to elude Marquez's range of vision before pulling over.

"Although this is a highly factual inquiry and all facts present are necessary to our conclusion, Marquez had sufficient evidence to conclude that Rodriguez and Gallardo were traveling in tandem. We hold that Officer Marquez had probable cause to stop Rodriguez's car based on narcotics trafficking. Marquez already knew that the pickup truck contained a large quantity of marijuana; thus, they unquestionably had probable cause to believe that Gallardo had committed a

crime. Accordingly, we hold that the evidence of tandem driving in the present case created probable cause that Rodriguez was committing a crime as well. This probable cause was sufficient to support his traffic stop and any subsequent arrest.”

**PROSECUTORS: Absolute Immunity;
Administrative Tasks Which Are
Prosecutorial in Nature**

Van De Kamp v. Goldstein,
No. 07-854, 1/26/09

In *Van De Kamp v. Goldstein*, the United States Supreme Court dealt with a 42 U.S. C. § 1983 claim asserting that certain supervisory prosecutors violated their constitutional duty to communicate impeachment information due to their failure to properly train or supervise prosecutors or to establish an information system containing potential impeachment material about informants.

Prosecutors enjoy absolutely immune from liability in §1983 suits brought against prosecutorial actions that are intimately associated with the judicial phase of the criminal process. Absolute immunity may not apply when a prosecutor is engaged in investigative or administrative tasks. The Court found that determining what information should be included in training, supervision, or information-system management on impeachment information on informants was “prosecutorial” in nature. Accordingly, absolute immunity must follow.

**SEARCH AND SEIZURE:
Arrest; Seizure and Search
of Cellular Telephone**

United States v. Murphy,
CA4, No. 07-4607, 1/15/09

In the early morning hours of June 6, 2006, Virginia State Trooper Danny Pruett was operating stationary radar along Interstate 81 in Wythe County, Virginia, when he observed a vehicle traveling northbound at a high rate of speed. Radar confirmed that the vehicle was traveling 95 miles per hour. After stopping the vehicle, Trooper Pruett asked the driver for her license and registration. The driver, who was later identified as Marsha Massengill, advised him that she had left her operator’s license at home. Massengill told Trooper Pruett that her name was Debbie Arlene Sanchez, and she provided a date of birth. Trooper Pruett observed that Massengill appeared to be nervous and hesitant. The front seat passenger, who was later identified as Damian Murphy, also claimed to have left his license at home. He told Trooper Pruett that his name was Corey Antonio Murphy and provided a date of birth. The back seat passenger, later identified as James McCord, provided to Trooper Pruett an unusually thick Alabama license bearing the name Clarence Todd Drain. The occupants could not produce a registration for the vehicle, but they did produce a rental agreement for the vehicle in the name of Sabrina Callaway.

Trooper Pruett conducted a check through the National Crime Information Center (NCIC) on the names and dates of birth provided by the vehicle’s occupants. The NCIC check revealed that there were no licenses or state

identification cards issued to any persons by those names. The check also revealed that the license number appearing on the license of "Clarence Todd Drain" was a legitimate number, but that it had been issued to a female.

Having determined that no one in the vehicle had a valid driver's license, Trooper Pruett prepared to have the vehicle towed. He also requested additional officer assistance to help determine the identity of the vehicle's occupants and to assist him in conducting an inventory of the vehicle's contents, as required by Virginia State Police policy.

In speaking with Trooper Pruett, Massengill initially referred to the front seat passenger as "Corey" but later told Trooper Pruett that his name was "Damian." She referred to McCord as "James" and "Jay." She also told Trooper Pruett that she and Murphy were traveling to New York City to see Murphy's sick grandmother, and that McCord was just getting a ride to New York.

Murphy spoke with a second officer on the scene, Trooper Chapman. Murphy first identified himself to Trooper Chapman as "Corey Antonio Murphy" but later stated that his name was "Corey Demetrius Murphy." He provided Trooper Chapman with the names of individuals with whom he claimed to work at a company called Colgate Steel who allegedly could verify his identity. Murphy also gave Trooper Chapman his cell phone and showed him how to use it in order to locate the number for his employer.

After conducting the NCIC check, Trooper Pruett arrested McCord for providing a fictitious driver's license. When told that

the license number that he had provided belonged to a woman, McCord admitted that the license was fictitious, and he provided a second false name, James Anthony McCoy. McCord claimed ownership of a green duffle bag in the back-seat of the vehicle. A search of this duffle bag incident to McCord's arrest revealed a fragment of a glass smoking pipe containing burnt residue, a dagger-type weapon, four additional fake licenses, and a plastic baggie with an off-white powdery substance consistent with the appearance of cocaine.

Trooper Pruett arrested Massengill for reckless driving. Trooper Pruett searched her purse incident to her arrest and found a Jefferson County, Alabama inmate photo identification card with her picture and a Social Security card, both bearing the name "Marsha Arlene Massengill." Massengill admitted that it was her true name, and she explained that she had lied about her identity because she was wanted in Alabama for forgery. Trooper Pruett confirmed this warrant through NCIC.

Because Murphy had provided multiple names and his true identity could not be verified, he was arrested for obstruction of justice.

The officers began an inventory search of the vehicle at the scene. Inside the trunk, they discovered a duffle bag containing make-up and women's clothing, and a laptop bag containing \$14,790 in U.S. currency, which was packaged in stacks containing equal amounts of money, folded and arranged to offset one another, and then banded with rubber bands. Based on his training, Trooper Pruett knew this type of packaging was

often used by drug dealers in the purchase of large quantities of narcotics. Murphy claimed ownership of the money and stated that he had withdrawn the money from a bank account, but he admitted that he had no documentation of this withdrawal. Murphy claimed to have earned the money by operating a lawn care business. Murphy further stated that he was planning to use the money to purchase shoes and clothing in New York for stores that he planned to operate in Alabama. A canine unit trained to detect the smell of narcotics was brought first to the scene of the traffic stop and then to the Sheriff's Department. While the drug dog did not alert to the vehicle on the scene, it did alert to the currency at the station in a manner indicating that it was positive for drug residue.

Prior to the vehicle being towed, the officers removed all items from the vehicle and transported them to the Sheriff's Department for completion of the inventory. All three of the vehicle's occupants were transported to the Wythe County Sheriff's Department for booking. When Murphy was told that he was going to be fingerprinted, he told Trooper Pruett his true name and date of birth. Murphy told Trooper Pruett that he had lied about his identity because he was on parole for several drug violations and had left the state of Alabama without his parole officer's permission. His identity was verified through NCIC and by photo identification faxed to the Sheriff's Office from an Alabama jail.

While at the Sheriff's Department, McCord made several requests to go to the restroom. He was searched prior to being allowed to go to the restroom, and a bag containing crack cocaine and powder cocaine was recovered

from his underwear. At that point, McCord's duffle bag was more thoroughly searched, and a business card was discovered, which revealed McCord's true name. McCord's identity was verified by photo identification faxed from Alabama authorities, who advised that there was an outstanding arrest warrant for McCord for distribution of narcotics.

