

CJI Legal Briefs

Volume 13, Issue 4

Winter 2009

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

Edited by Don Kidd



Contents

- 1 **ARKANSAS FREEDOM OF INFORMATION ACT:** Attorney's Fees
- 2 **AMERICANS WITH DISABILITIES ACT:** Accommodations
- 6 **CIVIL LIABILITY:** Arrest Outside of Jurisdiction
- 6 **CIVIL LIABILITY:** Probable Cause
- 18 **CONFESSIONS:** Failure to *Mirandize*; Public Safety Exception
- 19 **CONFESSIONS:** Invoking Right to Counsel
- 23 **CONFESSIONS:** Recording Requirement
- 25 **EYEWITNESS IDENTIFICATION:** Field Showups
- 27 **PROBABLE CAUSE:** Arrest; Claim of Lack of Direct Evidence
- 28 **SEARCH AND SEIZURE:** Automobile Inventory Searches
- 33 **SEARCH AND SEIZURE:** Private Clubs; Members Only "Admission Policy"
- 35 **SEARCH AND SEIZURE:** Reasonable Suspicion; Anonymous Telephone Call; Caller Identification
- 37 **SEARCH AND SEIZURE:** Reasonable Suspicion; Anonymous Telephone Call; Caller Identification
- 39 **SEARCH AND SEIZURE:** Stop and Frisk; Nervousness
- 39 **SEARCH AND SEIZURE:** Vehicle Stops; Expanding the Scope of the Initial Investigation
- 40 **SECOND AMENDMENT:** Right to Keep and Bear Firearms
- 41 **SUBSTANTIVE LAW:** Drugs; Constructive Possession

ARKANSAS FREEDOM OF INFORMATION ACT: Attorney's Fees

City of Little Rock v. Carpenter, No. 08-171, 10/30/08

On August 6, 2005, Little Rock police officers stopped a vehicle in which Mr. Willie Earl Leggs, Jr., was a passenger. As a result of the stop, Leggs was arrested for being a felon in possession of a firearm. While Leggs was incarcerated at the Northside Holding Facility of the Pulaski County Regional Detention Facility, he suffered some kind of seizure and was transported to Baptist Health Medical Center—North Little Rock. Leggs was later pronounced dead, and his autopsy report ruled the death as accidental, finding the cause of death to be from cocaine intoxication.

On September 26, 2005, Ms. Tammy B. Gattis, counsel for Ms. Willie Carpenter, Leggs's mother, hand delivered a request for documents, pursuant to Arkansas' Freedom of Information Act (FOIA), to the Little Rock City Attorney's Office and the Little Rock Chief of Police. The request read as follows:

All documents related in any way to any investigation/review conducted by any person or entity into the circumstances surrounding the incarceration or demise of Willie Earl Leggs, Jr., while in the Pulaski County Jail or in the custody of the Little Rock Police on or about August 6, 2005.

DISCLAIMER

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

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

Subsequently, numerous other requests were made for documents under the Arkansas Freedom of Information Act. Some requests were impacted by an ongoing Internal Affairs investigation in terms of the City of Little Rock's ability to disclose certain documents. However, numerous documents, videos, and audio tapes were supplied to Ms. Gattis. On December 6, 2005, Ms. Carpenter filed a lawsuit with the Pulaski County Circuit Court, pursuant to Arkansas's FOIA, codified at Ark. Code Ann. § 25-19-101 et seq. (Supp. 2005). The complaint alleged that the City and the LRPD had knowingly violated the FOIA and failed to timely respond to the FOIA requests.

The circuit court issued its final order on October 15, 2007, and found that the city was not required to disclose the contents of the Internal Affairs file to Ms. Gattis and that the City had responded promptly and provided public records as quickly as possible. The circuit court then awarded the plaintiff the cost of filing the lawsuit and also awarded attorney's fees of \$1,000.

The City asserted that because Ms. Carpenter did not substantially prevail in the FOIA litigation the circuit court erred in awarding fees and costs. The Arkansas Supreme Court agreed and stated that since the plaintiffs did not substantially prevail in the FOIA action, the circuit court abused its discretion in awarding her attorney's fees and costs.

AMERICANS WITH DISABILITIES ACT:

Accommodations

Tucker v. Tennessee,
CA6, No. 06-6208, 8/29/08

The Tuckers are all deaf and mute, and are related either by marriage or sanguinity. Lauren and Blake are husband and wife. Vonnie is Blake's mother, and Odis his uncle. On Sunday, February 29, 2004, the City of Savannah Police Department ("City Police") received a call regarding a domestic dispute at the home of Donna Spears, Lauren's mother. Blake had driven to Tennessee from Alabama to pick up his wife, Lauren, and their small child from Donna's home. A disagreement arose as to whether Lauren desired to return to Alabama with Blake, and a neighbor phoned the City Police. When they arrived, it became clear that the Tuckers suffered from a hearing and speech impairment. Consequently, the officers utilized a pen and paper to communicate. After these written discussions with Lauren, who initially was reluctant to engage the officers, it appeared the matter was resolved and Lauren would leave with Blake.

Although the exact circumstances surrounding their departure are not clear, it appears that Blake got into an altercation with a neighbor, Judy Crotts. One of the officers, Officer Pope, saw Blake strike Ms. Crotts and push Ms. Spears. Officer Pope then attempted to restrain Blake and place him under arrest. Blake responded by striking Officer Pope. Although Blake disputes that he *intentionally* assaulted Ms. Crotts, he concedes she fell down and started screaming. As for Officer Pope, Blake admits he struck him, but

again disputes that it was intentional. After witnessing two assaults, Officer Pope arrested Blake and charged him with resisting arrest, assault, assault on an officer, and disorderly conduct.

Odis apparently came towards the police officers during Blake's arrest with his fists clenched. Consequently, he was also arrested on charges of interference with an officer, disorderly conduct, and resisting arrest.

After their arrests, the City Police transported Blake and Odis to the Hardin County Jail. There, Odis and Blake requested a TDD/TTY telephone to make a phone call. Although the jail did not have the requested technology, the jailers allowed Blake and Odis to phone Vonnie, who talked with them by way of a relay operator. To facilitate effective communication for Blake and Odis, the jailers translated on their behalf through relay operators for over forty-five minutes. Blake and Odis were detained overnight until their initial appearance the following morning.

As was typical for the jurisdiction, those individuals entitled to an initial appearance were placed on the criminal docket. In turn, each case, including the Tuckers', was set and called that morning. Judge Smith, who presided over the proceeding, recognized that Odis and Blake suffered from a hearing impairment. He discerned their impairment based on the sounds they were making and their mannerisms while awaiting arraignment. Accordingly, he moved their proceedings to the end of the docket so that he could communicate more effectively with them because a sign language interpreter was not present that morning. Although the Tuckers claim they requested a sign language

interpreter while at the jail, Judge Smith testified that the first time he learned that Odis and Blake were hearing impaired was when they appeared at the Monday morning hearing.

Through a court official, Odis and Blake were provided a written card containing their rights, they nodded their understanding, wrote a plea of "not guilty" on a piece of paper, and Judge Smith released them both on their own recognizance pending further hearing. The matter was then set for hearing on March 19. The state court received notification that an attorney, Rusty Larsen, had been retained to represent Odis and Blake. In a letter to Judge Smith, Mr. Larsen advised that a sign language interpreter would be "appreciated" for the March 19 hearing. After learning that an interpreter could not be obtained for that particular date, Judge Smith called Mr. Larsen, as counsel for Odis and Blake, and offered to continue the hearing. The Tuckers do not dispute these facts, nor does the record refute them, although Mr. Larsen does not recall the telephone conversation with Judge Smith. The record, however, contains phone records showing the call made from Judge Smith to Mr. Larsen's office.

Further, in his deposition, Mr. Larsen admits that, after consultation with his clients, Blake and Odis decided not to postpone the March 19 hearing because they anticipated entering a guilty plea to the charges against them. Specifically, he testified that he advised his clients that no interpreter would be available at the March 19 hearing, and they declined to request a continuance; rather, they attended with the anticipation that an agreement could be reached regarding the charges.

Mr. Larsen testified that he met with his clients on the morning of March 19, in advance of the hearing where they discussed the potential plea, and made the final, voluntary decision to proceed that morning without an interpreter. Ultimately, the charges against Odis were dismissed in advance of the hearing. Through his counsel, Blake entered a guilty plea to reduced charges and was placed on a diversionary program. During this proceeding, Vonnie voluntarily acted as a translator between Odis, Blake, Mr. Larsen, and the state court. This request was made by Mr. Larsen. Again, the Tuckers do not dispute Mr. Larsen's testimony or the veracity of the chain of events. Instead, they now claim that they felt that they had no choice but to enter the plea because they did not believe an interpreter would be provided at a subsequent hearing. In addition, they make general allegations of "confusion" regarding the proceedings.

Based on the foregoing, the Tuckers filed suit alleging that their rights under the Americans with Disabilities Act (ADA) were violated. Specifically, Odis and Blake claim that the City Police discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during their arrest following the domestic disturbance call. Next, Odis and Blake allege that the City Police violated their civil rights by failing to have available and/or provide a TDD/TYY telephone at the jail where Odis and Blake were detained pending an initial appearance.

Finally, Odis and Blake claim that Hardin County violated the ADA when the state court judge failed to provide a sign language

interpreter at either the initial appearance or the dispositional hearing on the criminal charges asserted against them in state court. Vonnie asserts that the state court judge's use of her services as an interpreter during the dispositional hearing likewise violated her civil rights under the ADA.

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

"First, none of the parties in this case makes any claim of intentional discrimination as it relates to the arrest. Neither Odis nor Blake challenge the validity of the arrest or the facts supporting it. Odis was placed on pretrial diversion for the charges, and Blake ultimately plead guilty. The City Police were called to a domestic disturbance by a neighbor, Judy Crotts. The record contains no evidence that Ms. Crotts advised of the Tuckers' hearing impairment as part of that call. Once the officers arrived, the situation appeared under control, but subsequently escalated as often happens. There is no dispute that one of the officers observed Blake assault the neighbor, Ms. Judy Crotts. Undoubtedly, this constitutes an unanticipated situation which arose after the officers arrived, but one for which they must be able to respond immediately. Then, Blake admittedly struck one of the officers, and again, necessitated an immediate response. Likewise, Odis attempted to stop the police in their efforts to arrest Blake by running towards the officers flailing his arms. Both Odis and Blake were restrained and placed under arrest without an interpreter being present. The Tuckers were arrested because they assaulted police officers, individual citizens, or attempted to interfere with a lawful arrest and not because they were

disabled. *See e.g., Thompson v. Williamson County, Tennessee*, 219 F.3d 555, 558 (6th Cir. 2000) (finding no ADA violation where claimant was denied medical treatment initially because he had to be disarmed by police not because he was mentally disabled). Applying this rationale to the instant facts, we affirm the district court and find no ADA violation.

“The Tuckers rest the remainder of their argument on the failure of the police to provide effective communication because of a lack of interpreter, but both concede that the officers were effectively communicating with them. Had the situation remained controlled, the officers were communicating effectively with all parties by using a pen and paper. Next, the Tuckers claim that the police failed to advise them of their policy of making sign language interpreters available and that they did not do so, even after the Tuckers requested one. There is no evidence that the provision of auxiliary aids, i.e., a sign language interpreter would have changed the events in any way.

“Where officers are presented with exigent or unexpected circumstances, it would be unreasonable to require certain accommodations be made in light of the overriding public safety concerns. Further, we rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent with that expectation, and impedes their ability to perform their duties.

“Odis and Blake also challenge the district court’s finding regarding their claims against Hardin County during their post-arrest

detention at the Hardin County Jail. The jail did not have a TTY phone, and Odis and Blake claim that this failure constitutes discrimination against them under the ADA because they were ‘booked’ without first being permitted to make a phone call in the manner they requested. The district court found in favor of the jail on two alternative grounds: (1) if the detention was covered by the ADA, Odis and Blake failed to show any injury resulted from the use of the jailers to make their phone call from the jail rather than provide a TTY telephone, and (2) that the jail had made good faith efforts to accommodate Odis and Blake in a manner that resulted in communication that was as effective as that received by non-disabled persons.

