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## CIVIL COMMITMENT: Sexually Dangerous Individuals

*United States v. Volungus*, CA1, No. 09-1596, 1/8/10

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**I**n *United States v. Volungus*, the Court of Appeals for the First Circuit was called upon to determine the constitutionality of a provision of the Adam Walsh Child Protection and Safety Act (Walsh Act), codified as 18 U.S.C. §§ 4241 – 4248, a recently enacted federal law that provides, in pertinent part, for the civil commitment of a sexually dangerous person already in federal criminal custody in lieu of that person’s release upon service of his full sentence.

In court documents, civil commitment is described as follows:

“Mechanically, the Walsh Act’s civil commitment provision operates in the following manner. A responsible federal official (the Attorney General, the director of the Federal Bureau of Prisons, or the designee of either) may initiate commitment proceedings by petitioning the federal district court in the judicial district in which a targeted person is confined. The petition must certify to the court that the target, whom we shall call the respondent, ‘is a sexually dangerous person.’ The filing of the petition stays the respondent’s release from federal custody, notwithstanding the expiration of his sentence, ‘pending completion of procedures’ described in the Walsh Act. Those procedures include an opportunity for the district court to order a mental health examination and to hold a ‘hearing to

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determine whether the [respondent named in the petition] is a sexually dangerous person.’ Id. § 4248(a)-(c); see id. § 4247(b)- c). At the hearing, the respondent is entitled to counsel and to the opportunity ‘to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine’ the government’s witnesses. Id. § 4247(d).

“In prosecuting such a petition, the government has the burden of proving ‘by clear and convincing evidence that the [respondent] is a sexually dangerous person.’ Id. § 4248(d). If the court finds that the government has carried this heavy burden, it must commit the respondent to the custody of the Attorney General. The Attorney General is directed to defer to available state custody; that is, to ‘release the [respondent] to the appropriate official of the State in which [he] is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment.’ In addition, the Attorney General is required ‘to make all reasonable efforts to cause such a State to assume responsibility.’ If such efforts prove unsuccessful, the Attorney General must retain federal custody and place the respondent in a suitable facility for treatment until either an eligible state ‘will assume... responsibility’ or the respondent’s condition is ameliorated to the extent that ‘he can safely be released, either conditionally or unconditionally.’

“The Walsh Act provides an array of post-commitment safeguards to ensure periodic reevaluation of a committed person’s overall mental condition, potential dangerousness, and suitability for release. These include a requirement for an annual report setting forth a recommendation for or against continued

commitment. Id. § 4247(e)(1)(B). If the director of the facility in which the person is confined determines that he is no longer sexually dangerous, the director must notify the court, which must either order the person’s release or schedule a hearing to determine whether release is appropriate. Id. § 4248(e). The person himself, through counsel, may petition the court for such a hearing, but not within 180 days after a judicial determination that commitment is appropriate. Id. § 4247(h).”

The First Circuit held that the civil commitment provision comes within the legitimate scope of congressional power conferred by the Necessary and Proper Clause of the Federal Constitution.

#### DOMESTIC VIOLENCE:

#### **Federal Statute; Possession of Firearm; Second Amendment**

*United States v. White*

CA11, No. 08-16010, 1/11/10

**A**t around 2:00 a.m. on April 21, 2007, Police Officers Brad Latham and Otha Lee Hargrove received a complaint about loud music coming from a vehicle parked in a high-crime area of Mobile, Alabama. Upon arriving at the scene, the officers saw a vehicle that matched dispatch’s description. As Officer Hargrove drove by the vehicle with his windows partially open, he smelled a “strong” odor of marijuana and heard music emanating from the car. The vehicle contained four occupants: two females in the front seat and two males in the back seat.

Latham approached the driver and asked for identification, which she was unable to

provide. The officers then questioned the occupants about whether they had been smoking marijuana. The occupants denied possessing or using any drugs. Latham asked the driver to exit the vehicle and requested her name and social security number to perform a background check. Latham then requested that White step out of the car. Shortly thereafter, Hargrove, who was busy performing a background check on the other male passenger, heard Latham say "gun," at which point he saw Latham remove a black handgun from White's person. The officers arrested White after he failed to produce a permit for the pistol. No drugs were found in the car. Latham filed two police reports detailing the incident, neither of which mentioned the smell of marijuana. Hargrove did not file any written reports.

White was indicted for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. § 922(g)(9). Before trial, he filed a motion to suppress the firearm found on his person during the search, arguing that the officers had violated his Fourth Amendment rights. Hargrove testified to the facts stated above at the suppression hearing. On the motion to suppress, the court found that he was a credible witness, and it held that the smell of marijuana gave the officers reasonable suspicion to detain and question the passengers and to pat them down for officer safety.

Both officers testified at trial. Hargrove's testimony remained the same. Latham stated that he responded to a loud noise complaint; when he arrived on the scene, a car matching the description in the complaint contained four occupants and only the dome light was

on; and the occupants, when questioned, could not produce identification. He stated that he and Hargrove asked all the occupants if there were any weapons or illegal items in the vehicle, to which each responded in the negative. After recognizing White as having "given [him] problems in the past to where [sic] I stopped him before," he "patted him down for weapons...for officer safety," which was "standard [department] practice." As he was patting White down, he noticed the gun's magazine protruding from White's pocket. He could not remember whether there had been any music playing in the car, although he testified that if there had been, it was not loud. He stated that his report had not mentioned marijuana, because he had not smelled any.

Marcus Carothers and Tequila Ward Prince, two of the occupants of the car, later testified that they had been smoking marijuana prior to the stop. They stated that they had not been playing loud music, and that they believed that the loud noise complaint had been filed by a disgruntled neighbor. They were unsure whether the smell of marijuana had lingered in the air, but they estimated that they had ceased smoking marijuana between five to twenty minutes before the officers arrived.

To prove the predicate offense, the government offered a certified copy of White's previous misdemeanor conviction for domestic violence, which stated that he was convicted on January 11, 2005, of domestic violence in the third degree, harassment, in violation of Alabama Code §§ 13A-11-8A and 13A-6-132.

According to his conviction, on June 22, 2003, he tried to choke his then live-in girlfriend.

The district court overruled his objection that this conviction did not qualify as a predicate offense under 18 U.S.C. § 922(g)(9).

After the government rested, White moved for a judgment of acquittal and renewed his motion to suppress the gun. The district court denied both motions. The jury found White guilty, and he was sentenced to forty-six months' imprisonment. The trial court also denied his subsequent motion to dismiss based upon *District of Columbia v. Heller*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2783, 171 L.Ed. 2d 637 (2008). White now appeals pursuant to 28 U.S.C. § 1292. White contends that the U.S. Supreme Court decision in *Heller v. United States*, where the Court held that the District of Columbia's ban on handgun possession in the home by law-abiding citizens violated the Second Amendment, made his conviction under 18 U.S.C. § 922(g)(9) unconstitutional.

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

"...The United States Supreme Court qualified the right to bear arms when that stated that like most rights, it is not unlimited. Nothing in *Heller* should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. Accordingly, the Court of Appeals for the Eleventh Circuit stated the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence, § 922(g)(9), warrants inclusion on *Heller's* list of presumptively lawful longstanding prohibitions."

Given that *Heller* does not cast doubt on the constitutionality of § 922(g)(9), the Court affirmed White's conviction.

#### JAILS: **Conditions of Confinement; Medical Needs**

*Shepard v. Dallas County*  
CA5, No. 08-10918, 12/28/09

**O**n October 4, 2003, Stanley Shepherd was booked into the Dallas County Jail (Texas) as a pretrial detainee. At intake, he informed a nurse at the jail that he had hypertension and had been taking Clonidine twice daily to treat that condition. In his first two weeks at the jail, Shepherd requested Clonidine several times—one nurse practitioner recorded that he “wants and insists on Clonidine”—and, after a high blood-pressure reading on October 14, 2003, he was prescribed a different medication. Despite frequent complaints, he waited weeks between doses, was not monitored, and received no other medical treatment.

On November 27, Shepherd was brought to the jail clinic complaining of a severe headache. His blood pressure was high—165/117. Dr. Kathryn Flangin ordered that Shepherd be given one dose of Clonidine and that his blood pressure be checked for three days.

Four days later, on December 1, Shepherd's blood pressure read 181/133, a level considered a “hypertensive emergency.” He was given nitroglycerine and a prescription for twice-daily doses of Clonidine.

On December 3, Shepherd experienced a second hypertensive emergency, with his

blood pressure reading 242/132. At that time, a nurse noted on Shepherd's chart that he "had not received his Clonidine as ordered." He was administered an initial dose, which proved effective.

For the next seven weeks, Shepherd received no medical treatment. His medication was not dispensed as prescribed, and no medical provider checked his blood pressure. The record shows that he and his wife, who was aware of the situation, complained to jail staff and medical personnel about the lack of treatment. His wife, in particular, repeatedly expressed the concern that Shepherd would have a stroke if he did not receive his medication regularly.

Shepherd did not see a medical provider until January 22, 2004. Early that afternoon, he went to the nurse's station complaining of weakness on the left side of his body and hypertension. A nurse took his blood pressure, which was high, and reported it to Dr. Flangin, who ordered the nurses to monitor Shepherd's blood pressure and administer doses of two drugs, Lasix and Lopressor. Shepherd was sent back to his cell, over his protests that he was not well. An hour later, Shepherd was found lying on the floor of his cell, with slurred speech, sweating, and left-side weakness. He was immediately taken by ambulance to the hospital, where doctors concluded that he had suffered a stroke because of a hypertensive emergency. After 26 days in the hospital, he was discharged to a rehabilitation center, where he recuperated for several months.

Since his stroke, Shepherd has been permanently confined to a wheelchair, has lost most of his left-side functions, suffered

impairment of his left-side sight and hearing, and has slurred speech.

In 2005, Shepherd filed suit against Dallas County seeking damages under 42 U.S.C. § 1983 for violations of his Fourteenth Amendment right to medical care while in custody, challenging both specific "episodic acts and omissions" and the "conditions of confinement." At trial, the jury awarded him \$890,336 in damages. Shepherd presented extensive evidence on the jail's treatment of inmates with chronic illness. Witnesses, including the jail's Medical Director at the time of Shepherd's confinement, the jail's pharmacist, and an employee of the medical services contractor responsible for monitoring the jail's contract, testified that the jail's medical program was understaffed to the point that routine treatment could not be provided; that at times, no medical personnel were present at the jail; that fifty percent or more of prescriptions regularly went undelivered to inmates; that records concerning medication administration were regularly falsified; and that Dallas County officials had been repeatedly notified of these problems.

