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Arraignment or Initial Appearance; Right to Counsel; Interrogation by Law Enforcement

Montejo v. Louisiana, No. 07-1529, 5/26/09

Law enforcement officers are well acquainted with *Miranda v. Arizona*, which requires that any suspect subject to custodial interrogation must be advised of the so-called "Miranda Rights," which include having an attorney present during the interview. Subsequently, in *Edwards v. Arizona*, 451 U.S. 477 (1981), the United States Supreme Court stated that once an accused has invoked his right to have counsel present during custodial interrogation, he is not subject to further interrogation by law enforcement until counsel has been made available unless the suspect initiates the contact.

In *Minnick v. Mississippi*, 498 U.S. 146 (1990), Robert Minnick was arrested on a Mississippi warrant for capital murder. An interrogation by federal law enforcement officials ended when he requested a lawyer, and he subsequently communicated with appointed counsel two or three times. Interrogation was reinitiated by a county deputy sheriff after Minnick was told that he could not refuse to talk to him, and Minnick confessed. The motion to suppress the confession was denied, and he was convicted and sentenced to death. The Mississippi Supreme Court rejected his argument that the confession was taken in violation of his Fifth Amendment right to counsel, reasoning that the rule of *Edwards v. Arizona* did not apply, since counsel had been made available. The United States Supreme Court

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stated that when counsel is requested, interrogation must cease and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney. In context, the requirement that counsel be “made available” to the accused refers not to the opportunity to consult with an attorney outside the interrogation room, but to the right to have the attorney present during custodial interrogation. The Court stated the rule is appropriate and necessary, since a single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights and from the coercive pressures that accompany custody and may increase as it is prolonged.

Less well known to law enforcement is the rule set forth in *Michigan v. Jackson*, 475 U.S. 625 (1986), which held that if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.

In *Montejo v. Louisiana*, at a preliminary hearing required by Louisiana law, Jesse Montejo was charged with first-degree murder and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda v. Arizona*, 384 U. S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim’s widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over the defense’s objection, and he was convicted and sentenced to death. The Louisiana State

Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan v. Jackson*, 475 U. S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The Court reasoned that *Jackson’s* protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel. The Court also stated that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

It is also noted that the Court, in a twenty page opinion, dealt with the issue of the interpretation of *Jackson* that could lead to practical problems—many states require an indigent defendant formally to request counsel before an appointment is made while in more than half the states counsel is appointed without request from the defendant. The Louisiana State Supreme Court’s interpretation of *Jackson* might work in states that require an indigent defendant formally to request counsel before an appointment is made, but not in more than half the states, which appoint counsel without request from the defendant.

The Court noted that no reason exists to assume that a defendant like Montejo, who had done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who

never asked for counsel has not yet made up his mind in the first instance.

The United States Supreme Court overruled *Michigan v. Jackson* and determined the Louisiana Supreme Court correctly rejected Montejo's claim but for the wrong reason. The U.S. Supreme Court stated that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an "unequivocal election of the right."

Accordingly, the United States Supreme Court vacated the judgment of the Louisiana Supreme Court and remanded the case for further proceedings to determine if the letter was inadmissible under the *Edwards* rule.

Editor's Note: The Sixth Amendment rule set forth in Michigan v. Jackson, which required the exclusion of statements made by a suspect during a counselless interview initiated by police after the suspect has requested counsel at an arraignment or similar proceeding, was overruled in this case. The United States Supreme Court determined that the defendant's Fifth Amendment rights were adequately protected by the rules set forth in Miranda, Edwards, and Minnick.

ARREST: Prompt Appearance Before a Magistrate; Interrogation

Corley v. United States, No. 07-10441, 4/6/09

In *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), the United States Supreme Court laid down the so-called *McNabb-Mallory* rule, which stated that an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him (or presenting him or her) before a judge. While numerous states have similar presentation requirements, the *McNabb-Mallory* rule actually dealt with a number of federal statutes that codified the so-called presentation rule, (i.e., taking an arrested person before the nearest judicial officer for a hearing). At the time, it was alleged that federal agents flouted the rule by interrogating suspects for days before bringing them before a magistrate, and then only after they had given the confessions that convicted them.

Congress enacted 18 U. S. C. §3501 in response to *Miranda v. Arizona*, 384 U. S. 436, and some applications of the *McNabb-Mallory* rule. In an attempt to eliminate *Miranda*, §3501(a) provides that a confession shall be admissible in evidence if it is voluntarily given, and §3501(b) lists several considerations for courts to address in assessing voluntariness. Subsection (c), which focuses on *McNabb-Mallory*, provides that a confession made by a defendant while under arrest shall not be inadmissible solely because of delay in bringing such person before a magistrate judge if such confession is found by the trial judge to have been made voluntarily and within six hours of arrest; it

extends that time limit when further delay is reasonable considering the means of transportation and the distance to the nearest available magistrate.

In *Corley v. United States*, Johnnie Corley was suspected of robbing a bank in Norristown, Pennsylvania. After federal agents learned that Corley was subject to arrest on an unrelated local matter, some federal and state officers went together to execute the state warrant on September 17, 2003, and found him just as he was pulling out of a driveway in his car. Corley nearly ran over one officer, then jumped out of the car, pushed the officer down, and ran. The agents gave chase and caught and arrested him for assaulting a federal officer. The arrest occurred around 8 a.m. FBI agents first kept Corley at a local police station while they questioned residents near the place he was captured. Around 11:45 a.m., they took him to a Philadelphia hospital to treat a minor cut on his hand that he got during the chase. At 3:30 p.m., the agents took him from the hospital to the Philadelphia FBI office and told him that he was a suspect in the Norristown bank robbery. Though the office was in the same building as the chambers of the nearest magistrate judges, the agents did not bring Corley before a magistrate, but questioned him instead, in hopes of getting a confession.

The agents' repeated arguments sold Corley on the benefits of cooperating with the Government, and he signed a form waiving his *Miranda* rights. At 5:27 p.m., some 9.5 hours after his arrest, Corley began an oral confession that he robbed the bank, and spoke on in this vein until about 6:30 p.m., when agents asked him to put it all in writing. Corley said he was tired and wanted a break,

so the agents decided to hold him overnight and take the written statement the next morning. At 10:30 a.m. on September 18, they began the interrogation again, which ended when Corley signed a written confession. He was finally presented to a magistrate at 1:30 p.m. that day, 29.5 hours after his arrest.

Corley was charged with armed bank robbery, conspiracy to commit armed bank robbery, and using a firearm in furtherance of a crime of violence. §924(c). When he moved to suppress his oral and written confessions under Rule 5(a) and *McNabb-Mallory*, the District Court denied the motion, with the explanation that the time Corley was receiving medical treatment should be excluded from the delay, and that the oral confession was thus given within the six-hour window of §3501(c).

A divided panel of the Court of Appeals for the Third Circuit affirmed the conviction. The United States Supreme Court granted certiorari to resolve a division in the Federal Circuit Courts on the reach of §3501.

The Court held that §3501 modified *McNabb-Mallory* without supplanting it. Under the rule as revised by §3501(c), a Federal district court with a suppression claim must find whether the defendant confessed within six hours of arrest unless a longer delay was "reasonable" considering the means of transportation and the distance to be traveled to the nearest available magistrate. If the confession came within that period, it is admissible, subject to the other Federal Rules of Evidence, so long as it was made voluntarily and the weight to be given it is left to the jury. If the confession occurred before presentment and beyond six hours, however,

the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.

CIVIL LIABILITY: Armed Standoffs

Fisher v. City of San Jose,
CA9, No. 04-16095, 3/11/09

In *Fisher v. City of San Jose*, Steven Fisher triggered a standoff with San Jose police after he pointed a rifle at a private security guard who was investigating loud noises in Fisher's apartment complex. When the police arrived at his apartment, a noticeably intoxicated Fisher pointed one of his eighteen rifles at the officers and threatened to shoot them. The ensuing standoff lasted more than twelve hours and ended peacefully when Fisher finally emerged and allowed himself to be taken into custody.

Fisher and his wife sued under 42 U.S.C. § 1983 naming the City of San Jose, its police department, and several of its officers. The suit alleged, among other claims, that police violated Fisher's Fourth Amendment right to be free from unreasonable seizure by arresting him in his home without a warrant.

The Court of Appeals for the Ninth Circuit took the opportunity to clarify their jurisprudence relating to the Fourth Amendment's application to armed standoffs. They held that, during such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect

into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

CIVIL LIABILITY:

Search Warrant; Qualified Immunity

Morris v. Lanpher, CA8, No. 08-2040, 4/24/09

At 11 p.m. on July 28, 2003, Richard Schiele was shot in his Kansas City home by two assailants. After the shooting, Schiele did not identify his assailants before being taken to a hospital. Police Officer Jarrett Lanpher interviewed Schiele at the hospital the next evening. Schiele said he lived with a man named Jason, who was helping him remodel houses. Schiele described the assailants as "two black males." Lanpher's interview report then states:

The victim was asked if he knew anyone who would have done this he immediately thought that Jason had something to do with the attack and that the two dudes he hangs with were the ones who did the actual attack. He stated he knew the two dudes went by "Dink" and "Mont." He stated he did not know them personally but knew Jason went to their house all the time around the corner. The victim was asked if he would be able to identify the subjects who attacked him and he stated, "Yes."

Ricardo and Terrance Morris have been known since birth as "Dink" and "Mont."

Some three hours later, Lanpher interviewed Schiele's roommate, Jason Lancaster, then in custody on other charges. Lancaster denied

any part in the shooting and said he visited Schiele in the hospital earlier that day. Schiele told Lancaster “two black dudes shot him, one of them was stocky and the other a short dude.” Schiele said, “It might have been the two dudes who live in the 2nd house on the north side of 62nd Street,” who Lancaster knew only as “Dink” and “Mont.” Lancaster said he went to their house before visiting Schiele that day, as neighbors had reported, but no one was home. Lanpher’s interview report states:

Lancaster was then shown a photo line-up consisting of six black males all similar in appearance, which included a photograph of Ricardo Morris... in the number six position. Morris resides at 1318 E. 62nd Street, which was identified by neighbors as the residence that Lancaster had visited on his ATV earlier in the day. Lancaster identified Morris as the subject he knew as “Dink.”

The next morning, Lanpher visited Schiele at the hospital and showed him the same six-photo line-up. Lanpher’s report states, “The victim viewed the line-up and identified Morris as one of the suspects who shot him.”

That afternoon, Lanpher prepared an affidavit applying for a warrant to search 1318 E. 62nd Street for “Clothing, handguns, rifles, ammunition, spent shell casings, trace evidence, flashlights.” After reciting the victim’s description of the shooting and what neighbors reported hearing and seeing at the time, the affidavit recited:

Neighbors identified 1318 E. 62nd Street as the house that the victims friend hung out with. A computer check was

conducted and a photo line-up was shown to the victim, which included a resident of 1318 E. 62nd Street. The victim identified this subject as the one he wrestled with and shot him. The subject who lives with the victim also identified the subject.

Based on Schiele’s identification and corroboration by other witnesses, Lanpher obtained a warrant to search the nearby home where brothers Terrance and Ricardo Morris lived with their mother, Rosalind. The warrant search yielded no evidence, and the brothers were absolved of any role in the shooting.