“As an initial matter in this case, we find that the ADA applies to the post-arrest detention at the jail, and note that the parties have stipulated that the Tuckers are qualified individuals. Upon review, however, we conclude that the Tuckers were not *intentionally* discriminated against because of their hearing impairment. Although the jail did not have TTY telephones as standard equipment, Blake and Odis were provided an effective means of communication with relay operators, and permitted to make a phone call. In fact, the phone call lasted nearly forty-five minutes. In essence, the Tuckers ask this Court to find strict liability simply because the jail failed to provide exactly the auxiliary device they requested—a TTY phone. This is not the law nor do we make it so today.

“The district court concluded that Hardin County was not liable for failing to provide a sign language interpreter at the initial appearance because Odis and Blake received the same benefits of an ‘initial appearance’

under Tennessee law as those afforded to non-disabled persons, despite the unavailability of an interpreter. At an initial appearance, a criminal defendant is entitled to three things: (1) opportunity to enter a plea; (2) receive a trial date; and (3) be physically present. It is beyond dispute that both Odis and Blake Tucker received all of these benefits at their initial appearance. They claim, however, that they did not understand the proceedings and were not properly advised of their rights. These claims, however, are belied by the undisputed evidence.

“Upon determining that Blake and Odis were hearing impaired based on the sounds they were making in the courtroom during the initial appearance, the judge sent a hand-written note advising that he would move their case to the end of the docket so that he could spend more time with them. At that point, rather than delay their initial appearance and bond hearing, the state court judge communicated with the Tuckers through written notes by way of a court official. Odis and Blake were provided a written card containing their rights, they nodded their understanding, wrote a plea of ‘not guilty’ on a piece of paper, and were provided a trial date. Notably, the Tuckers did not write any request for an interpreter on this note, or any other information which could be construed as a request for an accommodation which was not provided. Based upon these undisputed facts, it cannot be said that Hardin County, through its state court, intentionally discriminated against these individuals because of their disability, or that they did not receive reasonable accommodations which allowed them communication as effective as a non-disabled person.”

CIVIL LIABILITY:
Arrest Outside of Jurisdiction

Engleman v. Murray,
CA8, No. 07-2060, 11/17/08

On January 11, 2005, Stephen James Engleman dialed 911 and his call was routed to the Benton County Sheriff’s Office in Arkansas. Caller identification on the 911 system indicated that Engleman made the call from his parents’ home at 24512 Van Fleet Road, Siloam Springs, Arkansas, from a telephone number containing a 479 area code, which is assigned to phone numbers in northwestern Arkansas. He reported three prowlers at 24512 Van Fleet Road and instructed officers to travel north on Highway 43 (an Arkansas road that runs from downtown Siloam Springs to Van Fleet Road) before turning west onto Van Fleet Road.

Benton County Deputy Sheriff Murray and a Gentry, Arkansas, police officer responded to the call. During the course of responding to Engleman’s request for assistance, the officers were informed of an outstanding warrant for Engleman’s arrest. Engleman’s father greeted the officers, who were told that they had a warrant for Engleman’s arrest. When they explained that the warrant was issued in Bentonville, Arkansas, Engleman’s father stated that they were in Oklahoma. The officers wanted to speak with Engleman, and his father replied that he was in the house. The officers then entered the house to look for Engleman.

As they entered the house, Engleman hid in a closet in the garage. Two more Benton County deputy sheriffs arrived, and a deputy sheriff said to the other officers that he could

see Engleman’s foot underneath a crack in the door. Engleman left the closet, and officers told him to stop because he was under arrest. Engleman ignored the command and attempted to flee through the back door of the garage, which was locked. Officers again told him he was under arrest, and Engleman said that they could not arrest him because he was in Oklahoma. After a scuffle, the officers restrained him.

His mother told the officers that they were in Oklahoma as they handcuffed Engleman. While two officers took Engleman to a squad car, Engleman claimed that a similar event had happened last year and his parents had proof that they were in Oklahoma. Deputy Murray drove Engleman to the Benton County Jail, where he was booked and released that day.

Engleman sued under 42 U.S.C. § 1983, alleging that the arrest in Oklahoma was unreasonable under the Fourth Amendment. During the course of litigation, a Global Positioning System map revealed that the house at 24512 Van Fleet Road was physically located in Oklahoma, and the parties agree that the Englemans’ mailbox is located in Arkansas.

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

“...from a historical perspective of the Fourth Amendment, the jurisdiction of the issuing judge and the executing officer is limited, and a warrant is not valid if an officer acts outside of that limited jurisdiction. Moreover, the Constitution explicitly provides a procedure for extradition between states, suggesting that an officer from one state may not simply cross into another state to arrest an individual.”

“...from a historical perspective of the Fourth Amendment, the jurisdiction of the issuing judge and the executing officer is limited, and a warrant is not valid if an officer acts outside of that limited jurisdiction. Moreover, the Constitution explicitly provides a procedure for extradition between states, suggesting that an officer from one state may not simply cross into another state to arrest an individual.

“Notwithstanding the historical prohibition on executing an arrest warrant outside of the arresting officer’s jurisdiction, the Eighth Circuit Court of Appeals concluded that Deputy Murray is entitled to qualified immunity because it was objectively reasonable for an officer in Deputy Murray’s position to have believed that he was executing the arrest in Arkansas. ‘Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.’ *Saucier v. Katz*, 533 U.S. 194, 206 (2001). We look at the totality of the circumstances surrounding the arrest to determine its reasonableness. Officers can make objectively reasonable mistakes about which premises a warrant authorizes them to search, *Maryland*

v. Garrison, 480 U.S. 79, 87-88 (1987), which individual an arrest warrant names, *Hill v. California*, 401 U.S. 797, 804 (1971); and even in which jurisdiction they are acting, *Pasiewicz v. Lake County Forest Preserve District*, 270 F.3d 520, 527 (7th Cir. 2001). The ‘objective facts available’ to Deputy Murray at the time would lead a reasonable officer to believe he was arresting Engleman in Arkansas.

“The Supreme Court has clearly stated that in establishing qualified immunity, the test must be applied at a level of specificity that approximates the actual circumstances of the case. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). The district court failed to do so here, instead analyzing the issue at a level of generality that did not account for the particularized circumstances by noting only that there is no question that a reasonable official would know that an unauthorized arrest—i.e., an arrest by a police officer outside that police officer’s jurisdiction—would amount to a violation of an individual’s right to be free from unreasonable seizure.

“The 911 system identified Engleman’s call as originating from a telephone number with an Arkansas area code and a Siloam Springs, Arkansas, address. The call was routed by the system to the Benton County Sheriff’s Office, and Benton County deputy sheriffs were summoned to a location with an Arkansas mailing address. Engleman provided directions to travel north along Highway 43 (from the direction of downtown Siloam Springs, Arkansas) and then west on Van Fleet Road. The arrest warrant had been issued in Arkansas and stated that Engleman resided at 24512 Van Fleet Road in Arkansas. Based on these facts at Deputy Murray’s

disposal, we conclude that it was objectively reasonable as a matter of law for an officer to believe he was arresting Engleman in Arkansas.”

CIVIL LIABILITY: **Probable Cause**

Parsons v. City of Pontiac,
CA6, No. 07-2299, 7/22/08

Sometime in the early morning hours of April 7, 2004, firefighter Arthur Frantz was shot twice in the chest at Fire Station # 1 in Pontiac. At approximately 6:50 a.m., firefighter Michael Lemons arrived at the station to start his shift. Lemons was the first person to discover that Frantz had been shot. Frantz was conscious and asked Lemons to call for help. The police were called to the scene and Frantz was transported to a local hospital. A preliminary investigation into the circumstances surrounding the shooting was conducted by the responding officers, who “indicate[d] that subject knocked on the northwest door and when the fireman opened it he was shot twice in the chest.”

Detectives Maurice Martin and Sherry McKinney were assigned to the investigation. The detectives went to the hospital where Frantz had been transported, but he was in the operating room when they arrived. According to a Supplemental Report prepared by Detective McKinney and dated April 7, the two detectives introduced themselves to Frantz’s wife, but she was too preoccupied to speak with them. The detectives left a business card with a chaplain and Frantz’s two sons so that they could be contacted.

A number of firefighters were interviewed by Detectives Francine Finnegan and Jaclyn

Wilton. Among those interviewed were Lemons, who initially discovered Frantz, and Captain Steven Fritz, who was the second firefighter on the scene. Lemons told the police that Frantz had said "somebody had been beating on the back door, [I] opened it up, and he shot me." Fritz also explained that Frantz told the two firefighters "that someone was banging on the door, that he opened the door, and that somebody shot him." According to Fritz, he had asked Frantz if he knew who the shooter was, and Frantz had said "No."

Detectives Martin and McKinney later conducted an interview with Sara Ann Henig, former firefighter Justin Parsons's ex-girlfriend. At approximately 8:45 a.m. on April 7, Henig had called her friend Pamela Jean Bissett and told Bissett that she suspected that Parsons had shot Frantz. Bissett convinced Henig to call the police, and the two women went to the police station. McKinney's Supplemental Report contains the following description of the interview with Henig:

In December of 2003, Ms. Henig said that Parsons was hired by the City of Pontiac to be a firefighter. She said that he was very excited and pleased to have a full time position in a city like Pontiac.

Ms. Henig said that it wasn't long before he started complaining about the department and that he hated the guys he worked with. She stated that he use[d] to get mad and said, "Once I get my year...I have a list of guys I'm gonna punch out when I get off probation."

Ms. Henig told us that she knew that Justin harbored ill feelings towards the Pontiac Fire Department and the guys that he worked with. She said that when she heard about a firefighter being shot on the news she automatically thought of Justin. Ms. Henig recalled that Justin was really depressed and upset about being terminated from the Fire Department. She stated that he called her and told her that he was on the road to the state of Florida after he was fired just to clear his head.

Henig also told the detectives about a conversation that she had had with Parsons on March 19, 2004. In a written statement, Henig said that she and Parsons were discussing "how upset [Parsons] was about having lost his job at the fire department." During the conversation, Henig explained, "the subject of [Parsons's] suicide attempt came up." The written statement continues:

I asked if he was going to try again[;] he said, "Yes, but I have a plan this time."

I asked what he was planning on doing[;] he answered "It's not something you need to worry about but you'll hear on the news when it happens."

I said, "You're not going to do anything stupid, are you?"

He replied, "Like I said, you don't need to worry about it."

McKinney's Supplemental Report also contains aspects of this conversation, but makes no mention of a previous suicide attempt or the correlation between Parsons' "plan" and his suicidal thoughts. The

Supplemental Report does indicate, however, that Henig told the detectives that Parsons “carried a gun on his body at all times and one in his truck for protection.”

According to Henig, the last time that she and Parsons communicated was online, via instant messenger, when they discussed an upcoming motorcycle race. At approximately 10:25 a.m. on April 7, Henig called and paged Parsons in the presence of the detectives. Parsons did not return Henig’s call, at which point she left the police station. The interview with Henig appears to be the first time that Parsons was implicated as a potential suspect in Frantz’s shooting.

Following the interview, other firefighters were questioned about Parsons. Lieutenant Harvey Holland, who was involved in Parsons’ discharge, told the police that there were “numerous reasons for the termination.” Upon being terminated, Parsons shook Holland’s hand and said, “I’m sorry, sir.” Marc Seay, the firefighters’ union president, said Parsons never spoke to him about the termination. Parsons’ behavior was in marked contrast to another individual who was terminated around the same time, one who “came in everyday to speak with the union and was active in trying to defend himself.” Seay said that the second employee’s behavior was much more typical of a terminated employee. There was no indication during these interviews that Frantz was involved in firing Parsons, although Frantz’s subsequent deposition in this case verified that Frantz had an intermittent supervisory role over Parsons during the latter’s employment.

Firefighter Christopher Gangnier said that he had seen Parsons about two weeks earlier,

and that Parsons was upset about being fired. According to Gangnier, Parsons mentioned a few people by name, but the only one that Gangnier could specifically remember was Chris Haney. “No direct threats were made to these individuals,” but Parsons basically “was saying that they did not treat him fairly.”

