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CIVIL COMMITMENT:

Mentally Ill, Sexually Dangerous Federal Prisoners

United States v. Comstock, No. 08-1224, 5/17/10

This case presented the question—“Does the Federal Government have the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of “sexually dangerous” persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences or does it fall beyond the reach of a government?”

The U.S. Supreme Court concluded that the Constitution grants Congress the authority to enact 18 U.S.C. § 4248 as “necessary and proper for carrying into Execution” the powers vested by the Constitution in the Government of the United States.

CIVIL LIABILITY: **Use of Force; Taser; Resistance to Law Enforcement**

Kijowski v. City of Niles, CA6, No. 09-3764, 4/8/10

On October 28, 2006, things got out of hand at Aulizio’s Banquet Center in Warren, Ohio. That night, the Banquet Center hosted a wedding reception, at which Joseph Kijowski was a guest. What should have been a wholly joyous occasion soured after Reuben Shaw, an off-duty police officer hired by the Banquet Center to provide

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security, observed the groom urinating in the parking lot. Officer Shaw approached the groom and suggested that he “use the restrooms inside.” Someone—possibly Kijowski’s brother, possibly the groom’s—then grabbed Officer Shaw from behind, telling him that the man he was speaking to was the groom and that he “better respect that.” The situation escalated when the interloper called Officer Shaw “a security guard” and pushed him with both hands. The pair then “locked up for a short struggle.” Officer Shaw eventually wrestled his opponent to the ground, but this prompted the groom to jump on Officer Shaw’s back. Although Officer Shaw was able to shake him off, three more wedding guests joined the fight. Officer Shaw radioed for backup.

In response to Officer Shaw’s call for help, the entire shift of the Warren Police Department, as well as members of other nearby departments, arrived at the Banquet Center. One of the responders was Officer Aurilio, a member of the City of Niles Police Department. According to his affidavit, Officer Aurilio arrived to find that members of the Warren Police Department had already taken several subjects into custody. He also alleges that police were attempting to arrest a number of others “who were actively resisting.” Officer Aurilio’s affidavit indicates that he proceeded to “assist Warren police officers in subduing a man who was extremely combative and resisting the attempts of the Warren officers to handcuff him.” To do so, Officer Aurilio “deployed his Taser in drive stun mode on the suspect male which allowed Warren officers to handcuff him.” Officer Aurilio was later “informed by the Warren Police Department that the aforementioned suspect was Kijowski.”

Kijowski’s account of the evening is quite different and begins in the Banquet Center. Kijowski claims that, during the initial altercation involving Officer Shaw, he was inside cleaning up. In his affidavit, Kijowski states that he then left the Banquet Center and got into a truck, where he was joined by the groom. At that point, he alleges, “several members of various Trumbull County police departments—probably Howland, Warren, and Niles—appeared at the Banquet Center and began spraying Mace into a crowd that had gathered outside. Because police were “beating and macing party-goers,” Kijowski claims that he reported what he saw, whereupon he was transferred to Warren dispatch. After briefly conversing with Kijowski, the dispatcher contacted officers on the scene, stating that Kijowski was on the phone “bothering him.”

As a result, Kijowski contends, a number of police officers, including Officer Aurilio, approached the truck. Some of them “began pounding on the truck, yelling at Kijowski to hang up the phone and get out of the truck.” Telling officers he was afraid to get out, Kijowski spotted Officer Crank, a member of the City of Niles Police Department whom Kijowski knew. Kijowski contends that he called Officer Crank over and that Officer Crank “told the other officers that Kijowski was O.K. and that he was not making trouble.”

Officer Crank then left, Kijowski claims, and just as he did, Kijowski “felt himself being dragged out of the truck and thrown to the ground face first.” The officers then crushed Kijowski’s phone, and “the next thing he felt was a sudden jolt of electricity to his mid back, and boots kicking his left side.” “As

soon as his muscles turned weak," he says, "he felt the jolt again." After he was shocked for a second time, "the officers continued kicking him." According to Kijowski, he then heard someone say, "The State boys are here," at which point the "beating stopped."

A report prepared by Officer Shaw indicates that, following the incident, Kijowski was arrested for assault. However, Kijowski was never indicted on assault charges. He did face an indictment for disorderly conduct, but neither party asserts that he was found guilty of any crimes stemming from the episode.

On October 24, 2008, Kijowski filed a complaint against Officer Aurilio, the City of Niles, the City of Niles Police Department, and several unnamed officers, raising, *inter alia*, an excessive force claim under 42 U.S.C. § 1983. The suit was filed in the Trumbull County Court of Common Pleas, but on November 24, 2008, it was removed to the United States District Court for the Northern District of Ohio.

Kijowski subsequently brought suit claiming he was entitled to damages under 42 U.S.C. § 1983 because the officers violated his Fourth Amendment right to be free from the use of excessive force. Officer Craig Aurilio, one of the defendants, asserted qualified

"...the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. This inquiry must be conducted with sufficient respect for the fact that police officers often confront exceedingly perilous situations where detached rumination risks loss of life."

immunity and moved for summary judgment. The district court granted his motion, and Kijowski appealed.

Viewing the facts in the light most favorable to Kijowski, the Court of Appeals for the Sixth Circuit reversed the district court and remanded the case for further proceedings. The Court found, in part, as follows:

"Kijowski alleges that, in twice shocking him with a Taser, Officer

Aurilio violated his Fourth Amendment rights. The Fourth Amendment prohibits the use of excessive force by arresting and investigating officers. In evaluating whether this prohibition has been violated, we employ an 'objective reasonableness' test, which requires consideration of the totality of the circumstances. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.). The test is fact specific, not mechanical, and the three most important factors for each case are: (1) the severity of the crime at issue; (2) the threat of immediate danger to the officers or bystanders; and (3) the suspect's attempts to resist arrest or flee.

"Furthermore, the reasonableness of a particular use of force must be judged from

the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. This inquiry must be conducted with sufficient respect for the fact that police officers often confront exceedingly perilous situations where detached rumination risks loss of life. (‘The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.’)

“We must first examine a critical factual issue—whether Kijowski was resisting arrest—as we cannot undertake the reasonableness analysis without assessing the circumstances confronting Officer Aurilio. According to Kijowski, a number of officers, including Officer Aurilio, accosted him while he was seated in a truck. As Kijowski tells it, he then summoned Officer Crank, who explained that Kijowski was not causing any trouble. Kijowski asserts that Officer Crank departed shortly thereafter. *As soon as Crank left*, Kijowski claims, he felt himself being dragged out of the truck and thrown to the ground face first. If the officers truly laid hands on him immediately after Officer Crank walked away, then there was no intervening window of time during which to resist. Similarly, drawing reasonable inferences in his favor, Kijowski’s affidavit provides evidence that, after he was tossed to the earth, he was shocked at once.

“Following his removal from the truck, he claims, *the next thing he felt* was a sudden jolt of electricity to his mid back. Like Kijowski’s previous statement, this language appears to foreclose the possibility of intervening

physical struggle. As a consequence, we may reasonably infer that no resistance was offered prior to Officer Aurilio’s initial use of his Taser. There simply was no time. Nor was there an opportunity for Kijowski to struggle between the first and second Taser shocks. *As soon as my muscles turned weak*, he says, I felt the jolt again. If the second shock actually followed on the heels of the first, the only tenable conclusion is that it would have been impossible for Kijowski to muster any fight. Thus, given our obligation to draw all reasonable inferences in his favor, we must assume that at no time during his encounter with Officer Aurilio did Kijowski resist arrest.