At the Sheriff's Department, the officers continued to inventory the items removed from the vehicle. One of the items that had been removed from the glove compartment of the vehicle was a plastic bag containing a yellow Timberland t-shirt. When the officers searched the bag at the Sheriff's Department, they discovered that inside the shirt were 26 uncut sheets of counterfeit \$100 bills. Murphy denied any knowledge of the counterfeit money, although he admitted that he had placed the plastic bag in the glove compartment at McCord's request.

During inventory of items seized from the vehicle, a supervisor advised Trooper Pruett that some of the cell phones contained possible incriminating information, and he instructed Pruett to log them as evidence.

The evidence in this case was transferred to Virginia State Police headquarters and subsequently turned over to the custody of a Drug Enforcement Administration (DEA) Task Force Officer, who transported it to the DEA office for processing. The evidence, including Murphy's cell phone, was examined by DEA Special Agent Brian Snedeker on June 29, 2006. Snedeker identified several text messages sent from an individual named Brian Sheppard. In a telephone interview with Snedeker that same day, Sheppard stated that Murphy was his drug supplier.

Upon appeal, Murphy argued that the district court erred in refusing to suppress evidence of his cell phone and its contents. Specifically, Murphy contended that the district court erred in concluding that the cell phone was seized during a search incident to arrest because there was no evidence presented to indicate that the cell phone was located on his person at the time of his arrest. He further argued that the officers were not authorized to examine the contents of the phone without first obtaining a warrant.

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

“...the Fourth Amendment protects individuals against ‘unreasonable searches and seizures.’ *U.S. Constitution, Amendment. IV.* Warrantless searches ‘are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.’ *United States v. Bush*, 404 F.3d 263, 275 (4th Cir. 2005) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)). One of the well-recognized exceptions to the warrant requirement is a search incident to a lawful arrest. See *United States v. Currence*,

“Citing the manifest need to preserve evidence, this Court has held on at least two prior occasions, albeit in unpublished opinions, that officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest... Similarly, the Fifth Circuit and Seventh Circuit have held that the need for the preservation of evidence justifies the retrieval of call records and text messages from a cell phone or pager without a warrant during a search incident to arrest.”

446 F.3d 554, 556 (4th Cir. 2006). Pursuant to this exception, law enforcement officers following a lawful arrest may search ‘the arrestee’s person and the area within his immediate control.’ *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)).

“Citing the manifest need to preserve evidence, this Court has held on at least two prior occasions, albeit in unpublished opinions, that officers may retrieve text messages and other information from cell phones and pagers seized incident to an

arrest. See *United States v. Young*, 278 Fed. Appx. 242, 245-46 (4th Cir. May 15, 2008) (per curiam) (holding that officers may retrieve text messages from cell phone during search incident to arrest), *cert. denied*, 129 S.Ct. 514 (2008); *United States v. Hunter*, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. Oct. 29, 1998) (holding that officers may retrieve telephone numbers from pager during search incident to arrest). Similarly, the Fifth Circuit and Seventh Circuit have held that the need for the preservation of evidence justifies the retrieval of call records and text messages from a cell phone or pager without a warrant during a search incident to arrest. See *United States v. Finley*, 477 F.3d 250, 260 (5th Cir.),

cert. denied, 127 S. Ct. 2065, 167 L. Ed. 2d 790 (2007); see also *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996).

“Murphy argues that whether a cell phone may be searched without a warrant can be determined only upon the officers ascertaining the cell phone’s storage capacity. In so arguing, he concedes that a device with a small storage capacity may be searched without a warrant due to the volatile nature of the information stored, but that a search of a cell phone with a larger storage capacity would implicate a heightened expectation of privacy and thus would require a warrant to be issued before a search could be conducted.

“Murphy’s argument is problematic for several reasons. First, Murphy has not provided the Court with any standard by which to determine what would constitute a ‘large’ storage capacity as opposed to a ‘small’ one, as he does not quantify these terms in any meaningful way. Second, Murphy has introduced no evidence that his cell phone had the requisite ‘large’ storage capacity which he contends is subject to a heightened expectation of privacy. Third, even assuming that his cell phone does have a ‘large’ storage capacity, his argument still fails because it is premised on the unwarranted assumption that information stored on a cell phone with a ‘large’ storage capacity would be any less volatile than the information stored on a cell phone with a ‘small’ storage capacity.

“Finally, Murphy’s argument must be rejected because to require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule. It is unlikely that officers would have any way of

knowing whether text messages and other information stored on a cell phone will be preserved or automatically deleted simply by looking at the cell phone. Rather, it is very likely that in the time it takes for officers to ascertain a cell phone’s particular storage capacity, the information stored therein could be permanently lost. For these reasons, we reject Murphy’s argument that the government must ascertain storage capacity in order to justify a warrantless search of that cell phone incident to arrest.

“Further, Murphy’s argument that the search of the cell phone’s contents was unlawful because it was not performed contemporaneously with his arrest is also without merit. The evidence establishes that the initial search of the cell phone occurred in Murphy’s presence and at his direction, after he indicated to Trooper Chapman that the phone contained phone numbers for people who could corroborate his identity. Another search of the cell phone occurred at the Sheriff’s Department during the course of the inventory search, when a supervising officer noted that the cell phone contained potentially incriminating information and directed Trooper Pruet to retain the cell phone as evidence in the case.

“Of course, once the cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents, as Agent Snedeker did, without seeking a warrant. See *United States v. Edwards*, 415 U.S. 800, 803-04, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). For these reasons, we conclude that the district court committed no error, plain or otherwise, in refusing to suppress the contents of Murphy’s cell phone.”

SEARCH AND SEIZURE:
Emergency Search; Domestic Violence

United States v. Henderson,
 CA8, No. 08-1966, 1/29/09

In *United States v. Henderson*, Kansas City police officers were dispatched to investigate a report of a suspicious person armed with a gun. A ten-year-old boy advised them that Alphonzo Henderson was armed with a gun and believed that his wife, Veronica Bennett, was in the house with another man. The boy told the officers that Henderson was walking around the house with the weapon saying that he was “going to kill him.”

The officers then went to the house and Allie Bennett, Veronica’s mother, informed them that Henderson had a gun and was inside a bedroom with Veronica. When the officers knocked on the bedroom door, someone inside the room turned off the lights and the conversation inside ceased. After a short wait, the police officers opened the door, entered the bedroom, and arrested and handcuffed Henderson. They then searched the room and found a gun underneath a sheet on the bed next to where Henderson and his wife were standing.

Henderson argues that the search was illegal and that the gun should have been suppressed because the officers did not obtain a search warrant. But officers who have a legitimate concern for their safety or for the safety of others may search areas that may conceal a threat to them without a warrant. See *United States v. Poe*, 462 F.3d 997, 1000 (8th Cir. 2006).

“Officers who have a legitimate concern for their safety or for the safety of others may search areas that may conceal a threat to them without a warrant.”

The 8th Circuit Court of Appeals found, in part, as follows:

“The district court found, on an adequate record, that the search here was conducted out of the officers’ legitimate concern for safety. It is true that Henderson was handcuffed at the time that the search occurred. But because domestic disturbances are highly volatile and involve large risks and because the police officers had reason to believe that a loaded gun was in the bedroom, we think it plain that exigent circumstances justified their effort to secure the weapon.”