The final firefighter who was interviewed before Parsons was arrested was Paul Holmes. According to his written statement, Holmes was awakened by a phone call from his wife at 8:30 a.m. on April 7, informing him about the shooting. Holmes explained that “in his own speculation he thought Justin Parsons a possible suspect due to the fact that the shooting happened at the back door near the time when shifts would be changing and that he was privy to that information and had recently been terminated by the department.” He called Parsons twice, once at approximately 8:30 a.m. and again at approximately 11:16 a.m. Parsons did not answer on either occasion, and Holmes left him two messages.

While Holmes was being interviewed by the police, Parsons called back to Holmes’ cell phone. Holmes asked Parsons if he had heard what had happened. Parsons said “No, what happened?” According to Holmes’ written statement, he proceeded to tell Parsons that Frantz had been shot and was at the hospital. Holmes then asked Parsons to meet him at a local restaurant for lunch. Parsons agreed, and Holmes “advised the detectives that [Parsons] would be headed to the restaurant in approximately 10 minutes.”

Police officers were dispatched to the restaurant where Parsons and Holmes were scheduled to meet. The officers located

Parsons sitting in his car in the parking lot. Believing that Parsons was armed, the officers approached his car cautiously, opened the car door, and pulled Parsons out of the car and to the ground. According to one officer's report of the incident, while being patted down for weapons, "Parsons made the unsolicited statement that 'Is this...about Art?'"

Parsons was handcuffed and transported by Detectives Martin and McKinney to the Pontiac police station, where he received a *Miranda* warning at 12:45 p.m.

After an in-person consultation with Art Weiss, a family friend and attorney, Parsons declined to waive his *Miranda* rights and refused to speak with the police. He was transported to the Oakland County Jail and ultimately booked on a charge of attempted murder at 4:56 p.m. Following Parsons' arrest, the police continued their investigation. A search warrant was executed at Parsons' place of residence at approximately 5:00 p.m. that afternoon. The search uncovered four firearms, but apparently none of the guns was ever linked to the shooting.

In addition to advising Parsons, Weiss reportedly told the police that they should speak with Kiera Evans, Parsons' then-girlfriend, about a possible alibi for Parsons. According to a Supplemental Progress Report signed by Detective Martin and dated April 7, 2004, the police were investigating a claim that Parsons and Evans were at the Auburn Hills Police Department early that morning in order for Evans to submit to a breathalyzer test. Martin and McKinney went to the Auburn Hills Police Department and spoke with Sergeant Groehn, who informed the detectives that there was video

of Parsons and Evans at the police station and a report indicating that Evans took her breathalyzer test at around 5:01 a.m. on April 7. According to Groehn, Parsons and Evans had left the station by 5:20 a.m. Groehn gave the detectives a copy of the surveillance video. Records from the Auburn Hills Police Department indicate that the Pontiac detectives left around 5:25 p.m. on April 7.

Martin and McKinney then went to interview Evans. According to Martin's report, Evans and Parsons spent much of the early morning hours of April 7 driving around in Parsons' truck. The couple made a number of stops, culminating in the trip to the Auburn Hills Police Department for Evans' breathalyzer test. Following the visit to the police department, Evans and Parsons returned to Evans's apartment and went to sleep. As set forth in Evans' written statement, Parsons left her apartment at around 12:20 p.m. (presumably to meet Holmes at the restaurant where he was arrested).

The police also conducted interviews on April 7 with a female friend of Parsons, Valerie McGee, and another ex-girlfriend of Parsons, Michelle Heide. McGee told the police that Parsons had expressed frustration with the fire department. Heide said that Parsons told her that he had been suspended from the fire department; she also thought that he had been out of town for the previous three weeks.

Detective Robert Koteles interviewed Roger Blovet, a possible witness to the shooting, who described a white male that he had seen running on a street near the fire station on April 7, 2004. Blovet described the man as six feet tall, weighing 200 pounds, with semi-

short black hair, and wearing tan pants and a tan coat. According to the report of Blovet's interview, he saw the man at approximately 7:30 a.m., which was almost 40 minutes after Frantz was found shot.

On the following day, April 8, Sergeant Detective P.J. Moore of the Michigan State Police was informed that Frantz had been taken off of the ventilator and was able to speak. Moore was the first law enforcement officer to speak with Frantz following the shooting, conducting an interview with him at approximately 8:00 a.m. During the interview, Frantz told Moore that he did not know who shot him. Frantz explained that, immediately prior to the shooting, "he was sitting in the kitchen at the fire hall reading the paper when somebody knocked on the window near the sink."

He believed that the person knocking at the window was a firefighter, explaining to Moore that firefighters arriving early for shifts often knocked on the window to get attention. Frantz unlocked the door and started to push it open. The shooter pulled the door open as Frantz pushed it.

Frantz remembered being shot only once. According to Frantz, the shooter was wearing a gray hooded sweatshirt with the hood pulled down to obscure his face. Frantz, who is 5'6", described the shooter as taller than him, perhaps as tall as 6'0". He further described the shooter as being of medium build, weighing approximately 160-170 pounds, "not real dark skinned," and "not old." Frantz said that he had no idea who would have shot him, but he did not think it was Parsons because Parsons was not as tall as the shooter.

At approximately 8:36 a.m. on April 8, Sergeant Hernanai Cristobal of the Pontiac Police Department arrived at the hospital to interview Frantz. Frantz provided Cristobal with essentially the same information that he had given to Detective Moore. With respect to the possibility that Parsons was the shooter, Frantz said: "I don't think it was Parsons[;] why would he want to shoot me?" Frantz also reiterated that it was usually firemen who knocked on the window if they arrived for work early and did not have a key to the door. He said that the shooting took place about 30 to 45 minutes after a fire engine had returned from a run, and that a firefighter named Chapman had talked to him in the kitchen before going to bed.

The timing of these interviews by Moore and Cristobal is important because they were the first direct interactions with Frantz. As such, they marked the first times that the police were given a description of the shooter from the victim. These interviews with Frantz on April 8 were also the first time that the police heard that the shooter had knocked on the kitchen window, a practice known to firefighters but not to the general public. This is in contrast to the earlier reports by Lemons and Fritz, the two firefighters who first discovered Frantz, both of whom told the police that Frantz had said to them that the shooter had banged on the door. Despite the police not being informed of the shooter's description and the window-knocking until the morning of April 8, McKinney's Supplement Report dated April 7 contains both of these facts in the first paragraph.

On April 8 and 9, the police continued to interview various individuals. A number of other firefighters, specifically those who were

working at the time that Frantz was shot, gave the police various opinions about Parsons and his job performance. The police also visited or spoke with Evans at least two more times, apparently trying to arrange a polygraph examination that Evans had offered to take.

At 11:50 a.m. on April 9, 2004, Detective McKinney completed an "Advice on Release from Custody" form for Parsons. The form indicated that Parsons was being released "pending further investigation for attempted murder charge." Parsons was then taken in handcuffs to a nearby psychiatric facility for evaluation. He was evaluated and released from the facility at 3:30 p.m. that afternoon. The Oakland County Sheriff's Department was responsible for taking Parsons to the psychiatric facility. At the hearing on the motion for summary judgment, Parsons acknowledged that none of the defendants were involved in his transfer. Accordingly, for the purposes of Parsons' claims in the present lawsuit, he was released from custody at 11:50 a.m. on April 9, a little less than 48 hours after he his initial arrest. He was never charged with the shooting of Frantz.

Parsons sued the City of Pontiac and a number of city police officers pursuant to 42 U.S.C. § 1983 and Michigan state law. Specifically, Parsons alleges that his constitutional rights were violated because he was arrested and detained without probable cause. The district court granted summary judgment in favor of the defendants. Justin Parsons appeals that decision.

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

"Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, (1986). The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

"Title 42 United States Code § 1983 provides a cause of action to those deprived of a constitutional right by law enforcement officers acting under the color of state law. *Gardenhire v. Schubert*, 205 F.3d 303, (6th Cir. 2000). A law enforcement officer's key defense to a § 1983 action is encapsulated in the concept of qualified immunity. Analysis of the qualified-immunity defense generally proceeds under the two-step, sequential inquiry articulated by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, (2001). The threshold question we must address is whether, in the light most favorable to the party asserting the injury the facts alleged show the officer's conduct violated a constitutional right. Evaluating the defense of qualified immunity on a motion for summary judgment requires that we adopt the plaintiff's version of the facts. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.

“On the other hand, if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. (See *Saucier v. Katz*, supra, explaining that the court must determine ‘whether the right is so clearly established that a reasonable official would understand that what he is doing violates that right.’)

“Parsons’ § 1983 claim is that the police wrongfully arrested him for the shooting of Frantz. In order for a wrongful arrest claim to succeed under § 1983, a plaintiff must prove that the police lacked probable cause. A police officer has probable cause only when he discovers *reasonably reliable information* that the suspect has committed a crime. Furthermore, in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest. A bare allegation of criminal wrongdoing, although possibly justifying a

“...In order for a wrongful arrest claim to succeed under § 1983, a plaintiff must prove that the police lacked probable cause. A police officer has probable cause only when he discovers reasonably reliable information that the suspect has committed a crime. Furthermore, in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest.”

brief investigatory detention, was insufficient by itself to establish probable cause that the suspect had committed a crime. Police officers may not make hasty, unsubstantiated arrests with impunity, nor simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone.

“A determination of whether probable cause existed requires us to examine the totality of the circumstances, and we may consider only the information possessed by the arresting officer at the time of the arrest. A finding of probable cause

does not require evidence that is completely convincing or even evidence that would be admissible at trial; all that is required is that the evidence be sufficient to lead a reasonable officer to conclude that the arrestee has committed or is committing a crime.

“In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible. But under § 1983, an arresting agent is entitled to qualified

immunity if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.

“The first question before us, then, is whether Detectives Martin and McKinney had probable cause to arrest Parsons. This determination must be made based on the totality of the information that was known to the detectives at the time of the arrest. In determining that no reasonable juror could find that they lacked probable cause to arrest Parsons, the district court described the facts known to the detectives in two different ways. First, the district court said that at the time Defendant McKinney made the decision to arrest the Plaintiff, she had the following information:

Sara Henig, Parsons’ former girlfriend, called to say that when she heard about the Frantz shooting on the news, she immediately thought of Parsons; that Parsons worked at the Pontiac Fire Department, and said that he hated the people who worked there; that Parsons had a “list of guys” he was going to harm (i.e., “punch out”) when his probationary period ended; that Parsons had been fired, and was despondent; that Parsons expressed suicidal feelings; that Parsons told Henig when he did something, it would be big, and she would “hear about it on the news”; that Parsons carried a gun with him. McKinney also knew that Frantz had opened the door to his assailant after hearing a knock at the window, which Frantz said was the typical fireman’s way of getting the attention of the persons inside. Prior to the arrest, the police

also talked to Parsons’ former co-worker Holmes, who said that Parsons was “the first person” to come to his mind when he learned of the shooting.

The district court later described the evidence known to the detectives as follows:

McKinney knew that Parsons worked for and had been fired by the victim, that he was familiar with the fireman’s protocol for gaining entry, that he harbored resentment and therefore had motive to shoot the victim, that he had made threats, that he carried a gun, and that he said Henig would hear about his plan on the news.

“The descriptions above are strikingly similar to McKinney’s deposition testimony regarding the information that she recalled knowing prior to the arrest of Parsons. McKinney said that she had:

information that he was disgruntled, that he had just recently been fired, that he had a weapon. Legally or not, I wasn’t sure at that time. That he had made some statements to Ms. Henig that when he did something, it would be big and it would be on the news. The knock at the window. The familiarity of that led me to believe that it was someone who knew how firemen maneuvered. The boldness of someone knocking, getting the attention and shooting someone right across the street from the police department at a time where there would be officers coming and leaving work, firemen coming and leaving work, and the confusion of driving the streets in Pontiac. You know, a lot of one-way streets. And people repeatedly saying,

you know, he was hinkey, and if anybody did it, it would be him.

“The problem with McKinney’s deposition testimony and the district court’s recitation of the facts purportedly known to the detectives at the time of the arrest is that the documentary evidence flatly contradicts a number of the key facts. Specifically, and most importantly, the district court relied heavily on the fact that the shooter knocked on the window to get Frantz’s attention, a technique that was commonly used by firefighters but not by the general public.