Rosalind and her sons filed this § 1983 complaint against the Kansas City Board of Police Commissioners and five police officers. The district court granted summary judgment dismissing the Fourth Amendment claim against Lanpher and his supervisor. The Morrises appeal the dismissal of the Fourth Amendment claim. They contend that the affidavit Lanpher submitted in obtaining the search warrant contained deliberate falsehoods and recklessly disregarded the truth.

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

“...Qualified immunity protects public officials from damage actions if their conduct did not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A police officer in applying for a search warrant is entitled to qualified immunity from a § 1983 Fourth Amendment damage claim if his conduct was objectively reasonable. ‘Only where the warrant application is so

lacking in indicia of probable cause as to render official belief in its existence unreasonable...will the shield of immunity be lost.’ *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). Officer Lanpher satisfies that standard in this case. His affidavit recited that he heard Schiele identify ‘Dink’ and ‘Mont’ as possible assailants, gathered evidence identifying Dink and Mont and linking them to Lancaster and to 1318 E. 62nd Street, and saw both Schiele and Lancaster identify Ricardo Morris as ‘Dink,’ one of the assailants, from a photo line-up. The affidavit clearly was not lacking in indicia of probable cause.

“The Morrisses argue that Lanpher is not entitled to qualified immunity for a different reason—because his warrant application ‘deliberately omitted material and exculpatory information and included falsehoods.’ The principle is sound. ‘A warrant based upon an affidavit containing “deliberate falsehood” or “reckless disregard for the truth” violates the Fourth Amendment’ and subjects the police officer to § 1983 liability. See *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Truthful in this context means that the information put forth is ‘believed or appropriately accepted by the affiant as true.’

“The Morrisses argue that Lanpher is not entitled to qualified immunity for a different reason—because his warrant application ‘deliberately omitted material and exculpatory information and included falsehoods.’ The principle is sound. ‘A warrant based upon an affidavit containing “deliberate falsehood” or “reckless disregard for the truth” violates the Fourth Amendment’ and subjects the police officer to § 1983 liability.”

“The Morrisses bore ‘the burden of proving the intentional or reckless inclusion of false statements in a warrant affidavit.’ *United States v. Ozar*, 50 F.3d 1440, 1443 (8th Cir. 1995). When Lanpher made a properly supported motion for summary judgment on the ground of qualified immunity, they ‘may not respond simply with general attacks upon the defendant’s credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried

his or her burden of proving the pertinent motive.’ *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998). The Morrisses presented no evidence Lanpher had a personal stake in the matter that might cause him to act other than as an impartial criminal investigator. They offered no specific, nonconclusory evidence that Lanpher believed his affidavit was false, or recklessly misconstrued Schiele’s identification. Significantly, they presented no affidavit or deposition testimony by victim Schiele or by roommate Lancaster contradicting their photo lineup identifications.

“Indeed, that the recitals in the warrant affidavit aligned closely with Lanpher’s contemporaneous interview reports is strong

evidence that Lanpher believed that Schiele had identified one of his attackers, or at least accepted the identification as true for purposes of further investigation. While we construe disputed facts in the non-moving parties' favor, we may not infer bad motive absent even a scintilla of material fact supporting that inference.

"For these reasons, we conclude that the Morrises failed to submit probative evidence that Lanpher's warrant affidavit contained deliberate falsehoods or a reckless disregard of the truth, and that an affidavit 'supplemented by the omitted information, would not have been sufficient to support a finding of probable cause.' *Riehm v. Engelking*, 538 F.3d 952, 966 (8th Cir. 2008). Accordingly, summary judgment was proper."

CONFESSIONS: **Impeachment**
Kansas v. Ventris, No. 07-1356, 4/29/09

In the early hours of January 7, 2004, after two days of no sleep and some drug use, Rhonda Theel and Donnie Ray Ventris reached an ill-conceived agreement to confront Ernest Hicks in his home. The couple testified that the aim of the visit was simply to investigate rumors that Hicks abused children, but the couple may have been inspired by the potential for financial gain: Theel had recently learned that Hicks carried large amounts of cash.

The encounter did not end well. One or both of the pair shot and killed Hicks with shots from a .38-caliber revolver, and the companions drove off in Hicks's truck with approximately \$300 of his money and his cell

phone. On receiving a tip from two friends of the couple who had helped transport them to Hicks's home, officers arrested Ventris and Theel and charged them with various crimes, chief among them murder and aggravated robbery. The State dropped the murder charge against Theel in exchange for her guilty plea to the robbery charge and her testimony identifying Ventris as the shooter.

Prior to trial, officers planted an informant in Ventris' holding cell, instructing him to "keep [his] ear open and listen" for incriminating statements. According to the informant, in response to his statement that Ventris appeared to have "something more serious weighing in on his mind," Ventris divulged that "[h]e'd shot this man in his head and in his chest" and taken "his keys, his wallet, about \$350, and...a vehicle."

Ventris then testified at trial that Theel committed the crimes. When the State sought to call the informant to testify to his contradictory statement, Ventris objected. The State conceded that Ventris' Sixth Amendment right to counsel had likely been violated, but argued that the statement was admissible for impeachment purposes. The trial court allowed the testimony. The jury convicted Ventris of aggravated burglary and aggravated robbery. Reversing, the Kansas Supreme Court held that the informant's statements were not admissible for any reason, including impeachment.

The United States Supreme Court held that Ventris' incriminating statement to a jailhouse informant, concededly elicited in violation of the Sixth Amendment strictures, is admissible at trial to impeach Ventris' conflicting testimony.

EMPLOYMENT DISCRIMINATION:

Religion Accommodation

Webb v. City of Philadelphia,
CA3, No. 07-3081, 4/7/09

In *Webb v. City of Philadelphia*, the issue on appeal is whether a police officer's request to wear religious garb with her uniform could be reasonably accommodated without imposing an undue burden upon the City of Philadelphia. The District Court held it could not. The Court of Appeals for the Third Circuit agreed.

Kimberlie Webb is a practicing Muslim, employed by the City of Philadelphia as a police officer since 1995. On February 11, 2003, Webb requested permission from her commanding officer to wear a headscarf while in uniform and on duty. The headscarf (a khimar or hijab) is a traditional head covering worn by Muslim women. Webb's headscarf would cover neither her face nor her ears, but would cover her head and the back of her neck. Her request was denied in view of Philadelphia Police Department Directive 78, the authoritative memorandum that prescribes the approved Philadelphia police uniforms and equipment. Nothing in Directive 78 authorizes the wearing of religious symbols or garb as part of the uniform.

On February 28, 2003, Webb filed a complaint of religious discrimination under Title VII of the 1964 Civil Rights Act with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission. On August 12, 2003, while the matter was pending before the EEOC, Webb arrived at work wearing her

headscarf. She refused to remove it when requested and was sent home for failing to comply with Directive 78. The next two days' events were indistinguishable: Webb arrived at work in her uniform and her headscarf, which she refused to remove, and was then sent home. On August 14, Webb was informed her conduct could lead to disciplinary action. Thereafter, she reported to work without a headscarf. Disciplinary charges of insubordination were subsequently brought against Webb, resulting in a temporary thirteen-day suspension.

On October 5, 2005, Webb brought suit against the City of Philadelphia, asserting three causes of action under Title VII—religious discrimination. The District Court found that Directive 78 and its detailed standards with no accommodation for religious symbols and attire not only promote the need for uniformity, but also enhance cohesiveness, cooperation, and the esprit de corps of the police force. The District Court held the City would suffer an undue hardship if forced to permit Webb and other officers to wear religious clothing or ornamentation with their uniforms. The District Court granted summary judgment on the claim. Webb appeals the adverse judgments on the religious discrimination claim.

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

"Title VII of the 1964 Civil Rights Act prohibits employers from discharging or disciplining an employee based on his or her religion. 'Religion' is defined as all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

employee's religious observance or practice without undue hardship on the conduct of the employer's business. To establish a prima facie case of religious discrimination, the employee must show: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement. Once all factors are established, the burden shifts to the employer to show either it made a good-faith effort to reasonably accommodate the religious belief, or such an accommodation would work an undue hardship upon the employer and its business.

"Title VII religious discrimination claims often revolve around the question of whether the employer can show reasonable accommodation would work an undue hardship. An accommodation constitutes an 'undue hardship' if it would impose more than a *de minimis* cost on the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Both economic and non-economic costs can pose an undue hardship upon employers.

"In *Kelley v. Johnson*, 425 U.S. 238 (1975) the Supreme Court characterized a police department's choice of organization, dress, and equipment for law enforcement personnel as a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power. Almost ten years later, in *Goldman v. Weinberger*, 475 U.S. 503 (1986) the Court stated that the desirability of dress regulations in the military is decided by the appropriate military officials. The Court also

found the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.

"Our most recent decision in this area is *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). In *Fraternal Order of Police*, we held the government cannot discriminate between conduct that is secularly motivated and similar conduct that is religiously motivated. The Newark police department forbade police officers from growing beards but granted medical exceptions for beards as required by the Americans with Disabilities Act, 42 U.S.C. § 12112. Two Muslim police officers, whose required they grow beards, filed suit contending their First Amendment rights were infringed upon by the no-beards policy. We agreed, holding that the police department must create a religious exemption to its 'no-beards' policy to parallel its secular one, unless it could make a substantial showing as to the hypothetical negative effects of a religious exemption.

"In a similar case, a sister court of appeals determined a police department cannot be forced to let individual officers add religious symbols to their official uniforms. *Daniels v. City of Arlington*, 246 F.3d 500, 506 (5th Cir. 2001). In *Daniels*, a police officer refused to remove a gold cross pin on his uniform, in non-compliance with a no-pins official policy. Because the Supreme Court has upheld appropriate restrictions on the First Amendment rights of government employees, specifically including both military and police uniform standards, the Court of Appeals for the Fifth Circuit determined

the City's uniform standards were proper and the City was unable to reasonably accommodate the officer's religious needs without undue hardship. Other courts have recognized the interests of a governmental entity in maintaining the appearance of neutrality. See, e.g., *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J., concurring) ("The importance of public confidence in the neutrality of its protectors is so great that a police department or a fire department...should be able to plead 'undue hardship.'")

"The District Court held Webb established a prima facie case of religious discrimination. We agree. Webb's religious beliefs are sincere, her employer understood the conflict between her beliefs and her employment requirements, and she was disciplined for failing to comply with a conflicting official requirement. Thus, the burden shifts and the City must establish that to reasonably accommodate Webb (that is, allow her to wear a headscarf

"...a police department cannot be forced to let individual officers add religious symbols to their official uniforms. In Daniels, a police officer refused to remove a gold cross pin on his uniform, in non-compliance with a no-pins official policy. Because the Supreme Court has upheld appropriate restrictions on the First Amendment rights of government employees, specifically including both military and police uniform standards, the Court of appeals for the Fifth Circuit determined the City's uniform standards were proper and the City was unable to reasonably accommodate the officer's religious needs without undue hardship."

with her uniform) would constitute an undue hardship. The City offered no accommodation, contending any accommodation would impose an undue hardship.

"In the City's view, at stake is the police department's impartiality, or more precisely, the perception of its impartiality by citizens of all races and religions whom the police are charged to serve and protect. If not for the strict enforcement of Directive 78, the City contends, the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference would be severely damaged to the detriment of the

proper functioning of the police department. In the words of Police Commissioner Sylvester Johnson, uniformity 'encourages the subordination of personal preferences in favor of the overall policing mission' and conveys 'a sense of authority and competence to other officers inside the Department, as well as to the general public.