SEARCH AND SEIZURE:
Hotel/Motel Rooms; Occupant Eviction

United States v. Molsbarger,
 CA8, No. 07-3874, 1/6/09

In the early morning hours of January 6, 2006, the night manager of the Ramada Inn Hotel in Grand Forks, North Dakota, contacted the Grand Forks Police requesting assistance with quelling a disturbance in Room 101. The manager explained that he had received several complaints about loud partying in the room. He told the police that he had seen many people entering and exiting the room and that he suspected illegal drug activity. The manager said that he had warned

the occupants of the room to be quiet, and that he now wanted the police to help evict them.

Officers Schauer, Jacobson, and Moe responded to the call. After speaking with the manager, the officers went with him to Room 101. As they stood outside, the officers heard loud noise and what they believed was a discussion about illegal drug trafficking. Officer Schauer briefly conferred with the hotel manager, who reiterated that he wanted the occupants evicted. Officer Schauer then knocked on the door and asked for permission to enter the room. A woman named Ashley Bigalke answered, but refused to allow the officers to enter the room because it was not hers and she did not know who had rented it. At that point, Officer Schauer told Bigalke that hotel management wanted everyone in the room evicted. He also stated that he was coming into the room and that all the occupants should gather their belongings and leave the hotel.

Shortly after entering the room, Officer Jacobson recognized one of the occupants as Corey Molsbarger, for whom there were outstanding arrest warrants. Molsbarger was lying sideways on the bed, apparently asleep. The officers handcuffed Molsbarger and performed a search incident to arrest. In a nightstand next to the bed, the officers found a methamphetamine pipe and a small butane torch. Molsbarger was carrying \$940 cash, and the officers found at the foot of the bed an empty beer box containing approximately one-half pound of methamphetamine, a small digital scale, and some marijuana.

On appeal Molsbarger seeks to suppress all of the evidence, contending that the

search of the hotel room violated his Fourth Amendment rights.

Upon review, the 8th Circuit Court of Appeals found, in part, as follows:

“The Fourth Amendment protects individuals from warrantless searches in places where they have a reasonable expectation of privacy, a protection that may extend to a hotel room if certain factors are present. Both parties focused on the threshold question whether Molsbarger ever had a reasonable expectation of privacy in the room. It is unnecessary to resolve that question, however, because whatever expectation of privacy Molsbarger may have had, it ceased when he was justifiably evicted from the hotel.

“Justifiable eviction terminates a hotel occupant’s reasonable expectation of privacy in the room. See *United States v. Rambo*, 789 F.2d 1289, 1295-96 (8th Cir. 1986); see also *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) (“Once a hotel guest’s rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room.”) (quoting *United States v. Rahme*, 813 F.2d 31, 34 (2d Cir. 1987)). This rule is consistent with the Fourth Amendment’s goal of protecting the sanctity of private behavior. Disruptive, unauthorized conduct in a hotel room invites intervention from management and termination of the rental agreement. Thus, an individual ‘cannot assert an expectation of being free from police intrusion upon his solitude and privacy in a place from which he has been justifiably expelled.’ *Rambo*, 789 F.2d at 1296.

“Molsbarger and the other occupants of the room were creating a public disturbance that

prompted several complaints from other hotel occupants about the noise level in the room. Notwithstanding the manager's warning that they quiet down, the occupants of Room 101 continued their raucous behavior. When the police arrived, the manager confirmed that he wanted the occupants evicted. The police justifiably entered the room to assist the manager in expelling the individuals in an orderly fashion. Any right Molsbarger had to be free of government intrusion into the room ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so. At that point, Molsbarger was identified and determined to be the subject of outstanding arrest warrants, leading to the discovery of the contraband in a search incident to his arrest. We conclude, therefore, that the district court did not err in denying Molsbarger's motion to suppress evidence."

**SEARCH AND SEIZURE: Open Fields;
Motion-Activated Video Camera**

United States v. Vankesteren,
CA4, No. 08-4110, 1/8/09

Steve Vankesteren is a farmer on the Eastern Shore of Virginia. In December 2006, the Virginia Department of Game and Inland Fisheries (VDGIF) received a telephone call alerting them that a protected bird was trapped in a cage in Vankesteren's fields near a public road. Steve Garvis, an agent with VDGIF, responded to the call and observed a trap that was one-to-two feet high and contained five leghold traps—one on top of the cage and four surrounding it. The trap was uncovered and set, and it contained one live and one dead pigeon inside. Garvis had allegedly seen a similar trap on Vankesteren's

property in 2003 and on the internet being advertised for the purpose of hawk trapping. In January 2007, Garvis contacted the VDGIF's Special Operations Division in order to obtain video surveillance of the trap. Such cameras were used because there were only five VDGIF special agents in the Commonwealth. The camera had a viewing area of twelve-by-twelve feet, ran only during daylight hours, and was motion activated. On January 11, 2007, Garvis and the special operations agents installed the camera without a warrant.

On January 24, 2007, Special Operations Agent Gene Agnese notified Garvis that he had obtained surveillance footage of two birds being trapped and killed at the site of the camera. Vankesteren killed the first bird on January 17. Garvis could not identify the bird in the footage with certainty, but he narrowed the possibilities to a red-tailed hawk, broad-wing hawk, or red-shouldered hawk. Vankesteren killed the second bird with an ax on January 20, and Garvis identified the bird in that footage as a red-tailed hawk. Agnese advised Garvis that their carcasses were likely along the hedgerow by the trap, just outside the camera's viewing area. On January 25, 2007, Garvis went to the area and located the carcasses. He identified both of the birds by their markings as red-tailed hawks. One of the hawks had sustained severe head damage, consistent with the video footage, and the other carcass was of an immature red-tailed hawk. The birds had not been eaten and had not begun decomposing.

On January 30, 2007, Garvis and Agent Dan Rolince of the U.S. Fish and Wildlife Service met with Vankesteren at his residence. He admitted to catching some hawks by accident and placing their carcasses by the hedgerow.

Vankesteren was charged in the U.S. District Court for the Eastern District of Virginia with two counts of taking or possessing a migratory bird without a permit, in violation of 16 U.S.C. § 703 (2006) and 50 C.F.R. § 21.11 (2008). Vankesteren appeared pro se before a magistrate judge on August 7, 2007. The judge refused to suppress the video surveillance footage and found the appellant guilty on both counts, imposing a \$500 fine for each count, along with a \$10 special assessment and \$25 processing fee.

Upon review, the Fourth Circuit Court of Appeal found that the protective wall of the Fourth Amendment does not shield Vankesteren from the Commonwealth's use of such a camera, finding, in part, as follows:

"In *Hester v. United States*, 265 U.S. 57, 59 (1924), the Supreme Court first held that the protection of the Fourth Amendment did not extend to open fields. In that case, revenue officers went to Hester's house and observed an illegal moonshine transaction from fifty to one-hundred yards away on Hester's land. The Court found no Fourth Amendment violation.

"The open-fields doctrine was clarified in *Oliver v. United States*, 466 U.S. 170 (1984). There, the Supreme Court considered two cases in which marijuana was being grown in wooded areas on the defendants' properties. In one instance, the police walked around a locked gate with a 'No Trespassing' sign, passed a barn and parked camper, and continued after someone shouted at them to leave. A mile from the defendant's house, they found the marijuana field. In the other case, police followed a path between the defendant's residence and the neighboring

house into the woods until they saw two marijuana patches surrounded by chicken wire. Upholding both searches, the Court held that 'an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home [the curtilage].' The Court further noted, 'An open field need be neither "open" nor a "field" as those terms are used in common speech. For example a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.