“The first indication that Frantz responded to a knock on the window, however, came from Frantz himself during his interviews with the police on the morning of April 8, 2004. Prior to speaking directly with Frantz, the only indication of how the shooter got Frantz’s attention came from firefighters Lemons and Fritz, who both reported to the police that Frantz had told them that he had heard someone banging on the door, a typical form of communication that would not lead to the conclusion that the shooter was familiar with firefighter protocol.

“As noted in the discussion of the facts above, McKinney’s report dated April 7, 2004 details the knocking on the window and Frantz’s physical description of the shooter. But the April 7 date on this report must be either a mistake or a deliberate back-date, given that the police were unable to speak with Frantz until April 8, when they first obtained his description of the shooter and the events that led to the shooting. In fact, a news story on the website *Click On Detroit*, originally posted at 3:38 p.m. on April 7 (three hours after Parsons was arrested), reported that

investigators believe that the shooting victim answered a knock at the firehouse’s side door Wednesday morning.

“Another key piece of evidence relied upon by the district court that is not supported by the record is the context in which Parsons told Henig that he had a plan that she would hear about on the news. The conversation between Parsons and Henig, which took place on March 19, 2004 (over two weeks before the shooting), centered around Parsons’ suicidal thoughts related to his discharge from the Pontiac Fire Department. Henig’s handwritten statement specifically links Parsons’ declaration that he had ‘a plan’ in mind to the possibility of a future suicide attempt on his part. McKinney’s incorrectly dated report from April 7 states that Parsons’ comment about having a plan came in response to Henig asking him ‘what he planned to do with his life.’ There is nothing in either description of the conversation that evinces a homicidal, rather than suicidal, intention. Parsons did say that he had a list of firefighters he planned to ‘punch out’ following his probationary period, but there is a vast difference between ‘punching someone out’ and attempted murder.

“Finally, although it is unclear exactly when the police learned that Parsons had been under some degree of supervision by Frantz during his employment with the Pontiac Fire Department, there is no evidence to suggest that at the time of Parsons’ arrest the detectives had information indicating that Parsons ‘had been fired by’ Frantz as described in the district court’s opinion. In fact, Frantz’s name does not appear in any of the disciplinary documents related to Parsons’ employment. Lieutenant Harvey Holland,

who was interviewed on April 7, told the police that he had been involved in Parsons' discharge, but gave no indication that Frantz was involved as well.

"Removing the above facts from the information known to the detectives at the time that Parsons was arrested casts considerable doubt on the probable cause associated with the arrest. What remains is the following: (1) information from Parsons' ex-girlfriend that (a) she thought it might be Parsons, (b) Parsons had recently been fired from the fire department and was upset, (c) Parsons had attempted suicide in the past, and that he had a plan to try again that she would hear about on the news, (d) Parsons had a list of guys at the fire department that he wanted to 'punch out' after his probationary period ended, and (e) Parsons generally carried a gun, (2) a fellow firefighter, Paul Holmes, also initially thought of Parsons as a suspect when he first heard the news that Frantz was shot, and (3) Parsons had made no effort to contest his termination from the Pontiac Fire Department, a reaction that the union president found surprising. But there were no eyewitness reports of the shooting, no forensic evidence linking Parsons to the crime, and the police, at that time, had heard only that Frantz was responding to someone banging on the back door of the fire station.

"We ultimately conclude that this evidence, when viewed in the light most favorable to Parsons, is *not* susceptible to only one reasonable determination—that the detectives had probable cause to arrest Parsons. The detectives certainly had information that was sufficient to support their questioning of Parsons as a potential suspect. But as

this court has made clear, probable cause for an arrest requires 'reasonably reliable information that the suspect has committed a crime.' A reasonable jury could find that the information known to the detectives when they arrested Parsons falls short of this probable-cause standard.

"In the present case, however, there is no dispute that Parsons was arrested at the time the police took him into custody and that an arrest without probable cause is unconstitutional.

"Detectives Martin and McKinney, however, are entitled to qualified immunity unless their actions 'were objectively unreasonable in light of the clearly established right.' But viewing the evidence in the light most favorable to Parsons, a jury could find that their actions were not objectively reasonable. The problem is not that they ignored exculpatory evidence in arresting a suspect, but that a genuine issue of material fact exists as to whether they possessed sufficient *inculpatory* evidence to reasonably believe that Parsons shot Frantz."

The Court of Appeals, in a lengthy and somewhat troubling decision, concluded that the district court opinion with regard to qualified immunity for Martin and McKinney must be reversed.

CONFESSIONS:
**Failure to Mirandize;
 Public Safety Exception**

McMurray v. State,
 CACR 07-1124, 10/1/08 [Unpublished]

Patrolman Mark Fallis of the Pine Bluff Police Department testified that on January 10, 2007, a call went out regarding a possible shooting with a description of a suspect vehicle. While he was proceeding to the area, Officer Fallis heard that another officer had stopped the vehicle in the parking lot of a coin laundry at the intersection of Sixth and Blake Streets.

When he arrived, he saw yet another officer chasing a black female on foot. Officer Fallis maneuvered his vehicle and pulled in front of the woman in the parking lot of a motel, which allowed the other officer to apprehend her. The woman, who was Felishia McMurray, struggled to get away but was eventually taken to the ground and handcuffed. Officer Fallis perceived that she was being arrested for fleeing.

Fallis testified that he lifted McMurray from the ground and began a pat-down search for weapons. As he did so, he asked McMurray about the location of the gun, and she responded that she had tossed it. Another officer asked her where, and she answered that it was on the expressway between Bryant and Hutchinson Streets. Officer Fallis stated that he asked the question because he was dealing with a person who was possibly involved in a shooting but that he did not give McMurray the *Miranda* warnings before questioning her about the gun. He testified:

Even though I patted Felishia McMurray looking for a weapon and found no weapons, I still was interested with whether there were any weapons or a weapon over against the Town House Motel or in the parking lot or anywhere in the vicinity of where she was stopped. Such was an issue of public safety for myself and the defendant and other people in the area if the issue was a gun.

McMurray argued that the trial court should have granted her motion to suppress the statement she made in response to questioning about the location of the gun. She argued that the statement was illegally obtained because she was in custody but had not been advised of her *Miranda* rights before the question was asked.

In *Marshall v. State*, 68 Ark. App. 223, 5 S.W.3d 496 (1999), the Arkansas Court of Appeal had confronted a similar set of facts and recognized the “public safety” exception to the requirement for *Miranda* warnings, which was enunciated by the Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984). In *Marshall*, suspects involved in an aggravated robbery fled from the police, wrecked the vehicle, and then ran from the police on foot. When Marshall was apprehended, an officer asked him what he had done with the gun and if it was still on his person. Marshall replied that he had thrown the gun out of the vehicle before the crash. In *Quarles*, an armed rape suspect entered a grocery store, and when he was caught, a search of his person revealed an empty holster. Quarles was asked where the gun was, and he indicated that it was by some empty cartons.

The Court in *Quarles* held that the un-Mirandized statement need not be suppressed. The Court observed:

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

The Court then held:

We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment privilege against self-incrimination. We decline to place officers...in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

On the strength of *Quarles*, the Arkansas Court of Appeal affirmed the denial of the motion to suppress in *Marshall*, stating that concerns for officer safety and the safety of the public at large justified the failure to provide *Miranda* warnings before asking questions about the location of an abandoned weapon. "Officer Fallis was confronted with a situation involving a suspect who was believed to have committed a crime with a gun. He said he asked the question out of concern for his safety, the safety of McMurray, and that of the public, because the flight and arrest of McMurray occurred in a public place. These facts fall squarely within the public safety exception, so it cannot be said that the trial court's decision was clearly erroneous."

CONFESSIONS:

Invoking Right to Counsel

Wedgeworth v. State, CR 07-1042, 10/2/08

On July 16, 2005, Megan Harbison was murdered in her apartment in El Dorado. James Wedgeworth and Harbison were in a relationship for more than one year and, according to Wedgeworth, were supposed to marry when her divorce was final. However, after Harbison's divorce became final, she ended her relationship with Wedgeworth. On the night of the murder, he told his mother about the relationship and that Harbison had ended it. He left the house, went to Harbison's apartment, and shot and killed her.

The El Dorado Police Department was advised that "A.F.," Harbison's eleven-year-old daughter, called 911 and told dispatchers that her mother was covered in blood. Upon

arrival, police found A.F. and another juvenile crying and asking for help. Lieutenant Kevin Holt summoned emergency personnel to the residence. Harbison's father advised police that his daughter had broken off her relationship with Wedgeworth, and since that time, Wedgeworth had been harassing her and making threats toward her.

Union County police officers arrested Wedgeworth at his parent's residence in Smackover and transported him to the El Dorado Police Department where he was interviewed by Detective Jamie Morrow. At approximately 4 a.m., Detective Morrow read Wedgeworth his rights, and Wedgeworth signed the rights form. When asked if he wished to have an attorney, Wedgeworth replied that he wanted "his attorney," but he did not remember his attorney's name. Detective Morrow told Wedgeworth that he would give him a few minutes to remember his attorney's name, and the detective left the room.

Within five to ten minutes, Detective Morrow returned and asked Wedgeworth if he remembered his attorney's name. Wedgeworth replied that he had not. Detective Morrow asked Wedgeworth, "What do you want to do?" At that time, Wedgeworth indicated that he wanted to make a statement. Detective Morrow said, "Even without an attorney?" Wedgeworth said, "Yes." Detective Morrow used the original form to re-Mirandize Wedgeworth and took a statement from him. At the pretrial motion hearing, Detective Morrow testified that he "read his rights to him a couple of times."

During the interview, before Wedgeworth's confession, the following colloquy took place:

MORROW: O.k., James when I read you your rights...ah...you said you wanted your attorney present...I give you an opportunity to tell me who your attorney was so we could get him up here...Is that correct?

WEDGEWORTH: Yes sir.

MORROW: At that time you told me you didn't have one but you wanted to go ahead and speak to me, is that correct?

WEDGEWORTH: Yes sir.

MORROW: O.k., you weren't forced to give me...to talk to me or anything like that were you?

WEDGEWORTH: No sir.

After Appellant confessed to shooting the victim with a twenty gauge shotgun, the following colloquy took place:

MORROW: And you...you...you understand you had the right to talk to a lawyer before any questions were asked... you may have had one present...you understood that?

WEDGEWORTH: Yes sir.

MORROW: O.k. if you couldn't afford one...one would be appointed to represent you free of cost...you understood that...that correct?

WEDGEWORTH: Yes sir.

MORROW: O.k., as I said earlier...when I started talking to you...you said you wanted your attorney but you didn't have an attorney and you chose to go ahead and speak to me of your own free will...is that correct?

WEDGEWORTH: Yes...I did not know of a name of an attorney right off hand.

MORROW: So...did I threaten you for you[r] statement?

WEDGEWORTH: No sir.`

MORROW: Did I make you any promises for your statement?

WEDGEWORTH: No sir.

MORROW: O.k., your statement made of your own free will?

WEDGEWORTH: Yes sir.

On August 5, 2005, a criminal information was filed charging Wedgeworth with the capital murder of Megan Harbison. On August 3, 2006, Wedgeworth filed a motion to suppress, alleging that El Dorado police "conducted an illegal custodial interrogation of the defendant after the defendant made an unambiguous request for legal counsel and before counsel was provided in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Arkansas." The circuit court entered an order on August 4, 2006, denying Appellant's motion to suppress. The circuit court ruled that "the defendant was advised he had the right to counsel, implied he wanted his counsel but could not

remember his name, and then did not ask for alternate counsel, did not ask to call his family or ask for a court-appointed attorney when asked what he wanted to do." The circuit court found that Wedgeworth understood his rights and voluntarily and intelligently waived his right to have counsel present.

A jury found Wedgeworth guilty and sentenced him to life imprisonment without parole. A judgment and commitment order was filed on August 17, 2006. Amended orders were filed on August 21, 2006, and September 5, 2006. On August 30, 2006, Wedgeworth filed his notice of appeal.

For his sole point on appeal, Wedgeworth argues that the circuit court erred in denying his motion to suppress and in allowing evidence to be introduced at trial that was allegedly obtained in violation of his Fifth Amendment right to counsel. Specifically, Wedgeworth contends that his right to counsel was violated when he continued to be interrogated by a police officer when he requested to have an attorney present. Wedgeworth asserts that he clearly invoked his Fifth Amendment right to counsel and that he did not initiate further communication with Detective Morrow.