“Proceeding from this assumption and taking into account the totality of the circumstances, we cannot say that Officer Aurilio’s conduct was objectively reasonable as a matter of law. In *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007), the Tenth Circuit remarked, ‘We have held that it was not excessive for officers to use an “electrical stun gun” on a man after grabbing him and wrestling him to the ground. But we noted that what justified this conduct was his active resistance to arrest—the man was kicking and biting the officers and had shoved one of them to start the fight.’

Without active resistance, the equation is different. A stun gun inflicts a painful and frightening blow, which temporarily paralyzes the large muscles of the body, rendering the victim helpless.” *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993). Absent some compelling justification—such as the potential escape of a dangerous criminal or the threat of immediate harm—the use of such a weapon on a non-resistant person is unreasonable.

“Consequently, because Kijowski offered no resistance, Officer Aurilio’s use of his Taser cannot be considered reasonable without some other indication that Kijowski posed a threat. But there was no such indication. True, the scene at which Officer Aurilio arrived was chaotic, but general bedlam does not necessarily justify the use of force against any particular individual. When police approached Kijowski, he was inside a truck, talking to a 911 operator. Nothing in the record suggests that he was attempting to drive the truck or that he had any kind of weapon on his person. Furthermore, assuming the veracity of Kijowski’s account, Officer Crank assured the other officers that Kijowski was not causing any trouble. Under these circumstances, a reasonable officer on the scene would not have perceived Kijowski as presenting a risk of harm. Accordingly, we conclude that, if Kijowski’s version of events is correct, Officer Aurilio deployed his Taser unreasonably, thereby violating Kijowski’s Fourth Amendment right to be free from the use of excessive force.

“Even if Officer Aurilio’s actions were objectively unreasonable, he is still entitled to qualified immunity unless it is shown that the right he violated was clearly established. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

“In this case, we find little difficulty in concluding that the right Officer Aurilio allegedly violated was clearly established. The right to be free from physical force when one is not resisting the police is a clearly established right. Even without precise

knowledge that the use of the Taser would be a violation of a constitutional right, Officer Aurilio should have known based on analogous cases that his actions were unreasonable. Relevantly, our court has repeatedly found that a totally gratuitous blow with a policeman’s nightstick may cross the constitutional line. *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988). We have also held that an officer has used excessive force when he pepper sprays a suspect who has not been told she is under arrest and is not resisting arrest. *Grawey v. Drury*, 567 F.3d 302, 311 (6th Cir. 2009). Against the backdrop of existing law, Officer Aurilio could not reasonably have believed that use of a Taser on a non-resistant subject was lawful.”

DWI: **Operating a Boat**

Brewer v. State, CACR 09-1063,
2010 Ark. App. 275, 3/31/10

On July 19, 2008, Russ Brewer was cited by the Arkansas Game and Fish Commission for the offense of boating while intoxicated. While on patrol, Officer Chris Majors and his partner observed a passenger in a boat being operated by Brewer standing up on the passenger’s side of the boat with his arms held up in a pose similar to that made famous by the film “Titanic.”

Officer Majors testified that he believed that the passenger’s conduct was a violation of Arkansas Code Annotated section 27-101-202(9), which states that no person operating a motorboat of twenty-six feet (26’) or less in length, shall allow any person to ride or sit on the gunwales or on the decking over the bow of the vessel while underway unless the vessel is equipped with adequate guards or

railing to prevent passengers from being lost overboard.

When the boat was stopped, Officer Majors noticed that Brewer and the passenger were moving around as though they were trying to hide something. Officer Majors noticed that there was a can of beer sitting between Brewer's legs and under the seat. The officers asked Brewer and the passenger about their safety equipment and requested their registration and insurance. Officer Majors testified that he smelled a strong odor of alcohol and observed Brewer "stumbling around in the boat." Brewer initially denied that he had been drinking, but later admitted that he had. According to Officer Majors, Brewer's speech was not impaired, but Brewer was yelling at the officers from only a short distance away. Brewer's eyes were also "really, really, really red."

The officers performed a horizontal-gaze nystagmus (HGN) test on appellant, which revealed "several indicators." Brewer was then taken to the shore, where another HGN test and a one-leg stand test were performed. The results of the second HGN test were the same, and appellant "didn't do very well" on the one-leg stand test. Brewer was administered a BAC test that revealed a blood-alcohol content of 0.197. Brewer stipulated that, if the evidence presented by the State were allowed to be admitted into evidence, it would be sufficient to prove the offense of boating while intoxicated.

In an order entered June 3, 2009, the trial court denied Brewer's motion to suppress, found Brewer guilty of the offense of boating while intoxicated, and sentenced Brewer to ninety days' imprisonment in the Baxter

County Detention Facility with eighty-nine days suspended contingent upon Brewer's successful completion of twelve months' probation. Brewer filed a timely notice of appeal on June 30, 2009.

The Arkansas Court of Appeals stated, in part, as follows:

"There is currently no case law in Arkansas concerning the circumstances under which a boat operating on a waterway in this state may properly be stopped and a search conducted. However, the circumstances under which a motor vehicle may be stopped are well established and are illustrative here.

"In order to be valid, a traffic stop requires that the officer have probable cause to believe that a traffic violation has occurred. See *Laimé v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). Officer Majors testified that, at the time the boat was stopped, he believed that the passenger on the boat was committing an act in violation of Arkansas Code Annotated section 27-101-202(9). The Arkansas Game and Fish Commission have the authority to enforce the provisions of Chapter 101 of Title 27 of the Arkansas Code. Ark. Code Ann. § 27-101-105(a)(1)(A) (Supp. 2009). In the exercise of its duty to enforce the provisions of that chapter, the Commission has the authority to stop and board any vessel subject to that chapter and to investigate any accident or violation involving vessels subject to that chapter. Ark Code Ann. § 27-101-105(a)(1)(B) (2) (Supp. 2009). Obviously, the language of section 27-101-105 encompasses section 27-101-202(9). The actions of Brewer's passenger gave Officer Majors probable cause to believe that a violation of section 27-101-202(9) had occurred. In addition, there was no indication

from the record that the stop was prompted by anything other than the perceived violation by the boat's passenger. As noted above, once an officer has probable cause to believe that a traffic violation has occurred, a stop of the vehicle is valid. Therefore, the stop of Brewer's boat, which occurred after Officer Majors had probable cause to believe that a violation of section 27-101-202(9) was occurring, was valid.

"As the stop of Brewer's boat was valid, it was then permissible for Officer Majors to investigate further the indications of intoxication exhibited by Brewer. The trial court properly denied the motion to suppress."

DWI: Probable Cause to Arrest

Banks v. State, CACR 09-1212,
2010 Ark. App. 383, 5/5/10

Merle Lee Banks, Jr. was arrested after midnight on July 15, 2008, and cited for a first-offense DWI. Officer Phillip Everett of the Warren Police Department was sitting in the parking lot at Mad Butcher when Banks drove by with his truck radio "blaring real loud" in violation of Warren City Ordinance No. 166. Everett stated that he pulled out behind Banks and observed him swerving within his lane, not driving in a straight line. After following Banks about two blocks, Everett turned on his blue lights. Banks did not stop right away; Everett testified that Banks could have pulled over at a tire shop or a Chinese restaurant but failed to do so.