"In *United States v. Dunn*, 480 U.S. 294 (1987), the Supreme Court considered a case that involved property that was approximately fifty yards from the main residence and on which officers took the following actions: They crossed over the perimeter fence and one interior fence. Standing approximately midway between the residence and the barns, the DEA agent smelled what he believed to be phenylacetic acid, the odor coming from the direction of the barns. The officers approached the smaller of the barns— crossing over a barbed wire fence— and, looking into the barn, observed only empty boxes. The officers then proceeded to the larger barn, crossing another barbed wire fence as well as a wooden fence that enclosed the front portion of the barn. The officers walked under the barn's overhang to the locked wooden gates and, shining a flashlight through the netting on top of the gates, peered into the barn. Once more, the Court found that there was no Fourth Amendment violation.

"The *Dunn* Court established four factors to consider when resolving questions about the boundaries of curtilage: 'the proximity

of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.’ Applying the factors, the Court found that the barn was sixty yards from the house; it was outside the fence surrounding the house, police had objective data— aerial photographs—that showed the barn was not being used for intimate activities, and there was no indication that the interior fences were designed to keep people out.

“Given the facts of these Supreme Court decisions, Vankesteren has little on which to base his case. Vankesteren instead stakes his case on the argument that hidden surveillance cameras are subject to a higher degree of Fourth Amendment scrutiny.

“Vankesteren attempts to distinguish his case from *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999), the most directly relevant case on this issue. In that case, law enforcement agents placed unmanned, motion-activated surveillance cameras onto land in a national forest in order to monitor a patch of marijuana plants. The agents used the footage from the cameras in order to identify and track down the defendants in the case. The court held that the placement of the cameras on public land, open to all, did not violate the defendants’ Fourth Amendment rights.

“While *McIver* involved public land and this case involves private land, the effect is still the same: just as one would not have a reasonable expectation of privacy in a national forest, the foregoing cases demonstrate that Vankesteren had no reasonable expectation

of privacy in the open fields where he killed the hawks. Those fields were located a mile or more from his home, near a public road, and as evidenced by the phone call reporting the trap, the land was accessible to other members of the public. Vankesteren notes that he felt comfortable enough to relieve himself there, but that is of no consequence under our jurisprudence.

“The idea of a video camera constantly recording activities on one’s property is undoubtedly unsettling to some. Individuals might engage in any number of intimate activities on their wooded property or open field—from romantic trysts under a moonlit sky to relieving oneself, as in Mr. Vankesteren’s case—and do so under the belief that they are not being observed. But the protection of the Fourth Amendment is not predicated upon these subjective beliefs.

“Open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. *Oliver*, 466 U.S. at 179. Anyone could have walked onto Vankesteren’s property, including a VDGIF agent, and observed his traps. Under our jurisprudence, VDGIF could have stationed agents to surveil Vankesteren’s property twenty-four hours a day. That the agents chose to use a more resource-efficient surveillance method does not change our Fourth Amendment analysis.

“Since Vankesteren had no legitimate expectation of privacy, the agents were free, as on public land, to use video surveillance to capture what any passerby would have been able to observe. As the Supreme Court noted in *Dow Chemical Co. v. United States*, 476 U.S.

227, 238 (1986), when it was assessing the constitutionality of aerial surveillance by the EPA:

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.

“Likewise, the placement of a video camera in an open field does not portend the arrival of the Orwellian state that the appellant would have us fear. We are not dealing in this case with a camera that took, for instance, thermal images of Vankesteren’s home or that was equipped with an automatic guidance system that allowed it to roam about Vankesteren’s property, possibly into protected Fourth Amendment areas. Instead, this camera was in a fixed location, was focused on a limited area of Vankesteren’s fields, was activated only by motion, and recorded only during the daylight hours. Essentially, the camera did little more than the agents themselves could have physically done, and its use was therefore not unconstitutional.”

SEARCH AND SEIZURE:

Plain View;

Incriminating Nature of Item Seized

United States v. Armstrong,
CA8, No. 08-1974, 2/10/09

On June 29, 2006, a search warrant was issued by the District Court of Blue Earth County, Minnesota, granting police officers the authority to search the residence and vehicle of Larry Armstrong and his girlfriend, Vera Gant (Gant). The police officers had probable cause to believe Armstrong and Gant used a stolen credit card to make several purchases, including the purchase of wheel rims on their vehicle. The warrant authorized the police officers to look for evidence of the fraudulent purchases made by Armstrong and Gant.

On the same day the warrant was issued, Mankato, Minnesota, police officers executed the warrant. Officer William Reinbold (Officer Reinbold), a member of the Minnesota Valley Drug Task Force, assisted in the execution of the warrant. Officer Reinbold entered the residence and searched the bedroom. Upon entering the bedroom, Officer Reinbold noticed a small plastic container which resembled a hotel ice bucket. Officer Reinbold searched the container looking for stolen credit cards and receipts. In the bucket, Officer Reinbold found a small electronic digital scale and a razor blade with white residue. Officer Reinbold field tested the white residue, and the test revealed the residue contained cocaine. Officer Reinbold told his partner about the field test results, and his partner and another officer immediately arrested Armstrong and Gant for possession of narcotics. During the same

search, other officers found cocaine residue in a small jeweler-sized plastic bag in the center console of Armstrong's vehicle, and also found approximately ten unused jeweler-sized bags in the residence's kitchen closet.

After Officer Reinbold finished searching the container, he proceeded to search the bedroom closet about three to five feet from the container. Officer Reinbold moved clothes on the floor of the closet and uncovered a small black case. Officer Reinbold opened the unlocked end of the case to look for credit cards and receipts, and noticed a Bersa Thunder .380 handgun with ammunition in the case. Officer Reinbold seized the handgun and gave it to another officer to compare the serial number with serial numbers of stolen firearms. The serial number check revealed the handgun was stolen, and a subsequent background check of Armstrong revealed Armstrong was a convicted felon.

Armstrong was indicted on one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g). The indictment also charged Armstrong with being an armed career criminal under 18 U.S.C. § 924(e). Armstrong moved the district court to suppress the handgun because it was obtained in violation of the Fourth Amendment. The district court referred the motion to a magistrate, and on February 13, 2007, the magistrate conducted a hearing on the motion to suppress. During the hearing, the government called Officer Reinbold. Officer Reinbold testified about his participation in the search, and stated his training and experience led him to believe Armstrong and Gant were engaged in narcotics dealing when he found the electronic digital scale and razor blade with

cocaine residue. Officer Reinbold also testified the handgun in the vicinity of the narcotics on the scale and razor blade evidenced narcotics dealing. The magistrate recommended the district court deny Armstrong's motion to suppress the handgun because the handgun's incriminating character was immediately apparent under the plain view doctrine after the scale and razor blade with cocaine residue provided probable cause to suspect drug trafficking.