In a twenty-three page decision, the Fifth Circuit Court of Appeals affirmed the damages award to Stanley Shepherd, and stated that a detainee challenging jail conditions must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs; any lesser showing cannot prove punishment in violation of the detainee's Due Process rights. Here, Shepherd demonstrated that serious injury and death were the inevitable results of the jail's gross inattention to the needs of inmates with chronic illness.

MIRANDA: **Break In Custody;  
The “Edwards Rule”**

*Maryland v. Shatzer*, No. 08-680, 2/24/10

**I**n *Maryland v. Shatzer*, the United States Supreme Court considered whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*, 451 U. S. 477 (1981). The decision in *Edwards v. Arizona* held:

*When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. He 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 2003, a police detective tried to question Michael Shatzer, who was incarcerated at a Maryland prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer invoked his Miranda right to have counsel present during interrogation, so the detective terminated the interview. Shatzer was released back into the general prison population, and the investigation was closed. Another detective reopened the investigation in 2006 and attempted to interrogate Shatzer, who was still incarcerated. Shatzer waived his *Miranda* rights and made incriminating statements.

The State’s Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards*. The trial court held a suppression hearing and later denied Shatzer’s motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer’s 2006 statements to the detectives. Based on the proffered testimony of the victim and the “admission of the defendant as to the act of masturbation,” the trial court found Shatzer guilty of sexual child abuse of his son.

The Court of Appeals of Maryland reversed and remanded. The court held that “the passage of time *alone* is insufficient to end the protections afforded by *Edwards*, and that, assuming, a break-in-custody exception to *Edwards* existed, Shatzer’s release back into the general prison population between interrogations did not constitute a break in custody.” The United States Supreme Court granted certiorari and found, in part, as follows:

“In *Miranda v. Arizona*, 384 U. S. 436 (1966), this Court adopted a set of prophylactic measures to protect a suspect’s Fifth Amendment right from the ‘inherently compelling pressures’ of custodial interrogation.

“*Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. Critically, however, a suspect can waive these rights. To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the high standard of proof for the waiver of constitutional rights.

“The rationale of *Edwards* is that once a suspect indicates that he is not capable of undergoing custodial questioning without advice of counsel, any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect. Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect’s right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police’s persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to increase as custody is prolonged. The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of prolonged

police custody by repeatedly attempting to question a suspect who previously requested counsel until the suspect is badgered into submission.

“It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, thrust into and isolated in an unfamiliar, police-dominated atmosphere where his captors appear to control his fate.

“When, unlike what happened in *Edwards*, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is far fetched to think that a police officer’s asking the suspect whether he would like to waive his *Miranda* rights will any more wear down the accused than did the first such request at the original attempted interrogation—which is of course not deemed coercive. His change of heart is less likely attributable to ‘badgering’ than it is

to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest.

“If Shatzer’s return to the general prison population qualified as a break in custody, there is no doubt that it lasted long enough (2½ years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard-of. In *County of Riverside v. McLaughlin*, 500 U. S. 44 (1991), we specified 48 hours as the time within which the police must comply with the requirement of *Gerstein v. Pugh*, 420 U. S. 103 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention. Like *McLaughlin*, we think it appropriate to specify a period of time. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacquainted to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.

“The 14-day limitation meets Shatzer’s concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has

been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.

“In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy. And when it is determined that the defendant pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel.

“The facts of this case present an additional issue. No one questions that Shatzer was in custody for *Miranda* purposes during the interviews with a detective in 2003 and the detective who conducted the 2006 interview. Likewise, no one questions that Shatzer triggered the *Edwards* protections when, according to the notes of the 2003 interview, he stated that he would not talk about this case without having an attorney present. After the 2003 interview, Shatzer was released back into the general prison population where he was serving an unrelated sentence. The issue is whether that constitutes a break in *Miranda* custody. We have never decided whether incarceration constitutes custody for *Miranda* purposes.

“Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*. Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

“Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time served. This is in stark contrast to the circumstances faced by the defendant in *Edwards* whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.

“Because Shatzer experienced a break in *Miranda* custody lasting more than two

weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.”

Editor’s Note: *The rule of Edwards v. Arizona, which prohibits law enforcement officers from approaching a suspect in custody for additional interrogation once he has invoked his Miranda rights, ceases to apply 14 days after the suspect is released from custody. While you will still advise an inmate in a correctional situation of his Miranda rights when questioning him about criminal activity, the fact that he is incarcerated does not in and of itself constitute custody within the meaning of Miranda.*

#### MIRANDA:

##### **Warnings; Adequately Conveying Rights**

*Florida v. Powell*, No. 08-1175, 2/23/10

**O**n August 10, 2004, law enforcement officers in Tampa, Florida, seeking to apprehend respondent Kevin Dewayne Powell in connection with a robbery investigation, entered an apartment rented by Powell’s girlfriend. After spotting Powell coming from a bedroom, the officers searched the room and discovered a loaded nine-millimeter handgun under the bed.

The officers arrested Powell and transported him to the Tampa Police headquarters. Once there, and before asking Powell any questions, the officers read Powell the standard Tampa Police Department Consent and Release Form. The form states:

*“You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.”*

Acknowledging that he had been informed of his rights, that he “understood them,” and that he was “willing to talk” to the officers, Powell signed the form. He then admitted that he owned the handgun found in the apartment. Powell knew he was prohibited from possessing a gun because he had previously been convicted of a felony, but said he had nevertheless purchased and carried the firearm for his protection.

Powell was charged in state court with possession of a weapon by a prohibited possessor. Contending that the *Miranda* warnings were deficient because they did not adequately convey his right to the presence of an attorney during questioning, he moved to suppress his inculpatory statements. The trial court denied the motion, concluding that the officers had properly notified Powell of his right to counsel. A jury convicted Powell of the gun-possession charge. On appeal, the Florida Second District Court of Appeal held that the trial court should have suppressed Powell’s statements. The appellate court concluded the *Miranda* did not adequately inform Powell of his right to have an attorney present throughout the interrogation. The Florida Supreme Court agreed with the

District Court of Appeals. The United States Supreme Court granted certiorari and reversed the judgment of the Florida Supreme Court, finding in part as follows:

“To give force to the Constitution’s protection against compelled self-incrimination, the Court established in *Miranda* certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation. Intent on giving concrete constitutional guidelines for law enforcement agencies and courts to follow *Miranda* prescribed the following four now-familiar warnings:

*A suspect must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.*

“*Miranda*’s third warning—the only one at issue here—addresses our particular concern that the circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent by his interrogators. Responsive to that concern, we stated, as an absolute prerequisite to interrogation, that an individual held for questioning “must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. The question before us is whether the warnings Powell received satisfied this requirement.

“The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed. This Court has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. In determining whether police officers adequately conveyed the four warnings, we have said, reviewing courts are not required to examine the words employed as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.

“The Tampa officers did not entirely omit any information *Miranda* required them to impart. They informed Powell that he had “the right to talk to a lawyer before answering any of their questions and the right to use any of his rights at any time he wanted during the interview. The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times. Although the warnings were not the *clearest possible* formulation of *Miranda*’s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a common sense reading.

“All federal law enforcement agencies explicitly advise suspects of the full contours of each *Miranda* right, including the right to the presence of counsel during questioning. The standard warnings used by the Federal

Bureau of Investigation are exemplary. They provide, in relevant part: “You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning.” This advice is admirably informative, but we decline to declare its precise formulation

#### MIRANDA:

#### **Warning Required from Parole Officers**

*Fowler v. State*, CACR09-426, 1/13/10

**A**t approximately 7:25 a.m. on October 22, 2007, Conway police officers Paul Burnett and Shawn Schichtl were patrolling near a high school when they observed a male walking across the backyard of a nearby residence. The officers asked the individual to approach them and asked him his name. As the individual approached the officers, he had a “deer-in-the-headlights” look, blurted out an unintelligible name, and then ran from the officers. They chased the individual, and when they apprehended him, they arrested him immediately for misdemeanor fleeing and obstruction of justice. At the police station, the officers learned that the individual was Antwan Lavan Fowler and that he was on parole. The officers did not question him. Instead, they called local parole officer Kelly Brock, advised her of the situation, and asked if they should release or hold Fowler. Brock asked the officers to place a “parole hold” on Fowler.

Brock arrived at the station just prior to 8:00 a.m., and soon thereafter interviewed Fowler, who told her that he did not have a travel pass permitting him to be in Faulkner County, that he was living in an apartment

in Conway, that he ran from the officers, and that he had a gun and drugs in his apartment. With this information, Brock, accompanied by Officers Schichtl and Burnett, searched Fowler's apartment. The search revealed a gun, drugs, and drug paraphernalia. Fowler was charged with six felony counts—simultaneous possession of drugs and firearms, possession of firearms, maintaining a drug premises, possession with intent to deliver a controlled substance, possession of drug paraphernalia, and theft by receiving. He was also charged with two misdemeanors—fleeing and obstruction of justice. Fowler moved to suppress the statements he made to Brock and all of the evidence that flowed from those statements (the items taken at his home) because the officers' stop and arrest were illegal, he was not *Mirandized* by the parole officer, and the warrantless search of his home was illegal. The trial court denied the motion to suppress, concluding that the officers' initial encounter was legal pursuant to Arkansas Rule of Criminal Procedure 2.2 and that the search of Fowler's apartment was performed under the authority of the parole officer. Fowler filed a motion for reconsideration; however, the trial court denied the motion. Thereafter, Fowler entered a conditional guilty plea to possession of a firearm by certain persons.

On appeal, Fowler argues that his statement to the parole officer that he had a gun and drugs at his home should be suppressed because he was not *Mirandized* by the parole officer. *Miranda* warnings are required where there is a custodial interrogation. The Arkansas Court of Appeals found, in part, as follows:

"The facts in this case establish that *Miranda* warnings were required. Fowler was in custody when he was arrested. The deprivation of his freedom continued after the formal arrest because he was held at the station on a 'parole hold' as requested by the parole officer. Moreover, Fowler was interrogated by the parole officer when asked, 'Is there anything in your residence that is illegal or that shouldn't be there?' This question led to an incriminating response, which in turn resulted in the search of Fowler's home and the discovery of contraband. Because Fowler was questioned in the context of a custodial interrogation and was not read his *Miranda* rights prior to the questioning, we hold that Fowler's statement to the parole officer was illegally obtained and inadmissible.