“Commissioner Johnson identified and articulated the police department’s religious neutrality (or the appearance of neutrality) as vital in both dealing with the public and working together cooperatively. ‘In sum, in my professional judgment and experience, it is critically important to promote the image of a disciplined, identifiable and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias.’ Commissioner Johnson’s testimony was not contradicted or challenged by Webb at any stage in the proceedings.

“Commissioner Johnson’s reasoning is supported by *Kelley* and *Goldman*. As a para-military entity, the Philadelphia Police Department requires ‘a disciplined rank and file for efficient conduct of its affairs.’ *Kelley*, 425 U.S. at 242); see also *Thomas v. Whalen*, 51 F.3d 1285, (6th Cir. 1995) (‘A paramilitary law enforcement unit, such as the police, has many of the same interests as the military in regulating its employees’ uniforms.’) Commissioner Johnson’s thorough and uncontradicted reasons for refusing accommodations are sufficient to meet the more than *de minimis* cost of an undue burden. *Hardison*, 432 U.S. at 84.

“Despite Webb’s assertions, *Fraternal Order of Police* is distinguishable from this case. The focus of *Fraternal Order of Police* is the lack of neutrality in applying the no-beards regulation. As we explained, ‘the Department’s decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent.’ *Fraternal Order of Police*, 170 F.3d at 365. The Philadelphia

Police Department’s Directive 78, by contrast, contains no exceptions, nor is there evidence the City allows other officers to deviate from it. In other ways, our decision in *Fraternal Order of Police* buttressed the District Court’s opinion. We recognized that ‘safety is undoubtedly an interest of the greatest importance’ to the police department and that uniform requirements are crucial to the safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police.

“The District Court correctly concluded the City would suffer undue hardship under Title VII if required to grant Webb’s requested religious accommodation. We will affirm the judgment of the District Court.”

EXCESSIVE FORE: **Police Reports; Prior Inconsistent Statements**

United States v. DiSantis,
CA7, No. 07-3692, 5/4/09

In *United States v. DiSantis*, a jury convicted police officer James DiSantis of depriving a suspect’s right to be free from unreasonable seizure, in violation of 18 U.S.C. § 242. On appeal, DiSantis raises several issues including a challenge to a jury instruction given at his trial.

On September 3, 2003, DiSantis, an officer of the Cicero, Illinois Police Department, passed Jennifer Pine while driving through Chicago. DiSantis knew of prior criminal activity by Pine, as well as by her two passengers, Stephen Roden and Robert Bertucci, and suspected that Pine was either driving a stolen vehicle or heading to buy drugs. Acting

on this hunch, DiSantis followed Pine and pulled her over on Central Avenue. According to Pine's testimony, DiSantis pulled her out of the car by the hair and struck her multiple times in the head. DiSantis denied pulling Pine's hair or striking her, testifying that he only raised his voice during the course of the traffic stop.

While this incident was transpiring, Hector Montes passed DiSantis' and Pine's stopped cars and saw DiSantis striking Pine. Hector continued south on Central Avenue to his home, where he picked up his brother, Richard Montes. The Montes brothers then drove back north on Central Avenue on their way to view a construction project at Millennium Park, which Richard planned to record with his video camera. When they passed the point of the traffic stop, Hector and Richard saw that DiSantis and Pine were still at the scene, but now joined by a second police car driven by Joseph Melone, another Cicero police officer who worked under DiSantis.

The Montes brothers pulled into a parking lot across from the traffic stop, and Richard attempted to record the incident with his video camera. After a few minutes, Hector and Richard decided to leave the scene and continued on Central Avenue. But by that time, DiSantis and Melone had spotted Hector's SUV, and both officers testified that they thought that the video camera that Richard had pointed out of the passenger window was actually a gun. The officers accordingly pursued and pulled Hector over at a nearby hospital parking lot.

DiSantis approached the passenger side of Hector's SUV. According to the Montes

brothers, DiSantis immediately went up to the passenger window and wrestled the video camera away from Richard. The Montes brothers further testified that DiSantis began screaming at them and demanding the camera's "memory stick." After Hector told DiSantis that he did know anything about the memory stick, DiSantis struck Hector with the camera across the face and again on the head. DiSantis then threw the camera on the ground and stepped on it. DiSantis also conducted a pat-down search of both men and squeezed their genitals.

After finding a bullet magazine in Hector's SUV, DiSantis arrested Hector for unauthorized possession of ammunition and took him to the Cicero police station. Hector was released later that evening, after which he went to the hospital. DiSantis filed a police report on the incident and submitted Richard's video camera as evidence.

Based on these events, the government charged DiSantis with willfully depriving Pine and Hector of their constitutional right to be free from unreasonable seizure, in violation of 18 U.S.C. § 242. The case proceeded to a six-day jury trial at which several witnesses, including DiSantis, testified about the Pine and Montes traffic stops. The government capably impeached DiSantis' testimony using the police report that he filed on the Montes incident. For example, after DiSantis denied grabbing Richard's video camera, the government read a portion of DiSantis's report stating that "Hector Montes, was clutching the...video camera" and that "DiSantis removed the camera from the suspect by force." The government also noted that DiSantis's report catalogued the camera as "damaged," suggesting that DiSantis

was lying when he testified that he had not deliberately stepped on the camera.

Based on the inconsistencies between DiSantis' testimony and his police report, the district court instructed the jury that they could consider DiSantis' prior inconsistent statements as substantive evidence. The given instruction provided:

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony at trial.

The jury found DiSantis not guilty of violating Pine's constitutional rights but guilty of violating Hector's rights. The district court imposed a sentence of 66 months' imprisonment. On appeal, DiSantis challenges the jury instructions on the use of his prior inconsistent statements, among other things.

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

"DiSantis argues that his police report did not qualify as an admission by a party-opponent, such that the district court had no basis for instructing the jury on the substantive use of his prior inconsistent statements. However, under Rule 801(d)(2)(A), 'written statements may be admitted as non-hearsay against the party who made the statement.' *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 779 (7th Cir. 2006); see also *Spiller*, 261 F.3d at 690 (characterizing a defendant's handwritten ledgers indicating the quantities of crack cocaine that he sold as admissions by a party-opponent); *United*

States v. Harvey, 117 F.3d 1044, 1049-50 (7th Cir. 1997) (concluding that a defendant's handwritten letters and diaries documenting his marijuana production were admissions by a party-opponent). Applying that principle in a similar § 242 case arising out of a police officer's use of excessive force, the First Circuit concluded that the officer's arrest report fell within the hearsay exemption of Rule 801(d)(2)(A). *United States v. Rios Ruiz*, 579 F.2d 670, 675-77 (1st Cir. 1978). Likewise, DiSantis's prior inconsistent statements in his police report qualified as party admissions, and the district court committed no error in instructing the jury that they could consider those statements for their truth."

FEDERAL CRIMES:
Aggravated Identity Theft

Flores-Figueroa v. United States,
No. 08-108, 5/4/09

In *Flores-Figueroa v. United States*, the United States Supreme Court held the crime of Aggravated Identity Theft, 18 U. S. C. §1028A(a)(1), requires the Government to show that the defendant *knew* that the "means of identification" he or she unlawfully transferred, possessed, or used, in fact, belonged to "another person."

FORFEITURE: **Appointed Counsel**

United States v. Saccoccia,
CA1, No. 06-2121, 4/29/09

Stephen A. Saccoccia was convicted, along with several co-conspirators, of RICO conspiracy and money laundering crimes related to proceeds derived from illegal drug trafficking. 18 U.S.C. § 1962

(2006). In addition to a sentence of 660 years in prison and a \$15.7 million fine, the district court found that Saccoccia was required to forfeit over \$136 million, comprising the proceeds of his criminal activity. Saccoccia requested appointed counsel to represent him in the forfeiture proceedings.

The Court of Appeals for the First Circuit stated that an individual's property can be in jeopardy in many kinds of proceedings to which the government is a party; examples are eminent domain proceedings, suits by the government to collect taxes, disputes with the government over ownership of land, and suits in which an individual sues the government for patent violations. The individual in such cases is free to be represented by counsel but has no constitutional right to counsel at the expense of the government.

INFORMANTS:

Reliability; Controlled Buys

Morgan v. State, No. CR08-1330, 5/7/09

On March 8, 2007, a search warrant was issued for the residence of Johnny Elmo Morgan shared with Amy Smith. The warrant was issued based upon the affidavit of Sergeant Joey Deer of the Scott County Sheriff's Office, explaining that he had reason to believe the residence was being used to conceal illegal property, namely, methamphetamine and/or drug paraphernalia. The affidavit further stated that a confidential informant, who had been proven credible by making at least two controlled-substance purchases that led to the confiscation of illegal narcotics, had made a controlled buy of meth within the last forty-eight hours from the Morgan residence.

At trial, Heath Tate of the Fifteenth Judicial District Drug Task Force testified that he executed the warrant at Morgan's residence. When the warrant was executed, Morgan was not present, but Smith and another woman were standing outside the single-wide mobile home. Two children, both of whom were Morgan's, and a fifteen- or sixteen-year-old juvenile were inside. Two more of Morgan's children later arrived on a school bus.

Tate testified that there was an unlocked metal outbuilding approximately thirty to forty feet behind the trailer, as well as a "semi-trailer box." Tate acted as the evidence custodian and, according to his log, the following evidence was found: a glass smoking pipe, a plastic bag, three corners of plastic bags, and a plastic bag containing a white powder substance, all located in the north bedroom of the residence; and two light bulbs, a rolled dollar bill, a straw, and a roll of plastic bags, all located on top of the refrigerator in the kitchen. He testified that the pipe could be used for smoking methamphetamine, that a controlled substance could be wrapped in a plastic bag corner, and that the light bulb had been hollowed out and could be used to smoke methamphetamine. Both light bulbs had discoloring which, as Tate testified, suggested they had been used to smoke methamphetamine. Tate also noted that the plastic bags could be used for delivery of methamphetamine and that the corners of the bags are also commonly utilized as a way to handle methamphetamine.

The evidence log also reflects that the police found the following evidence in the outbuilding: a camp stove; an "active" HCL generator; two one-gallon containers of muriatic acid; a one-gallon container of lighter

fluid that was one-half full; coffee filters; two glass containers; a paper towel with red residue; a glass container holding one pound of salt; two glass containers holding unknown liquids; two empty charcoal starter containers; an empty salt package; plastic tubing; “ten generators made of plastic 20 oz. bottles”; a “green metal ammo can containing numerous matches”; and a plastic cardboard box containing seven pints of hydrogen peroxide. Tate testified that the “active” HCL generator, which had a tube coming out of it, was used in the manufacture of methamphetamine. Though listed as part of the items found in the outbuilding, Tate stated that the ten, twenty-ounce plastic bottles were found “outside the metal building just laying around the yard” between the residence and the building. Keith Vanravensway of the Scott County Sheriff’s Office had participated in the search and stated that he found them scattered around the back yard in a twenty-five-to fifty-yard radius. Tate testified that the bottles had been used as generators because they contained salt inside, which is used to gas off the methamphetamine. Tate further testified that the striker plates had been removed from the matches, which is consistent with the manufacture of methamphetamine.

Sergeant Deer also assisted in the search of Morgan’s residence. Deer testified that there was a metal outbuilding, a trailer for an eighteen wheeler, an old swimming pool, thirty or forty salvage vehicles, and other buildings. He also stated that the back yard was “grown up.” According to Deer, there was no fence between the residence and the outbuilding.