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

"...under the plain view doctrine, evidence may be seized without a warrant if the following three conditions are met: (1) the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, (2) the object's incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object itself. *United States v. Hughes*, 940 F.2d 1125, (8th Cir. 1991).

"The only dispute in this appeal is whether the handgun's incriminating character was immediately apparent. Evidence is immediately apparent if there is probable cause to associate the property seized with criminal activity. *United States v. Newton*, 788 F.2d 1392, (8th Cir. 1986). In determining whether this requirement is met, we may consider the collective knowledge of the officers executing the searches.

"The circumstances surrounding the seizure of the handgun persuade us there was probable cause to believe drug trafficking was occurring. Officer Reinbold testified the

small electronic digital scale and razor blade with cocaine residue led him to believe drug trafficking was occurring. Officer Reinbold's belief was strengthened when he found the gun and ammunition three to five feet from the scale and razor blade. Officer Mortensen and Officer Boulger corroborated Officer Reinbold's conclusion. Officer Mortensen, using the 'collective knowledge of the officers executing the searches,' testified the jeweler-sized bags and the electronic digital scale were indicative of drug distribution. Officer Boulger affirmed the scale was a tool of the drug trade, and the scale, razor blade, and jeweler-sized bags collectively evidenced drug trafficking. Based on this record, we conclude a reasonable officer would have probable cause to believe Armstrong was engaging in drug trafficking.

"Because it is unlawful to use, carry, or possess a firearm in furtherance of a drug trafficking crime, the handgun's incriminating nature was immediately apparent and admissible under the plain view doctrine."

SEARCH AND SEIZURE:
**Protective Sweep; Search Under
 Mattress Where Suspect is to Sit on Bed**

United States v. Bennett,
 CA11, No. 08-12352, 1/21/09

In *United States v. Bennett*, FBI agents arrested Dain Bennett after entering his mother's apartment to execute an arrest warrant for him. During a protective sweep of one of the apartment's bedrooms, which was occupied by Bennett's teenaged brother and a friend but not Bennett, agents located a rifle between a mattress and box spring. Bennett contends that the entry and search were

unlawful. He challenges the district court's denial of his motion to suppress evidence because the agents improperly expanded the scope of their protective sweep outside Bennett's "grab area."

Upon review, the 11th Circuit Court of Appeals found, in part, as follows:

"On the morning of Bennett's arrest, at least seven agents entered his mother's apartment looking for him. The FBI sent that many agents because the crime underlying one of the arrest warrants—aggravated assault with a gun—indicated that Bennett might be armed. The agents who conducted the protective sweep of the back bedroom expected to find someone dangerous hiding there: Bennett. Thus their initial sweep of the room for people, during which they found the two teenaged boys, was justified.

"Whether the later search under the mattress was lawful, however, is a more difficult question. The agent who lifted the mattress admitted that he was looking for hidden weapons rather than hidden people, which is consistent with our earlier suggestion that it is hard to imagine a person could hide there. That search is justified, then, only if it is limited to the immediate grasp area of a person who the agent reasonably suspects poses a danger to his safety. Given the size of the boys and the situation in which the agents encountered them, we cannot say the agent was unreasonable in suspecting that the boys were potentially dangerous.

"The record shows that although the boys were young teenagers, they looked fairly grown up. They stood nearly six feet tall and had some facial hair. When agents discovered

them, the agents did not yet know that Bennett had been found and arrested in the front bedroom. Because the boys had not been identified at the time of the mattress search, the searching agent was unsure if either of the boys was Bennett. That one of the boys could have been the suspect, who was known to be dangerous, supports the agent's decision to search their grab area. Whether the agent's search was so limited is a closer question.

"After ordering the boys out of bed onto the floor and cuffing their hands behind their backs, agents decided to return the boys to the bed to question them. To secure the area before the move, one agent shook the sheets and pillows and then lifted the mattress. He uncovered a rifle between the mattress and box spring, about a foot from the edge of the bed. When the agent decided to sit the boys on the bed for questioning, he was within his authority to search those areas of the bed that came within their grab area. Although it may have been difficult to do while handcuffed, it is not impossible that the boys could have reached under the mattress for a weapon. A suspect has a leg up on agents entering an unfamiliar location because he knows where hidden weapons can be found, and that advantage could aid even a restrained person in reaching a weapon before agents can react.

"We have never addressed whether an agent sweeping a detained person's grab area may

" A suspect has a leg up on agents entering an unfamiliar location because he knows where hidden weapons can be found, and that advantage could aid even a restrained person in reaching a weapon before agents can react."

actually lift a mattress to check for weapons, though we have noted that reaching beneath a mattress is permissible when an agent does so as a safety precaution. But while our decision here would be easier had the agent limited his search to running his hand between the mattress and box

spring, we do not think law enforcement should be required to endanger themselves by blindly sticking their hands into unknown and unseen spaces. Nor do we think only those agents willing to put their hands into concealed areas—which could contain needles, knives, or worse—deserve to be protected from weapons in a suspect's grab area. If there is reason to search the edge of a mattress by touch, there is reason enough to lift it up.

"Because the agent had a reasonable belief that the boys could be dangerous and his reason for moving them to the bed was legitimate, his sweep of the boys' grab areas was properly limited. The under-mattress search was not unlawful."

SEARCH AND SEIZURE:
Recording Conversations; Police Vehicle

United States v. Dunbar,
 CA1, No. 07-1752, 1/16/09

In March 2002, Oklahoma police officer Bobby Tyrone Williamson stopped Rex Vernal Geovaney Dunbar and his wife Sandra Boisvert on Interstate 40 in Oklahoma. Williamson stopped Dunbar for following another vehicle too closely, a traffic offense under Oklahoma law. Williamson asked Dunbar to sit in Williamson's cruiser while he prepared a warning for the traffic violation. Boisvert and Dunbar made inconsistent statements to Williamson about their travel plans. Williamson also determined that Dunbar's license, carrying the name of Dave Maughn, was expired. Williamson issued the written warning for the traffic violation.

Just as Dunbar was exiting the cruiser, Williamson asked if he was carrying drugs or weapons. Dunbar replied that he was not. Williamson asked for permission to search Dunbar's car, and Dunbar agreed. Williamson then placed Dunbar back in the cruiser and asked Boisvert to join Dunbar there. A video-recording device had been capturing the events of the stop. At the time Boisvert joined Dunbar in the cruiser, Williamson activated audio recording equipment inside the cruiser. This equipment recorded incriminating statements made by Dunbar to Boisvert. Williamson searched Dunbar's vehicle and found "17 or 18" pounds of marijuana and a 9mm semiautomatic pistol. Williamson then arrested Dunbar and Boisvert. Dunbar appealed the admission of his incriminating statements and testimony regarding the discovered drugs.

One of Dunbar's arguments on appeal was that his statements to Boisvert in the cruiser were illegally recorded. Upon review, the First Circuit Court of Appeals found, in part, as follows:

"...the back of a police car is not a place where individuals can reasonably expect to communicate in private. ('Patrol cars bristle with electronics, including microphones to a dispatcher, possible video recording with audio pickup, and other electronic and recording devices.' *United States v. Clark*, 22 F.3d 799, 801-802 (8th Cir. 1994) (noting that a marked police car is owned and operated by the state for the express purpose of ferreting out crime, 'is essentially the trooper's office, and is frequently used as a temporary jail' and concluding that the general public has no reason to frequent the back seat of a patrol car, or to believe that it is a sanctuary for private discussions); *United States v. McKinnon*, 985 F.2d 525, 528 (11th Cir. 1993).