Everett "bumped" his siren, and Banks eventually pulled his vehicle over. Everett

testified that when he approached the vehicle, Banks immediately stated that he knew the sheriff, Everett wouldn't write him a ticket, and if he did write him a ticket, it would not go to court. Officer Everett noticed an open container of beer in the console between the seats and could smell the odor of an intoxicant from Banks' breath. He asked Banks to step out of the vehicle, and he called Officer Greer, who was dispatched on a 911 call at the time. Everett arrested Banks and took him to the police department. There, Banks was watched for thirty minutes and then was administered field-sobriety tests by Officer Greer. Officer Everett issued Banks a citation for DWI. During trial, it was brought out that Banks was not cited for a noise ordinance violation, failure to yield to an emergency vehicle, fleeing, or manner of driving, and that his speech was marked "normal."

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

"The arresting officer had reasonable or probable cause to believe that Banks had committed DWI. When Officer Everett first attempted to stop Banks, he had only observed a violation of the city's anti-noise ordinance. Then he observed Banks weaving within his lane and failing to heed the police lights. After the legal stop, Officer Everett observed Banks' behavior, the open container of alcohol, and Banks' breath smelling of intoxicants. A police officer's observations with regard to the smell of alcohol and other physical characteristics consistent with intoxication can constitute competent evidence to support a charge of driving while intoxicated."

FIRST AMENDMENT: “Crush Videos”
United States v. Stevens, No. 08-769, 4/22/10

In *United States v. Stevens*, the United States Supreme Court dealt with a challenge to 18 U. S. C. § 48 enacted by Congress to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute applies to any visual or auditory depiction “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed. The legislative background of §48 focused primarily on “crush videos,” which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish. Robert J. Stevens was indicted under §48 for selling videos depicting dogfighting. He moved to dismiss, arguing that §48 is facially invalid under the First Amendment. The District Court denied his motion, and Stevens was convicted. The Third Circuit vacated the conviction and declared §48 facially unconstitutional as a content-based regulation of protected speech.

The United States Supreme Court held that 18 U.S.C. § 48 was overbroad and unconstitutional under the First Amendment. The Court cited several examples, such as individuals who publish hunting videos and publications and might have difficulty complying with the statute.

JUVENILES: Life Imprisonment;
 Cruel and Unusual Punishment
Graham v. Florida, No. 08-7412, 5/17/10

In *Graham v. Florida*, the issue before the United States Supreme Court was whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime. The sentence was imposed by the State of Florida. Terrance J. Graham challenges the sentence under the Eighth Amendment’s Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. The case is as follows:

Graham was born on January 6, 1987. His parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was 16, he and three other school-age youths attempted to rob a barbecue restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham’s masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Fla. Stat. §985.227(1)(b) (2003) (subsequently renumbered at §985.557(1)(b) (2007)). Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, §§810.02(1)(b), (2)(a) (2003); and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment, §§812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. He wrote a letter to the trial court. After reciting "this is my first and last time getting in trouble," he continued, "I've decided to turn my life around." App. 379-380. Graham said, "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*, at 380.

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. He was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than 6 months later, on the night of December 2, 2004, Graham again was arrested. The State's case was as follows: Earlier that evening, Graham participated in a home invasion robbery. His two

accomplices were Meigo Bailey and Kirkland Lawrence, both 20-year-old men. According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. Before leaving, Graham and his accomplices barricaded Rodriguez and his friend inside a closet.

The State further alleged that Graham, Bailey, and Lawrence, later the same evening, attempted a second robbery, during which Bailey was shot. Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. As Graham drove away, a police sergeant signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered Bailey and Lawrence only after Bailey had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham, "Aside from the two robberies tonight how many more were you involved in?" Graham responded, "Two to three before tonight." *Id.*, at 160. The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.

On December 13, 2004, Graham's probation officer filed with the trial court an affidavit

asserting that Graham had violated the conditions of his probation by possessing a firearm, committing crimes, and associating with persons engaged in criminal activity. The trial court held hearings on Graham's violations about a year later, in December 2005 and January 2006. The judge who presided was not the same judge who had accepted Graham guilty plea to the earlier offenses.

The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, [see Fla. Stat. §921.002(1) (e) (2003)], a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

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

“...This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment. Because the age of 18 is the point where society draws the line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a non-homicide crime.”

“...penological theory is not adequate to justify life without parole for juvenile non-homicide offenders. This determination; the limited culpability of juvenile non-homicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment. Because the age of 18 is the point where society draws the

line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a non-homicide crime.

“A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State

must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.”

MIRANDA: Juveniles; Waiver of Rights

T.C., A Minor v. State, No. 09-1128,
2010 Ark. 208, 5/6/10

In this case, T.C., a minor, appeals from an order of the Ouachita County Circuit Court adjudicating him delinquent as an extended-juvenile-jurisdiction (EJJ) offender on the charge of second-degree murder for the death of his sister, Kaylee, and committing him to the Department of Youth Services.

On the morning of August 7, 2006, police officers of the Camden Police Department responded to a 911 call from T.C.’s residence, which he shared with his mother, Melody Jones, and his eleven-year-old sister, Kaylee. T.C. at the time was twelve years old. Upon

their arrival, the police officers found Kaylee dead on her bed with her hands bound together in the front of her body with what was later determined to be a dog leash and her feet bound together with a cloth measuring tape. The police officers learned that Kaylee had been found with two plastic shopping bags over her head, which her mother had removed when she discovered Kaylee on her bed. The cause of Kaylee’s death was later determined to be suffocation.

The police officers concluded that they were dealing with a potential homicide and quickly cleared and secured the residence. While police investigators processed the house for evidence, T.C. and his mother waited outside in a relative’s vehicle. Sometime after noon, the police officers asked the relative to drive T.C. and his mother to the Camden Police Station where it was cooler and where they would not have to witness the removal of Kaylee’s body from the residence. The relative then drove T.C. and his mother to the police station where they waited in the station’s break room with family.

Having discovered no evidence of forced entry into the home, the police officers returned to the police station to interview T.C. and his mother. Melody Jones was interviewed first at approximately 4:30 that afternoon, while T.C. waited in the break room with his family. Jones’s interview lasted approximately one hour and was videotaped in its entirety in the station’s interview room. Following Jones’s interview, police officers interviewed T.C. with his mother’s permission in the interview room. T.C.’s interview began at approximately 5:30 p.m. Forty-five minutes into the interview, he was advised of his *Miranda* rights, and he signed a waiver-

of-rights form. The interview continued until 6:45 p.m., when T.C. told the police officers that he was hungry. At that point, he was taken from the interview room to a detective's office, and the officers went to pick up some food for him. The portion of T.C.'s interview that occurred from 5:30 p.m. to 6:45 p.m. was videotaped by the police department.

What happened during the ensuing time period was testified to at the suppression hearing and trial by the police officers and deputy prosecuting attorney. While T.C. was eating his dinner in the detective's office, Deputy Prosecuting Attorney Gregg Parish talked with him for five to ten minutes about school, video games, and the things his sister liked. After Parish left, Officer Scott Wells spoke with T.C. about their shared interest in video games and science fiction. Officer Evin Zeek joined T.C. and Wells sometime later. After listening to T.C.'s and Wells's conversation for awhile, Zeek turned the conversation to what had happened to Kaylee the night before. According to the police officers, T.C. soon became frustrated when they began to point out inconsistencies in his version of what had happened the previous night. At some point later in the conversation, T.C. asked, "If I tell the truth, what's gonna happen? Do you think I can get probation?" After the police officers told T.C. that they did not know what would happen to him, he proceeded to tell them that he had placed plastic bags over his sister's face and bound her hands and feet. During part of the time that T.C. was in the detective's office, Melody Jones was being interviewed in the interview room.