In response, the State argues that the circuit court properly denied Wedgeworth's motion to suppress his custodial confession. The State concedes that it is undisputed that Wedgeworth invoked his right to counsel after being advised of his Miranda rights and that Detective Morrow, rather than Wedgeworth, initiated contact. The State asserts the detective's post-invocation communications with Wedgeworth did not amount to a re-initiation of an interrogation,

but rather Wedgeworth's communication with Detective Morrow amounted to a self-incriminating statement.

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

"...both the Fifth and Sixth Amendments provide a right to counsel. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006). Under the Fifth Amendment, the right to counsel is derived from the amendment's prohibition against self-incrimination while in custody. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Once a defendant invokes his Fifth Amendment right to counsel at a custodial interrogation, the police may not interrogate any further until counsel is provided, or the defendant initiates further communication. *Michigan v. Jackson*, 475 U.S. 625 (1986).

"Once a defendant is read his or her *Miranda* rights, the relevant inquiry is whether (1) a defendant's initial response indicated in any manner under *Miranda* and Rule 4.5 is an invocation of the right to remain silent or an invocation of the right to counsel; and (2) the interrogation must immediately cease whenever a suspect states that he or she wants counsel, *Miranda*, 384 U.S. at 474, or when he or she invokes the right to remain silent, pursuant to *Miranda* and Rule 4.5. However, an accused may waive her rights by initiating further communication

"An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

with the police. If an accused waives his or her rights and initiates further communication, exchanges, or conversation with police officers, after initially requesting an attorney before speaking, any resulting statements may be admissible. *Vidos*, supra (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). An accused, having expressed his desire to deal with the police only through

counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

"In the present case, the circuit court wrote: 'The court finds this to be a very close question. However, the defendant was advised he had the right to counsel, implied he wanted his counsel but could not remember his name, and then did not ask for alternate counsel, did not ask to call his family or ask for a court appointed attorney when asked what he wanted to do.'

"Here, the facts show that Detective Morrow testified that he read Wedgeworth his rights and specifically told him that he had a right to have a lawyer present. Wedgeworth indicated 'he wanted his lawyer present' but couldn't identify who his attorney was. Detective Morrow told Wedgeworth he would leave the room for a little bit, give him some time to

think, and maybe remember who his attorney was. After five to ten minutes, Detective Morrow returned to the room, asked Wedgeworth if he recalled his attorney's name, and Wedgeworth said 'he did not.' Detective Morrow then asked Wedgeworth 'what he wanted to do,' and according to the detective, Wedgeworth 'said he wanted to provide the statement.' Detective Morrow asked, 'Even without an attorney?' Wedgeworth replied, 'Yes.' The detective then read his rights again, using the same form, and took Wedgeworth's taped statement.

"Detective Morrow testified that Wedgeworth signed a *Miranda* form, which Detective Morrow signed and dated July 16, 2005, at 0350 hours. Wedgeworth signed the form and dated it July 16, 2005, at 4:00 a.m. It is unclear from Morrow's testimony when exactly Wedgeworth signed the *Miranda* form.

"Here, Wedgeworth asked for his attorney, a clear invocation of his right to counsel. The State concedes that Detective Morrow initiated contact following a five to ten minute break taken to give Wedgeworth the opportunity to remember his attorney's name. Though the State argues waiver and that the two questions by Detective Morrow were not interrogation, it is clear that Wedgeworth's confession was taken after the invocation of right to counsel and before either counsel was present or he initiated further conversation, as required by *Vidos, supra*.

"Because the *Vidos* prerequisites were not met, the Arkansas Supreme Court held that Wedgeworth's right to counsel was violated. Therefore, it was error for the circuit court to admit the confession."

CONFESSIONS: Recording Requirement

Clark v. State, CR 07-1276, 9/25/08

Anna Clark was employed in early 2006 by the Arkansas Department of Correction as a psychologist and one of her patients was Inmate Dan Burns. On April 17, 2006, a correctional officer, Latasha Robinson, discovered Clark having sexual intercourse with Burns in her counseling office. Warden Gaylon Lay interviewed Clark shortly after the alleged incident. At that point, she denied the allegations. Then, in a subsequent interview conducted by Detective Kenneth Whitmore on April 18, 2006, she admitted the allegations. The detective did not record the entire interview; rather, the interview began around 3:15 p.m. and the recording of the confession did not start until 4:30 p.m. No one else was present in the interview room. In a separate interview, Inmate Dan Burns admitted the allegations.

Clark urged the Arkansas Supreme Court to construe the due process clause in Article 2, Section 8 of the Arkansas Constitution to include a constitutional right to a recording of all phases of a police interrogation leading to a confession. She concedes that no federal court has recognized such a right under the U.S. Constitution.

In this case, the Arkansas Supreme Court declined to recognize a constitutional right to recordation under the due process clause in the Arkansas Constitution, finding, in part, as follows:

"...Indeed, Clark acknowledges this court's prior holding in *State v. Sheppard*, 337 Ark.

1, 987 S.W.2d 677 (1999), that the lack of a recording does not invoke a constitutional safeguard. Even before *State v. Sheppard*, we declared that no Arkansas law requires the police to record the interrogation in its totality. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996). As this court explained in the *Misskelley* case, we will consider such a factor in the totality of the circumstances mix, but we will not invalidate a confession for that reason alone. *Id.*, at 472, 915 S.W.2d at 714. In the absence of any indication that our court has traditionally viewed custodial interrogation requirements more rigorously than the federal courts, we reject the expansion of constitutional rights proposed by Clark. *Polston v. State*, 360 Ark. 317, 201 S.W.3d 406 (2005).

“With regard to other state courts that have addressed similar arguments under their respective state constitutions, only the Supreme Court of Alaska has recognized a right to have the entire interview recorded under its state constitution. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985). While many courts have noted approvingly the protection provided by a complete recording of an interrogation, they have declined to hold that recording the entire interrogation is required by their respective state constitutions.”

The Arkansas Supreme Court was also aware that many states, while declining to constitutionally require the recording of an entire interrogation, have adopted the requirement through the court’s supervisory power or through legislation. *See, e.g., State v. Scales*, 518 N.W.2d 587; *State v. Barnett*, 789 A.2d 629; *In re Jerrell C. J.*, 699 N.W.2d 110 (juveniles); D.C. Code § 5-116.01 (2006); 725 Ill. Comp. Stat. Ann. 5/103-2.1 (West 2006);

New Jersey Rules Governing Criminal Practice R. 3:17; Wis. Stat. Ann. § 972.115 (2006).

The Court also found as follows:

“With regard to Clark’s policy arguments, the New Jersey Supreme Court’s decision in *State v. Cook*, 847 A.2d 530, contains a succinct summary of the policy arguments for and against a recording requirement. The benefits of requiring a complete recording include: (1) protection against admission of involuntary or invalid confessions and enhancement of the reliability of confessions; (2) protection for police officers from false allegations and improved ability of the police to assess the guilt or innocence of suspects; and (3) attainment of an objective and reviewable record that would enhance a judge or juror’s assessment of credibility, and preservation of judicial resources by discouraging defendants from raising ‘frivolous’ pretrial challenges to confessions. Some of the policy arguments against a recording requirement include: (1) cost in the purchase and maintenance of recording equipment, which would be a financial burden for some municipalities; and (2) the potential to hamper police interrogation techniques and reduce the ability of police officers to obtain truthful confessions.”

The Arkansas Supreme Court was also aware of the differences among states that have adopted a recording requirement. States have not been consistent in designating the portions of an interrogation that must be recorded. For example, Minnesota requires that all custodial interrogations, including any information about rights, waiver of those rights, and all questioning, be recorded electronically when feasible and whenever

questioning occurs at a place of detention. *State v. Scales*, supra. In contrast, New Hampshire does not require a recording of the administration of a defendant's *Miranda* rights or the defendant's subsequent waiver of those rights, but it does require a complete recording following the waiver of a defendant's *Miranda* rights. *State v. Barnett*, supra. States are also in disagreement as to what sanctions should be imposed when law enforcement fails to record an interrogation. The Supreme Courts of Minnesota and Alaska have both held that failure to record the complete interrogation will result in the exclusion of the entire interrogation, absent certain narrow exceptions. The Supreme Court of New Hampshire, on the other hand, has held that where the incomplete recording of an interrogation results in the exclusion of the tape recording itself, evidence gathered during the interrogation may still be admitted in alternative forms, subject to the usual rules of evidence.

The Arkansas Supreme Court concluded that the case law and secondary authority cited by Clark reflects little if any agreement regarding how electronic recordation should be implemented, or whether it should be required, encouraged formally through evidentiary rules, or encouraged through other informal means. *State v. Cook*, supra. **In view of these questions and many others that merit consideration, and bearing in mind the difficult task of drafting a rule that would clearly delineate the parameters of a recording requirement, the Arkansas Supreme Court believed that the criminal-justice system will be better served if their supervisory authority was brought to bear on this issue. The Court referred the practicability of adopting such a rule to the**

Committee on Criminal Practice for study and consideration.

The Court noted that even if they were to adopt a recording requirement today and exclude the confession in this case, any resulting error would be harmless in light of the otherwise overwhelming evidence of Clark's guilt. Officer Latasha Robinson was an eyewitness to the alleged incident, and Dan Burns admitted the allegations.

EYEWITNESS IDENTIFICATION:

Field Showups

Rodgers v. State, CACR 08-80, 8/27/08,
[Unpublished]

On the night of April 16, 2007, Christy Owen was studying in a café at Barnes & Noble when she noticed Bobby Rodgers, an older white gentleman wearing blue coveralls, enter the store. She observed him looking around as he stood at the register and watched him sit down. After ten or fifteen minutes, Rodgers got up and went outside. Approximately twenty minutes later, Owen collected her things and left the café. As she walked out the door, she saw Rodgers sitting at one of the bistro tables outside. As she walked past, he stood up and began to follow her.

As she approached her vehicle, she hit the panic button on her keychain, hoping to attract the attention of other people in the parking lot or scare Rodgers. She opened the back door of her car and was preparing to put her things in the backseat, when Rodgers said something to her. She did not hear him and said, "What?" He repeated "Put your things in the car" several times, and each

time Owen responded by asking, "What?" Then he said to her, "Get in the car. If I have to tell you again, I will blow your head off." According to Owen, appellant had his hand in the pocket of his coveralls, as if he had a gun, and was holding a styrofoam coffee cup in the other hand. Owen responded that she would give him the keys to her car, but she was not getting in the car. When she hesitated in giving him the keys, however, Rodgers ran away. Owen quickly called 911 and spoke to the dispatcher as she watched Rodgers run across the parking lot.

Officers quickly responded and apprehended Rodgers within ten minutes of receiving the 911 call. Once Rodgers was in custody, the officers recovered a toy gun, a steak knife, and .22 caliber ammunition. Officers took Owen to the location where Rodgers had been apprehended, told him to stand up straight, placed a spotlight on him, and asked Owen if she recognized him. Owen positively identified Rodgers as the man who had approached her.

At the suppression hearing, Owen testified that when the police had her look at the suspect, she did not know if he was handcuffed and could not tell if he was bleeding from a cut suffered from a fall. She stated that she knew immediately it was him.

Officer John Hughes testified that when Owen arrived at the scene, he removed Rodgers from the back of a patrol vehicle and stood him up straight so that Owen could see him. Officer Mark Hosier testified that once Owen had arrived at the scene, he knelt down beside her and asked her if she recognized the man who was standing beside the police car. Hosier admitted that Rodgers was handcuffed

at the time, that he was bleeding, and that there were approximately six officers at the scene. He also read aloud the policy for this type of field identification:

In the field when a person is arrested in close proximity in time and place to the commission of an offense, that individual may be taken to be viewed by the victim of or witness to the offense for purposes of identification. This type of confrontation is a proper exercise of investigatory powers and will result in avoiding the incarceration or further detention of innocent suspects, in making positive identifications at a time when identifying factors are fresh in the witness' memories, and in avoiding the necessity of subsequent identification procedures. The suspect shall be brought to be viewed by the witness in a neutral manner. The suspect will not be presented in an obviously custodial manner, as in handcuffs or other physical restraints unless necessary.