"Dunbar attempts to distinguish his case by virtue of the fact that he and Boisvert were married. While marital communications are privileged, the marital privilege protects only confidential communications. See *United States v. Madoch*, 149 F.3d 596, 602 (7th Cir. 1998) (finding no privilege where a spouse's conversations with her imprisoned husband were recorded). Since the police car was not a reasonably confidential place to talk, Dunbar's statements to Boisvert were not protected."

SEARCH AND SEIZURE:
**Stop and Frisk; Anonymous Tips;
 Need For Immediate
 Law Enforcement Action**

United States v. Wooden,
 CA7, No. 08-1600, 12/29/08

Early one Saturday morning, the 911 system in South Bend, Indiana, received this call from a pay phone:

I would like to report a black male with a silver handgun. He was arguing with his, ah, girlfriend, or whatever... They were walking toward [the] 7-Eleven on Miami [Street]. He's tall. He's wearing a black jacket and blue jean pants. He has the gun on a holster. And I seen him pull it out.

Police quickly spotted the couple but did not see an ongoing argument; they were eating snack food. But Officer Gary Reynolds thought that an armed domestic quarrel could resume at any time and stopped the pair. A pat-down found the gun, just as the caller had described it. The safety was off; the serial number had been obliterated.

Whether the gun should have been suppressed as the fruit of an unlawful search is the question reserved for this appeal.

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

“Wooden concedes that the call would have provided adequate support for a *Terry* stop (see *Terry v. Ohio*, 392 U.S. 1 (1968)) if the caller had given his name. But he contends that, because the call was anonymous and the police did not verify any details other

than innocuous ones (such as his position and clothing), the holding of *Florida v. J.L.*, 529 U.S. 266 (2000), requires application of the exclusionary rule. The district court found otherwise, concluding that 911 calls reporting an ongoing crime must be treated differently. See *United States v. Hicks*, 531 F.3d 555, (7th Cir. 2008), reporting that every court of appeals that has considered the subject has concluded that *J.L.* does not cover anonymous reports of ongoing crime that require immediate action to ensure public safety.

“*Terry* and its successors hold that a stop supported by articulable suspicion is ‘reasonable’ under the fourth amendment. Articulable suspicion can be established by an anonymous tip if the police corroborate enough of the tipster’s information to imply that the tipster must possess inside knowledge about the details that the police could not otherwise observe. See *Alabama v. White*, 496 U.S. 325 (1990), and the discussion in *J.L.*, 529 U.S. at 270–71. Knowing a tipster’s name increases the chance that he can be held accountable (both state and federal governments make it a crime to tell material lies to law enforcement officials), and knowledge that a tipster has inside information likewise increases the chance that the report of crime is accurate.

“But people who report crimes do not invariably claim ‘inside information’ (as the tipsters in *J.L.* and *White* did). The caller in this case told us how he knew that Wooden had a gun: he saw Wooden draw it from its holster in public. Corroboration of other information (such as whether a tall man near the 7-Eleven store was wearing a black jacket and blue jeans) would not make this claim more plausible—but then, the assertions of

eyewitnesses to crime generally do not need corroboration, or a history of other accurate reports.

“Doubtless greater confidence can be achieved when police know a caller’s identity, for then, as the Court observed in *J.L.*, the threat of penalties for lies makes information more reliable. Yet as a practical matter a name given by a caller does not make the tip less anonymous. Suppose that the 911 call in this case had begun: “My name is John Jenkins, and I would like to report...” That a caller gives a name does not mean that he is John Jenkins (either the President of Notre Dame or any other John Jenkins). Caller ID does not solve this problem for public phones or even home phones, which can be used by multiple people (including guests at a party); some subscribers block the service. Cell phones, which almost always use caller ID, can be stolen. And it would undermine the goal of the 911 system to require a caller to prove his identity, perhaps by coming to the station with a driver’s license or passport, before the police react to the information. When crime is in progress, prompt action is essential. The fourth amendment prohibits unreasonable searches and seizures, and it has long been understood that, when the police believe that a crime is in progress (or imminent), action on a lesser degree of probability, or with fewer procedural checks in advance, can be reasonable. See *Brigham City v. Stuart*, 547 U.S. 398 (2006).

“*J.L.* dealt with a situation in which there was no apparent need for haste, in which the caller did not describe how he knew that *J.L.* was armed, and in which the tip was not recorded (so the police may have misunderstood the details). The police could

take their time to gather more information, and the Court held that an immediate stop was unreasonable. Our case, by contrast, arises from a recorded 911 call that revealed how the caller knew about the crime and that implied a need for dispatch. Wooden observes that the couple was chatting amicably by the time the police arrived, but the officer explained that domestic violence comes and goes; a man who pulls a gun on his wife or girlfriend may do it again at any moment. (There is also a risk that an armed man may threaten the woman with him that, unless she ‘acts natural’ when the police arrive, she will be beaten or shot later.)

“A 911 system designed to provide an emergency response to telephonic tips could not operate if the police had to verify the identity of all callers and test their claim to have seen crimes in progress. A process of testing would frustrate the expedition that often is essential to protect lives and safety. A system that follows an ‘act fast, verify later’ approach creates risks of unjustified action and makes it possible for someone holding a grudge to cause trouble. All of this goes into the calculus of reasonableness, together with the fact that *Terry* stops are brief, and people can quickly go on their way if the call proves to be unfounded. So we reiterate the holding of *Hicks* that a need for dispatch can make reasonable a stop that would not be reasonable if the police had time to investigate at leisure.

“The district court did not err in concluding that the circumstances reported to the police implied a need for haste, and that a report by a person claiming to have seen a gun drawn in public provided articulable suspicion for a *Terry* stop and frisk.

“After Wooden’s arrest, the person who made the 911 call was identified. Wooden maintains that the caller held a grudge against him and lied when he said that Wooden had drawn his gun on the street—though the caller did know that Wooden was packing heat. But the police are entitled to act on what is known at the time; information turned up later neither vindicates nor condemns a search.

“A constitutional obligation to defer action pending an investigation into the possibility that a 911 caller may be out to cause mischief would cripple the emergency response system; far better to act quickly and later prosecute any mischief-makers who can be caught. Judges must not underestimate the value of deterrence for 911 callers, as well as for those who may be committing other crimes, for as this case shows callers’ identity may be pinned down with enough time, whether or not they identify themselves. If this 911 call was an effort by someone who knew an incriminating fact (that Wooden was carrying a gun) to mislead the police by asserting something else that was not true (that Wooden had drawn his gun to intimidate a companion), the best remedy is to prosecute the caller rather than allow a gun-toting felon to escape punishment.”