Because the interview in the detective's office was not recorded, the police officers then took T.C. back to the interview room to record his confession. The videotaped interview that followed began at approximately 10:20 p.m. with Officer Zeek again advising T.C. of his *Miranda* rights. After T.C. stated that he understood his rights, Officer Zeek moved on to the waiver-of-rights form and the following colloquy occurred:

OFFICER ZEEK: At the bottom is what we call a Waiver of Rights Okay, and I will read it to you quickly. It says no promises or threats have been used against me to induce me to waive rights listed above. With full knowledge of my rights, I hereby voluntarily, knowingly, and intelligently waive them and agree to answer questions. Do you understand the Waiver?

T.C.: No, what is a waiver?

OFFICER ZEEK: It simply says that what you are saying, you are doing of your own free will.

T.C.: Okay.

OFFICER ZEEK: Okay. We haven't made any promises. We haven't threatened you in any way. You are doing this because you want to do this. Okay. And again, it is by your own free will that you do this, that you make this statement.

T.C.: Yes.

OFFICER ZEEK: Do you understand that?

T.C.: Yes.

T.C. then signed the waiver-of-rights form and gave his confession.

The Arkansas Supreme Court focused initially on whether T.C.'s waiver of *Miranda* rights was voluntary, knowing, and intelligent:

"...That determination involves the consideration of two components, both of which must be satisfied. See *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005). The first component involves the voluntariness of the waiver and concerns whether the waiver was the product of free and deliberate choice rather than intimidation, coercion, or deception. The second component involves whether the defendant made the waiver knowingly and intelligently and concerns whether the waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. In making these decisions, this court reviews the totality of the circumstances surrounding the waiver, including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). This court will reverse a circuit judge's ruling on this issue only if it is clearly against the preponderance of the evidence."

Using the totality-of-the-circumstances analysis, the Court concluded that T.C.'s waiver was not knowingly and intelligently made:

"While a defendant's youth is a factor to be considered in determining whether a juvenile knowingly and intelligently waived his or her *Miranda* rights, it is generally not enough, standing alone, to prove that he or she is incapable of knowingly and intelligently waiving *Miranda* rights. For example, in *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005), this court held that a fourteen-year-old with a functional age of nine to twelve years old had knowingly and intelligently waived his rights where officers had carefully explained what the words on the waiver form meant, where Otis had asked no questions, and where he had indicated that he understood the form. The court also noted that Otis's mother was present when he signed the form.

"Similarly, in *Sandford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1999), the court held that a sixteen-year-old with an Intelligence Quotient of 67 had knowingly waived his *Miranda* rights under the totality of the circumstances. Testimony regarding those circumstances showed that he understood the statements on the waiver form, that he had not asked any questions about the form, and that his father had been present during the execution of the waiver forms. Likewise, in *Oliver v. State*, 322 Ark. 8, 907 S.W.2d 706 (1995), it was held that a fifteen-year-old with the mental age equivalent of a twelve-year-old had knowingly and intelligently waived his rights where testimony from the suppression hearing showed that the arresting officers had explained the waiver-of-rights form to Oliver and that he appeared to understand it.

"A common thread running through these cases is that the defendants had their rights carefully explained to them and either asked no questions or otherwise did not express

confusion about the meaning of the waiver-of-rights form. In contrast, T.C. was given no explanation of the waiver-of-rights form the first time he signed it and instead was merely asked to read it for himself. The second time he was asked to sign the form, he said that he did not understand what 'waiver' meant. Instead of explaining what waiver meant, the police gave T.C. the definition of voluntariness, saying: 'what you are saying, you are doing of your own free will...we haven't made any promises. We haven't threatened you in any way. You are doing this because you want to do this. And again, it is by your own free will that you do this, that you make this statement.' This definition of what 'waiver' means was patently wrong."

As a result, the court concluded, based on T.C.'s question and the police officer's explanation, that T.C. did not understand the meaning of waiver:

"Waiver, of course, is routinely defined as the 'intentional relinquishment or abandonment of a known right or privilege.' See *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387 (1977)). In laymen's terms, it is 'giving up' something, in this case the right to be silent and the right to counsel. The police officer's explanation imparted to T.C. did not make clear that he was giving up his rights to remain silent and to the assistance of counsel. It necessarily follows then that T.C.'s waiver was not made with 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' *E.g.*, *Otis v. State*, 364 Ark. at 161, 217 S.W.3d at 845. And that is the crucial test. The circuit judge's finding that T.C. knowingly and intelligently waived his rights was clearly

against the preponderance of the evidence. For this reason, we suppress T.C.'s confession. Because the court suppress the confession due to T.C.'s lack of a knowing and intelligent waiver of his rights under *Miranda*, it was unnecessary to address the other grounds presented for suppression."

Editor's Note: On 5/14/10, the Arkansas Supreme Court filed a substituted opinion in this case. There is no change in the outcome of the case or the citation references.

MIRANDA:

Unambiguous Invocation Requirement

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified. Van Chester Thompkins, who was a suspect, fled. About one year later, he was found in Ohio and arrested there.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the *Miranda* rule. It stated:

NOTIFICATION OF CONSTITUTIONAL
RIGHTS AND STATEMENT

1. *You have the right to remain silent.*
2. *Anything you say can and will be used against you in a court of law.*
3. *You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.*
4. *If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.*
5. *You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."*

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four *Miranda* warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form. At trial, Helgert stated, "I don't know that I orally asked him" whether Thompkins understood his rights.

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he

wanted an attorney. Thompkins was largely silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes welled up with tears. Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary.

Tompkins was convicted by a jury and sentenced to life without parole. The Michigan Court of Appeals rejected Thompkins' *Miranda* claim. A Federal District Court in Michigan rejected Thompkins' habeas corpus request. The Court of Appeals for the Sixth Circuit reversed the Michigan Federal

District Court. The United States Supreme Court granted certiorari finding, in part, as follows:

“...the *Miranda* Court formulated a warning that must be given to suspects before they can be subjected to custodial interrogation. The substance of the warning still must be given to suspects today. A suspect in custody must be advised as follows:

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

“All concede that the warning given in this case was in full compliance with these requirements. The dispute centers on the response—or non-response—from the suspect.

“Thompkins makes various arguments that his answers to questions from the detectives were inadmissible. He first contends that he invoked his privilege to remain silent by not saying anything for a sufficient period of time, so the interrogation should have ceased before he made his inculpatory statements.

“This argument is unpersuasive. In the context of invoking the *Miranda* right to counsel, the Court in *Davis v. United States*, 512 U. S. 452, 459 (1994), held that a suspect must do so ‘unambiguously.’ If an accused makes a statement concerning the right to counsel ‘that is ambiguous or equivocal’ or makes no statement, the police are not required to end the interrogation, or ask

questions to clarify whether the accused wants to invoke his or her *Miranda* rights.

“There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity. *Davis*, 512 U. S., at 458–459. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused’s unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society’s interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights might add marginally to *Miranda*’s goal of dispelling the compulsion inherent in custodial interrogation. But as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.

“Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his right to cut off questioning. Here he did neither, so he did not invoke his right to remain silent.

“In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an

uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police.”

The judgment of the Sixth Circuit Court of Appeals was reversed.

Judge Kennedy delivered the opinion of the Court, in which Roberts, Scalia, Thomas, and Alito joined. Judge Sotomayor filed a dissenting opinion, in which Stevens, Ginsburg, and Breyer joined.

PHOTOGRAPHS: Enlarged Photographs at Trial; Gruesome and Prejudicial

Marcyniuk v. State, No. CR 09-634, 2010 Ark. 257, 5/27/10

In *Marcyniuk v. State*, Zachariah Marcyniuk was sentenced to death after his conviction for capital murder in Washington County. On appeal, he claims that the circuit court erred in allow certain photographs into evidence and permitting the state to enlarge these photographs of the victim on a projection screen. The Arkansas Supreme Court stated photographs are ordinarily admissible when they are helpful to explain testimony, finding, in part, as follows:

“In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police.”