The Arkansas Court of Appeals stated that a pretrial identification violates the Due Process Clause when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the culprit. But even when the process is suggestive, the circuit court may determine that under the totality of the circumstances the identification was sufficiently reliable for the matter to be decided by the jury. *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002). In determining reliability, the following factors are considered: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description

of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure.

Considering the above factors, the Court found no error in the trial court's ruling allowing the field identification and the subsequent in-court identification into evidence. While Rodgers was handcuffed and surrounded by several officers at the time Owen viewed him on the scene, Owen testified that she could not tell if he was handcuffed, and considering the very short lapse of time between the confrontation and the field identification, and Owen's opportunity to observe Rodgers in a non-threatening environment prior to the confrontation, it was not error to determine that the identification was sufficiently reliable to be decided by the jury. And any inconsistencies in the evidence were for the jury to resolve.

Under the totality of the circumstances, the trial court's decision was not clearly erroneous.

PROBABLE CAUSE:

Arrest; Claim of Lack of Direct Evidence

Pullan v. State, CACR 08-67, 11/19/08

On January 28, 2006, Clifford Joe Pullan was arrested for delivery of marijuana. The arrest was the culmination of an operation conducted by the Twenty-first Judicial District Drug Task Force undertaken

to determine whether Pullan was the supplier for a lower-level drug dealer, John Nick. Prior to the start of the operation, a confidential informant (CI) who had made three marijuana purchases from Nick told the drug task force that Nick claimed that Pullan was his supplier. In December 2005, the task force had arrested Pullan for drug trafficking the previous summer. This alleged activity was not connected to his suspected involvement with Nick.

On the day in question, the drug task force set up surveillance on Pullan's residence. Drug task force investigator Lanny Reese and Crawford County Sheriff's Department narcotics officer Shawn Firestine then sent the CI to Nick's residence to purchase marijuana with marked currency. The CI had been given approximately \$2,000 so that he could buy all of Nick's existing stock of marijuana. Nick sold him eight ounces of marijuana for \$640. While the CI was present in Nick's home, the drug task force heard Nick's wife, Kim Mereshka, call an unnamed person and ask "Can you bring me something?" Reese identified this request, based on his experience, as a "dope deal." Immediately after the telephone call, Pullan left his residence carrying a package. Pullan drove directly to Nick's residence and he entered without knocking. Pullan only stayed inside a few minutes before leaving without the package. The drug task force intended to follow Pullan back to his home. However, when Pullan took a different route, going instead to his daughter's house, Reese decided to stop and arrest Pullan. Upon making contact with Pullan, both Reese and Firestine noticed a large wad of bills in Pullan's shirt pocket. They seized the cash, and it proved to be most of the "buy money."

Pullan asserts that the State lacked probable cause because there was no “direct evidence” that he had committed a criminal offense because he was not present at any of the controlled buys at Nick’s residence, the police could not determine the content of the package he was carrying and did not “personally observe” or otherwise monitor the alleged delivery to Nick in exchange for the buy money. Further, he contends that the police did not conduct a controlled buy at his residence, he did not have any marijuana on his person or in his vehicle at the time of the arrest, and the police surveillance did not sufficiently corroborate the informant’s tip. Regarding the latter point, he further states that there was not a sufficient basis for establishing that the informant’s information was reliable because the CI’s report that Pullan was Nick’s supplier was based solely on Nick’s unsubstantiated hearsay statement. Citing *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986), he contends that the police only had a suspicion that he had engaged in criminal conduct, which was insufficient to establish probable cause.

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

“...At the time the drug task force initiated its operation, it knew from its prior arrest of Pullan that he had been involved with delivering marijuana. In subsequent controlled buys from John Nick, the CI was told by Nick that Pullan was his supplier. While the identification of Pullan as his supplier was unsubstantiated hearsay, the operation mounted by the drug task force provided corroboration. As we noted earlier, on January 28, 2006, the drug task force placed Pullan’s house under surveillance.

It then conducted a controlled buy that prompted Nick to seek resupply of his stock of marijuana. The drug task force heard a telephone conversation that, based on Investigator Reese’s training and experience, was identified as a request to purchase drugs. Immediately after that request, Pullan left his house carrying a package. He drove directly to Nick’s house and went inside without knocking. Approximately five minutes later, Pullan left Nick’s house without the package.

“In our view, these facts would cause a person of reasonable caution to believe that delivery of marijuana had taken place. In essence, this was a call by a known drug dealer requesting a delivery of narcotics from a supplier, immediate movement by a known drug supplier who was the suspected supplier, direct travel by that suspected supplier to the source of the resupply request, and the apparent delivery of a package. While this proof may not have risen to the quantum of proof required to convict Pullan, we nonetheless conclude that there was probable cause sufficient to make the arrest.”

SEARCH AND SEIZURE: Automobile Inventory Searches

United States v. Lopez,
CA2, No. 06-3730, 11/10/08

On August 3, 2005, at approximately 3:30 a.m., Police Officer Lorrie Arroyo and Sergeant Stacy Barrett of the New York City Police Department (“NYPD”) were patrolling in a police vehicle in the Hunts Point neighborhood of the Bronx, watching out for prostitution and auto theft. They observed a car parked on the right side of Faile Street. Two people were in the

car, with the passenger door open and the engine running. The officers slowed as they passed the car and overheard the occupants arguing. They parked their car and got out to investigate. Arroyo approached the driver's side of the car; Barrett the passenger's side. The driver, Ricardo Lopez, told them he had been arguing with his girlfriend. The passenger identified herself as Griselle Lopez. (Ricardo Lopez and Griselle are neither married to each other nor otherwise related.) Griselle told the police she was just hanging out with her boyfriend. Arroyo smelled alcohol and noticed that the defendant's eyes were bloodshot and his speech was slurred. She asked him if he had been drinking, and he responded, "Yes, one cup." Arroyo decided to arrest him for driving while intoxicated. She asked him to step out of the car and frisked him. She found a bulge in his rear right pants pocket, which seemed heavier than a wallet. Arroyo asked him what was in his pocket. He replied that it was a gun. Officer Arroyo then reached into the defendant's pocket, recovered a handgun and a wallet, and alerted Barrett that the defendant had a gun.

Meanwhile, Sgt. Barrett had asked Griselle to get out of the car. The sergeant asked for her identification. She replied that it was in the car. Two other officers who had arrived on the scene stood with Griselle while Barrett went to get Griselle's bag from the car. Sgt. Barrett located a bag near the front passenger seat and asked Griselle if it was hers, and if so, whether the sergeant could look in it for a driver's license or some other form of identification. Griselle confirmed that it was her bag and gave the sergeant permission to search it for identification. Barrett observed a wallet in the bag. On removing it, she saw a clear glass container of white powdery

substance, which she believed to be cocaine. Barrett then arrested Griselle.

Both were taken to the 41st Precinct station house in separate police cars. Officer Fischer, one of the other officers who had arrived on the scene, took over the car and drove it to the station.

At the 41st Precinct, Officer Arroyo and Sgt. Barrett conducted an inventory search of the defendant's car. According to Arroyo's testimony, inventory searches are standard in the NYPD when a car is seized upon the arrest of an intoxicated driver, both to protect the property of the owner and to protect the police. "[Y]ou have to do a total inventory search of the vehicle," she testified. "Everything has to come out." In searching the car, Arroyo found two glassines of cocaine in the middle console between the two front seats, as well as a bottle of liquor in the driver's side door. From the trunk, the officers removed plastic bags, canvas bags, a beach chair and umbrella, and some audio speakers. Arroyo then found a small green toiletry bag "tucked away" on the driver's side of the trunk. In it she discovered thirteen glassines of cocaine, as well as cocaine-related paraphernalia: a scale, a strainer with cocaine residue, a wooden masher with cocaine residue, two spoons with cocaine residue, more than one hundred empty glassines, and a jar of a white powdery substance that looked like cocaine. The officers then locked the gun, the bottle of liquor, the two glassines from the front middle console, and the green bag with its contents in a desk in their office. They drove the defendant to the 45th Precinct—which was, according to Officer Arroyo, an area hub for alcohol screening—where he was given a breathalyzer test

and found to be legally impaired. At approximately 8:00 a.m., he was brought back to the 41st Precinct and returned to his cell. Shortly thereafter, Sgt. Barrett's shift ended and she went home.

Upon returning to the 41st Precinct, Arroyo noticed that Griselle was wearing jewelry. Arroyo asked her if someone could pick up the jewelry for her. Griselle arranged to have her daughter come to the station to get it. The daughter agreed also to take the defendant's belongings. Arroyo asked another officer, Officer Rivera, to make a list of the jewelry and have the daughter sign for it when the jewelry was handed over to her. Arroyo then went back to Lopez's car and began to place the contents into large plastic bags to give to Griselle's daughter. In the process of emptying the car, Arroyo looked in the glove compartment, where she found a loaded .38 caliber gun. Barrett testified that she had opened the glove compartment during the first search of the car, but became distracted when Arroyo asked her for a flashlight and failed to search it. Arroyo returned to the 41st Precinct to voucher the newly discovered gun and then turned over the non-contraband property to Griselle's daughter.

The list created by the officers identified items such as Griselle's pocketbook and jewelry. The beach chair, the umbrella, the audio speakers, etc.—items which Arroyo considered to be of no substantial value—were covered by a general catch-all description: "the belongings from the vehicle." Officer Arroyo explained that it was her practice to itemize objects in an inventory list only when they are "worth something." "If I handed off something smaller, say like car items, antifreeze, I wouldn't make a list, because it is worth

nothing." Sgt. Barrett testified that it was her practice to make a complete list of returned property to be signed by the recipient. Sgt. Barrett testified that a written inventory of seized items—including "non-contraband evidence"—is supposed to be made as part of an inventory search. However, Sgt. Barrett also testified that the absence of a list of "non-contraband property" was not a violation of police regulations.

Lopez's first argument on appeal was that the district court erred in denying his motion to suppress the items seized from the car. He contends that the warrantless search violated the standards of the Fourth Amendment because the government failed to establish that it was a valid inventory search. According to his arguments, the search could not qualify as an inventory search because its conduct was not dictated by a standardized policy and because the police did not create a complete inventory list of the objects found.

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

"It is well recognized in Supreme Court precedent that, when law enforcement officials take a vehicle into custody, they may search the vehicle and make an inventory of its contents without need for a search warrant and without regard to whether there is probable cause to suspect that the vehicle contains contraband or evidence of criminal conduct. *See Illinois v. Lafayette*, 462 U.S. 640, 19 643 (1983) (An inventory search constitutes a well-defined exception to the warrant requirement under the Fourth Amendment (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976))). This is because the policies behind the warrant requirement are not implicated in

an inventory search, nor is the related concept of probable cause.

Colorado v. Bertine, 479 U.S. 367, 371 (1987).

Such a search is not done to detect crime or to serve criminal prosecutions. It is done for quite different reasons: (1) to protect the owner's property while it is in police custody; (2) to protect the police against spurious claims of lost or stolen property; and (3) to protect the police from potential danger. *Opperman*, 428 U.S. at 369; see also *Bertine*, 479 U.S. at 372. The service of these objectives is wholly independent of whether the contents of the car figure in any way in a criminal investigation or prosecution.

"The Supreme Court has, however, recognized the danger to privacy interests protected by the Fourth Amendment if officers were at liberty in their discretion to conduct warrantless investigative searches when they suspected criminal activity, which searches they would subsequently justify by labeling them as 'inventory searches.' See *Florida v. Wells*, 495 U.S. 1, 4 (1990). Accordingly, the Court has stressed the importance, in determining the lawfulness of an inventory search, that it be conducted under 'standardized procedures.' See *Bertine*, 479 U.S. at 374 & n.6; *Lafayette*, 462 U.S.14 at 648; *Opperman*, 428 U.S. at 374-75. In *Bertine*, the Court upheld the lawfulness

"It is well recognized in Supreme Court precedent that, when law enforcement officials take a vehicle into custody, they may search the vehicle and make an inventory of its contents without need for a search warrant and without regard to whether there is probable cause to suspect that the vehicle contains contraband or evidence of criminal conduct. "

of the inventory search, concluding that, 'as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.' Our court has noted that a consideration in determining the reasonableness of an inventory search is

whether the officials conducting the search acted in good faith pursuant to standardized criteria or established routine.