SEARCH AND SEIZURE:

Stop and Frisk; Vehicle Passengers

Arizona v. Johnson, No. 07-1122, 1/26/09

While patrolling near a Tucson neighborhood associated with the Crips gang, police officers serving on Arizona’s gang task force stopped an automobile after a license plate check revealed that the vehicle’s registration had

been suspended for an insurance-related violation. Under Arizona law, the violation for which the vehicle was stopped constituted a civil infraction warranting a citation. At the time of the stop, the vehicle had three occupants—the driver, a front-seat passenger, and a passenger in the back seat, Lemon Montrea Johnson. In making the stop the officers had no reason to suspect anyone in the vehicle of criminal activity. The three officers left their patrol car and approached the stopped vehicle. Machado instructed all of the occupants to keep their hands visible. He asked whether there were any weapons in the vehicle; all responded no. Machado then directed the driver to get out of the car. Gittings dealt with the front-seat passenger, who stayed in the vehicle throughout the stop.

While Machado was getting the driver’s license and information about the vehicle’s registration and insurance, Trevizo attended to Johnson. Trevizo noticed that, as the police approached, Johnson looked back and kept his eyes on the officers. When she drew near, she observed that Johnson was wearing clothing, including a blue bandana, that she considered consistent with Crips membership. She also noticed a scanner in Johnson’s jacket pocket, which struck her as highly unusual and cause for concern,” because “most people” would not carry around a scanner that way “unless they’re going to be involved in some kind of criminal activity or are going to try to evade the police by listening to the scanner.” In response to Trevizo’s questions, Johnson provided his name and date of birth but said he had no identification with him. He volunteered that he was from Eloy, Arizona, a place Trevizo knew was home to a Crips gang. Johnson

further told Trevizo that he had served time in prison for burglary and had been out for about a year.

Trevizo wanted to question Johnson away from the front-seat passenger to gain “intelligence about the gang Johnson might be in.” For that reason, she asked him to get out of the car. Johnson complied. Based on Trevizo’s observations and Johnson’s answers to her questions while he was still seated in the car, Trevizo suspected that “he might have a weapon on him.” When he exited the vehicle, she therefore “patted him down for officer safety.” During the patdown, Trevizo felt the butt of a gun near Johnson’s waist. At that point Johnson began to struggle, and Trevizo placed him in handcuffs.

Johnson was charged in state court with, possession of a weapon by a prohibited possessor. He moved to suppress the evidence as the fruit of an unlawful search. The trial court denied the motion, concluding that the stop was lawful and that Trevizo had cause to suspect Johnson was armed and dangerous. A jury convicted Johnson of the gun-possession charge. A divided panel of the Arizona Court of Appeals reversed Johnson’s conviction. The United States Supreme Court granted certiorari and reversed the judgment of the Arizona Court of Appeals.

Upon review, the United States Supreme Court found, in part, as follows:

“We begin our consideration of the constitutionality of Officer Trevizo’s pat down of Johnson by looking back to the Court’s leading decision in *Terry v. Ohio*, 392 U. S. 1 (1968). *Terry* involved a stop for interrogation of men whose conduct had attracted the

attention of a patrolling police officer. The officer’s observation led him reasonably to suspect that the men were casing a jewelry shop in preparation for a robbery. He conducted a pat down, which disclosed weapons concealed in the men’s overcoat pockets. This Court upheld the lower courts’ determinations that the interrogation was warranted and the pat down, permissible.

“*Terry* established the legitimacy of an investigatory stop ‘in situations where the police may lack probable cause for an arrest.’ When the stop is justified by suspicion (reasonably grounded, but short of probable cause) that criminal activity is afoot, the Court explained, the police officer must be positioned to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous. *Ibid.* Recognizing that a limited search of outer clothing for weapons serves to protect both the officer and the public, the Court held the pat down reasonable under the Fourth Amendment.

“‘Most traffic stops,’ this Court has observed, ‘resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry.*’ *Berkemer v. McCarty*, 468 U. S. 420, 439, n. 29 (1984). Furthermore, the Court has recognized that traffic stops are ‘especially fraught with danger to police officers.’ *Michigan v. Long*, 463 U. S. 1032, 1047 (1983). ‘The risk of harm to both the police and the occupants of a stopped vehicle is minimized,’ we have stressed, ‘if the officers routinely exercise unquestioned command of the situation.’ *Maryland v. Wilson*, 519 U. S. 408, 414 (1997) (quoting *Michigan v. Summers*, 452 U. S. 692, 702–703 (1981)); see *Brendlin*, 551 U. S., at 258. Three decisions cumulatively portray

Terry's application in a traffic-stop setting: *Pennsylvania v. Mimms*, 434 U. S. 106 (1977) (per curiam); *Maryland v. Wilson*, 519 U. S. 408 (1997); and *Brendlin v. California*, 551 U. S. 249 (2007).

"In *Mimms*, the Court held that 'once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.' The government's 'legitimate and weighty' interest in officer safety, the Court said, outweighs the '*de minimis*' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. Citing *Terry* as controlling, the Court further held that a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'

"*Wilson* held that the *Mimms* rule applied to passengers as well as to drivers. Specifically, the Court instructed that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. 'The same weighty interest in officer safety,' the Court observed, 'is present regardless of whether the occupant of the stopped car is a driver or passenger.' It is true, the Court acknowledged, that in a lawful traffic stop, 'there is probable cause to believe that the driver has committed a minor vehicular offense,' but 'there is no such reason to stop or detain the passengers.' On the other hand, the Court emphasized, the risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from

the fact that evidence of a more serious crime might be uncovered during the stop.' 'The motivation of a passenger to employ violence to prevent apprehension of such a crime,' the Court stated, 'is every bit as great as that of the driver.' Moreover, the Court noted, 'as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle, so the additional intrusion on the passenger is minimal.'

"Completing the picture, *Brendlin* held that a passenger is seized, just as the driver is, 'from the moment a car stopped by the police comes to a halt on the side of the road.' A passenger therefore has standing to challenge a stop's constitutionality. After *Wilson*, but before *Brendlin*, the Court had stated, in dictum, that officers who conduct 'routine traffic stops' may 'perform a pat down of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.' *Knowles v. Iowa*, 525 U. S. 113, 117-118 (1998). That forecast, we now confirm, accurately captures the combined thrust of the Court's decisions in *Mimms*, *Wilson*, and *Brendlin*.

"The Arizona Court of Appeals recognized that, initially, Johnson was lawfully detained incident to the legitimate stop of the vehicle in which he was a passenger. But, that court concluded, once Officer Trevizo undertook to question Johnson on a matter unrelated to the traffic stop, *i.e.*, Johnson's gang affiliation, pat down authority ceased to exist, absent reasonable suspicion that Johnson had engaged, or was about to engage, in criminal activity. In support of the Arizona court's portrayal of Trevizo's interrogation of Johnson as 'consensual,' Johnson emphasizes Trevizo's testimony at the suppression hearing. Responding to the prosecutor's questions,

Trevizo affirmed her belief that Johnson could have ‘refused to get out of the car’ and ‘to turn around for the pat down.’

“It is not clear why the prosecutor, in opposing the suppression motion, sought to portray the episode as consensual. *Florida v. Bostick*, 501 U. S. 429 (1991) (holding that police officers’ search of a bus passenger’s luggage can be based on consent). In any event, Trevizo also testified that she never advised Johnson he did not have to answer her questions or otherwise cooperate with her. And during cross-examination, Trevizo did not disagree when defense counsel asked ‘in fact you weren’t seeking Johnson’s permission...?’ As the dissenting judge observed, ‘consensual’ is an ‘unrealistic’ characterization of the Trevizo-Johnson interaction. ‘The encounter...took place within minutes of the stop;’ the pat down followed ‘within mere moments’ of Johnson’s exit from the vehicle; beyond genuine debate, the point at which Johnson could have felt free to leave had not yet occurred.