"Case law from other jurisdictions supports our holding. In *United States v. Cain*, the United States District Court of Minnesota held that during a custodial interrogation, the requirement of *Miranda* warnings remains when a probation officer questions a probationer. *United States v. Cain*, 2008 WL 2498176, at 11 n.5 (D. Minn. 2008). Likewise, in *United States v. Andaverde*, 64 F.3d 1305, 1311 (9th Cir. 1995), the Ninth Circuit stated that 'custodial statements made to probation officers are subject to the same voluntariness analysis as statements made to other law enforcement officers.' In *Minnesota v. Murphy*, 465 U.S. 420, 430 n.5 (1984), the Supreme Court suggested that a parolee in police custody being interviewed by a parole officer would be entitled to *Miranda* warnings. Finally, the Fifth Circuit in *United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972), affirmed the admission of a parolee's statement to a parole officer without *Miranda*

warnings because evidence was cumulative but stated that we have no doubt that the testimony was inadmissible unless the officer gave prior *Miranda* warnings. A parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer.

“Based on these persuasive authorities, we hold that Fowler, while in police custody and being interrogated by the parole officer, was entitled to *Miranda* warnings. Because he was not read his *Miranda* rights, his statement that he had a gun and drugs in his home is inadmissible.”

POLICE DISCIPLINE:

**Fourth Amendment;  
Special Needs Doctrine**

*Lynch v. City of New York*,  
CA2, No. 08-5250-cv, 12/11/09

**P**atrick J. Lynch, as President of the Patrolmen’s Benevolent Association of the City of New York, Inc, brought an action in the United States District Court for the Southern District of New York challenging the constitutionality of an NYPD policy that requires that a breathalyzer test—which measures the amount of alcohol in the bloodstream—be administered to an NYPD officer immediately after he or she causes injury or death as a result of firing his or her gun. The Association moved in the District Court to preliminarily enjoin the enforcement of the breathalyzer policy, and the District Court denied the motion. The Association appealed the denial of the preliminary injunction.

In November 2006, undercover NYPD officers in Queens, New York, shot and killed a man named Sean Bell, prompting intense and widespread criticism from the public. In the wake of the Bell shooting, the Commissioner of the NYPD appointed a committee to review the Department’s undercover operations and to make recommendations for improvements. The committee was chaired by Chief Charles V. Campisi, the head of the Internal Affairs Bureau of the NYPD, which is charged with investigating police misconduct.

The committee recommended, among other things, that a breathalyzer test be administered to any officer who fires his or her weapon and causes death or injury. The Police Commissioner accepted this suggestion and, in September 2007, promulgated Interim Order 52, which established the breathalyzer policy at issue in this action.

The breathalyzer policy applies when any NYPD officer “on or off duty, is involved in a firearms discharge within New York City which results in injury to or death of a person.” (Interim Order 52). The policy first requires that senior NYPD officials be notified of a shooting, including officials from the Internal Affairs Bureau. The policy then requires that a “portable breathalyzer test” be administered “in a private setting” to the “uniformed member(s) of the service who discharged a firearm.” If the portable breathalyzer test yields a reading of blood alcohol level of 0.08 or greater—the legal limit for driving an automobile in New York State—the officer in question must be transported to an Internal Affairs Bureau testing facility where he or she will be given a second test on a more accurate “Intoxilyzer” machine.

The Association brought this action against the City of New York, the NYPD, and Police Commissioner Raymond W. Kelly claiming that the breathalyzer policy violates the Fourth Amendment to the United States Constitution. Upon review, the Second Circuit Court of Appeals found, in part, as follows:

“The parties do not dispute that, assuming the breathalyzer program violates the Fourth Amendment, plaintiffs have demonstrated ‘irreparable harm.’ See, e.g., *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (concluding that a possible deprivation of constitutional rights sufficiently demonstrated a likelihood of irreparable harm). It is also uncontested that the breathalyzer tests at issue here constitute ‘searches’ and are therefore subject to the strictures of the Fourth Amendment. See, e.g., *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616-17 (1989).

“The Fourth Amendment requires that searches and seizures be reasonable, and a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Nevertheless, the Supreme Court has upheld certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement.

“A program or general scheme of searches qualifies for treatment under the special needs doctrine only if the program’s primary purpose is not a ‘general interest in crime control. If the court makes such a finding—that is, if the court finds that the primary purpose of a program of searches is a ‘special need’ and not a general interest in crime control—the court must then

conduct a context-specific inquiry into the ‘reasonableness’ of the program, weighing the special need against the privacy interest advanced. That task is accomplished by means of a ‘balancing test’ that is ‘based on an examination of three factors: (1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government’s needs, and the efficacy of its policy in addressing those needs. The program of searches passes constitutional muster if it is ‘reasonable’ under that three-factor balancing test.

“The record shows that the breathalyzer policy has multiple purposes. Some of the policy’s purposes are related to ‘special needs’ apart from the NYPD’s general interest in crime control. First, the NYPD conducts a detailed administrative review every time an officer fires his or her gun, and the breathalyzer program facilitates that review. To that end, it ensures that an officer who fires his or her gun while intoxicated—a clear violation of NYPD policy—can be quickly disciplined or removed from duty. That aim is not related to crime control; it is related to personnel management. The point is not to prosecute the offending officers but to remove them from duty or to impose on them internal, employment-related sanctions.

“The breathalyzer program also operates as a deterrent to officers who may consider carrying their firearms while under the influence of alcohol. The NYPD acknowledges that some of its officers have alcohol problems, and the NYPD requires its officers to take precautions to avoid carrying their firearms into off-duty situations in which they may become intoxicated. Thus,

the breathalyzer policy is designed to convey to NYPD officers the message that alcohol-related firearms incidents are likely to be discovered, providing an extra incentive to the officers to follow the NYPD's regulations regarding firearms and alcohol. Here again, the NYPD's interest is not in crime control but in personnel management; the breathalyzer program, in this respect, is more concerned with encouraging officers to follow the NYPD's internal safety policies than with prosecuting NYPD officers who violate the law. In this sense, this case very much resembles *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (upholding drug tests of railway employees immediately following serious train accidents in order to discipline those employees involved in the accident who had tested positive for drug use).

"Another purpose of the breathalyzer program—apart from crime control—is promoting the NYPD's reputation among New York City residents. There is no dispute that the breathalyzer program was put in place in response to the shooting of Sean Bell, a widely publicized incident that generated criticism of the NYPD by some members of the public. In this context, the breathalyzer program is an effort to promote public confidence in the NYPD by showing the public that the NYPD takes seriously its policies regarding alcohol and firearms. Moreover, when an officer fires his or her gun while *not* under the influence of alcohol, a breathalyzer test assures the public that the officer was fit for duty when he or she chose to fire. Here, the NYPD's interest is in maintaining strong community relations, not in crime control.

"Nevertheless, even though the record shows that several of the purposes of the breathalyzer program are unrelated to crime control, the record also shows that one of the program's purposes is directly related to crime control. The NYPD acknowledges that it treats every shooting involving an officer as a potential crime and that the breathalyzer results could be used as evidence in a criminal investigation of the officer who was tested. In other words, to the extent that a police officer commits a crime by firing his or her gun, the NYPD is charged with investigating that crime, and the breathalyzer program is meant to be one investigatory tool at the NYPD's disposal.

"There are, therefore, multiple purposes of the breathalyzer policy—some unrelated to crime control and *one* directly related to crime control—and the critical question in determining whether the special needs doctrine applies is whether the NYPD's general interest in crime control is the policy's '*primary* purpose.' Even if crime control is one purpose of a program of searches, the program may nevertheless be reasonable under the special needs doctrine so long as crime control is not the program's primary purpose. As a result, even though the District Court found that crime control was one purpose of the breathalyzer policy, the Court correctly applied the special needs doctrine upon finding that crime control was not the policy's *primary* purpose.

"After determining that the special needs doctrine applies, the next step of the inquiry is to assess the reasonableness of the breathalyzer policy by weighing 'the special need against the privacy interest advanced' under a three-factor balancing test.

“First, as to the nature of the privacy interest involved, we note that NYPD officers, like all law enforcement officials, have a diminished expectation of privacy when it comes to carrying and using firearms. See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (upholding a drug testing program for employees of the United States Customs Service in part because Customs employees who are required to carry firearms in the line of duty have a diminished expectation of privacy in respect to the intrusions occasioned by a drug test.) Indeed, NYPD officers are already subject to drug screening as part of their employment in the NYPD, and although breathalyzer testing may be intrusive in some workplaces, operational realities of the workplace for NYPD officers render entirely reasonable certain work related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts.

“Second, as to the character and degree of the governmental intrusion, we note that NYPD officers who discharge their weapons are, under separate, preexisting NYPD policies, already subject to close scrutiny in the form of an administrative investigation. Thus, we do not think that a breathalyzer test is an “unexpected intrusion on privacy.

“Third, as to the nature and immediacy of the government’s needs and the efficacy of its policy in addressing those needs, we think that the government’s needs here are manifest and that the breathalyzer policy straightforwardly addresses those needs. Like the Customs Service employees in *Von Raab*, NYPD officers who may use deadly force plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have

disastrous consequences. Thus, the NYPD’s regulations involving alcohol and firearms are vital to public safety, and the NYPD has a substantial interest in detecting and disciplining officers who violate those policies. The NYPD also has a substantial interest in deterring its officers from using their firearms while intoxicated. By quickly and unequivocally determining whether alcohol was involved in an NYPD officer’s use of his or her firearm, the breathalyzer policy will assist the NYPD in disciplining officers who use their firearms while intoxicated and will provide an incentive to officers to stow their firearms before drinking alcohol.

“Finally, we recognize that the NYPD’s reputation in the eyes of the public is directly tied to its effectiveness as a police force. Thus, to the extent that the breathalyzer policy improves the NYPD’s public reputation, it furthers an important governmental interest.

“In light of each of these factors, we conclude that the special needs asserted by the NYPD outweigh the privacy interest advanced by plaintiffs. Accordingly, we hold that, on the record before us, plaintiffs have not demonstrated a likelihood of success on the merits because the breathalyzer program is reasonable under the Fourth Amendment. As a result, the District Court did not abuse its discretion in denying plaintiffs’ motion for a preliminary injunction.”

## POSSESSION OF DRUGS:

**Constructive Possession**

*Harris v. State*, CACR08-762,  
2010 Ark. App. 123, 2/11/10

**I**n *Harris v. State*, the Arkansas Court of Appeals stated that it is not necessary for the State to prove literal physical possession of drugs in order to prove possession. Possession of drugs can be proved by constructive possession. Although constructive possession can be implied when the drugs are in the joint control of the accused and another, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be some other factor linking the accused to the drugs such as (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and (5) whether the accused acted suspicious before or during the arrest.