Phillip Johnston, a forensic chemist with the Arkansas State Crime Laboratory,

testified that the burned residue in the pipe was methamphetamine and dimethyl sulfone, which is a common cutting agent that is combined with a drug to increase the weight of the drug. He stated that the white powder in the plastic bag was 0.2199 grams of dimethyl sulfone. Johnston also tested the residue in the light bulb and the straw and found it was also methamphetamine and dimethyl sulfone. He found methamphetamine, phosphorus, and iodine residue on the stained paper towel and concluded that it was evidence of manufacturing methamphetamine. The unknown liquids found in a glass container did not contain any controlled substance, but one contained an acid, which is used in the manufacture of methamphetamine. Johnston testified that an HCL generator is a plastic bottle with salt and sulfuric acid mixed in the bottom. He further testified that a hole can be made in the cap of the bottle, through which a tube is inserted, and gas then exits the bottle through the tube. Johnston concluded that the plastic bottle found with the tubing might indicate the manufacture of methamphetamine and that a gas stove can be used in the manufacture of methamphetamine. He also testified that lighter fluid, muriatic acid, phosphorus, plastic tubing, charcoal fluid, salt, hydrogen peroxide, and iodine are used in the manufacture of methamphetamine. On cross-examination, Johnston acknowledged that he did not know when the manufacturing process would have taken place and that he could not determine how long ago someone used the HCL generator that had the tubing.

Larry Garner, a five-year agent of the Fifteenth District Drug Task Force, testified that, upon investigation and consideration

of the materials present, he concluded it was a methamphetamine lab. In his opinion, the ten HCL generators made from the plastic bottles were old and inactive, but that the one with the tubing was still active. He stated that each one indicated a separate manufacturing process.

Morgan appealed the judgment of the Scott County Circuit Court convicting him of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, first-degree endangering the welfare of a minor, manufacturing methamphetamine in the presence of a minor, and manufacturing methamphetamine near certain facilities. He was sentenced to a total of 480 months' imprisonment. On appeal, Morgan argued that the circuit court erred in denying his motion to suppress evidence and that the evidence was insufficient to support the convictions.

The Arkansas Court of Appeals issued an opinion finding that the evidence was insufficient to support the convictions. Accordingly, the Court of Appeals reversed and dismissed the case. Upon review, the Arkansas Supreme Court found, in part, as follows:

"On appeal, Morgan argues that the information provided by Sergeant Deer in his affidavit obtaining the search warrant was so deficient and lacking in indicia of probable cause, reliance upon the search warrant issued was unreasonable, and the circuit court should have granted his motion to suppress the evidence. Specifically, Morgan contends that there was no basis upon which to gauge or assess the reliability of the confidential

informant because Sergeant Deer did not know the confidential informant before the Morgan investigation and because the two controlled buys that Sergeant Deer referenced in his affidavit had been controlled buys in this case, at the residence in question, rather than in previous cases. Further, Morgan argues that while Sergeant Deer believed he had made a thorough search of the confidential informant before each controlled buy, he admitted that he did not search under the confidential informant's shoe inserts.

"Arkansas Rule of Criminal Procedure 13.1 governs the issuance of search warrants. Rule 13.1(b) generally requires that where an affidavit or testimony is based in whole or in part on hearsay, the affiant shall set forth particular facts bearing on the informant's reliability. However, Rule 13.1(b) also provides that the failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied if the affidavit or testimony, viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

"This is not a case in which the search warrant was based on pure hearsay or in which the reliability of the informant was completely unknown. There is no fixed formula in determining an informant's reliability. See *Stanton v. State*, supra. Factors to be considered in making such a determination include whether the informant's statements are: (1) incriminating; (2) based on personal observations of recent criminal activity; and (3) corroborated by other information. See *Stanton v. State*, supra.

“Here, the confidential informant’s information was corroborated by his personal observations and corroborated by the personal observations of officers Tate and Deer. The controlled buy was corroborated by the participation and observation of officers Tate and Deer: Sergeant Deer searched the informant and his vehicle for any

illegal contraband or monies; the informant was given money to make the controlled buy; Tate and Deer followed the informant to a location near Morgan’s residence; and, Tate and Deer observed the informant walk into the residence, stay approximately two minutes, and return with drugs

“Sergeant Deer’s account of the drug buy, alone, was sufficient to establish probable cause to search Morgan’s home for drugs and other contraband. See *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998) (holding that an officer’s account of a controlled buy, made by an informant, was, by itself, sufficient to establish probable cause for issuance of a search warrant).

“The Court did not find the fact that the officers did not search under the confidential informant’s shoe inserts of consequence as both Deer and Tate personally observed the controlled buys in their entirety other than the short amount of time that the confidential informant was inside Morgan’s

“There is no fixed formula in determining an informant’s reliability. Factors to be considered in making such a determination include whether the informant’s statements are: (1) incriminating; (2) based on personal observations of recent criminal activity; and (3) corroborated by other information.”

home. Considering the totality of the circumstances, that fact, alone, does not obliterate the probable cause established.

“The facts in the affidavit, as a whole, provided a substantial basis for determining that reasonable cause existed to believe that items related to the sale of controlled substances would be found in Morgan’s

residence. Accordingly, the circuit court’s denial of Morgan’s motion to suppress was not clearly against the preponderance of the evidence, and we affirm.”

RELIGIOUS FREEDOM
RESTORATION ACT: **Marijuana**
United States v. Quantance,
CA10, No. 09-2015 and 09-2016, 3/3/09

Daniel and Mary Quantance who are husband and wife, were arrested near Lordsburg, New Mexico, in connection with the transportation and possession of large quantities of marijuana. They asserted that their activities were protected by the United States Constitution because they were founders of the Church of Cognizance, which advocates the religious use of marijuana.

The district court examined the evidence and determined that the Quantances’ beliefs did not qualify as a religion. It also made a finding of fact that the Quantances’ beliefs

were not sincere, and barred them from using the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb to 2000bb-4 as a defense. The Court of Appeals for the Tenth Circuit concurred in the decision of the district court.

PROBABLE CAUSE: Arrest; Traffic Stop; Obscured License Plate

Hinojosa v. State, CR 08-1336, 5/21/09

On January 27, 2007, Sergeant Kyle Drown of the Arkansas State Police initiated a traffic stop of Martin Hinojosa’s truck in Pope County after observing that the vehicle’s license plate cover obscured the name of the issuing foreign state. During the traffic stop, Drown eventually asked Hinojosa if he had anything illegal in his vehicle. Hinojosa responded that there was approximately three hundred pounds of marijuana in the truck. After a canine sniff confirmed presence of the marijuana, Hinojosa was charged with possession of a controlled substance with an intent to deliver.

Hinojosa filed a motion to suppress, contending that the physical evidence was illegally seized as a result of an unlawful traffic stop. Sergeant Drown testified at the suppression hearing that he stopped Hinojosa, because the license plate frame on his truck obscured the identification of the plate’s issuing state in violation of Ark. Code Ann. § 27-14-716.2 Hinojosa asserted that the license plate cover did not violate Arkansas or Arizona law, and that Sergeant Drown’s mistake of law rendered the traffic stop without probable cause and, therefore, illegal. The circuit court denied the motion

to suppress. Hinojosa entered a conditional plea of guilty, reserving his right to appeal the suppression ruling, and filed a timely notice of appeal. The Arkansas Court of Appeals reversed the circuit court holding that the traffic stop was unlawful because it was conducted without probable cause.

The Arkansas Supreme Court granted the State’s petition for a review of the decision, finding, in part, as follows:

“...a police officer must have probable cause to believe that a vehicle has violated a traffic law before making a valid stop. Probable cause is defined as ‘facts or circumstances within a police officer’s knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected.’ *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005). In assessing the existence of probable cause, this court’s review is liberal rather than strict. In the context of traffic stops, this court has ‘repeatedly held that degree of proof sufficient to sustain a finding of probable cause is less than required to sustain a conviction.’ *Burris v. State*, 330 Ark. 66, 73, 954 S.W.2d 209, 213 (1997). Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation which the officer believed to have occurred.

“Hinojosa contends that as a nonresident, the statute applicable to his vehicle was § 27-14-704 titled ‘Vehicles of nonresidents’ rather than § 27-14-716. Section 27-14-716(b) provides that:

Every license plate shall, at all times, be securely fastened in a horizontal position

to the vehicle for which it is issued so as to prevent the plate from swinging and at a height of not less than twelve inches (12") from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible.

The Arkansas Supreme Court concluded that the license plate display requirements of § 27-14-716 apply to all vehicles traveling on Arkansas roads—resident and non-resident alike. Accordingly, Sergeant Drown had probable cause to stop Hinojosa for violation of § 27-14-716.

**SEARCH AND SEIZURE:
Affidavits; Probable Cause**

United States v. Harris,
CA8, No. 08-2203, 3/12/09

In *United States v. Harris*, Antonio Harris moved to suppress the weapon and drugs seized at his apartment on the ground that the warrant authorizing the search that produced them was not supported by probable cause. The Court of Appeals for the Eighth Circuit stated that “probable cause” exists where attendant circumstances indicate that there is a fair probability that contraband or evidence of a crime will be found in a particular place. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The affidavit of Detective Leo Liston, which was offered in support of the warrant application, stated that a confidential informant told him that a man calling himself Bones was selling crack and marijuana out of an apartment. According to the affidavit, the

informant advised Detective Liston that he had seen drugs inside Bones’ apartment and he provided the address where Bones lived and a description of Bones and of the car that he drove. The informant later identified Bones as Mr. Harris. Detective Liston attested that he engaged in an independent investigation that confirmed the information provided to the extent that it could be confirmed. The detective further explained in his affidavit that the confidential informant was reliable because the informant had previously provided information that led to an arrest.

An informant is sufficiently reliable if the informant has provided reliable information in the past or if details from the informant are independently corroborated. See *United States v. Leppert*, 408 F.3d 1039, 1041 (8th Cir. 2005). Taken together, the facts recited in support of the warrant application made it fairly probable that drugs would be found in the apartment. Cf. *United States v. Vinson*, 414 F.3d 924, 930 (8th Cir. 2005). The Court affirmed the denial of Mr. Harris’ motion to suppress.

**SEARCH AND SEIZURE:
Automobile Searches; Search Incidental
to Arrest; Search Warrants**

Arizona v. Gant, No. 07-542, 4/21/09

After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the

Fourth Amendment's warrant requirement, as defined in *Chimel v. California*, 395 U. S. 752 (1969), and applied to vehicle searches in *New York v. Belton*, 453 U. S. 454 (1981), did not justify the search in this case. The United States Supreme Court agreed with that conclusion, finding, in part, as follows:

"Under *Chimel*, police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.' 395 U. S., at 763. The safety and evidentiary justifications underlying *Chimel's* reaching-distance rule determine *Belton's* scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. We also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

"On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated that he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

"When the officers returned to the house that evening, they found a man near the

back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10-to-12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

"Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

"Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (i.e., the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that *Belton* did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked

at the suppression hearing why the search was conducted, Officer Griffith responded: 'Because the law says we can do it.'

"The trial court rejected the State's contention that the officers had probable cause to search Gant's car for contraband when the search began, but it denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. A jury found Gant guilty on both drug counts, and he was sentenced to a three year term of imprisonment.