"The lack of standardization that serves as the basis of Lopez's argument concerns whether the inventory list produced must include an itemization of every object found in the car, or whether items of small value may be omitted or grouped under a general category. We do not understand the Supreme Court's requirement of a standardized policy to extend to this issue because it has no bearing on the reason for the requirement of standardization. A standardized policy is needed to ensure that inventory searches do not become 'a ruse for a general rummaging in order to discover incriminating evidence.' *Wells*, 495 U.S. at 4.

"While the Supreme Court referred to the need for a standardized policy, we do not

think the Court meant that every detail of search procedure must be governed by a standardized policy. We doubt, for example, that the Court intended a requirement of standardized policy as to the order in which different parts of the car are searched, or whether officers performing the search need to report the results on a standardized form, or whether the search should be conducted by the officers responsible for the impoundment decision. A standardized policy governing those questions would do nothing to safeguard the interests protected by the Fourth Amendment. Nor do we think the Court intended to require uniformity as to whether insignificant items of little or no value must be explicitly itemized. Once again, departmental uniformity on that issue would have no bearing on protecting the privacy interests of the public from unreasonable police intrusion. On the other hand, when a police department adopts a standardized policy governing the search of the contents of impounded vehicles, the owners and occupants of those vehicles are protected against the risk that officers will use selective discretion, searching only when they suspect criminal activity and then seeking to justify the searches as conducted for inventory purposes. As we understand the Supreme Court's objective, this is the kind of issue the Supreme Court had in mind in requiring that an inventory search be governed by a standardized policy. The evidence offered by the government and accepted by the district court satisfied that requirement.

"Nor do we find merit in Lopez's argument that the failure to itemize each object found in the car, instead of covering items of lesser value under a general catch-all category of 'personal belongings,' is incompatible with the Supreme Court's warning that

'inventory searches should be designed to produce an inventory.' *Wells*, 495 U.S. at 4. The search did produce an inventory. The concept of an inventory does not demand the separate itemization of every single object. A conventional family automobile is likely to contain a bunch of road maps, pens and a notepad, a bottle opener, packs of chewing gum or candy, clip-on sunshades, a pack of tissues, a vanilla-scented deodorizer, DVDs and children's games, a baby bottle and a soiled baby blanket, an old sock, a sweater, windshield cleaning fluid, jumper cables, a tow rope, a tire iron and jack, a first aid kit, and emergency flares, not to mention empty candy wrappers and wads of chewed gum.

"That an officer might use a catch-all to cover objects of little or no value in no way casts doubt on the officer's claim that the purpose of the search was to make an inventory. It would serve no useful purpose to require separate itemization of each object found, regardless of its value, as a precondition to accepting a search as an inventory search. Such an obligation would furthermore interfere severely with the enforcement of the criminal laws by requiring irrational, unjustified suppression of evidence of crime where officers, conducting a *bona fide* search of an impounded vehicle, found evidence of serious crime but, in making their inventory, failed to distinguish between the maps of Connecticut and New York, or failed to list separately the soiled baby blanket or a pack of gum. Imposing a requirement to identify each item separately would furthermore add considerable administrative burden without in any way advancing the purposes of the Fourth Amendment to protect the public from 'unreasonable searches and seizures.'"

SEARCH AND SEIZURE: **Private Clubs;
Members Only “Admission Policy”**

United States v. Perry,
CA8, No. 07-3732, 11/24/08

On October 17, 2006, police officers received a tip from a confidential informant that Javarlo Perry was inside a Veteran of Foreign Wars (VFW) hall in St. Paul, Minnesota, wearing a bullet-resistant vest and carrying narcotics. When the officers approached the VFW, they observed a group of eight people standing outside the door. As members of that group entered the hall through the open door, several officers followed. The officers did not ask for permission to enter the VFW, nor did they seek permission to remain there once inside. After they entered, no one challenged the officers' presence; the only person who spoke with the officers asked, "What's going on... is there a problem...can I help you with something?" The officers observed a stage to their immediate right covered by a projection screen. As one of the officers approached the stage, he heard male voices coming from behind the screen. Looking behind the screen through a twelve- to sixteen-inch opening between the screen and the wall, the officer observed Perry conversing with another man. Perry saw the officer, and he withdrew a firearm from his waistband and placed it in an adjacent media cabinet. The officers then arrested Perry and seized the gun from the media cabinet. A search of Perry outside the VFW revealed crack cocaine, which tests later determined weighed 3.53 grams.

Perry moved to suppress the firearm as the fruits of a Fourth Amendment violation, arguing the VFW's "members-only"

admissions policy provided him with an expectation of privacy therein.

Several of the officers testified the VFW is a "members-only" establishment where the door is regularly locked. Anyone seeking to enter must press a buzzer, at which point someone inside the hall, who is presumably monitoring the door with a camera, can press a button to unlock the door. In the past, officers have sometimes had to wait a few moments to enter before the door was unlocked. The VFW does not maintain someone at the door to verify compliance with whatever admissions policy is in place. Perry did not testify at the suppression hearing. As such, there is no evidence how Perry entered the VFW that night, whether he is a member of the VFW, or whether his admission that night was in compliance with whatever limited admissions policy is allegedly enforced.

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

"Perry did not testify or put forward any evidence demonstrating his subjective expectation of privacy within the VFW, and the district court did not make a factual finding in this regard. We will assume, therefore, that Perry carried his burden of establishing a subjective expectation of privacy in the VFW hall. Nevertheless, Perry does not have standing to challenge the search because he has not met his burden of demonstrating his expectation of privacy was objectively reasonable. We have identified a number of factors relevant to this analysis: whether the party has a possessory interest in the things seized or the place searched; whether the party can exclude others from that place; whether the party took precautions

to maintain the privacy; and whether the party had a key to the premises.

“At its core, the VFW is a commercial establishment. Notably, an expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual’s home. *New York v. Burger*, 482 U.S. 691, 700 (1987). We find it indisputable that someone present in a commercial establishment in an area open to the general public has no objectively reasonable expectation of privacy therein. See *Lewis v. United States*, 385 U.S. 206, 211 (1966) (A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.) Therefore, if the VFW was a typical commercial establishment, Perry would have no expectation of privacy in the portions of the hall open to the public, including the media cabinet where his firearm was found.

“Perry argues, however, his expectation of privacy in the VFW was greater because it is a ‘members-only’ establishment not open to the general public. As such, Perry contends, the restrictive admissions policy creates an objectively reasonable expectation of privacy therein. This argument fails for several reasons. First, Perry did not put forward any evidence demonstrating the nature of the alleged ‘members only’ policy. Although several officers testified they regarded the VFW as a ‘members-only’ establishment, there is no evidence what policy the VFW has in place with respect to the admission of non-members. If the VFW does not actually have a policy restricting admission, then it is no different than a typical commercial establishment open to the general public.

Perry’s failure to develop the record in this regard is fatal since he ‘has the burden of showing a legitimate expectation of privacy in the area searched.’ *United States v. Pierson*, 219 F.3d 803, 806 (8th Cir. 2000).

“Second, Perry did not put forward any evidence demonstrating he was a member of the VFW or was entitled to be present under whatever ‘members-only’ policy was allegedly enforced. It is entirely possible Perry entered the VFW in the same manner, and in equal contravention of the policy he relies upon, as the officers whose conduct he seeks to challenge; in such a circumstance, we fail to see how Perry can have an objectively reasonable expectation of privacy based on a restrictive admissions policy that his very presence violates.

“Finally, there is no evidence even if the VFW did have an admissions policy under which Perry was entitled to be present, that the policy was strictly enforced in the past. See *Ouimette v. Howard*, 468 F.2d 1363, 1365 (1st Cir. 1972) (holding lax enforcement of private club’s privacy measures negates an expectation of privacy); In fact, the only evidence presented at the suppression hearing was that officers in the past have been admitted into the VFW without incident, though they sometimes had to wait a few moments after pressing the buzzer. If the VFW did not effectively enforce its policy in the past, then Perry’s expectation of privacy based on that policy is not objectively reasonable.

“The Court of Appeals for the Eighth Circuit emphasized that they do not decide today whether a member of a private club, which employs a restrictive admissions policy that it strictly and consistently enforces, has an objectively reasonable expectation of privacy therein. They concluded only that in this case Perry has failed to show there was a policy limiting admission, he was entitled to be present under that policy, and the policy was strictly and consistently enforced in the past. Because he bears the burden of demonstrating an objectively reasonable expectation of privacy, his failure to do so deprives him of standing to challenge the search. Therefore, the district court did not err in denying Perry’s motion to suppress.”

SEARCH AND SEIZURE:
**Reasonable Suspicion;
 Anonymous Telephone Call;
 Caller Identification**

United States v. Casper,
 CA5, No. 06-11381, 7/18/2008

In January 2006, two Dallas police officers responded to a complaint that an aggravated assault with a gun had occurred at a motel. The complaint was made via telephone, and the dispatcher relayed the information to the officers by radio and computer. The complainant alleged that his life had been threatened by a white male with a firearm who was driving a white Ford Ranger pickup with Illinois license plates.

On arriving at the motel, the officers witnessed Brian Keith Casper backing out of a parking spot in a white Ford Ranger pickup with Illinois plates. They turned on their lights,

blocked Casper’s path, drew their weapons, and ordered him to exit the vehicle. He complied, and the officers handcuffed him and asked whether he had any weapons. He told them of a handgun in the truck. The officer asked whether he had a permit for the gun. Casper admitted he did not, and the officers arrested him.

While the officer was retrieving the handgun from the truck, he observed what he believed to be drug paraphernalia. After arresting Casper, the officers inventoried the vehicle in preparation for impounding it. They seized the box of paraphernalia and found scales, torches, a Bunsen burner, glassware, methamphetamine, and a disassembled handgun. Casper admitted the contraband belonged to him.

Casper filed motions to suppress the evidence gathered from the searches. The court held a hearing on the search. At the hearing, the government offered the testimony of the two arresting officers. Other than the details offered above, the officers testified that they were able to contact the complainant and bring him to the scene, where it was determined the complaint was a hoax. The officers also testified that they did not know the name of the complainant, though normally it would have been on the call sheet, which they did not produce at the hearing. The call sheet did have the complainant’s phone number, so the police were able to contact him and bring him to the scene. The court concluded that it was not evident that the complainant had made an anonymous tip, meaning that the officers did not have to corroborate the tip, and thus the seizure of Casper was legal.

Casper contends that his January 2006 detention and the subsequent search of his vehicle, culminating in his arrest, were illegal because they were executed without a warrant and did not fall within any exception. Specifically, he asserts that the complaint that led the officers to the motel was the equivalent of an anonymous tip that the officers failed to corroborate and that the government has failed to demonstrate was reliable.

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

“A person is seized when a show of authority is sufficient to convince a reasonable person that he is not free to leave. An investigative stop by the police, though a seizure, is constitutionally permissible if the police have a reasonable suspicion, supported by articulable facts, that criminal activity is afoot. *See Terry v. Ohio*, 392 U.S. 1, 27 (1967); *United States v. Martinez*, 486 F.3d 855, 861 (5th Cir. 2007). Reasonable suspicion is a lower standard than is the probable cause required to make an arrest. *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000).

“The Dallas police officers exhibited sufficient force for Casper to believe he was not free to leave; in fact, he was ordered out of his truck and was handcuffed immediately. If a defendant produces evidence that he was arrested or subjected to a search without a warrant, the burden shifts to the government to justify the warrantless arrest or search.

“The government asserts that the complaint telephoned to the Dallas police created reasonable suspicion to justify the investigative detention. The government offers as articulable facts that, on arriving

at the location given in the complaint, the police found ‘Casper, who fit the description of the suspect, and was driving a vehicle which matched exactly the description of the suspect vehicle.’ That information alone is not sufficient to establish reasonable suspicion; something needs to be known about the informant. *See Florida v. J.L.*, 529 U.S. 266, (2000).

An informant’s tip can provide reasonable suspicion, depending on the credibility and reliability of the informant, the specificity of the information contained in the tip or report, the extent to which the information in the tip or report can be verified by officers in the field, and whether the tip or report concerns active or recent activity, or has instead gone stale.

“Where the tip is anonymous, the credibility and reliability of the informant cannot be determined, and the government must establish reasonable suspicion based on some or all of the other factors.