SEARCH AND SEIZURE: **Automobiles;  
Stop Based on Informant Information;  
Protective Sweep for Weapons**

*United States v. Griffin*,  
CA4, No. 08-4045, 12/17/09

**I**n *United States v. Griffin*, Antonio Bernard Griffin appeals his conviction and sentence for being a felon in possession of a firearm. Griffin contends that the district court erred in denying his motion to suppress the firearm by holding that

(1) the police officers who arrested him had reasonable suspicion to perform an investigatory stop of his vehicle under *Terry v. Ohio*, 392 U.S. 1 (1968), and (2) the officers were justified in conducting a protective search of his vehicle under *Michigan v. Long*, 463 U.S. 1032 (1983).

The evidence presented during the suppression hearing establishes that the Value-Lodge Motel in Charlotte, North Carolina, was well known to officers of the Charlotte-Mecklenburg Police Department as a location for violent crime and drug trafficking. On the evening of September 28, 2005, someone called 911 from a second floor room of the Value-Lodge reporting a man in possession of a gun. The 911 call center relayed this information, including the caller's room number, to Officer Crystal Lee Clifton, and she responded to the call. Upon arriving at the Value-Lodge, Officer Clifton proceeded to the second floor room from which the call was made and talked with one of the room's occupants (the "informant") who was aware that the call had been placed. Shortly thereafter, Officer Brian Carey, who was also responding to the 911 call, arrived at the Value-Lodge. While Officer Clifton was talking to the informant, a white Cadillac drove past in the parking lot below, and the informant immediately pointed to the vehicle and identified the driver as the man with the gun. Officer Carey returned to his patrol car and pursued the Cadillac which was exiting the Value-Lodge parking lot. He proceeded approximately 50 feet and then entered a nearby parking lot where the Cadillac was turning around. Officer Clifton remained with the informant.

Officer Carey then initiated a traffic stop of the vehicle and its sole occupant, Antonio Griffin. When Griffin exited the vehicle, he “started looking around” and “kept turning around like he was going to take off running.” Carey conducted a *Terry* frisk of Griffin and, out of concern for his safety, handcuffed Griffin and placed him in the backseat of the patrol car. While Officer Carey was speaking with Griffin, Officer Clifton and another officer arrived on the scene. At this time, an individual approached the officers claiming to know Griffin, and onlookers from the motel gathered at the scene. Officer Clifton thereafter performed a search of the passenger compartment of Griffin’s car, finding a pistol on the driver’s side floorboard. Officer Clifton seized the weapon, and Officer Carey placed Griffin under arrest for carrying a concealed weapon.

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

“...in cases such as this, where the officer met with the informant in a face-to-face encounter, we have considered numerous factors to determine whether the officer had reasonable suspicion to effect a *Terry* stop. For example, we have examined whether the officer had the opportunity to observe the informant’s credibility and demeanor and whether the officer could later hold the informant accountable for making false accusations. We have also considered whether the informant reported to the police in public, exposing himself to retaliation from the suspect and increasing the informant’s reliability. We also have looked to the informant’s proximity to the reported activity as a factor in determining his reliability. Additionally, we have placed importance on the officer’s

personal experience in investigating similar activity at the reported location in justifying the stop. Finally, the Supreme Court has stated that less scrutiny is required as to an informant’s basis of knowledge where a citizen whose honesty has not been questioned reports criminal activity “which if fabricated would subject him to criminal liability.” *Illinois v. Gates*, 462 U.S. 213, 233-34 (1983).

“Here, Officer Clifton spoke with the informant and remained with the informant when Officer Carey left in pursuit of Griffin, giving her further opportunity to observe the informant’s credibility and demeanor. Having observed the informant’s physical appearance and location, the officers could have returned to the Value-Lodge and tracked him down to hold him accountable if his accusations had proven false. The informant met with Officer Clifton in public, thereby exposing himself to retaliation from Griffin. In addition, the informant was in close proximity to Griffin’s vehicle when he spoke with Officer Clifton. Further, Officer Carey was familiar with the Value-Lodge and had taken numerous calls reporting dangerous weapons from that motel, thereby contributing to his reasonable suspicion for the stop. Finally, there are no facts in the record that call into question the informant’s honesty or motivation.

“In short, we agree with the district court that the circumstances of the face-to-face encounter between the informant and Officer Clifton provided sufficient reasonable suspicion to justify the *Terry* stop of Griffin’s vehicle.

“Griffin also challenges the actual search of his vehicle which resulted in the seizure of

the pistol. When officers conduct a Terry stop of an automobile, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

“In order to conduct a lawful protective search of a stopped vehicle an officer must possess a reasonable belief of both (1) the suspect’s dangerousness and (2) the possibility that the suspect might gain immediate control of any weapons inside the vehicle.

“The Supreme Court has observed that, where an officer concludes that a suspect is armed, the suspect poses a serious and present danger to the safety of the officer. *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977). Officers may also consider a suspect’s evasive behavior in analyzing the existence of reasonable suspicion to believe that an individual is armed and dangerous. Furthermore, officers may consider the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

“As to the first prong of the test, the circumstances of the stop justified a reasonable belief in Griffin’s dangerousness. First, once the officers arrived on the scene, an informant met face-to-face with Officer Clifton and pointed out the driver of Griffin’s

vehicle as the man with the gun. Second, at the time of the protective search of the vehicle, Officer Carey was responding to a firearm call in a high crime neighborhood where he had personally taken numerous calls reporting dangerous weapons. Third, Griffin’s evasive behavior when Officer Carey stopped his vehicle heightened the officers’ concern that Griffin was armed and dangerous. These factors, taken together, gave the officers reasonable suspicion to believe that Griffin could be dangerous.

“The second prong, concerning the possibility that the suspect might gain immediate control of any weapons inside the vehicle, is also satisfied. Although Griffin was restrained in the backseat of the police vehicle at the time of the search, he was being detained at that time solely pursuant to the *Terry* stop. If Griffin had been released after the brief detention, as he presumably would have been, he would have regained access to his vehicle and any weapon inside. Therefore, given the circumstances confronting the officers, the brief protective search of Griffin’s vehicle was proper.”

#### SEARCH AND SEIZURE:

##### **Automobiles;**

##### **Plain View Seizure of Weapon**

*United States v. Rumley*,  
CA4, No. 08-5269, 12/7/09

**O**n December 12, 2007, Deputy Michael Wagner initiated a traffic stop of a Chevrolet pickup truck owned and driven by Clinton Lee Rumley. Deputy Wagner believed that the truck lacked working taillights, in violation of Virginia law. The deputy approached the

truck and asked Rumley for his license and registration; Rumley responded that his license was suspended. After learning that Rumley had two prior convictions for driving with a suspended license, Deputy Wagner arrested Rumley, handcuffed him, and placed him in the backseat of the deputy's patrol car. Deputy Wagner then returned to the passenger side of Rumley's truck and requested that the front seat passenger, Fletcher Ross, step out of the truck. When Ross moved his right leg to step out, Deputy Wagner noticed a silver pistol lying on the floorboard in front of the passenger-side seat.

After conducting a pat-down search of Ross and securing him in the backseat of a second patrol car, Deputy Wagner seized the pistol from Rumley's truck. The deputy then returned to his own patrol car, read Rumley his *Miranda* rights, and questioned him about the pistol. Rumley admitted that the gun was his and that he had placed it on the floorboard when Deputy Wagner stopped him.

On appeal, Rumley challenges the constitutionality of Deputy Wagner's asserted *search* of the truck and ultimate *seizure* of the pistol. The Fourth Circuit Court of Appeals found, in part, as follows:

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. Amend. IV. The 'plain-view' exception to the requirement that police obtain a warrant before *seizing* property 'does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth Amendment.' *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir.

1997). Pursuant to this plain-view doctrine, an officer may, without a warrant, seize incriminating evidence when (1) the officer is lawfully in a place from which the object may be plainly viewed; (2) the officer has a lawful right of access to the object itself; and (3) the object's incriminating character is immediately apparent.

"Rumley contends that the plain-view doctrine does not apply in his case because Deputy Wagner, by approaching the truck with intent to search it and requesting that Ross exit the vehicle, engaged in the 'first step' of an assertedly unconstitutional search that led to his spotting the pistol. Rumley relies on the Supreme Court's recent holding in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which establishes that a search of a vehicle incident to a recent occupant's arrest is justified only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

"Rumley maintains that because Deputy Wagner arrested him for a minor offense and at all relevant times had him handcuffed in the back of a patrol car, the deputy had no justification under *Gant* for any search of, or seizure from, Rumley's truck.

"Deputy Wagner discovered Rumley's pistol while standing beside the truck after asking Ross to step out of it. Rumley argues that the deputy's request that Ross leave the truck constituted the first step of an impermissible search. Rumley maintains that this 'search,' not the pistol's presence in plain view, occasioned the deputy's seizure of the pistol.

This argument fails.

“Long before its holding in *Gant* or the events giving rise to this appeal, the Supreme Court held that an officer conducting a lawful traffic stop may, as a safety measure, order any passenger to exit the vehicle as a matter of course. *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997); see also *United States v. Sakyi*, 160 F.3d 164, 168 (4th Cir. 1998). Nothing in *Gant*, which limits permissible searches incident to arrest, undermines the bright-line rule established in *Wilson*. Thus, Deputy Wagner acted lawfully in requesting that Ross step out of the truck.

“Moreover, Deputy Wagner’s intent to search the truck does not transform his lawful request of Ross into the ‘first step’ of an improper search. Rather, Deputy Wagner’s request was a ‘discrete’ act that brought the pistol into plain view. Rumley makes no other argument as to why the plain-view doctrine does not apply here, nor could he. Deputy Wagner required no further inspection of the truck and its contents to observe the previously concealed pistol, which the deputy immediately recognized as potential evidence of a crime.

“In summary, Deputy Wagner lawfully seized the pistol when it came into plain view. Therefore, we reject Rumley’s challenge to the district court’s refusal to suppress the pistol.”

## SEARCH AND SEIZURE:

### Automobiles;

### Probable Cause to Search Vehicle

*United States v. Tapia*,

CA10, No. 09-3060, 1/27/10

**K**ansas State Trooper Lee Rose received a call from dispatch alerting him to a speeding silver car with Arizona plates traveling on Kansas Highway 54. Trooper Rose soon spotted the car in question and followed it into a gas station without activating his emergency lights. He parked a few spaces from the silver car, exited his own vehicle, and approached the silver car, which contained the defendant, a female passenger, and two children.