"After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length our decision in *Belton*, which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of an arrest of the vehicle's recent occupant. The court distinguished *Belton* as a case concerning the permissible scope of a vehicle search incident to arrest and concluded that it did not answer 'the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure.' Relying on our earlier decision in *Chimel*, the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and evidence preservation. When 'the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer,' the

court concluded, a 'warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.' Accordingly, the court held that the search of Gant's car was unreasonable.

"The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari.

"Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U. S. 347, 357 (1967). Among the exceptions to the warrant requirement is a search incident to a lawful arrest. See *Weeks v. United States*, 232 U. S. 383, 392 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. See *United States v. Robinson*, 414 U. S. 218, 230–234 (1973). In *Chimel*, we held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control" —construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting

officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

“In *Belton*, we considered *Chimel*’s application to the automobile context. A lone police officer in that case stopped a speeding car in which *Belton* was one of four occupants. While asking for the driver’s license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked ‘Supergold’ — a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees, the officer ‘split them up into four separate areas of the Thruway so they would not be in physical touching area of each other’ and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine.

“In *Belton*, we held that when an officer lawfully arrests ‘the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile’ and any containers therein. That holding was based in large part on our assumption ‘that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within “the area into which an arrestee might reach.”’

“The Arizona Supreme Court read our decision in *Belton* as merely delineating ‘the proper scope of a search of the interior of an automobile’ incident to an arrest. That is, *when* the passenger compartment is within an arrestee’s reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached. On that view of *Belton*, the state court concluded that the search of *Gant*’s car was unreasonable because *Gant* clearly could not have accessed his car at the time of the search. It also found that no other exception to the warrant requirement applied in this case. *Gant* now urges us to adopt the reading of *Belton* followed by the Arizona Supreme Court.

“Despite the textual and evidentiary support for the Arizona Supreme Court’s reading of *Belton*, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan’s dissent in *Belton*, in which he characterized the Court’s holding as resting on the ‘fiction...that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.’ Under the majority’s approach, he argued, ‘the result would presumably be the same even if [the officer] had handcuffed *Belton* and his companions in the patrol car’ before conducting the search. Since we decided *Belton*, Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee’s reach to justify a vehicle search incident to arrest, but Justice Brennan’s reading of the Court’s opinion has predominated. As Justice O’Connor observed,

'lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.' Justice Scalia has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the back seat of a patrol car, cases allowing a search in this precise factual scenario are legion. Indeed, some courts have upheld searches under *Belton* even when the handcuffed arrestee has already left the scene.

"Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests. **Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.**

"Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to

believe evidence relevant to the crime of arrest might be found in the vehicle. In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

"Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas *Belton* was arrested was arrested for a drug offense, Gant was arrested for driving with suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

"The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle. For several reasons,

we reject the State's argument. First, the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

“At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'

“Contrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and

evidentiary interests. Under our view, *Belton* permits an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U. S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.' If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U. S. 798, 820–821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. *Maryland v. Buie*, 494 U. S. 325, 334 (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

“These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and

it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are not persuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.

"The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded.

We now know that articles inside the passenger compartment are rarely within the area into which an arrestee might reach, and blind adherence to *Belton's* faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."

The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed."

Editor's Note: Law enforcement officers should discuss this case with their appropriate legal advisor. While there are many exceptions to the warrant requirement that justify a vehicle search, this case severely limits the search incidental to arrest doctrine in the context of automobiles.

SEARCH AND SEIZURE:
**Computer Hard Drive Seizure;
Delay in Obtaining Search Warrant**

United States v. Mitchell,
CA11, No. 08-10791, 4/22/09

On February 22, 2007, ICE Special Agent Thomas West and FBI Special Agent Josh Hayes went to Peter Mitchell's residence. Mitchell consented to a search of the upstairs laptop computer and executed a "Consent to Search" form. Agent West subsequently accessed a computer's central processing unit ("CPU") and removed the computer's hard drive from the CPU. The

agents departed from Mitchell's residence at approximately 12:00 p.m. with only the hard drive.

The following Sunday, February 25, 2007, West traveled to Virginia to attend a two-week ICE training course. On March 15, 2007, three days after his return to Savannah and twenty-one days after the initial seizure of Mitchell's hard drive, an application for a search warrant was presented to a United States magistrate judge, who issued it the same day. The affidavit in support of the search warrant was twenty-three pages long, but of those twenty-three pages, only the cover page, paragraph two, and paragraphs twenty-five through twenty-nine—a total of less than three double-spaced pages—was composed of original content. The remainder was boilerplate taken from another affidavit. Acting pursuant to the warrant, Agent West accessed the materials stored on Mitchell's hard drive for the first time and discovered electronic images of child pornography.

On appeal, Mitchell argues that the twenty-one-day delay in obtaining a search warrant was unreasonable. The Court of Appeals for the Eleventh Circuit found, in part, as follows:

"While the possessory interest at stake here was substantial, there was no compelling justification for the delay. The hard drive was seized at noon on Thursday, February 25, 2007. Although Agent West testified that he was scheduled to depart for a two-week training program in West Virginia on February 28, 2007, this still left two and one-half days after seizing the hard drive before his scheduled departure. Indeed, the twenty-three-page supporting affidavit was largely composed of boiler plate language,

and contained less than three double spaced pages of original content. Moreover, although Agent West departed Savannah on February 28, 2007, the FBI agent who accompanied Agent West to Mitchell's residence could have secured a warrant during Agent West's absence.

"As the United States magistrate judge observed, the government has never contended that Special Agent Hayes was unfamiliar with the background of the child pornography investigation or, if he was, that he could not have acquired sufficient knowledge to prepare a search warrant affidavit.

"The only reason Agent West gave for the twenty-one-day delay in applying for a search warrant, was that he didn't see any urgency of the fact that there needed to be a search warrant during the two weeks that he was gone, and that he felt there was no need to get a search warrant for the content of the hard drive until he returned back from training. Subsequently, he explained that any sense of urgency was eliminated by Mitchell's admission that the hard drive contained child pornography.

"While the United States Attorney does not offer this justification for the delay, and the United States magistrate judge properly rejected it, he argues that Agent West was the only agent in the Southern District of Georgia, and Savannah specifically, trained to conduct a forensic examination of the computer for child pornography. Because he was away until March 12, 2007, the search of the computer could not have been undertaken before then, even if a warrant had been obtained earlier. Thus, the argument

continues, the delay had no practical effect upon Mitchell's rights, for his possessory interest would not have been restored prior to the issuance of the search warrant. Moreover, the United States magistrate judge suggested that even if Agent West had secured a warrant on the day of the hard drive's seizure, his evaluation of that hard drive would not have been completed prior to his departure for the two-week training program, for given the thousands upon thousands of images and the numerous video files stored on Mitchell's hard drive, it took Agent West two weeks to complete his evaluation of only *some* of the images.

"We find these arguments unpersuasive because they are predicated on the premise that Agent West's attendance at the training session would have provided an excuse for the delay in applying for the warrant and, if a warrant had been obtained, it would have justified a delay in commencing the search of the hard drive until three weeks after its seizure. We reject this premise.

"The United States magistrate judge correctly observed that the purpose of securing a search warrant soon after a suspect is dispossessed of a closed container reasonably believed to contain contraband is to ensure its prompt return should the search reveal no such incriminating evidence, for in that event the government would be obligated to return the container (unless it had some other evidentiary value). In the ordinary case, the sooner the warrant issues, the sooner the property owner's possessory rights can be restored if the search reveals nothing incriminating. If anything, this consideration applies with even greater force to the hard drive of a computer, which is the digital

equivalent of its owner's home, capable of holding a universe of private information.

"Under these circumstances, the excuse offered for the three-week delay in applying for a warrant is insufficient. If Agent West's attendance at the training seminar could not have been postponed to a later date, an issue as to which no evidence was offered, there is no reason why another agent involved in this nationwide investigation, who possessed qualifications similar to that of Agent West, could not have been assigned the task of conducting the forensic search of the hard drive. The fact that Agent West did all of the forensic examinations in Savannah does not provide a basis for undermining the significant Fourth Amendment interests at stake here.

"While we conclude that the delay in obtaining a warrant here was not justified, we emphasize again that we are applying a rule of reasonableness that is dependent on all of the circumstances. So for example, if the assistance of another law enforcement officer had been sought, we would have been sympathetic to an argument that some delay in obtaining that assistance was reasonable. The same would be true if some overriding circumstances arose, necessitating the diversion of law enforcement personnel to another case. We also recognize that there may be occasions where the resources of law enforcement are simply overwhelmed by the nature of a particular investigation, so that a delay that might otherwise be unduly long would be regarded as reasonable. The circumstances in *United States v. Dass*, 849 F.2d 414 (9th Cir. 1988), are illustrative.

“There the government seized over 1,000 packages from ten selected post offices in Hawaii as part of a joint state/federal task force assembled to slow the flow of drugs mailed from Hawaii. Within two days of their seizure, the packages were transported to a police station and exposed to drug-sniffing dogs. Officials proceeded to seek search warrants for ‘441 packages—an unanticipated flood of packages which were alerted by the dog.’ After mobilizing available resources, they began preparing warrant applications at the rate of seventy-five per week, a rate of one warrant every seventy-five minutes. Nevertheless, despite this effort, there were delays of between seven and twenty-three days between the seizures and issuance of warrants. While a split panel of the Ninth Circuit concluded that the delays were unreasonable, we agree with the dissenting judge that the evidence in the case demonstrated legitimate and practical reasons for the delay in processing the flood of warrants to search the suspicious packages seized.

“By contrast, the present case involved the seizure of a single hard drive. No effort was made to obtain a warrant within a reasonable time because law enforcement officers simply believed that there was no rush. Under these circumstances, the twenty-one-day delay was unreasonable.”

SEARCH AND SEIZURE:
**Consent; Search Based on
Consent of a Co-Occupant**

United States v. Brown,
CA9, No. 08-30040, 4/17/09

On April 3, 2007, Special Agent Dale Watson of the Bureau of Alcohol, Tobacco, Firearms and Explosives received information from a confidential informant that David Brown, wanted on an outstanding warrant for the felony offense of second degree assault, was staying at 807 East Augusta Avenue (the “East Augusta Residence”) in Spokane, Washington, and was in possession of two firearms. Agent Watson and several members of the Spokane Gang Enforcement Team set up surveillance in the neighborhood and soon spotted Brown walking with Lacie Rishel. The officers approached with guns drawn. Both Brown and Rishel were ordered to the ground, handcuffed, and patted down for weapons. No firearm was found on Brown’s person. The officers arrested Brown on the outstanding warrant, placed him in a squad car, and eventually transported him to the Spokane County Jail. At no time did Agent Watson ask Brown for permission to search the East Augusta Residence.

Agent Watson initiated a discussion with Rishel while she was in handcuffs. The parties dispute how long Rishel was in handcuffs and when during her exchange with Agent Watson they were removed. Because the district court denied Brown’s suppression motion, we interpret the evidence from the suppression hearing in the light most favorable to the government absent a contrary factual finding by the court. See *United States*

v. Patayan Soriano, 361 F.3d 494, 501 (9th Cir. 2004). Rishel informed Agent Watson that she lived at the East Augusta Residence with her boyfriend, Devion Tensley, and that Brown had been sleeping on their couch for the past few nights as their guest. At the suppression hearing, Agent Watson and Rishel offered conflicting testimony on how the discussion progressed thereafter.