“...Standing alone, a photograph that is inflammatory or cumulative is not sufficient reason to exclude it. *Wenger v. State*, 315 Ark.555, 869 S.W.2d 688 (1994).

“We have often held that a photograph is not inadmissible merely because it is cumulative and that the defendant cannot admit the facts portrayed to prevent the state from putting on its proof. *Berry v. State*, 290 Ark. 223, 227, 718 S.W.2d 447, 450 (1986). Of course, if a

photograph serves no valid purpose and can only result in inflaming the passions of the jury, it is inadmissible. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979). Even the most gruesome photographs have been held admissible to show the nature and location of wounds in order to rebut a defendant’s claim of self-defense, *Perry v. State*, 255 Ark. 378, 500 S.W.2d 387 (1973), or to show premeditation and deliberation, *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980). Moreover, other acceptable purposes for admitting photographs include showing the condition of the victim’s body, the probable type or location of the injuries, and the position in which the body was discovered. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000).

“In *Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988) (reversed on other grounds), we remarked that virtually all photographs are enlargements to some degree, and having examined the one enlargement complained of, we found it had not been demonstrated that it accentuated the injuries of the victim in any unfairly prejudicial way. We reaffirmed that holding in *Harris v. State*, 314 Ark. 379, 382, 862 S.W.2d 271, 273 (1993), where we stated that although the photographs were ‘gory, and some are similar to each other,’ all were offered with investigating officers’ testimony to depict the crime scene and show the extent of the wounds. We held that the extent of the wounds was relevant to show the defendant killed purposefully. Furthermore, we held that the enlargement of the photographs was not overly prejudicial. *Harris*, 314 Ark. at 382, 862 S.W.2d at 273.

“Here, the circuit judge stated that he had ‘spent a considerable amount of time’ reviewing each photograph the State offered for relevancy and balanced the probative value versus the prejudicial effect. The State offered thirty photographs into evidence, but the judge only allowed seventeen into evidence. Taking each photograph in turn, the court explained his reasoning for allowing its admission. Thereafter, the crime-scene photographs were introduced during the crime-scene technician’s testimony to illustrate how the body was found, a depiction of the injuries to the body, and what the scene looked like when police arrived. Autopsy photographs were introduced during the forensic examiner’s testimony to explain the nature of the injuries and cause of death.

“We are convinced that the circuit judge did not abuse his discretion on this point. The trial court carefully examined each photograph offered for admission and weighed the appropriate balancing test. It exercised considerable discretion and restraint in deciding what photographs to admit into evidence. Further, the court individually pointed out its basis for allowing in each photograph, whether because it accurately depicted the crime scene, the extent of the victim’s injuries, and the condition of the victim’s body following the attack, or was essential for a full understanding of the State’s forensic and investigatory witnesses. Finally, the enlargement of the photographs alone is not prejudicial under our holdings in *Mitchell*. The projection of the photographs on a screen in the courtroom did not misrepresent the wounds in any way or accentuate them prejudicially.”

SEARCH AND SEIZURE:
**Affidavits; Staleness of Information;
 Refreshing With Corroborating Information**

United States v. Thomas,
 CA6, No. 08-5239, 5/13/10

On October 25, 2005, Tennessee Bureau of Investigation Special Agent Dennis Mabry presented an application for a warrant to search the premises of 3971 Taz Hyde Road in Nashville, Tennessee to a judge of the Metropolitan Davidson County, Tennessee Court. In his affidavit in support of the warrant, Mabry recited information that was provided to him by Drug Enforcement Administration Special Agent John Hardcastle, a twenty-year veteran of the DEA who had been involved in an investigation of Thomas. The relevant

portions of the affidavit¹ contained the following information:

1. SA John Hardcastle with the Drug Enforcement Administration (DEA) recently met with a Confidential Informant (CI) who works for DEA. This CI provided information regarding [sic] illegal indoor marijuana grow operation located at 3971 Taz Hyde Road, Nashville, TN. This CI has worked with SA Hardcastle, and has given him reliable information within the past year. Information provided by this CI has led to the successful arrests and prosecution of three subjects who were arrested. Two were charged and convicted in Federal Court.

2. The CI has informed SA Hardcastle that James I. THOMAS has had a reputation within the marijuana community of Nashville for the past two to three years as being a successful producer of just not [sic] leaf marijuana, but the more sought after "bud" of the plant, which is more expensive and produces a greater high for the user. Typically one ounce of the "hydroponically" produced bud will sell as for a high [sic] as \$250.00 per ounce.

3. The CI informed SA Hardcastle where James I. THOMAS lived. SA Hardcastle was able to confirm by [sic] THOMAS'S driver's license has the address of 3971 Taz Hyde Road. SA Hardcastle discovered that THOMAS has an active gun permit with the address listed as 3971 Taz Hyde Road. On 10-18-2005 at approximately 10:15 am, SA Hardcastle drove by the residence of 3971 Taz Hyde Road and observed THOMAS standing in the driveway smoking a cigarette.

4. According to the reliable CI, he/she has been to the residence on at least three occasions and observed THOMAS conduct narcotic transactions. The CI has observed THOMAS exit the residence with marijuana and sell the marijuana to customers on at least three occasions.

5. According to Nashville Electric Service, the subscriber to this residence is Sandra G. Brumit the girlfriend of James I. THOMAS. According to Metro Nashville Property Records, Brumit is the owner of the property. The house has a finished area of 1059 square footage. SA Hardcastle pulled electricity records for that address from March 2005 through September 2005. The research conducted by SA Hardcastle revealed usage which SA Hardcastle and I believe to be high usage. The following information was provided by Nashville Electric Service (NES) to the [sic] SA Hardcastle for the electrical usage at 3971 Taz Hyde Road:

March 2005 - \$345.24

April 2005 - \$371.22

May 2005 - \$337.51

June 2005 - \$436.28

July 2005 - \$513.90

August 2005 - \$499.63

Sept. 2005 - \$530.46

6. The following information was provided by the Nashville Electric Service (NES) to SA Hardcastle for the electric usage for the neighbor of THOMAS located at address of 3986 Taz Hyde Road. The square footage of the residence according to the Davidson County is 1568 square footage of finished area.

May 2005 - \$125.00

June 2005 - \$181.64

July 2005 - \$202.78

Aug 2005 - \$221.89

Sept 2005 - \$233.21

7. According to the NES records, THOMAS'S residence regularly uses more electricity than the neighbor. THOMAS pays twice as much a month on a regular basis which you [sic] affiant knows is something that is very common with indoor marijuana grow operations.

8. Indoor marijuana cultivation operations typically use large volumes of electricity to operate the advanced lighting systems used in such operations. An indoor grow operation can generate marijuana year round if the growing operation is managed properly. An indoor grower of marijuana will use a technique that is referred to as an "up cycle" to increase the lighting given to the marijuana simulate [sic] the coming of fall to make the marijuana plants to [sic] produce more "buds" on the plants.

9. NES disclosed to the Affiant that the January 2005 bill was for \$745.00. Given the recorded square footage of the 3971 Taz Hyde Road location and the utility usage, it strongly appears that James I. THOMAS is "cycling up" on his utility usage which indicates that THOMAS is running a marijuana cultivation operation on the 3971 Taz Hyde Road location.