When Trooper Rose arrived at the driver’s side window, it was about halfway down and the defendant was speaking on a cell phone. Trooper Rose asked the defendant if they could talk. According to Trooper Rose, the defendant said, “I gotta go,” into his cell phone and stepped out of the car. The Trooper then asked the defendant to move away from the car, explained that he was responding to a speeding complaint, and asked to see the defendant’s driver’s license. The defendant replied he didn’t have his license with him, and so Trooper Rose asked the defendant his name. The defendant provided the false name “Phil Tapia.” During the pair’s conversation, the defendant also indicated that the silver car did not belong to him, but was instead rented by his mother, who was not traveling with him. Trooper Rose then asked for, and received, permission to retrieve the rental agreement from the car.

Trooper Rose walked back over to the silver car and retrieved the rental agreement, which confirmed that the vehicle had been rented to the defendant's mother and that no one else was authorized to drive the vehicle. After reviewing the rental documents, Trooper Rose spoke with the female passenger, Tiffany Kastner. Ms. Kastner, the defendant's girlfriend, revealed that the defendant's real name is Israel, not Phil, Tapia. When Trooper Rose returned to speak with the defendant, the defendant admitted that he had lied about his name. Trooper Rose then called dispatch and learned that Mr. Tapia's license had been revoked. On learning this, Trooper Rose placed Mr. Tapia under arrest.

While arresting Mr. Tapia, Trooper Rose conducted a routine pat-down and found a cigarette packet containing what appeared to be marijuana. Trooper Rose then searched the interior of the rental car, where he found rolling papers, multiple air fresheners, and what seemed to be marijuana residue. At that point, the Trooper read Mr. Tapia his Miranda rights and then resumed his search of the car. During his search of the vehicle's trunk, he found more air fresheners and several duffle bags. In one of the duffle bags he discovered several large bundles of marijuana totaling twenty-nine pounds, which he seized as evidence.

After discovering the drugs, Trooper Rose placed Ms. Kastner under arrest and transported her, Mr. Tapia, and Mr. Tapia's children to the Pratt County Sheriff's Department. He also had a tow truck transport the rental car to the Sheriff's Department. At the station, Trooper Rose had Ms. Kastner and the children sit in a waiting room and had Mr. Tapia placed in a cell. A

little later, the Trooper moved Mr. Tapia to an interview room where he and Agent Dave Heim of the United States Drug Enforcement Administration could question him. Agent Heim began by reading Mr. Tapia his Miranda rights again, after which Mr. Tapia voluntarily waived his right to remain silent. During the interview, Mr. Tapia made several incriminating statements.

Following their interview of Mr. Tapia, Agent Heim and Trooper Rose decided to release Ms. Kastner and the children, as well as the rental car. Before releasing the rental car to Ms. Kastner's care, though, Trooper Rose conducted another search of the vehicle. During his search of the trunk, he discovered a yellow mesh bag that felt suspiciously heavy. Trooper Rose opened the bag and discovered two handguns, which he seized as evidence.

In due course, Mr. Tapia was indicted for possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1), and for possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i). Following his indictment, Mr. Tapia moved to suppress his incriminating statements and all items found in the rental car on the basis that they were obtained in violation of his Fourth Amendment rights. The district court denied these motions to suppress, and it is that ruling Mr. Tapia now challenges on appeal.

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

"...Trooper Rose undoubtedly had probable cause to search Mr. Tapia's bag. By the time Trooper Rose conducted the challenged search, he had already discovered contraband

on Mr. Tapia's person. He had also seen rolling papers, multiple air fresheners, and what seemed to be marijuana residue in the passenger compartment of the vehicle. Under our controlling precedents, these facts are more than enough for probable cause to suspect the car contained contraband. See, e.g., *United States v. Parker*, 72 F.3d 1444, 1450 (10th Cir. 1995) (holding that discovery of marijuana during pat-down and scent of burnt marijuana in passenger compartment provided probable cause to search vehicle). And once probable cause existed to search the vehicle, 'it justified the search of every part of the vehicle and its contents that may conceal the object of the search,' including the duffle bags. *United States v. Ross*, 456 U.S. 798, 825 (1982); see also *United States v. Bradford*, 423 F.3d 1149, 1160 (10th Cir. 2005) ('Once probable cause to search is established, the officer may search the entire vehicle, including the trunk and all containers therein that might contain contraband.')

#### SEARCH AND SEIZURE:

##### **Consent Search; Withdrawal of Consent**

*Rockward v. State*, CACR 09-346,  
2010 Ark. App. 110 (2/3/10)

**A** Saline County jury found William Rockward guilty of possession of marijuana with intent to deliver. He was sentenced to six years' probation and fined \$3,000. On appeal, Rockward challenges the trial court's refusal to suppress evidence obtained as the result of an unlawful search. The Arkansas Court of Appeals affirmed the trial court's refusal to suppress evidence, finding as follows:

"At a hearing on Rockward's motion to suppress, Arkansas State Police Trooper Dale Donham testified that he initiated a traffic stop of appellant after witnessing the vehicle that Rockward was driving change lanes into a lane where a tractor-trailer rig was traveling. The trooper saw the brake lights of the tractor-trailer rig and characterized the change of lanes as unsafe. The trooper identified the unsafe change of lanes as the reason for the traffic stop.

"The vehicle Rockward was driving was a rented vehicle. The rental agreement in the vehicle had another individual's name listed as the person who rented the vehicle, and when the trooper asked Rockward about the discrepancy, Rockward stated that he did not have a credit card required by the company for the rental. During the course of the traffic stop, the trooper confirmed with the rental-car company that Rockward was authorized to use the rented vehicle. The trooper also noticed in the front passenger seat a small overnight bag with a military uniform draped over the front seat. After confirming that Rockward had lawful possession of the vehicle, the trooper asked Rockward where he was headed. The trooper testified that Rockward 'told me he was headed to Cleveland, Ohio for a funeral for a fallen comrade out of Iraq, which I had no doubt or no reason to disbelieve that.' At that point, with Rockward secured in the backseat of the patrol car, the officer asked Rockward if he would mind if the trooper searched the vehicle. Rockward verbally consented. During the search, the trooper discovered a change of clothing and items appropriate for a short trip inside the small bag. He opened the trunk and saw a speaker box with no wires connected to it. He testified that he had never seen a

speaker box in a rental vehicle. Inside the trunk, screws were lying all around and some screws were missing from the speaker box.

“According to the trooper, when screws are missing from appliances, drugs are often found inside those items. Previous to his encounter with Rockward, the trooper had found drugs inside speaker boxes in other situations. When he shook the speaker, he believed he could feel something inside the box. He explained that he returned to his car to get a screwdriver because it was necessary to continue his search.

“Rockward’s interactions with the trooper were polite and respectful throughout this process. As the trooper explained, when he returned to his car, Rockward addressed him as ‘Sir’ in requesting information as to the progress of the trooper’s search. When the trooper responded with ‘hang on just a second, I’ll be right back,’ Rockward exited the police vehicle.

“The trooper described his concern that Rockward had been able to voluntarily leave the vehicle and expressed his fear of harm from Rockward knowing that he was a United States Marine and well trained in combat. He also characterized Rockward’s approach as ‘charging’ him. The trooper stated that he began to draw his gun on Rockward, ordering Rockward to the ground. When Rockward complied by lying on the ground, the trooper placed him under arrest for his own safety. At that point, Rockward stated, ‘Sir, it’s over with. It’s over with. You can’t do anything else at this point.’

“The trooper then described a scuffle with Rockward, who was resisting being

handcuffed. Rockward continued to struggle with the trooper down the road embankment to the ditch where Rockward broke away from the trooper and attempted to flee on foot.

“Rockward was chased and tackled by another military officer who had happened upon the scene. Rockward was eventually subdued, handcuffed and placed in the back of the patrol car with this military officer’s assistance. After Rockward was handcuffed and placed into the backseat of the patrol car, the trooper removed the final screws from the speaker, looked inside, and saw three bags of marijuana.

“The Supreme Court in *Ornelas v. United States*, 517 U.S. 690 (1996), held that determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search should be reviewed de novo on appeal; in conducting a de novo review, the reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by judges and law-enforcement officers. The Court further held that the principal components of a determination of reasonable suspicion or probable cause will be the events that occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. *Id.* The first part of the analysis involves only a determination of historical fact, but the second is a mixed question of law and fact. *Id.*; see also *Clark v. State*, 374 Ark. 292, 297-98, 287 S.W.3d 567, 571 (2008).

“Rockward does not challenge the constitutionality of the traffic stop. As part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks on the vehicle’s registration and the driver’s license and criminal history, and the writing up of a citation or a warning. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered. *Id.* However, after those routine checks are completed, unless the officer has a reasonable articulable suspicion for believing that criminal activity is afoot, continued detention of the driver may become unreasonable. *Id.*; *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995). In the absence of a reasonable, articulable suspicion of some drug-related criminal activity, once the purpose of the traffic stop is completed, the operator of the vehicle should be allowed to proceed on his way, without being subject to further delay by police for additional questioning. See *Sims v. State*, *supra*; *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997).

“Rockward does not argue that the trial court erred because his extended detention was without reasonable suspicion and accordingly in violation of his rights. See *Lilly v. State*, 362 Ark. 436, 208 S.W.3d 785 (2005) (reversing trial court’s denial of suppression motion holding that officer did not have reasonable suspicion that defendant was committing a crime and, thus, was not justified in detaining defendant after legitimate purpose of traffic stop had ended). Neither does he argue that his consent to search was invalid. Rather,

Rockward’s argument focuses upon the withdrawal of his consent to search.

“Our analysis, therefore, is limited to the question of whether the trial court erred in denying Rockward’s motion to suppress because Rockward withdrew his consent. In reviewing the denial of a motion to suppress evidence, this court conducts a *de novo* review based upon the totality of the circumstances, reversing only if the circuit court’s ruling is clearly against the preponderance of the evidence. *Stokes v. State*, 375 Ark. 394, 291 S.W.3d 155 (2009). Issues regarding the credibility of witnesses testifying at a suppression hearing are within the province of the circuit court. *Id.* Any conflicts in the testimony are for the circuit court to resolve, as it is in a superior position to determine the credibility of the witnesses. *Id.*

“Rule 14.1 of the Arkansas Rules of Criminal Procedure addresses vehicular searches and provides in pertinent part: (a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is: (i) on a public way or waters or other area open to the public[.] Ark. R. Crim. P. 14.1(a).