Agent Watson testified that after informing Rishel that Brown was likely in possession of two firearms and that these were probably located at the East Augusta Residence, Rishel “adamantly denied” this and stated, “Well, you know what, you can come down and look if you want.” On cross-examination, Agent Watson repeatedly denied that he or any other officer told Rishel either that they had enough evidence to get a search warrant or that they would “mess the house up” and “slice the couches” if forced to obtain one.

During direct and redirect examination, Rishel denied inviting Agent Watson to search the East Augusta Residence. To the contrary, Rishel claimed that the officers threatened not only to lock her out until they obtained a search warrant, but also to “tear the place apart” if forced to take that route. She stated that she only agreed to the search because of these threats. Upon cross-examination, however, Rishel also admitted to Agent Watson’s version of the events:

Q: Do you recall telling agent Watson...that you didn't believe that there were any firearms in your apartment and if he wanted to, he could search it, do you recall saying that to him?

A: Right, yes.

Q: Before he ever asked you anything about searching that apartment, any consent or whatever, you offered him the opportunity to search your apartment, did you not?

A: Right.

The district court found that Rishel spontaneously volunteered consent without any prompting by Agent Watson.

The parties agree that after her exchange with Agent Watson, Rishel walked back to the East Augusta Residence alone. Agent Watson testified that because Rishel expressed concern that her landlord would be upset by law enforcement activity, the officers removed some police insignia before meeting Rishel at home. Rishel denied making such a request, and further claimed that the officers were already waiting for her outside the East Augusta Residence when she arrived.

Agent Watson’s and Rishel’s accounts of the search itself are mostly in accord. After entering the apartment, Agent Watson asked if he could search the area where Brown had slept, and Rishel consented. Agent Watson found a semiautomatic pistol under a couch cushion. Upon probing by the agents, Rishel revealed that the revolver was likely in the bedroom she shared with Tensley. After Agent Watson asked Rishel if he could search the bedroom and she consented, he found a .357 caliber revolver in a chest of drawers.

Tensley, Rishel’s boyfriend, arrived at the East Augusta Residence after the officers had finished their search. Agent Watson explained that Brown had been arrested on an outstanding warrant, that Rishel had consented to a search of the East Augusta

Residence, and that two firearms had been found. Because Rishel expressed fear of Tensley's reaction should he learn of her cooperation, Agent Watson also asked Tensley not to be upset with Rishel for consenting to the search-adding that he believed he had probable cause for a search warrant and likely would have applied for one had he needed to do so.

Brown was charged by indictment with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924. After hearing testimony, the district court denied Brown's motion to suppress the two firearms and ammunition. The court found that Rishel gave knowing and voluntary consent to search the apartment. The court also concluded that the officers did not violate the mandate of *Georgia v. Randolph*, 547 U.S. 103 (2006), because Brown was placed in the police car pursuant to his arrest and prior to any discussion between Agent Watson and Rishel. Brown pleaded guilty but reserved the right to appeal the district court's ruling.

Upon appeal, the Ninth Circuit Court of Appeals rejected his arguments and affirmed his conviction, finding, in part, as follows:

"...In *Georgia v. Randolph*, the Supreme Court held that an occupant's consent to the warrantless search of a residence is not valid as to a physically present co-occupant who expressly refuses consent. 547 U.S. 103, 120 (2006). In so holding, the Supreme Court distinguished and expressly preserved its prior holdings in *United States v. Matlock*, 415 U.S. 164 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

The second loose end is the significance of Matlock and Rodriguez after today's decision. Although the Matlock defendant was not present with the opportunity to object, he was in a squad car not far away; the Rodriguez defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent cotenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self interest in objecting is in fact at the door and objects, the cotenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. Randolph, 547 U.S. at 121-22. Seizing on the emphasized language, Brown argues that officers placed him in the squad car in order to avoid his possible objection to a search of the East Augusta Residence.

"The record does not support Brown's claim. While Agent Watson admitted focusing on Rishel rather than Brown in his effort to access the East Augusta Residence and secure the firearms in Brown's possession,

Brown's claim that he was intentionally removed to avoid his objection during the consent colloquy with Rishel is mere speculation. Officers placed Brown in the squad car pursuant to his lawful arrest on the assault charge and to transport him to the Spokane County Jail. Brown points to no evidence to the contrary. Brown nonetheless relies on *United States v. Murphy*, in which we held that *if the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made.* 516 F.3d at 1124-25. But we said this in the context of the same *Randolph* passage quoted above, and were thus referring to a pretextual arrest made for the specific purpose of preventing the arrestee's subsequent objection to the search. Again, there is no evidence that Brown's arrest was motivated by any purpose other than removing from the streets of Spokane a felon wanted on an outstanding warrant for second degree assault and reportedly in possession of firearms. Moreover, the emphasized language is dictum as the arrestee in *Murphy* had in fact refused consent to search; the search conducted was predicated on consent obtained two hours later from a co-tenant.

"That Agent Watson retrieved from Brown's pocket the key to the East Augusta residence after obtaining Rishel's consent, and thus had an additional opportunity to obtain Brown's consent, does not alter the fact that Brown was justifiably absent from the search colloquy. Moreover, in light of the policy justifications provided in *Randolph* for the 'fine line' drawn therein, Agent Watson's decision not to seek consent from Brown does not invalidate the consent spontaneously volunteered by Rishel.

"Seeking Brown's consent would have needlessly limited the capacity of the police to respond to ostensibly legitimate opportunities in the field. *Randolph*, 547 U.S. at 122. Agent Watson encountered two such opportunities on the day he arrested Brown—he encountered Brown in the company of a co-occupant, and that co-occupant later spontaneously volunteered consent to a search of the shared residence. These two legitimate opportunities allowed Agent Watson to remove from a felon's possession both a semiautomatic pistol and a revolver.

"We thus agree with the district court that Agent Watson did not violate the Supreme Court's mandate in *Randolph*."

SEARCH AND SEIZURE:
**Locked Safe Opened During
 Execution of a Search Warrant**
State v. Stites, CR-09-1186, 3/19/09

In *State v. Stites*, the Fort Smith Police Department conducting a search by warrant of Shane Stites' residence. During the search, the police discovered a locked safe inside a small closet in the entry hall by the front door and adjacent to the living room. The safe was twelve-by-eighteen inches and large enough to contain drugs, drug paraphernalia and firearms. A locksmith was summoned to the scene to open the safe. Once the safe was opened, the officers discovered crystalline substance, methamphetamine, and a Honeywell lock box that contained a crystalline and vegetable residue.

Stites asserts, among other things, that the evidence seized from the locked safe found

inside his residence should be suppressed because neither the affidavit for the search warrant nor the warrant itself mentioned a safe, and thus, the search of the safe exceeded the scope of the search authorized by the warrant.

The Arkansas Supreme Court stated that there is no dispute that the search for the items specified in the warrant was ongoing when the police opened the safe. “At that time, they had found some of the items listed in the warrant. Moreover, the safe was large enough to contain drugs, drug paraphernalia and the second handgun described by the informant. The fact that the officers had already discovered some drugs and drug paraphernalia did not preclude them from continuing to search for drugs and drug paraphernalia and the second handgun. To hold otherwise would lead to an absurd result—the search would have to cease upon the initial discovery of any drugs or drug paraphernalia. It was therefore reasonably necessary for the police to search the safe. Thus, we conclude that the officers’ search of the safe was within the scope of the search authorized by the warrant, and the circuit court erred in ruling that the safe could not be opened without a second warrant.”

SEARCH AND SEIZURE:

“Nexus”; Inferences

United States v. Biglow,
CA10, No. 08-3155, 4/20/09

In *United States v. Biglow*, the Court of Appeals for the Tenth Circuit discussed the nexus between suspected criminal activity and the place to be searched and found, in part, as follows:

“Whether a sufficient nexus has been established between a defendant’s suspected criminal activity and his residence thus necessarily depends upon the facts of each case. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (noting that probable cause ‘deals with probabilities and depends on the totality of the circumstances’). Certain non-exhaustive factors relevant to our nexus analysis include (1) the type of crime at issue, (2) the extent of a suspect’s opportunity for concealment, (3) the nature of the evidence sought, and (4) all reasonable inferences as to where a criminal would likely keep such evidence. See *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981); *United States v. Rahn*, 511 F.2d 290, (10th Cir. 1975).

“While the nexus requirement — like probable cause itself — is not reducible ‘to a neat set of legal rules,’ see *Pringle*, 540 U.S. at 371, our case law reveals that little ‘additional evidence’ is generally required to satisfy the Fourth Amendment’s strictures. We have never required, for example, that hard evidence or “personal knowledge of illegal activity” link a Defendant’s suspected unlawful activity to his home. See *United States v. Tisdale*, 248 F.3d 964, (10th Cir. 2001) (explaining that probable cause to “believe certain items will be found in a specific location is a practical, nontechnical conception that need not be based on direct, first-hand, or ‘hard’ evidence). Instead, we have indicated that a sufficient nexus is established once ‘an affidavit describes circumstances which would warrant a person of reasonable caution’ in the belief that the articles sought’ are at a particular place.

“We have long recognized that magistrate judges may ‘rely on the opinion’ of law enforcement officers ‘as to where contraband’

or other evidence may be kept. *United States v. Hargus*, 128 F.3d 1358 (10th Cir. 1997). In some cases, the ‘additional evidence’ linking an individual’s suspected illegal activity to his home has thus come in the form of an affiant officer’s statement that certain evidence — in his or her professional experience — is likely to be found in a defendant’s residence. See, e.g., *Sanchez*, 555 F.3d at 913 (pointing to an affiant officer’s observation that, in his professional experience, drug dealers often keep evidence related to their unlawful activities at home. But an affiant officer need not draw an explicit connection between a suspect’s activities and his residence for a Fourth Amendment nexus to exist.

“Additional evidence connecting a defendant’s suspected activity to his residence may also take the form of inferences a magistrate judge reasonably draws from the Government’s evidence. See, e.g., *Tisdale*, 248 F.3d at 971 (concluding a magistrate judge could infer a nexus existed to search a suspect’s car where a dead body lay adjacent to the vehicle and an unidentified party had opened the trunk earlier in the day); *Hargus*, 128 F.3d at 1362 (inferring a nexus to a suspect’s residence based on the small scale of his business, the ongoing nature of the conspiracy at issue, and the fact that he used his home telephone to arrange the sale of stolen goods); *Reyes*, 798 F.2d at 382 (approving the inference that evidence would be found at a defendant’s home based on an affiant officer’s statement that the conspirators maintained records of their activities); *Anthony*, 667 F.2d at 874 (reasoning that since an illegal wiretap device had to be constructed it was reasonable to assume evidence related to its assemblage would be found at a suspect’s home); *Rahn*, 511 F.2d 293-94 (explaining that it was reasonable to

assume an ATF agent who allegedly possessed a stolen gun and used it to go hunting would keep the weapon at his home).

“In other words, magistrate judges may draw their own reasonable conclusions, based on the Government’s affidavit and the practical considerations of everyday life, as to the likelihood that certain evidence will be found at a particular place. *Anthony*, 667 F.2d at 874. Thus, we have specifically acknowledged that the nexus between the place to be searched and the evidence sought may be established through normal inferences about the location of evidence. *Tisdale*, 248 F.3d at 971 (quoting *United States v. Gant*, 759 F.2d 484, 488 (5th Cir. 1985)); see also *Reyes*, 798 F.2d at 382 (noting that it is reasonable to assume that certain types of evidence would be kept at a defendant’s residence.)