“A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. See *Brendlin*, 551 U. S., at 258. An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. See *Muehler v. Mena*, 544 U. S. 93, 100–101 (2005).

“In sum, as stated in *Brendlin*, a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will. Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free ‘to depart without police permission.’ Officer Trevizo surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.

“For the reasons stated, the judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.”

SEARCH AND SEIZURE:
**Unlawful Search Based on Police
 Negligence; Exclusionary Rule**

Herring v. United States, No. 07-513, 1/14/09

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff’s Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county’s warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring’s arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County’s computer database, Morgan replied that there was an active arrest warrant for Herring’s failure to appear on a felony charge. Pope relayed the information to

Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mix up, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office.

“The U.S. Supreme Court decided that the good-faith exception to the exclusionary rule applies when a police officer makes an arrest based on an outstanding warrant in another jurisdiction, and the information is later found to be incorrect because of a negligent error by that agency.”

Herring was indicted on federal gun and drug possession charges and moved to suppress the evidence on the ground that his initial arrest had been illegal. Assuming that there was a Fourth Amendment violation, the District Court concluded that the exclusionary rule did not apply and denied the motion to suppress. The Eleventh

Circuit affirmed, finding that the arresting officers were innocent of any wrongdoing, and that Dale County's failure to update the records was merely negligent.

Upon review, the U.S. Supreme Court decided that the good-faith exception to the exclusionary rule applies when a police officer makes an arrest based on an outstanding warrant in another jurisdiction, and the information is later found to be incorrect because of a negligent error by that agency. Citing *Hoay v. State*, 348 Ark. 80, 86–87, 71 S. W. 3d 573, 577 (2002), the United States Supreme Court stated other courts have required exclusion of evidence obtained through similar police errors and granted certiorari to resolve the conflict. The Court affirmed the Eleventh Circuit's judgment, finding, in part, as follows:

“When police mistakes leading to an unlawful search are the result of isolated negligence, rather than systemic error or reckless disregard of constitutional requirements, does the exclusionary rule apply?”

“The Coffee County officers did nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant. The Eleventh Circuit concluded, however, that somebody in Dale County should have updated the computer database to reflect the recall of the arrest warrant. The court also concluded that this error was negligent, but did not find it to be reckless or deliberate. That fact is crucial to our holding that this error is not enough by itself to require the extreme sanction of exclusion.

“The Court stated that the exclusionary rule is not an individual right and applies only where it ‘results in appreciable deterrence.’ The benefits of deterrence must outweigh the costs. We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system.

“The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. An assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule. Evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

“We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. In *Leon*, supra, we held that ‘the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.’ The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.

“If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. We said as much in *Leon*, explaining that an officer could not obtain a warrant on the basis of a bare bones affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. Petitioner’s fears that our decision will cause police departments to deliberately keep their officers ignorant are thus unfounded.

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.”

SEARCH AND SEIZURE:

Vehicle Stops; Illegal Detention*Bedsole v. State*, CACR08-376, 1/7/09

Roger Bedsole was traveling east on I-40 in Pope County when State Trooper Condley noticed Bedsole's car cross the fog line onto the shoulder. Condley initiated a traffic stop. Bedsole pulled over and got out of his car to talk to Condley. Bedsole provided his driver's license, the rental agreement for his car, and answered Condley's questions. Condley issued Bedsole a warning. The video tape of the stop reveals that, right after receiving the warning, Bedsole began to turn toward his vehicle. At that instant, Condley said "Let me ask you a question." The Trooper asked whether Bedsole had any drugs or weapons in his car. Bedsole said that he did not. Condley then asked to search the car and Bedsole agreed.

Condley's search revealed approximately two pounds of methamphetamine. The State charged Bedsole with possession of a controlled substance. Bedsole moved to suppress the items seized and his statements made during the search. After a hearing, the circuit court denied his motion. Bedsole then entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress. He now appeals.

The issue presented is whether a reasonable person in Roger Bedsole's position would have felt free to ignore State Trooper Condley's post-traffic-stop questions and proceed on his way. Upon review, the Arkansas Court of Appeals found, in part, as follows:

"The case thus turns on whether Condley's post-warning questioning of Bedsole was a consensual police-citizen encounter or an illegal detention. The critical question is whether Trooper Condley's conduct would have communicated to a reasonable person that he could not answer Condley's questions and leave.

"Here, Bedsole voluntarily got out of his car and spoke with Trooper Condley near the front of the patrol car. Bedsole remained between the vehicles while Condley ran the appropriate checks and asked him general questions.

"Trooper Condley then issued Bedsole the warning and, after a moment's pause, said 'let me ask you a question.' Officer Condley testified that he 'gave Bedsole a warning and handed his driver's license back and then started talking to him about if he had anything illegal in the vehicle.' Bedsole also testified that, after Trooper Condley issued the warning and returned his paperwork, 'he never quit talking to me.' The video confirms this testimony.

"The immediacy of Trooper Condley's continued questioning of Bedsole did not change the encounter's climate. Finally, the Trooper never told Bedsole that he was free to go. We conclude that a reasonable person would not have felt free to ignore Trooper Condley's final questions and proceed on his way. We therefore hold that the post-warning encounter was not consensual. Because the State concedes that Condley did not have reasonable suspicion, the Trooper illegally detained Bedsole. The circuit court should have suppressed all the evidence obtained as a result of that illegal detention."

SEXUAL HARASSMENT:

Retaliation

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee,
No. 06-1595, 1/25/09

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the United States Supreme Court stated that Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq. (2000 ed. and Supp. V), forbids retaliation by employers against employees who report workplace race or gender discrimination. The question before the Court is whether this protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. The Court held that it does.

In 2002, the Metropolitan Government of Nashville and Davidson County, Tennessee (Metro) began looking into rumors of sexual harassment by the Metro School District's employee relations director, Gene Hughes. When Veronica Frazier, a Metro human resources officer, asked Vicky Crawford, a 30-year Metro employee, whether she had witnessed "inappropriate behavior" on the part of Hughes, Crawford described several instances of sexually harassing behavior: once, Hughes had answered her greeting, "Hey Dr. Hughes, what's up?," by grabbing his crotch and saying, "You know what's up." He had repeatedly put his crotch up to her window, and on one occasion, he had entered her office and grabbed her head and pulled it to his crotch. Two other employees also reported being sexually harassed by Hughes.

Although Metro took no action against Hughes, it did fire Crawford and the two other accusers soon after finishing the investigation, saying in Crawford's case that it was for embezzlement. Crawford claimed Metro was retaliating for her report of Hughes' behavior and filed a charge of a Title VII violation with the Equal Employment Opportunity Commission (EEOC), followed by this suit in the United States District Court for the Middle District of Tennessee. The district court granted Metro summary judgment on the claim and the Sixth Circuit Court of Appeals affirmed.

The United States Supreme Court held that the anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. "Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question."