“Trooper Donham testified that before Rockward withdrew his consent to search, the trooper had discovered the speaker box. The trooper observed indications that the box had been opened inside the trunk with screws missing from the box and lying in the trunk. In addition he determined that the

screws had been replaced enough to secure the box to prevent the box from opening, and that something shifted inside the box when he picked it up, which was inconsistent with the ordinary contents of a speaker box. He explained that based upon his training and experience he knew that speaker boxes are sometimes used to conceal drugs and had previously found contraband hidden in similar speaker boxes. Accordingly, the trooper already had reasonable cause to believe that the speaker box contained contraband prior to appellant's withdrawal of his consent to the search. Trooper Donham therefore had reasonable cause to believe that the trunk contained things subject to seizure, establishing an exception to the warrant requirement. See *Turner v. State*, 94 Ark. App. 259, 229 S.W.3d 588 (2006). Because Trooper Donham had reasonable cause to search before appellant withdrew his consent, the trial court did not err in failing to suppress the evidence."

#### SEARCH AND SEIZURE:

##### **De Facto Arrest; Drawn Weapons and Handcuffing of Suspect**

*United States v. Johnson*,  
CA3, No. 09-2245, 1/27/10,

**A** hard rain was falling in Harrisburg, Pennsylvania on the night of January 7, 2007 when Tammy Anderson noticed a taxicab pull into a parking lot across the street from her house and park next to a van. Though visibility was poor, Anderson was able to observe what appeared to be two men emerge from the vehicles and begin to fight. Watching this altercation develop from the doorway of her home, Anderson heard at least one gunshot ring out.

Upon hearing the gunshot, Anderson called 911 and told the police dispatcher: "I heard a gunshot. I seen [sic] two people wrestling on the ground and I don't see them now. And there was a gunshot. I'm standing here on [sic] my front door." When prompted by the dispatcher, Anderson provided her full name, her telephone number, and described the location of the parking lot. Although Anderson was unable to describe in any detail the individuals involved in the altercation, she said the taxi appeared to be white-possibly with tan paneling-and had a green light on its roof. While she was still on the phone, Anderson told the dispatcher that the taxi was departing from the parking lot and heading southbound on Seventh Street. The van, Anderson noted, remained in the lot and appeared to be unattended.

The information Anderson provided was dispatched to Harrisburg police officers on patrol that evening. Officer John Doll responded to the parking lot and confirmed that a van was parked in the lot. Doll arrived so quickly that Anderson, who was still on the phone, told the dispatcher that she saw a police car drive by. At about the same time, another officer reported that he had spotted a taxicab matching the description provided by Anderson heading southbound on Seventh Street approximately ten blocks away. After determining that no one remained with the van, Officer Doll proceeded southbound on Seventh Street in search of the taxicab.

Doll quickly tracked down the taxi, though he did not stop the vehicle immediately. Concerned that its occupants might be armed, Doll and other officers followed the taxi for several blocks to allow backup to join the pursuit. When the taxi turned onto Aberdeen

Street, a narrow alleyway approximately two miles from the reported altercation, the officers initiated a traffic stop. The purpose of this stop, Doll testified at the suppression hearing, was to investigate the “shots fired call” and to ensure that no one in the taxicab was either armed or injured. Positioning their vehicles to block the exit to the alleyway, numerous officers surrounded the taxicab. Because the information relayed by the dispatcher indicated that the occupants of the taxi may have been involved in the reported shooting incident, the officers approached the taxicab slowly, with guns drawn, while shouting for the occupants to exit the vehicle. According to Doll, such a response was “general practice” in such circumstances “in case somebody comes out of the vehicle with a gun ready to shoot.”

The police proceeded to clear and secure the vehicle. Riding in the backseat of the taxi with his young son was the Appellant, Anthony Johnson. After removing both Johnson and the taxi driver, Kenneth Cobb, the officers handcuffed both men, though neither was formally arrested at that time. Rather, Officer Doll testified at the suppression hearing that the police handcuffed the men so the officers could safely clear the vehicle and gather information about the shooting reported by Anderson. Surprised to discover Johnson’s eight-year-old son in the taxicab, the officers also removed him and placed him to the side.

After Johnson and Cobb were detained, another responding officer, Richard Gibney, approached the car. Though it was raining hard, the location was well-lighted and the taxicab’s interior dome light was on, illuminating the vehicle’s passenger compartment. Looking through a back

window, Officer Gibney observed the butt of a Taurus.<sup>38</sup> Special revolver protruding from an unzipped duffel bag on the taxicab’s rear seat, where Johnson had been sitting. After consulting with Officer Doll, Officer Gibney retrieved the weapon from the taxi and unloaded it, finding two spent shell casings inside.

Officer Doll then placed Johnson, a convicted felon, under arrest for possession of the gun and suspected involvement in the shooting and altercation reported by Anderson. After reading Johnson his Miranda rights, Doll began questioning him about the firearm and the shooting. Johnson declined to respond. A search of Johnson incident to his arrest revealed that he carried on his person marijuana, cocaine, and related drug paraphernalia.

Johnson was transported to the police station for booking, where he again encountered Officer Doll, who had traveled to the station separately. Although Doll did not attempt to question Johnson at the police station, Johnson began speaking to Doll during the booking process, admitting ownership of the revolver and duffel bag but denying responsibility for the shooting reported by Anderson. Johnson also attempted to persuade Doll to forego charging him with any drug offenses.

In *United States v. Johnson*, Anthony Johnson contends that the initial stop of the taxi was unconstitutional because his stop amounted to a *de facto* arrest which requires probable cause. Upon review, the Court of Appeals for the Third Circuit found, in part, as follows:

“...in certain circumstances, it can be difficult to distinguish between a *Terry* stop, which requires only reasonable suspicion, and a *de facto* arrest, which must be supported by probable cause. We do not find Johnson’s appeal to present such a case. We have recognized that the vast majority of courts have held that police actions in blocking a suspect’s vehicle and approaching with weapons ready, and even drawn, does not constitute an arrest per se. Nor does placing a suspect in handcuffs while securing a location or conducting an investigation automatically transform an otherwise-valid *Terry* stop into a full-blown arrest. *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1993) (‘There is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest.’); *Torres v. United States*, 200 F.3d 179, 185 (3d Cir. 1999) (‘In certain circumstances officers lawfully may handcuff the occupants of the premises while executing a search warrant.’) We likewise find unpersuasive Johnson’s argument that the stop constituted a *de facto* arrest because the police did not question the taxi’s occupants or check their identification before ordering them from the vehicle and handcuffing them. In *Terry*, the Supreme Court recognized that ‘it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.’ 392 U.S. at 23.

“Accordingly, the Supreme Court noted:

*When an officer is justified in believing that the individual whose suspicious behavior he is investigating...is armed and presently dangerous to the officer or to others, it would...be clearly unreasonable to deny the officer the power to take necessary measures to determine whether*

*the person is in fact carrying a weapon and to neutralize the threat of physical harm.*

“Here, the Harrisburg police, acting on a credible tip that at least one of the taxi’s occupants was armed and dangerous, took reasonable steps to ensure that the scene was secure before investigating further. That the police did not first engage the taxi’s occupants in conversation or check their driver’s licenses did not transform the stop into a *de facto* arrest.

“In light of the foregoing, we conclude that nothing about the conduct of the Harrisburg police in this case rises to the level that we have previously required to constitute a *de facto* arrest under the Fourth Amendment. Accordingly, we decline Johnson’s invitation to subject the stop of the taxicab to the probable cause standard.”

#### SEARCH AND SEIZURE:

##### **Emergency Searches**

*Michigan v. Fisher*, No. 09-91, 12/7/09

**I**n *Michigan v. Fisher*, police officers responded to a complaint of a disturbance near Allen Road in Brownstown, Michigan. Officer Christopher Goolsby later testified that, as he and his partner approached the area, a couple directed them to a residence where a man was “going crazy.” Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fence posts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the

hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. Through a window, the officers could see Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew.

Fisher was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court concluded that Officer Goolsby violated the Fourth Amendment when he entered Fisher's house, and granted Fisher's motion to suppress the evidence obtained as a result—that is, Officer Goolsby's statement that Fisher pointed a rifle at him. The Michigan Court of Appeal then affirmed over a dissent by Judge Talbot. The Michigan Supreme Court granted leave to appeal, but, after hearing oral argument, it vacated its prior order and denied leave instead; three justices, however, would have taken the case and reversed on the ground that the Court of Appeals misapplied the Fourth Amendment.

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

"...because the decision of the Michigan Court of Appeals is indeed contrary to our Fourth Amendment case law, particularly *Brigham City v. Stuart*, 547 U. S. 398 (2006), we grant the State's petition for certiorari and reverse.

"The ultimate touchstone of the Fourth Amendment we have often said is 'reasonableness.' Therefore, although searches and seizures inside a home without a warrant are presumptively unreasonable, that presumption can be overcome. For example, the exigencies of the situation may make the needs of law enforcement so compelling that the warrantless search is objectively reasonable. *Mincey v. Arizona*, 437 U. S. 385, 393–394 (1978).

"*Brigham City* identified one such exigency: the need to assist persons who are seriously injured or threatened with such injury. Thus, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. This emergency aid exception does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only an objectively reasonable basis for believing, that a person within the house is in need of immediate aid.

"*Brigham City* illustrates the application of this standard. There, police officers responded to a noise complaint in the early hours of the morning. As they approached the house, they could hear from within an altercation occurring, some kind of fight. Following the tumult to the back of the house whence it came, the officers saw juveniles drinking beer

in the backyard and a fight unfolding in the kitchen. They watched through the window as a juvenile broke free from the adults restraining him and punched another adult in the face, who recoiled to the sink, spitting blood. Under these circumstances, we found it 'plainly reasonable' for the officers to enter the house and quell the violence, for they had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.

"A straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable. Just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside. Although Officer Goolsby and his partner did not see punches thrown, as did the officers in *Brigham City*, they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage. In short, we find it as plain here as we did in *Brigham City* that the officer's entry was reasonable under the Fourth Amendment.

"The Michigan Court of Appeals, however, thought the situation did not rise to a level of emergency justifying the warrantless intrusion into a residence. Although the Court of Appeals conceded that there was

evidence an injured person was on the premises, it found it significant that the mere drops of blood did not signal a likely serious, life-threatening injury. The court added that the cut Officer Goolsby observed on Fisher's hand likely explained the trail of blood and that Fisher was very much on his feet and apparently able to see to his own needs.

"Even a casual review of *Brigham City* reveals the flaw in this reasoning. Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception. The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fisher argues that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. This would have no bearing, of course, upon their need to assure that Fisher was not endangering someone else in the house. Moreover, even if the failure to summon medical personnel conclusively established that Goolsby did not subjectively believe, when he entered the house, that Fisher or someone else was seriously injured (which is doubtful), the test, as we have said, is not what Goolsby believed, but whether there was "an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger.

"It was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an

apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties. It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands.”