10. Davidson County property records reveal that there are at least two "out buildings" located on the property out of sight from the front of the property. Property records do not indicate that there are any other structures on the property that would legitimately use such a high volume of electricity such as a heated pool or air conditioned buildings other that

[sic] the residence.

Based on this information, the judge issued a search warrant, which was executed on October 26, 2005. When the officers arrived at the Taz Hyde property, they discovered that Thomas, as well as his girlfriend and their two children, lived in a freestanding trailer home behind the main building of the property. Agents searched the trailer and seized the following: 128 living marijuana plants growing in soil; five pounds of processed marijuana; indoor marijuana grow equipment; five handguns and a sawedoff shotgun; \$5,600 in cash; and six motorcycles. Thomas was arrested and later charged in the Middle District of Tennessee with one count of manufacturing 100 or more marijuana plants and one count of possession with intent to distribute a detectable amount of marijuana, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

The Court of Appeals for the Sixth Circuit dealt with Thomas challenge to the affidavit in that the confidential informant's tip was stale because it was over eight months old, finding, in part, as follows:

"A determination of whether an informant's tip is stale rests on several factors including 'the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?)." *Hammond*, 351 F.3d at 771 (quoting *United States v. Greene*, 250 F.3d 471, 480-81 (6th Cir. 2001)). The question of staleness, then, depends on the 'inherent

nature of the crime.’ *United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir. 1988) (quoting *United States v. Haimowitz*, 706 F.2d 1549, 1554-55 (11th Cir. 1983)). A marijuana growing operation, which is a long-term operation, may allow for greater lapses of time between the information relied upon and the request for a search warrant. See *United States v. Greany*, 929 F.2d 523, 525 (6th Cir. 1991); *Thomas*, 1993 WL 337553, at *3. Furthermore, information from an informant that is otherwise stale may be ‘refreshed’ if the affidavit contains recent information that corroborates otherwise stale information.’ *United States v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998).

“Here, the Nashville Electrical Service utility usage records sufficiently refreshed the informant’s tip. See *Zimmer*, 14 F.3d at 287-89 (relying in part on electrical records to corroborate a probable cause finding); *Thomas*, 1993 WL 337553, at *5 (same). The affidavit contained the Taz Hyde property electrical bills for the six months leading up to the submission of the warrant application. The affidavit also provided the comparable monthly bills for a neighboring property, and the bills of the neighboring property were on average less than half as high. Furthermore, the numbers indicated that energy usage at the Thomas property was generally increasing over time, which the affidavit indicated suggested that Thomas was ‘cycling up’ to stimulate the marijuana plants to produce more buds. Thus, this evidence corroborates the informant’s tip that Thomas was a marijuana grower (not just a sporadic seller) and thereby refreshed the informant’s information.”

SEARCH AND SEIZURE: Automobiles; Mobility of a Truck Trailer

United States v. Navas,
CA2, No. 09-1144-cr, 3/8/10

In this case, the issue before the Second Circuit Court of Appeals was whether a search by DEA Agents of a trailer, unhooked from its cab and with its front stabilizing legs lowered into place, was a search of a mobile vehicle. The DEA Agents on top of the trailer observed physical indicia of a secret compartment. The agents then “ripped off the sheet metal roof” of the trailer and discovered 230 kilograms of cocaine.

The Court of Appeals for the Second Circuit stated that the district court took the view that the mobile vehicle doctrine generally relates to some type of vehicle that is capable of moving on its own. Framed as such, the district court held that the exception was inapplicable because a stationary trailer, detached from a tractor cab with its legs dropped, is not a vehicle that is readily mobile or in use for transportation.

The Court of Appeals for the Second Circuit were left with a straight forward legal question: *Is the warrantless search of a trailer that is unhitched from its cab permissible under the automobile exception to the Fourth Amendment’s warrant requirement?* The Court held that the exception applies finding, in part, as follows:

“The ‘Automobile Exception’ permits law enforcement to conduct a warrantless search of a readily mobile vehicle where there is probable cause to believe that the vehicle contains contraband. *Pennsylvania v. Labron*,

518 U.S. 938, 940 (1996). Where the probable cause upon which the search is based ‘extends to the entire vehicle,’ the permissible scope of a search pursuant to this exception includes ‘every part of the vehicle and its contents [including all containers and packages] that may conceal the object of the search.’ *United States v. Harwood*, 998 F.2d 91, 96 (2d Cir. 1993) (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)); see also *California v. Acevedo*, 500 U.S. 565, 580 (1991).

“The Supreme Court has relied on two rationales to explain the reasonableness of a warrantless search pursuant to the automobile exception: vehicles’ inherent mobility and citizens’ reduced expectations of privacy in their contents. One of the seminal cases defining the exception, *Carroll v. United States*, emphasized vehicles’ mobility. Based on this reasoning, courts have held that vehicular mobility is a sufficient exigency to permit law enforcement to invoke the doctrine. In addition to the mobility rationale, other authority emphasizes that warrantless searches pursuant to the automobile exception are also reasonable because citizens possess a reduced expectation of privacy in their vehicles.

“In this case, the trailer remained inherently mobile as a result of its own wheels and the fact that it could have been connected to *any* cab and driven away. For similar reasons, we are unpersuaded by the district court’s reference to the position of the trailer’s ‘legs.’ These legs served only as a temporary stabilization mechanism. They could be retracted and a cab could be attached to the trailer. As such, the fact that the trailer was ‘detached from a...cab with its legs dropped,’ did not eliminate its inherent mobility.

“...based on the nature and scope of the regulations relating to the commercial trucking industry, we are persuaded that defendants’ reasonable expectations of privacy in the trailer were minimal. Therefore, the reduced-privacy rationale provides further support for our conclusion that the warrantless search of this inherently mobile trailer was reasonable under the Fourth Amendment.

“For the foregoing reasons, we hold that the automobile exception applies because the trailer was inherently mobile, and defendants possessed a significantly reduced expectation of privacy in the trailer.”

SEARCH AND SEIZURE:

Consent Search; Scope of the Consent

United States v. Garcia,
CA5, No. 09-40575, 4/14/10

In *United States v. Garcia*, Texas Department of Public Safety (“DPS”) officers searched Lee Roy Garcia’s commercial truck while performing inspections at a weigh station. Garcia first caught the officers’ attention because he appeared overly friendly and cooperative when told he had been selected for a more thorough ‘level two’ inspection. According to one of the officers who later testified, most drivers are frustrated by the delays caused by level two inspections.

While inspecting Garcia’s paperwork, the officers noticed some items that gave them cause for concern. They learned, based on Garcia’s logbook and by questioning him, that on the previous day he had picked up a load of tomatoes but had immediately parked

his truck and did not begin to transport the shipment until eighteen hours later. According to the officers, that behavior was abnormal, because Garcia would have been forced to run his refrigerated truck all night to keep the tomatoes at the appropriate temperature, which is costly, and because drivers generally want to deliver perishable goods as quickly as possible. Garcia had no explanation for the delay.

The logbook revealed that Garcia had recently taken multiple days off, even though he reported that truck driving was his primary source of income. The officers found that suspicious, because generally drivers do not take off large amounts of time unless there is a reason; Garcia offered none. He also said he was delivering the tomatoes to New Jersey and New York, but his bill of lading revealed that he was scheduled to make a delivery only in New Jersey. When questioned about his odd behavior and the inconsistencies, Garcia showed signs of nervousness, including shaking his knee, looking down, and attempting to talk to another truck driver.