“Allowing such inferences to establish a Fourth Amendment nexus is appropriate because probable cause is a matter of ‘probabilities and common sense conclusions, not certainties.’ *United States v. Orr*, 864 F.2d 1505, 1508 (10th Cir. 1988); see also *Anthony*, 667 F.2d at 874 (recognizing the Government’s affidavit need not establish to a “certainty that the objects sought will be found as a result of the search).”

In this case, the Court of Appeals for the Tenth Circuit determined that the search warrant affidavit satisfied the requirements of the Fourth Amendment.

SEARCH AND SEIZURE:

Protective Sweep

United States v. Green,
CA8, No. 08-1680, 3/26/09

After extensive investigation and surveillance, United States Marshals and Dallas police officers executed an Arkansas fugitive arrest warrant at Fred Green's residence in a Dallas suburb. Upon entering, the officers secured four other men found in the living room and spread out in the large house to conduct a protective sweep and to search for Green. Deputy Marshal Thomas Kinsella and Police Officer Kurt Hibbits proceeded to the kitchen area. Marshal Kinsella entered a large pantry and saw in plain view a duffel bag with a clear plastic bag "with white powdery substance sticking out." The duffel bag was seized and found to contain 486 grams of cocaine, 145 grams of methamphetamine, and digital scales.

Meanwhile, Officer Hibbits went through the kitchen to the attached garage, where Green was located and arrested. Other officers continued the protective sweep without a search warrant, seizing various items. At issue on appeal are the drugs in the duffel bag; a MAC-10 9mm machine gun with two magazines, a Derringer .410 caliber pistol, and \$13,664 in cash found on top of a six foot dresser in the master bedroom; an SKS .308 caliber rifle found in a large bedroom closet; and 229 rounds of 9mm ammunition for the MAC-10 machine gun and nine rounds of .410 caliber ammunition for the Derringer. Green argues that the officers exceeded the permissible limits of a protective sweep in seizing this evidence.

In this case, the Court of Appeals for the Eighth Circuit found that the evidence was legally seized under the protective sweep doctrine, finding, in part, as follows:

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337 (1990). To be 'properly limited,' a protective sweep must be a quick and limited search of premises conducted to protect the safety of police officers or others and narrowly confined to a cursory visual inspection of those places in which a person might be hiding. An officer arresting a suspected drug trafficker in one room of a multi-room residence is justified in conducting a *Buie* sweep out of concern that there could be individuals lurking in the other rooms who may resort to violence to thwart the arrest. *United States v. Cash*, 378 F.3d 745, 749 (8th Cir. 2004), cert. denied, 544 U.S. 963 (2005).

During a properly limited protective sweep, the police may seize an item that is in plain view if its incriminating character is 'immediately apparent.' *Horton v. California*, 496 U.S. 128, 136 (1990). The government bears the burden of proving that this exception to the search warrant requirement applies.

SEARCH AND SEIZURE:
Revocation Hearings

Sherman v. State,
 CR 08-523, 5/14/09

The Arkansas Supreme Court held that the exclusionary rule does not apply to revocation hearings unless the defendant demonstrates that the officers conducting the search acted in bad faith. The Court made no distinction between the different types of revocation proceedings and held that the bad-faith exception applies to all revocation proceedings.

SEARCH AND SEIZURE:
Roadblocks; DWI Arrest

Basham v. State, No. CACR08-812, 4/9/09,
 [Unpublished]

In *Basham v. State*, David Basham challenges the trial court's ruling denying his motion to suppress. On appeal to the Arkansas Court of Appeals, he argues that his arrest for driving while intoxicated flowed from a constitutionally infirm roadblock administered by the Jonesboro Police Department and, as a result, all evidence acquired during the stop should have been suppressed.

On September 9, 2006, inside the city limits of Jonesboro, a roadblock operation was ordered by the Chief of Police for the city. The purpose of the roadblock was to check for obstructed or damaged windshields, inoperable headlights and tail-lights, and damaged safety equipment on every third vehicle that passed through a designated portion of Airport Road. Jonesboro police officer, Robert Ghea,

made contact with Basham while carrying out the roadblock plan. Ghea asked for Basham's driver's license and registration. During the stop, Ghea noticed that Basham smelled of alcohol and began investigating him on suspicion of driving while intoxicated. Ultimately, Basham was arrested and charged with driving while intoxicated, second offense.

Basham challenges the constitutionality of the checkpoint on the grounds that it was a "general criminal investigatory roadblock" with a primary purpose of looking for violations of Arkansas criminal law. His argument is grounded in the specifics of the checkpoint program that were established at the hearing. Specifically, he notes that officers were instructed to look for invalid and suspended driver's licenses and discrepancies between the vehicle and the paperwork presented. He argues that because these violations could subject the driver to a citation or warning, the roadblock was "transformed" into a constitutionally violative program with the primary purposes of "revenue enhancement" and "general criminal investigation." In further support of this contention, he cites the testimony of Officer Ghea who stated that—while operating the checkpoint—officers were empowered to further investigate any driver that exhibited signs of impairment for suspicion of driving while intoxicated.

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

"Basham's contentions are not supported by either the facts or the law surrounding this case. A roadblock initiated for the purpose of checking driver's licenses and vehicle registration is a permissible means of ensuring

roadway safety. *Camp v. State*, 26 Ark. App. 299, 764 S.W.2d 463 (1989). Indeed, our court has previously noted that roadblocks initiated to check driver's licenses and registrations have the legitimate objective of ascertaining that only qualified drivers and safe vehicles are using our highways. Further, as the Supreme Court of the United States has observed, the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation and hence that licensing, registration, and vehicle inspection requirements are being observed because such matters are 'essential elements in a highway safety program.' See *Deleware v. Prouse*, 440 U.S. 648 (1979)"

"It would result in a practical and legal absurdity to require an officer conducting a valid safety-inspection roadblock to turn a blind eye to an intoxicated or impaired driver—allowing an individual driving under the influence to continue on his way—in order to avoid the stop being decried as one primarily designed to detect ordinary, criminal wrongdoing."

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SEARCH AND SEIZURE:
Search by a Private Person; Bounty Hunters
United States v. Poe, CA10, No. 07-6237, 3/3/09

Aaron Dale Poe was apprehended by bounty hunters after he jumped bail in an Oklahoma state criminal case. In the home where Poe was found, the bounty hunters discovered drugs, drug-related paraphernalia, and a loaded firearm that was used in evidence in a trial in which he was convicted.

The Tenth Circuit Court of Appeals had to determine if bounty hunters constitute state actors for purposes of the Fourth Amendment when they conduct a search in the course of seeking out a bailjumper. The Court concluded that bounty hunters do not qualify as state actors when, as here, they act without the assistance of law enforcement and for their own pecuniary interests.

SEARCH AND SEIZURE:
**Search by Private Person
who is a Government Employee**

United States v. Inman,
CA8, No. 07-1881, 3/5/09

Jason D. Inman was employed as a paramedic by the Ste. Genevieve County Ambulance District in Missouri. On Saturday, March 11, 2006, Inman was away from the ambulance station responding to a call for service. Two other employees of the ambulance service, Captain Brian Watson and Bill Becker, were at the station having a conversation about Inman's new girlfriend. Watson could not remember her name, so he opened Inman's personal laptop to see if she was included on Inman's instant messenger list. The laptop was turned on and sitting on the kitchen table in the station.

Watson did not find the name of Inman's girlfriend, but as he was about to close the computer lid, he noticed icons on the computer screen with file names that suggested child pornography, namely, "pedoMarie," "10-year-old prostitute," and "Parents teach eight, nine, and 10-year-olds sex." Watson and Becker clicked on the icons, viewed three videos accessed through the icons, and observed minors engaging in sexual acts.

Watson then called a friend, a local police chief, to ask for advice. After Watson presented a "theoretical" story describing what he and Becker had found, the friend suggested that they report the incident. Watson called Kendall Schrum, the ambulance

district administrator, who told Watson not to confront Inman and that an investigation would ensue after the weekend.

On the following Monday, Watson reported what he had found to Lieutenant Jason Schott of the Ste. Genevieve County Sheriff's Department. Using the information that Watson provided, Schott obtained a search warrant for Inman's computer. Inman also consented to a search of his house. The police found child pornography on the hard drive of Inman's computer and on DVDs found in Inman's house. A grand jury charged Inman with three counts of possession of child pornography. Inman moved to suppress evidence seized from his home and computer on the ground that it was the fruit of an illegal search of his computer by Watson. Inman argued that Watson's actions, as a government employee and Inman's supervisor, were regulated by the Fourth Amendment, and that Watson violated Inman's rights by searching the computer without a warrant.

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

"In considering whether conduct of a private citizen is subject to the Fourth Amendment, our court considers 'whether the government had knowledge of and acquiesced in the intrusive conduct; whether the citizen intended to assist law enforcement agents or instead acted to further his own purposes; and whether the citizen acted at the government's request.' *United States v. Smith*, 383 F.3d 700, 705 (8th Cir. 2004). When the actor alleged to have conducted an unlawful search is a government employee, the second factor is particularly important. In a leading decision, for example, the Ninth Circuit concluded

that ‘for the conduct of a governmental party to be subject to the fourth amendment, the governmental party engaging in that conduct must have acted with the intent to assist the government in its investigatory or administrative purposes and not for an independent purpose.’ *United States v. Attson*, 900 F.2d 1427, 1433 (9th Cir. 1990).

“The record supports the conclusion that in opening Inman’s computer and accessing a few files, these employees did not act with the intent to assist the government in its investigatory or administrative purposes. It is virtually undisputed that Watson and Becker first opened the computer to satisfy their curiosity about Inman’s new girlfriend. When Watson noticed icons with suspicious filenames, he evidently was concerned that they might contain illegal child pornography, but he also testified at trial that he ‘wasn’t thinking anything about policy’ or ‘legality’ when he accessed the files. Only a moment passed between the initial foraging for information about Inman’s girlfriend and the opening of the computer files. We are not persuaded that the district court erred in declining to find that Watson’s intent shifted from that of curious fellow employee to law enforcement adjunct in that short period of time. That Watson thereafter sought advice from a local police chief by presenting a ‘theoretical’ scenario and then deliberated with Becker for twenty to thirty minutes before reporting the discovery of child pornography, further supports the conclusion that Watson and Becker had not already formed an intent to assist law enforcement when they first accessed Inman’s files. We therefore uphold the district court’s denial of Inman’s motion to suppress evidence.”

SEARCH AND SEIZURE:
**Seizure of a Passenger in a Vehicle;
 Submission to Authority**

United States v. Jones,
 CA6, No. 07-5994, 4/16/09

On the afternoon of November 29, 2006, Detective Jonathan Mattingly of the Louisville Metro Police Department was patrolling in his unmarked pickup truck in what was regarded as a drug-trafficking neighborhood in Louisville, near Seventh and Kentucky Streets. He noticed a maroon Nissan automobile traveling northbound on Seventh Street and watched as it came to a stop in front of a house at 1245 South Seventh Street. The car was occupied by a white female driver and two black male passengers. Mattingly saw one of the passengers, later identified as defendant Tobias Jones, exit the Nissan and enter the house. While Jones was in the house—his mother’s house, as it turned out—the driver and the other passenger remained in the car with the engine running. After a couple of minutes, Jones came out and returned to the waiting car. Based on his seven years’ experience in law enforcement and his observation of these events, Mattingly suspected he could be witnessing an incident of “flagging.”