Seven justices voted to reverse the decision of the Michigan Court of Appeals, and remand the case for further proceedings not inconsistent with their opinion. Justice Stevens and Justice Sotomayor dissented.

#### SEARCH AND SEIZURE:

##### **Emergency Search; Initial Entry to Protect**

*Miller v. State*, No. CR 08-1297, 1/7/10

**F**ort Smith Police Officer Stephen Hutchinson was dispatched pursuant to a 911 call from James Aaron Miller’s father, who was in Colorado and had received a text message from Miller stating that Miller was thinking of killing himself with pills. Officer Hutchinson and Officer Derek Harwood went to an apartment rented to Bridgette Barr to conduct a welfare check on Miller. They knocked on the door and Miller opened it. They explained to Miller that they were there in response to a 911 call from his father about a suicide threat and that they were checking to see how he was doing. Officer Hutchinson asked if they could come inside to talk because it was

so cold outside. After first asking to leave immediately with the officers, Miller agreed to let them in the apartment and to wait for an ambulance to take him to the hospital for a mental-health evaluation. While inside the entryway, Officer Hutchinson began to offer help to Miller and to inquire about what kind of problems he was having. Miller stated that he and his girlfriend had been fighting. While this conversation was occurring inside the apartment, Officer Hutchinson noticed pictures of a woman, whom Hutchinson thought to be Miller’s girlfriend because he had his arm around her and two small children.

He also noticed a dried blood stain approximately six to eight inches in diameter on the door. Despite having a head cold at the time, Officer Hutchinson also noticed a foul odor in the apartment.

Officer Hutchinson continued his testimony by relating that the ambulance arrived and Miller left the apartment with the Emergency Management Services personnel. While Officer Harwood sought the keys from Miller to lock the apartment, Officer Hutchinson observed that Miller seemed like he did not care whether the apartment was locked. Officer Hutchinson then recalled that Miller was acting suspicious in wanting to leave the apartment so quickly. He also recalled the blood stain on the door and then wondered where the people in the picture were. Accordingly, before locking the door, the officers walked through the apartment to make sure everything was okay. Officer Hutchinson stated that since they were dealing with a suicidal subject, he wanted to make sure they were not leaving something out that a child could use to hurt himself.

In conducting the walk-through of the apartment, the officers saw in plain view a foot with toenails painted red extending from a pile of blankets on the floor at the end of a bed.

Officer Hutchinson pulled the blanket back just enough to see the forehead of a body that appeared to be decayed. Both officers then left the apartment, returned to the ambulance outside, and read Miller his Miranda rights. Officer Hutchinson then asked Miller if he had killed the person in the bedroom; Miller answered yes. Remembering that he had also seen pictures of two small children, Officer Hutchinson asked Miller where the children in the picture were. Miller stated they were in the house and then admitted to killing the children also.

While Officers Hutchinson and Harwood were talking to Miller, Officer Calvin Treat arrived on the scene and entered the apartment with knowledge that a body had been discovered. He discovered the female victim, Ms. Barr, as well as a female child victim, Sydney, lying next to each other. After determining that both were dead and not in need of aid, he left the apartment. Meanwhile, Miller signed a consent-to-search form. Additional law enforcement officers then entered the apartment and discovered the third body, that of Garrett, in the bathtub.

After hearing the foregoing testimony, the trial court denied the motion to suppress, stating that the observations made by the officers entitled them to look through the apartment before they locked it to make sure there was no one inside who needed attention. *Miller v. State* is an automatic appeal from a judgment of the Sebastian County Circuit Court

convicting Miller of three counts of capital murder and sentencing him to death on each count. The Arkansas Supreme Court found no error in the guilt phase of the bifurcated trial, and therefore affirmed the judgment of convictions for capital murder. The Court did find that reversible error occurred in the penalty phase reversed the death sentences and remanded to the trial court for resentencing.

The Arkansas Supreme Court found, in part, as follows:

“Miller’s first assignment of error in the guilt phase is that the trial court erred in denying his motion to suppress evidence seized as a result of the search of his residence, which included all the evidence seized from the crime-scene investigation. Miller contends the search of his home was conducted without a warrant, without his consent, and was otherwise unjustifiable under the Fourth Amendment.

“...the United States Supreme Court’s recognition of the emergency exception to the warrant requirement in its Fourth Amendment jurisprudence. *Steinmetz v. State*, 366 Ark. 222, 234 S.W.3d 302 (2006). The Supreme Court’s most recent statements of the emergency exception reiterate that the emergency exception does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating, but rather it requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid. *Michigan v. Fisher*, 558 U.S. \_\_\_ (Dec. 7, 2009). Furthermore, though officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception, there must be an

objectively reasonable basis for believing that medical assistance was needed, or persons were in danger.

“...This court has observed that when the police reasonably believe that a victim or occupants of a home are in distress or in need of protection, an emergency entry into a home satisfies the reasonableness requirement of the Fourth Amendment and supplies a compelling reason for immediate entry quite apart from the purpose of prosecuting for crime.

“We conclude that the preponderance of the evidence supports the trial court’s determination, and we cannot say the officers acted unreasonably here. We reject Miller’s argument on appeal that once he opened the door to the officers, there was no longer any basis for believing that anyone was in imminent danger. Based on information the officers received when they were dispatched, they knew they were checking on a suicidal subject at the apartment he shared with his girlfriend. The subject had admitted he and his girlfriend had been fighting. The officers saw a blood stain on the door and smelled a foul odor. The subject was eager to leave the apartment. In addition, the officers saw photographs of the subject with his arm around someone they thought was the subject’s girlfriend and two small children. It was certainly reasonable to think the children might be in the home and that the officers should ensure they were not in the home before locking and leaving it. It was likewise reasonable for the officers to ensure that, if the children were not present in the home, no weapons or pills from a suicide attempt or fight between the adults were left accessible to the children. Finally, given the description by the EMS personnel that the odor in the

apartment smelled like burned wild game or burned Spam, it was also reasonable for the officers to ensure that there was nothing left in the apartment likely to burn or explode when they locked the door and left. These circumstances are consistent with all the emergencies described in Rule 14.3 of the Arkansas Rules of Criminal Procedure. Thus, we conclude the initial entry and search of the apartment were in compliance with Rule 14.3.

“We further conclude that subsequent actions by these officers were permissible as within the scope of the emergency that justified them. Once an entry is permitted in accordance with Rule 14.3, any subsequent search and seizure is limited to that which is in plain view and observed incident to the entry in response to the emergency. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998). Officer Hutchinson stated he saw the foot extending from the blankets in plain view. Further, Officer Treat’s entry into the apartment was permissible, as reports of death can frequently prove inaccurate, and it therefore became incumbent upon Officer Treat to immediately ascertain the situation and whether there might be some hope that one or more of the victims might still be alive.

“In summary, based on all the foregoing testimony, we conclude the evidence established that the officers acted reasonably in response to the emergencies and was thus sufficient to overcome the presumption of unreasonableness. We therefore affirm the trial court’s denial of the motion to suppress.”

Editor’s Note: *Law enforcement officers will recall that Mincey v. Arizona*, 437 U.S. 385 (1978) held that a reasonable warrantless search of the scene of a homicide—or of a serious professional injury with likelihood of death where there is a reason to suspect foul play—does not violate the

*Fourth Amendment where the law enforcement officers were legally on the premises in the first place. For this search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope of the search must not exceed that purpose. The search must also be within a reasonable period following the time when the officials first learn of the murder of potential murder. While the Court did not question the right of the police to respond to emergency situations, any further search to gather evidence against the individual in possession of the premises requires a search warrant. In **Mincey**, the Court declined to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.*

#### SEARCH AND SEIZURE:

#### **GPS Device Placed on Vehicle in Driveway**

*United States v. Pineda-Moreno,*  
CA9, No. 08-30385, 1/11/10

**I**n *United States v. Pineda-Moreno*, the Court of Appeals for the Ninth Circuit had to decide whether law enforcement officers violated a suspect's Fourth Amendment rights when they entered the curtilage of his home and attached a mobile tracking device to the undercarriage of his car.

On May 28, 2007, a Drug Enforcement Administration ("DEA") special agent noticed a group of men purchasing a large quantity of fertilizer from a Home Depot. Recognizing the fertilizer as a type frequently used to grow marijuana, he followed the men as they left the store and saw them drive away in a silver 1997 Jeep Grand Cherokee. Law enforcement later identified one of the men as Juan Pineda-Moreno, the owner of the Jeep.

In June, DEA agents obtained information that Pineda-Moreno and his associates had purchased large quantities of groceries, irrigation equipment, and deer repellent at several stores. On several of these occasions, the group traveled in Pineda-Moreno's Jeep. Agents eventually followed these individuals to a trailer home Pineda-Moreno was renting at the time.

After learning where Pineda-Moreno lived, agents escalated their investigation. Over a four month period, agents repeatedly monitored Pineda-Moreno's Jeep using various types of mobile tracking devices. Each device was about the size of a bar of soap and had a magnet affixed to its side, allowing it to be attached to the underside of a car.

Agents installed these devices on the underside of Pineda-Moreno's Jeep on seven different occasions. On four of these occasions, the vehicle was parked on a public street in front of Pineda-Moreno's home. On one occasion, it was located in a public parking lot. On the other two occasions, the Jeep was parked in Pineda-Moreno's driveway, a few feet from the side of his trailer. The driveway leading up to the trailer was open; agents did not observe any fence, gate, or "No Trespassing" signs indicating that they were not to enter the property. The agents entered Pineda-Moreno's driveway between 4:00 and 5:00 a.m. and attached the tracking devices to the Jeep. Once in place, the tracking devices recorded and logged the precise movements of the vehicle. Some of these devices permitted agents to access the information remotely, while others required them to remove the device from the vehicle and download the information directly.

On September 12, 2007, information from a mobile tracking device alerted agents that Pineda-Moreno's vehicle was leaving a suspected marijuana grow site. Agents followed the Jeep, pulled it over, and smelled the odor of marijuana emanating from a passenger in the backseat of the vehicle. The agents contacted immigration authorities, who arrested all three individuals in the vehicle for violations of immigration laws. Pineda-Moreno subsequently consented to a search of his vehicle and home. In Pineda-Moreno's trailer, agents found two large garbage bags full of marijuana.

Pineda-Moreno moved in Federal District Court to suppress the evidence obtained from the mobile tracking devices, arguing that agents violated his Fourth Amendment rights by attaching the devices to his vehicle. The district court denied his motion to suppress. After the district court's ruling, Pineda-Moreno entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress. Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

"Pineda-Moreno first argues that by attaching mobile tracking devices to the undercarriage of his Jeep, agents invaded an area in which he possesses a reasonable expectation of privacy, thereby violating his Fourth Amendment rights. We rejected a similar argument in *United States v. McIver*, 186 F.3d 1119 (1999). In *McIver* we concluded that attaching the tracking device to *McIver's* vehicle did not constitute a 'search' cognizable under the Fourth Amendment because the undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.