One of the officers then asked Garcia whether the truck contained “anything illegal.” Garcia responded that it did not and gave the officers permission to search the truck and trailer. While searching the cab, the officers noticed fresh tool marks on the screws securing the stereo speakers, suggesting that the screws had been recently removed. The officers also found a toolkit in the cab containing a screwdriver bit that fit the screws. Using that screwdriver, they removed the screws, took the speaker cover off, and found bundles containing nearly 30 kilograms of cocaine inside the void behind the cover. Garcia was arrested and charged.

Garcia moved to suppress the cocaine on the grounds that neither probable cause nor voluntary consent supported the search and that even if he did consent, the search exceeded the scope of consent. The district court denied the motion. Immediately following the suppression hearing, the court held a bench trial and found Garcia guilty.

Garcia contends that by removing the cover from the speakers, the officers exceeded the scope of his consent and that the district court thus erred in denying the motion to suppress. Upon review, the Fifth Circuit Court of Appeals found, in part, as follows:

“The Fourth Amendment proscribes unreasonable searches and seizures. A search not based on a warrant may still be reasonable if based on probable cause or, as here, consent. *United States v. Ross*, 456 U.S. 798, 809 (1982); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). When conducting a warrantless search of a vehicle based on consent, officers have no more authority to search than it appears was given by the consent. *Mendoza-Gonzalez*, 318 F.3d at 666-67. The scope of consent is determined by objective reasonableness—what a reasonable person would have understood from the exchange between the officer and searched party—and not the subjective intent of the parties. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *Mendoza-Gonzalez*, 318 F.3d at 667.

“The scope of a consensual search may be limited by the expressed object of the search. *Jimeno*, 500 U.S. at 251. But where, as here, an officer does not express the object of the search, the searched party, who knows the contents of the vehicle, has the responsibility explicitly to limit the scope of the search.

Mendoza-Gonzalez, 318 U.S. at 667. Otherwise, an affirmative response to a general request is evidence of general consent to search. Garcia did not qualify his consent to the officers, who therefore had general consent to search the truck.

“General consent to search a vehicle does not, however, give an officer *carte blanche* over the vehicle. A search must still be reasonable, given the totality of the circumstances. The search here was reasonable. When the officers requested permission to search the truck after asking Garcia whether he was carrying ‘anything illegal,’ it was natural to conclude that they might look for hidden compartments or containers.

“This case is similar to *Mendoza-Gonzalez* and *United States v. Crain*, 33 F.3d 480 (5th Cir. 1994). In both, officers searched vehicles pursuant to general consent. In *Mendoza-Gonzalez*, an officer cut open a taped box in the trailer of a commercial truck and discovered bricks of marijuana. In *Crain*, an officer opened a twisted and rolled up paper bag found under the driver’s seat of a car containing crack cocaine base. On de novo review, we found both searches reasonable. In transporting the cocaine, Garcia knew the speaker cover was easy to unscrew and replace without damaging the cab.

“In sum, the search of Garcia’s truck cab was reasonable. The district court did not clearly err in denying the motion to suppress.”

SEARCH AND SEIZURE: Probable Cause; Affidavits

United States v. Colbert,
CA8, No. 08-3243, 5/20/10

On June 7, 2006, Detectives Kelly Myers and Mike Martin of the Davenport, Iowa, Police Department drove to Vandever Park to investigate a complaint of suspicious activity related to a young child. Upon arriving at the park, the detectives spoke with the child’s uncle, who informed them that he had become concerned after observing a man interacting with the uncle’s five-year-old niece, pushing her on a swing and talking about movies and videos the man had at his home. The detectives spoke with the child and two other witnesses and obtained a description of what was later determined to be Donald Gene Colbert’s vehicle: a blue sedan with rear antennas resembling those of a police cruiser.

While Detectives Myers and Martin were still at the park, two patrol officers identified the vehicle and stopped Colbert. Colbert consented to a search of his vehicle and agreed to speak with Myers and Martin, who had arrived at the scene of the traffic stop. Inside Colbert’s car the detectives found a police scanner, handcuffs, and a hat bearing the phrase “New York PD.” Colbert told the officers that he had the handcuffs because he had been employed as a security guard four years earlier, and he admitted speaking to the girl about movies that he had at his apartment. Colbert was then taken to the police station for questioning.

Detective Myers meanwhile relayed information from the investigation to Detective Mark Dinneweth, who drafted a warrant application seeking permission to search Colbert's residence for books, photos, videos, and other electronic media depicting "minors engaged in a prohibited sexual act or in the simulation of a prohibited sexual act." In support of the warrant, Detective Dinneweth set forth the following summation of the investigation:

On 06-07-06 officers responded to Vandever Park reference a suspicious subject.

During the course of the investigation it was determined Donald Colbert 512 E Locust St Apt #3 attempted to lure a five year old female to go to his apartment.

Colbert conducted a conversation with the girl for approximately forty minutes telling his apartment had movies and videos she would like to watch and other things for the girl to do.

Colbert's license plate IA 510NYF was provided by a witness and the vehicle was located by officers at Colbert's apartment.

Colbert gave consent to search his vehicle where officers observed a police scanner, binoculars, a police type hat, handcuffs, and the vehicle was equipped with CB antennas making it similar to a police vehicle.

An Iowa state district judge issued a search warrant for Colbert's apartment. The subsequent search resulted in the discovery of a number of children's movies, a computer, and numerous compact discs containing child pornography.

Colbert argues that the evidence seized from his apartment should have been excluded because the search warrant was not supported by probable cause.

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

"...Although the affidavit in this case may not be a model of detailed police work, it sets forth a number of specific facts and explains the investigation that took place. As Colbert points out, Detective Dinneweth did not word the affidavit in the first person. But his statements supported a fair inference that the police officers were the source of the information and that Dinneweth had firsthand knowledge of the investigation. Accordingly, we reject the argument that the affidavit was too conclusory to establish probable cause.

"Colbert next contends that the facts set forth in the affidavit failed to establish probable cause to search his apartment for child pornography. He argues that the affidavit did not establish a link between the evidence of enticement at the park and child pornography in his home. Although this issue presents a closer question, we conclude that the affidavit established probable cause.

"The affidavit included evidence that Colbert had attempted to lure a five-year old girl to his apartment. Colbert had a vehicle and clothing that made him look like a police officer, suggesting that he was attempting to appear as an authority figure.

"The affidavit also related that Colbert possessed handcuffs and a pair of binoculars, which could reasonably give rise to the

inference that he was surveilling the area, looking for opportune targets. For no apparent reason, Colbert approached a five year-old girl and spoke with her for approximately forty minutes. Finally, the affidavit explained that Colbert attempted to convince the girl to accompany him to his apartment, where he claimed to have movies for her to watch and other things for her to do. Taken together, those facts tend to paint a picture of an older male attempting to entice a young girl into sexual activity.

“The district court concluded that this information established probable cause to search Colbert’s apartment because ‘individuals sexually interested in children frequently utilize child pornography to reduce the inhibitions of their victims.’ The court found that sexual depictions of minors could be logically related to the crime of child enticement, particularly under the facts of this case, in which Colbert had referred to movies and videos that he wanted the child to view at his apartment. We agree. Notwithstanding the affidavit’s admitted lack of detail, the reviewing magistrate could have reasonably concluded that the search of Colbert’s apartment was justified on this basis.