Mattingly described “flagging” as a common practice whereby a person unfamiliar with a neighborhood but interested in buying drugs drives around the neighborhood until flagged-down by someone waiting on a corner. That person will then enter the vehicle, direct the driver to a house where drugs can be purchased, enter the house to negotiate the deal, and then return to the vehicle to consummate the transaction. Mattingly

described the actions of the Nissan's occupants as consistent with flagging, but admitted he had no other reason to suspect criminal activity was afoot.

Intending to make inquiry of the Nissan's occupants, Mattingly had in the meantime radioed for assistance. Before the Nissan could leave the curb, Mattingly pulled up in front of it, so that the front bumper of his pickup truck was about two or three feet from the Nissan's front bumper. Almost simultaneously, Detective Kevin McKinney arrived and pulled his car, also unmarked, up to within four or five feet behind the Nissan. As he pulled in behind the Nissan, McKinney turned on his emergency lights. As the Nissan was thus hemmed in, Jones did not remain seated in the back seat of the Nissan. Rather, he opened the car door and "jumped out." It was at this point that Mattingly, having already noticed the confused, nervous, "like a deer in the headlights" look on Jones's face, also noticed a "lump" or "bulge" on Jones's person, "in the front," and saw him "acting weird . . . kind of holding his stomach." Thinking that Jones was about to run, Mattingly identified himself as a police officer and ordered him to stop. Jones immediately complied. Mattingly then patted Jones down and discovered a .38 caliber pistol in the front pocket of Jones's hooded sweatshirt. He removed the pistol and continued the pat down, finding a 9 mm pistol in the waistband of Jones's pants. It was later determined that the second gun was reported stolen in Indiana. Mattingly also found a bag of marijuana in Jones's right front pants pocket, and McKinney found a bag of marijuana in the passenger compartment of the Nissan. As Mattingly applied handcuffs to Jones, Jones asked him to go easy, because he had been shot in the chest a couple of weeks

earlier. Indeed, later examination revealed a number of staples securing a wound on Jones's chest and abdomen.

Jones was arrested and eventually charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Before trial, Jones moved the district court to suppress the firearms the police seized during the stop and the statements he made during the incident. Jones contended the officers did not have reasonable suspicion when they initiated the stop, rendering the Terry stop and pat-down each unreasonable and violative of his Fourth Amendment rights. Following an evidentiary hearing, the district court agreed and granted the motion to suppress.

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

"By blocking in the Nissan the officers communicated to a reasonable person occupying the vehicle that they were not free to leave. See *Brendlin v. California*, 551 U.S. 249, (2007) where the United States Supreme Court held that automobile passengers are seized during traffic stops even though the police command to stop is directed to the driver, because reasonable persons in the passenger seats would not feel free to move once the police have stopped the vehicle). Hence, a warrantless 'seizure' had occurred at the time the Nissan was hemmed in by the unmarked police vehicles.

"The district court concluded that, at the time the Nissan was initially blocked in, the officers' observations of conduct in a drug-trafficking neighborhood consistent with flagging but otherwise innocent did not give rise to

reasonable suspicion. We conclude the district court's ruling is marked by two errors.

"In its initial decision, the district court erred by limiting its consideration to the circumstances known to the officers as of the time when they initiated the seizure by hemming in the Nissan. Yes, at that point, the Nissan was seized, and so were its occupants—but only insofar as they can be deemed to have submitted to the officers' show of authority. Brendlin makes it clear that, generally, when a police officer pulls over a vehicle during a traffic stop, the officer seizes everyone in the vehicle, not just the driver. Yet, the Brendlin Court also observed, 'there is no seizure without actual submission.' Without actual submission, 'there is at most an attempted seizure.'

"The driver and other passenger were, by virtue of their passive acquiescence, effectively seized when the police vehicles hemmed in the Nissan. But what of Jones? Jones undisputedly did not passively acquiesce; he did not remain seated in the Nissan; he did not submit to the show of authority. Rather, he opened the car door and 'jumped out' as though he wanted to run. It was at this point that Mattingly, having already noticed the confused, nervous, 'like a deer in the headlights' look on Jones's face, also noticed a 'lump' or a 'bulge' on Jones's person, 'in the front,' and saw him 'acting weird . . . kind of holding his stomach.' Then Mattingly identified himself as a police officer and ordered Jones to stop. Jones immediately complied. It was *then* that Jones submitted to the show of authority and the seizure of Jones was effected. Up to that point, the officers' actions, in relation to Jones, amounted to no more than an attempted seizure.

"We hold that the district court, in measuring reasonable suspicion, should have considered all of Mattingly's observations up to the moment when Jones finally yielded to the unambiguous show of police authority.

"In the suppression hearing, Mattingly testified that he had almost seven years' experience in law enforcement with the Louisville Metro Police Department, most of it devoted to drug-related crime investigations. Based on this experience, Mattingly recognized the indicia of flagging (i.e., drug trafficking) when he observed the Nissan and the conduct of its occupants, as he patrolled in a known drug-trafficking neighborhood. These observations, Mattingly believed, justified further inquiry. We have recognized the importance of allowing police officers to draw reasonable inferences from their observations in light of their specialized training and experience.

"The fact that the Nissan's occupants were not engaged in flagging does not negate the fact that their conduct was consistent with flagging. Nor does it undermine the reasonableness of Mattingly's deduction that flagging may have been afoot. Mattingly's observation and deduction, though perhaps not sufficient in themselves to establish reasonable suspicion, certainly represented a relevant part of the totality of the circumstances.

"On reconsideration, the district court concluded that Jones's frightened reaction to the sudden arrival of the unmarked vehicles added little to the totality of the circumstances. The district court treated Jones's frightened reaction dismissively, finding it was not an unexpected or unreasonable reaction and

therefore not suspicious. Yet, circumstances comprising a particularized and objective basis for reasonable suspicion need not be uncommon or especially unique. Further, although each particular act in a series of acts may be innocent in itself, taken together, they may substantiate suspicion of wrongdoing warranting further investigation.

“Although the district court purported to consider the totality of the circumstances, it gave no weight to Mattingly’s observations (1) of a bulge in the front of Jones’s hooded sweatshirt, (2) of Jones weirdly holding his stomach, and (3) of Jones appearing to want to run. In our opinion, these are critical observations, suggesting the possible presence of a firearm in a confrontational setting, and calling for an immediate show of authority to neutralize potential danger and conduct further investigation.

“The totality of relevant circumstances included the facts that: Mattingly had substantial experience in law enforcement, much of it spent investigating drug-related crimes; he was patrolling in a known drug-trafficking area when he observed conduct undisputedly consistent with flagging; when Mattingly confronted the occupants of the Nissan, Jones reacted in a nervous and frightened manner, in apparent defiance; and that, as Jones jumped out of the car as though to run, he was seen to have a bulge in the front of his sweatshirt which he was holding in a weird way. These circumstances, viewed together, not individually, comprise a particularized and objective basis for suspecting wrongdoing.

“Accordingly, when Jones’s seizure was effected, it was supported by reasonable

suspicion. It follows that Jones’s Fourth Amendment rights were not violated and that the district court’s suppression of the evidence seized was erroneous. The suppression order must therefore be reversed.”

SECOND AMENDMENT:
**Ordinance Regulating Weapon
Possession on County Property**

Nordyke v. King, CA9,
No. 07-15763, 4/20/09

Russell and Sallie Nordyke operate a business that promotes gun shows throughout California. A typical gun show involves the display and sale of thousands of firearms, generally ranging from pistols to rifles. Since 1991, they have publicized numerous shows across the state, including at the public fairgrounds in Alameda County. Before the County passed the law at issue in this appeal, the Alameda gun shows routinely drew about 4,000 people. The parties agree that nothing violent or illegal happened at those events.

In the summer of 1999, the County Board of Supervisors, a legislative body, passed Ordinance No. 0-2000-22 (“the Ordinance”), codified at Alameda County General Ordinance Code (“Alameda Code”) section 9.12.120. The Ordinance makes it a misdemeanor to bring onto or to possess a firearm or ammunition on County property. Alameda Code § 9.12.120(b). It does not mention gun shows.

According to the County, the Board passed the Ordinance in response to a shooting that occurred the previous summer at the fairgrounds during the annual County Fair.

The Ordinance begins with findings that “gunshot fatalities are of epidemic proportions in Alameda County.” Id. § 9.12.120(a). At a press conference, the author of the Ordinance, Supervisor Mary King, cited a “rash of gun-related violence” in the same year as the fairground shooting. She was referring to a series of school shootings that attracted national attention in the late 1990s, the most notorious of which occurred at Columbine High School in Littleton, Colorado.

But the Nordykes insist that something more sinister was afoot. They point to some of King’s other statements as evidence that she actually intended to drive the gun shows out of Alameda County. Shortly before proposing the Ordinance, King sent a memorandum to the County Counsel asking him to research “the most appropriate way” she might “prohibit the gun shows” on County property. King declared she had “been trying to get rid of gun shows on Country property” for “about three years,” but she had “gotten the run around from spineless people hiding behind the constitution, and been attacked by aggressive gun toting mobs on right wing talk radio.” At her press conference, King also said that the County should not “provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.” Without expressing any opinion about King’s remarks, the Board of Supervisors adopted the Ordinance.

County officials then exchanged several letters with the Nordykes. The General Manager of the fairgrounds asked the Nordykes to submit a written plan to explain how their next gun show would comply with the Ordinance. As the County Counsel had told the General Manager, the Ordinance did not expressly

prohibit gun shows or the sale of firearms. The Nordykes insisted then and maintain now that they cannot hold a gun show without guns; perhaps because they thought it futile, they never submitted a plan.

The Nordykes and several patrons of and exhibitors at the gun shows (collectively, “the Nordykes”) sued the County and its Supervisors under 42 U.S.C. § 1983 for various constitutional violations. The lawsuit has wended through various procedural twists and turns for nearly a decade.

In a 45-page opinion, the Court of Appeals for the Ninth Circuit expressed the following thoughts:

“We conclude that the right to keep and bear arms is ‘deeply rooted in this Nation’s history and tradition.’ Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the ‘true palladium of liberty.’ Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

“Though we conclude that the Due Process Clause of the Fourteenth Amendment applies the protections of the Second Amendment to state and local governments, the question remains whether such application invalidates the specific Ordinance the Nordykes challenge.

“The United States Supreme Court in *District of Columbia v. Heller*, No. 07-290, 6/26/08, CJI Legal Briefs, Volume 13, Issue 3 at page 6, stated that the Second Amendment’s guarantee revolves around armed self-defense. If laws make such self-defense impossible in the most crucial place—the home —by rendering firearms useless, then they violate the Constitution.

“But the Ordinance before us is not of that ilk. It does not directly impede the efficacy of self-defense or limit self-defense in the home. Rather, it regulates gun possession in public places that are County property.

“The Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it. The Ordinance falls on the lawful side of the division, familiar from other areas of substantive due process doctrine, between unconstitutional interference with individual rights and permissible government nonfacilitation of their exercise. Finally, prohibiting firearm possession on municipal property fits within the exception from the Second Amendment for ‘sensitive places’ that *Heller* recognized. These considerations compel us to conclude that the Second Amendment does not invalidate the specific Ordinance before us.”