"Pineda-Moreno's case differs from *McIver* in only one respect. Whereas *McIver* conceded that his car was *not* parked within the curtilage of his home when the agents attached the tracking device, the government here concedes that Pineda-Moreno's Jeep *was* parked within the curtilage of his home when the agents attached the tracking device. We need not decide, however, whether Pineda-Moreno's vehicle was parked within the curtilage of his home. Even assuming it was, it was parked in his driveway, which 'is only a semiprivate area.' *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975). In order to establish a reasonable expectation of privacy in his driveway, Pineda-Moreno must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it. *Maisano v. Welcher*, 940 F.2d 499, 503 (9th Cir. 1991). Pineda-Moreno offers no such evidence. To the contrary, the driveway had no gate, no 'No Trespassing' signs, and no features to prevent someone standing in the street from seeing the entire driveway. Additionally, one of the investigating agents testified that 'an individual going up to the house to deliver the newspaper or to visit someone would have to go through the driveway to get to the house.' If a neighborhood child had walked up Pineda-Moreno's driveway and crawled under his Jeep to retrieve a lost ball or runaway cat, Pineda-Moreno would have no grounds to complain. Thus, because Pineda-Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home.

“Pineda-Moreno argues that the driveway was nonetheless an area in which he possessed a reasonable expectation of privacy because the agents entered his driveway between 4:00 and 5:00 a.m. But just as the timing of the agents’ actions was immaterial to our analysis in *McIver*, where we upheld agents’ entry onto a suspect’s driveway at 3:30 a.m. to attach a mobile tracking device to his vehicle, the time of day is immaterial here.

“In sum, Pineda-Moreno cannot show that the agents invaded an area in which he possessed a reasonable expectation of privacy when they walked up his driveway and attached the tracking device to his vehicle. Because the agents did not invade such an area, they conducted no search, and Pineda-Moreno can assert no Fourth Amendment violation.

“Pineda-Moreno’s last claim is that the agents’ use of mobile tracking devices continuously to monitor the location of his Jeep violated his Fourth Amendment rights because the devices attached to his vehicle are not generally used by the public. He acknowledges that in *United States v. Knotts*, 460 U.S. 276 (1982), the Supreme Court held that law enforcement officers do not conduct a ‘search’ cognizable under the Fourth Amendment by using a beeper to track a vehicle because ‘a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.’

“The only information the agents obtained from the tracking devices was a log of the locations where Pineda-Moreno’s car traveled, information the agents could have obtained by following the car. Insofar as Pineda-Moreno’s complaint appears to be simply that

scientific devices such as the tracking devices enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality and decline to do so now. We conclude that the police did not conduct an impermissible search of Pineda-Moreno’s car by monitoring its location with mobile tracking devices.”

SEARCH AND SEIZURE:  
**Search Warrants; Staleness of the Information; Child Pornography**

*United States v. Estey*  
 CA8, No. 09-1950, 2/19/10

**A** computer crime investigation unit in Spain informed the Federal Bureau of Investigation (FBI) of computer IP addresses in the United States that were sharing child pornography using eDonkey and eMule peer-to-peer file-sharing software. One of the addresses matched the Des Moines residence of Jacob Benjamin Estey. FBI Special Agent David Larson was assigned to work the suspected child pornography investigation in Des Moines. Larson obtained and executed a search warrant of Estey’s residence.

During questioning, Estey admitted to FBI agents that he had copied programs containing child pornography onto disks when he disposed of his brother’s computer and loaded the contents of the disks onto his own computer. Larson testified that Estey also admitted to going online and using the file-sharing software to collect child pornography. Images were found in the shared folder of the file-sharing software, allowing others to access the images on the internet. Photographs on Estey’s computer corresponded to images

discovered by the Spanish investigation unit. Hard drives and computer disks seized during the search of the residence revealed images of child pornography.

Estey moved to suppress evidence on two grounds. First, he argued that his confession was elicited in violation of the Fifth Amendment; and, second, that the probable cause for the search warrant for his residence was stale, in violation of the Fourth Amendment. The Eighth Circuit Court of Appeals found that the district court did not err in denying both motions to suppress stating, in part, as follows:

“...Probable cause for a warrant search exists if there is a fair probability that contraband or evidence of a crime will be found in a particular place. A warrant becomes stale if the information supporting is not sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search. There is no bright-line test for determining when information is stale—time factors must be examined in the context of a specific case and the nature of the crime under investigation.

“The factors in determining whether probable cause has dissipated, rendering the warrant fatally stale, include the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search. We agree with the district court’s determination that the information in the search warrant was not stale. While Estey is correct to note there are outer limits to the use of such evidence, this case involves a search warrant issued five months after discovering information linking the defendant’s residence

with child pornography. This Court, and others, have held that evidence developed within several months of an application for a search warrant for a child pornography collection and related evidence is not stale. Estey does not offer evidence contrary to the FBI statements regarding the habits of child pornography collectors. Given the circumstances of the case and the nature of the crime, the execution of the warrant five months after the development of the information did not render the warrant deficient in any respect based on stale information. Estey’s motion to suppress was properly denied.”

#### SEARCH AND SEIZURE:

##### **Stop and Frisk; Emergency Situation**

*Palacios v. Burge*, CA2, No. 07-0470pr, 12/21/09

**O**n the evening of April 27, 1997, undercover New York City police officers Richard Crespo, James O’Boyle, and Daniel Corey conducted surveillance at the 30-30 Club in Queens, New York, which was holding a “Mexican party.” The police had information that “there might be problems there” between “rival Mexican gangs.” The club opened at 9:00 p.m. After ten to fifteen minutes, Officer Crespo saw several men whom he thought to be Hispanic run in front of people waiting” in line outside of the club. Moments later, a BMW pulled up across the street from the club, and a man, Edin Kolenovic, emerged from the car shouting and waving his arms frantically.

When the officers approached Kolenovic, they saw that his shirt was bloody, and that his passenger and brother-in-law, Sanin Djukanovic, had been beaten and stabbed,

and was bleeding profusely. Djukanovic was unable to speak and died later that night. Kolenovic told the officers that a group of Hispanic men tried to steal the BMW, stabbed him and Djukanovic, and ran towards the 30-30 Club. The police placed Kolenovic in an ambulance stationed in front of the club to be treated for his stab wounds.

In "securing the area" around the club, the officers arranged with the club's security personnel to let into the club the forty or fifty individuals in line outside. When one person, William Mero, stepped out of the line and tried to leave, the police stopped him and walked him in front of the parked ambulance to "conduct a show-up." Kolenovic identified Mero as "one of the guys," and Officer Corey handcuffed Mero and put him in an unmarked patrol car with a view of the club. Mero denied any involvement in the stabbing, but told the police that he had seen the fight and could identify the individuals involved.

Inside the club, at the officers' request, the club owner stopped the music and announced that the police planned to escort all the male patrons outside for a show-up to identify anyone connected to the stabbing that had occurred. The officers sealed the exits, separated out the women, and lined up at the front of the club the approximately 170 men, all of whom looked to them to be Hispanic and ranged in age from about eighteen to twenty-five years. The police then had the men walk, one by one, out the front door and in front of Kolenovic and Mero, who were in the ambulance and the unmarked car, respectively. The show-up process began at approximately 10:00 p.m., and ended less than forty minutes later, after which the patrons outside were allowed back into the club. During the show-

up, Kolenovic and Mero separately identified the same six men, including Palacios, as being involved in the stabbings.

The Second Circuit Court of Appeals, in affirming Palacios' conviction, stated, in part, as follows:

"...A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, such as in cases in which the 'primary purpose of the seizure is ultimately indistinguishable from the general interest in crime control.' *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 48 (2000). The Supreme Court has recognized limited circumstances in which the usual rule, requiring individualized suspicion, does not apply. Individualized suspicion is not needed, for example, in cases involving an emergency that justifies immediate action on the police's part.

"Specifically, the Supreme Court has indicated that such an exigency exists when the police utilize an 'appropriately tailored' seizure set up to catch a dangerous criminal who is likely to flee by way of a particular route. *Edmond*, 531 U.S. at 44. The show-up in this case involves that exact exigency: The police knew that the perpetrators were within the finite group of men, whom the officers understood to be Hispanic, inside or lined up outside of the 30-30 Club near the stabbing, and the show-up was contemporaneous to the stabbings and aimed to identify and arrest dangerous criminals who were likely to flee the club and surrounding area were it not for the police seizure. Moreover, there was a high risk that the two witnesses who could identify the perpetrators would not be available at a later time: the first, one of the stabbed victims,

had severe wounds, and the second was a suspect who had tried to leave the scene. Thus, the challenged seizure does not violate the Fourth Amendment simply because it was made without individualized suspicion.

“Finding exigent circumstances, however, does not alone answer the question of whether the show-up comports with the Fourth Amendment. We must still examine whether it was reasonable, which remains the touchstone of the Fourth Amendment.

“Here, the police knew that two serious stabbings had occurred (one soon-to-be fatal), and they were armed with reliable information that the perpetrators were among the group of individuals inside or lined up outside of the 30-30 Club. The police could have reasonably believed that the delay necessary to procure a warrant would thwart the possibility of ever finding the perpetrators, by increasing the likelihood that one or more of them would be able to get away. See *United States v. Gordils*, 22 982 F.2d 64, 69 (2d Cir. 1992) (holding that “a likelihood that the suspect will escape” supports a finding of exigency). The police had two eyewitnesses who were able to identify the perpetrators, but who may have been unable or unwilling to do so in the future: One was grievously wounded, and the other was a suspect who had already attempted to flee the scene. The police had reason to believe that the perpetrators posed an immediate danger to others inasmuch as they were armed, in a crowded place, and had just engaged in an act of extreme violence. In light of these circumstances, it was not unreasonable for the police to settle on the show-up procedure that they adopted.

“In addition, the police took reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. The detention was limited in scope: The police separated out the women and briefly held only the possible male suspects followed by the request that the men line up and walk out of the club one-by-one. The seizure was also limited in duration and was no longer than necessary for the police, acting with diligence, to identify the perpetrators.

“For the reasons stated, Palacios has failed to meet his burden regarding his ineffective assistance of counsel claim. Palacios cites to, and we have found, no Supreme Court case that establishes that show-ups of the sort employed here, immediately following the commission of a violent crime in the vicinity, are unlawful seizures under the Fourth Amendment.”