“The government agrees that if the source of the information were anonymous, it would be more difficult to establish the veracity of the tip and to conclude the tip provided reasonable suspicion. The government contends, however, that the complainant was not anonymous, but rather a citizen reporting a crime.

“We agree that a citizen reporting a crime is more reliable, because such citizens are exposed to criminal liability for false complaints. *United States v. Basey*, 816 F.2d 980, 988-89 (5th Cir. 1987). Reliability is the central concern. Thus, in *Basey* the tipster was reliable because the deputies conducting

the *Terry* stop knew the citizen informant. In contrast, in *Martinez*, 486 F.3d at 861-62, where the government ‘never introduced any evidence about the informant whatsoever and made no effort to illustrate his or her reliability in the district court,’ the tip was the ‘functional equivalent of an anonymous tip. To characterize it as anything else would be to assume the very credibility and reliability that the government has the burden of proving.’

“In the instant case, the government must establish the reliability of the informant, base its reasonable suspicion on other factors named in *Martinez*, or both. The government offers that the informant was not anonymous because he could be identified by his phone number and held accountable for a false tip if that became necessary. We agree that, where instant caller identification allows the police to trace the identity of an anonymous telephone informant, the ready identifiability of the caller increases the reliability of such tips. See *J.L.*, 529 U.S. at 276. Additionally, an informant who explains the basis for his knowledge increases his reliability, especially if he is a person relating the details of a crime he has personally suffered, see *Adams v. Williams*, 407 U.S. 143, 147 (1972). (Ultimately, in this case the tip was false but the informant was identified. That knowledge, however, is unhelpful for determining whether the officers had reasonable suspicion.)

“Based on the captured telephone number and the victim status of the caller, the government has established some reliability and credibility for the instant informer, thereby creating reasonable suspicion. The specificity of the information in the tip and the fact that the tip addressed very recent events also indicate reliability and create reasonable suspicion.

See *Martinez*, 486 F.3d at 861. In light of these factors, the officers had reasonable suspicion to justify an investigative stop of Casper, which permitted the protective search of Casper’s truck that resulted in the probable cause necessary to justify his arrest, rendering the subsequent search of the vehicle permissible as incident to that arrest or as an inventory.”

SEARCH AND SEIZURE:

Reasonable Suspicion; Anonymous Telephone Call; Caller Identification

Scucchi v. State,

CACR 08-428, 11/12/08, [Unpublished]

Officer Kevin Barnett was on patrol in Ashley County on February 3, 2007, when he received a broadcast from a dispatcher. The dispatcher related that an unidentified civilian had called and reported a reckless driver. Based on the information given by the civilian, Officer Barnett was able to locate the suspected vehicle, which was being driven by Donald Scucchi. The vehicle matched the description and license plate provided by the tipster.

Officer Barnett testified that he followed Scucchi’s vehicle for about a mile. During that time, Officer Barnett observed very noticeable and continuous weaving between the center line and fog line. Officer Barnett acknowledged that Scucchi never crossed any lines, but stated that the weaving from line to line “created red flags.” Officer Barnett also indicated that Scucchi was driving at a normal speed. Based on the continuous weaving, Officer Barnett made a traffic stop. Several sobriety tests were administered, and

according to the officer, Scucchi failed them all and was placed under arrest.

The trial court denied Scucchi's motion to suppress. Scucchi argues that his motion to suppress the incriminating evidence should have been granted because the police officer lacked reasonable cause to stop his vehicle.

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

"...Scucchi relies on the decision in *Frazer v. State*, 80 Ark. App. 231, 94 S.W.3d 357 (2002), where we held that when reasonable suspicion is based solely on a citizen-informant's report, the three factors in determining reliability are: (1) whether the informant was exposed to possible criminal or civil prosecution if the report is false; (2) whether the report is based on personal observations of the informant; and (3) whether the officer's personal observations corroborated the informant's observations. Scucchi asserts that the testimony in this case established that the informant did not identify himself, nor did he personally observe appellant's driving. Because these elements of the test announced in *Frazer* were missing, Scucchi contends that the officer lacked reasonable suspicion and that his motion to suppress should have been granted.

"Justification for a stop depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). In *Frette*, *supra*, our supreme court emphasized the significant policy considerations where a tipster reports a driver who is drinking, and further wrote:

This court has previously recognized the magnitude of the State's interest in eliminating drunk driving in comparison to relatively minimal intrusions on motorists. See Mullinax v. State, 327 Ark. 41, 938 S.W.2d 801 (1997). In balancing the rights of a motorist to be free from unreasonable intrusions and the State's interest in protecting the public from unreasonable danger, one court has stated that a motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible. The 'totality' of circumstances tips the balance in favor of public safety and lessens the requirements of reliability and corroboration [*Kaysville City v. Mulcahy*, 943 P.2d 231 (Utah Ct. App. 1997)] (quoting *State v. Tucker*, 878 P.2d 855 (Kan. Ct. App. 1994))

"Turning to the present case, Officer Barnett had sufficient reasons to believe that Scucchi may have been driving while intoxicated. Contrary to Scucchi's argument, the information relayed to the dispatcher was based on the citizen's personal observations, as is evident from the officer's testimony that the dispatcher "was called by a civilian that had been following Scucchi." And Officer Barnett corroborated the citizen's report when he located the described vehicle in the given location and himself observed erratic driving. In this regard, Officer Barnett testified that Scucchi's vehicle was continuously weaving from one line to the other for a period of about a mile. Although the informant in this case was unidentified and thus did not expose himself to criminal or civil prosecution if his report was false, his account was sufficiently corroborated.

“In *Piercefield v. State*, 316 Ark. 133, 871 S.W.2d 348 (1994), there was no tip given to the police, and our supreme court held that the officer’s observation that a motorcycle was weaving from the centerline to the shoulder alone gave the officer reasonable suspicion that the driver was driving while intoxicated. In the present case, we hold that the tip based on the informant’s personal observations coupled with the officer’s observations provided reasonable suspicion to make the stop.”

SEARCH AND SEIZURE:
Stop and Frisk; Nervousness

United States v. Wilson,
CA6, No. 06-6339, 10/29/07

In *United States v. Wilson*, the Court of Appeals for the Sixth Circuit discussed nervousness in connection with a frisk for weapons. The Court in this case stated Wilson was “extremely nervousness” when officers approached his car. However, the officer in this case testified that it was fairly common for people to be nervous when he pulled them over. Nervous behavior, standing alone, is not enough to justify a *Terry* search. *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995) (“Although there are a plethora of cases referring to a defendant appearing nervous, nervousness is generally included as one of several grounds for finding reasonable suspicion and not a ground sufficient in and of itself.”)

SEARCH AND SEIZURE:
**Vehicle Stops;
Expanding the Scope
of the Initial Investigation**

United States v. Nassar,
CA8, No. 08-1665, 11/7/08

In *United States v. Nassar*, the Court of Appeals for the Eighth Circuit summarized its position on vehicle stops and expanding the scope of the initial investigation as follows:

“A police officer who observes a traffic violation has probable cause to stop the vehicle and its driver. *United States v. Olivera-Mendez*, 484 F.3d 505, 509 (8th Cir. 2007). Incident to the stop, an officer is entitled only to conduct an investigation reasonably related in scope to the circumstances that justified the initial stop. *United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990), citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968). The officer may lawfully check the driver’s license and registration, ask the driver about his destination and purpose, and request that the driver sit inside the patrol car. *United States v. Brown*, 345 F.3d 574, 578 (8th Cir. 2003). The officer may detain the driver as long as reasonably necessary to conduct these activities and to issue a warning or citation. *United States v. Jones*, 269 F.3d 919, 925 (8th Cir. 2001). However, reasonable, articulable suspicion is necessary to expand the scope of the initial investigation. *United States v. Payne*, 534 F.3d 948 (8th Cir. 2008).”

SECOND AMENDMENT:

Right to Keep and Bear Firearms*United States v. Fincher,*

CA8, No. 07-2514 and 07-2888, 8/13/08

Hollis Wayne Fincher was convicted by a jury on one count of possession of a machine gun and one count of possession of an unregistered sawed-off shotgun. Fincher does not dispute that he possessed these guns or that he did so without a license. He appeals his conviction, however, arguing that he has the right to possess these weapons under the Second Amendment of the United States Constitution because his possession has some reasonable relationship to the maintenance of a well regulated militia.

Fincher testified that he possessed the guns as part of his membership in the Washington County Militia (WCM), an organization he helped found in 1994. He testified that the purpose of the WCM is to ensure the militia can operate as effectively militarily as possible in a time of state emergency and that the WCM has regular meetings and training sessions for its members.

Fincher testified that between seven and nine individuals attend any given meeting of the WCM, though it is not always the same individuals in attendance. The WCM does not maintain a roster of its members or an inventory of weapons. The WCM is not a secret organization. In fact, along with the other members of the WCM, Fincher wrote and sent letters to federal agencies via certified mail informing them of the WCM's existence and attempting to put them on notice that the WCM was lawful under state law. Fincher also sent at least one letter to the governor of Arkansas, informing him about

the WCM, seeking approval, and stating that the governor's failure to object to the WCM's declaration would provide affirmation that the state of Arkansas did not object to the WCM. Fincher denied receiving a letter from the governor stating that the state records did not contain any reference to the WCM and that no such organization was registered with, or sanctioned by, the office of the governor or the state of Arkansas.

In addition to sending written notice of the WCM to various governmental offices, Fincher invited local sheriffs to view the WCM facilities and weapons. Fincher also told state officials that the WCM possessed machine guns, which the public could observe at any one of the three annual picnics sponsored by the WCM, and he showed the machine guns to at least one sheriff. Fincher also testified about how the weapons used by the WCM were chosen and stored, some at the WCM facility and others at the individual members' residences.

When asked about the procedures for activating the WCM in the case of an emergency, Fincher stated that if an emergency occurred while he was the commander of the WCM, he would contact "the sheriff if – if I was able, you know, depending on the emergency, or the governor, or probably any other – or maybe the mayor of a city or any – anyone or no one. If there was an emergency that had to be taken care of, we have the right to preserve life, liberty, and pursuit of happiness. We have the duty to. You don't stand around and wait for someone to tell you can protect your life or perform emergency medical assistance or put out a fire. These are natural offices of the people." He also testified that the state could call up the militia at any point, and that even though the written notices

that WCM sent to various governmental offices did not contain any phone numbers or other direct contact information, the governor would know how to contact them.

The Court of Appeals for the Eighth Circuit agreed with the district court's determination that the WCM was not affiliated with the state militia and therefore not subject to the protections of the Second Amendment. In reaching this conclusion, the Court took into account the Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), in which the Court held that the District of Columbia's complete prohibition on the possession of usable handguns in one's home violated the Second Amendment. In holding that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," the Court also stated that the right to possess firearms is not beyond the reach of all government regulation.

Fincher's possession of the guns is not protected by the Second Amendment. Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use. Furthermore, Fincher has not directly attacked the federal registration requirements on firearms, and the Court doubted that any such attack would succeed in light of *Heller*. Accordingly, Fincher's possession of guns is not protected by the Second Amendment.

SUBSTANTIVE LAW:
Drugs; Constructive Possession

Jones v. State,
CACR 07-952, 9/17/08 [Unpublished]

In *Jones v. State*, the Arkansas Court of Appeals stated that Arkansas Code Annotated section 5-64-401 (Repl. 2006), makes it unlawful for any person to possess a controlled substance. Possession need not be actual possession, but may be constructive if a person controls a substance or has the right to control it. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251, 253 (1982). When illegal substances are located in a jointly occupied residence or vehicle, the State must either provide the necessary link to a specific occupant or prove that the occupant was in sole possession. However, proof must be presented that an occupant exercised care, control, and management over the substance, and knew that the substance was illegal.

Factors that reasonably establish constructive possession are as follows: 1) whether the contraband was in plain view; 2) whether the contraband was found on the person or with his personal effects; 3) whether it was found on the same side of a car seat where the accused was sitting, or close by; 4) whether the accused owned the vehicle or exercised control over it; 5) whether the accused acted suspiciously before or during the arrest. *Jones v. State*, 357 Ark. 545, 551, 182 S.W.3d 458, 488 (2004).