“Accordingly, we conclude that Colbert’s attempt to entice a child was a factor that the judicial officer reasonably could have considered in determining whether Colbert likely possessed child pornography, all the more so in light of the evidence that Colbert heightened the allure of his attempted inveiglement by telling the child that he had movies she would like to watch. That information established a direct link to Colbert’s apartment and raised a fair question as to the nature of the materials to which

he had referred. Although the return on the warrant does not list the titles of the children’s movies found in his apartment, it would strain credulity to believe that Colbert was attempting to lure the child there to watch, say, ‘Mary Poppins’ or ‘The Sound of Music,’ or to engage in basket weaving or a game of pickup sticks. The circumstances suggest that Colbert intended to victimize the child in some manner, and as the Supreme Court recognized nearly twenty years ago, ‘evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.’ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). Thus, the state court judge could reasonably have concluded that the facts in the affidavit established a fair probability that child pornography would be found in Colbert’s apartment.

“There no doubt were ways in which the affidavit could have been strengthened by the inclusion of additional information. The law enforcement officers involved in obtaining the warrant testified at the suppression hearing about their knowledge of the link between child enticement and possession of child pornography. Dinneweth testified that, based upon his training and experience, ‘a subject trying to lure a 5 year old, they do possess pornographic material, specifically child pornography,’ and that he had forgotten to include that information in the affidavit. Our task is not to criticize the affidavit for what it did not contain but to determine, under a commonsense, nontechnical analysis that gives due deference to the initial judgment of the issuing magistrate, whether what it did contain established probable cause to search for that which it described. Under that standard, we conclude that the affidavit was sufficient.”

SEARCH AND SEIZURE:
**Probable Cause of a Traffic Violation;
 Pretextual Stops**

State v. Mancía-Sandoval,
 No. CR 09-1094, 2010 Ark. 134, 3/18/10

Benton County Sheriff's Deputy Cory Coggin had been conducting a six-month drug-trafficking investigation, which involved a possible drug house that he had under surveillance. On November 3, 2008, Deputy Eric Lyle and his canine were stationed near that house. Two different sources advised Deputy Coggin that there was going to be some type of drug activity coming from that house that night. Around ten o'clock that evening, Deputy Coggin told Deputy Lyle on the radio that two vehicles left the house and asked him to follow a white Honda until he had probable cause to stop it. Deputy Lyle quickly followed the white Honda, and as he approached the car to read the license plate, the driver slammed on his brakes, started to turn, turned on the turn signal, and turned into a corner gas station's parking lot. The car's signal came about 10 to 20 feet before the car turned. Deputy Lyle initiated a pretextual traffic stop based on the improper signaling before the turn. Deputy Lyle testified that after he told the driver the reason he stopped the car, the driver appeared to be extremely nervous.

Deputy Lyle ran his canine around the car approximately five minutes after he initiated the traffic stop. Deputy Lyle did not issue a traffic-violation citation, but, after the dog alerted on the car, he detained both the driver and a passenger and searched the car.

Deputy Lyle found approximately four ounces of methamphetamine. Jose A. Mancía-Sandoval and Osires Guevara were charged with possession of methamphetamine with intent to deliver. They moved to suppress the evidence, alleging that it was seized in violation of their Fourth Amendment rights.

The State admitted that the stop was pretextual, but argued that, because Deputy Lyle had probable cause that a traffic violation occurred, it was reasonable to stop the vehicle under Arkansas and federal constitutional law and that the officer's immediate use of his canine around the vehicle and a positive alert gave him probable cause to search it. Appellees argued that Deputy Lyle created the probable cause to stop the vehicle and that there was no additional probable cause to allow the canine sniff because mere nervousness during the traffic stop did not justify it.

The circuit court held a suppression hearing. The circuit court held:

*While it's clear under the United States Supreme Court decisions—decisions in **Whren v. United States**, 517 U.S. 806 (1996) and **United States v. Robinson**, 414 U.S. 218 (1973), and the **State v. Sullivan**, 348 Ark. 647, 74 S.W.3d 215 (2002) case by the Arkansas Supreme Court, that pretextual stops in general are constitutional, in this case I'm persuaded that this traffic stop was unconstitutional.*

Upon review, the Arkansas Supreme Court reversed and remanded the decision, finding, in part, as follows:

“The issue presented here is whether or not the circuit court erred when it looked to the subjective intent of the law enforcement officers involved in the traffic stop and found that the stop violated constitutional rights based on that intent. The Court concluded that this appeal does present an issue involving the interpretation of our criminal rules and will have widespread ramifications because it will provide guidance to our law enforcement officers and our courts as to the law in our state when faced with similar circumstances in the future. Therefore, the Court accepted this case as a proper state appeal.

“We have previously recognized that a pretextual traffic stop does not violate the federal constitution. We note at the outset that a pretextual stop does not violate federal constitutional law. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the United States Supreme Court held that a consensual search for contraband that took place just after a valid traffic stop did not violate the United States Constitution. See also *Whren v. United States*, 517 U.S. 806 (1996) (holding that the constitutionality of a traffic stop does not depend on the actual, subjective motivations of the individual police officers involved). *State v. Harmon*, 353 Ark. 568, 574, 113 S.W.3d 75, 78 (2003).

“Additionally, this court concluded in *Harmon* that our previous decisions relating to traffic stops where the police officer had an ulterior motive for the stop were treated differently than cases involving pretextual arrests. This court has never held a valid traffic stop to be unconstitutional because of a police officer’s ulterior motives.” *Id.* at 575, 113 S.W.3d at 79.

“It is clear that this court will not allow a police officer’s ulterior motives to serve as the basis for holding a traffic stop unconstitutional so long as it was a valid stop—meaning, the officer had the proper probable cause to make the traffic stop.

“As previously noted, a pretextual stop is not impermissible under either the federal or Arkansas Constitution and, thus, does not invalidate an otherwise lawful stop of a vehicle. See *Harmon, supra*. The circuit court did not find that the reasons cited by the officers for the stop did not constitute probable cause, nor did it express that it believed the officer’s testimony to be fabricated. To the contrary, the circuit court commended the officers for their honesty, their integrity, and credibility. Therefore, when the subjective intent of the officers is not considered, the stop was ‘otherwise lawful.’ For this reason, we reverse the circuit court’s order suppressing the evidence against the Mancia-Sandoval and Osires Guevara and remand for further proceedings.”

SEARCH AND SEIZURE:
**Reasonable Suspicion;
 Probable Cause to Arrest;
 Probable Cause for Vehicle Search**

Johnson v. United States,
 CA4, No. 08-4042, 4/1/10

On the evening of September 14, 2006, Baltimore City Police Detective Eric Green was monitoring the 1800 block of Pennsylvania Avenue in the city of Baltimore by video camera from a police station about five minutes’ drive away.

The block is reputedly home to a brisk open-air drug trade. Around 7 o'clock, Detective Green witnessed Johnson standing on the sidewalk of the street. He watched as Larry Johnson, in rapid succession, made quick hand-to-hand contact with three different men, after which each of the three men immediately hurried off. Although he could not see an actual object being exchanged, it appeared to Green that something small was being passed between them. Green, who had made thousands of drug arrests based on observing hand-to-hand exchanges during his career, concluded that Johnson was dealing drugs. He immediately dispatched his partner, Officer Joseph Bannerman, and another officer to the scene.

While his colleagues were en route, Detective Green continued to monitor Johnson's movements. He watched as Johnson milled about on the sidewalk, briefly turned down a side street, and soon returned to the spot where the previous interactions had taken place. Green then saw two other people enter the frame, whereupon Johnson headed for a local Chinese carry-out restaurant with the two others appearing to follow. Green suspected Johnson was about to sell them drugs, since local dealers sometimes conduct their business in legitimate shops in order to elude police cameras.

Green alerted his colleagues that Johnson was taking the suspected buyers into the Chinese carry-out. Johnson and one of the suspected buyers entered the eatery as the police officers pulled up, but the second suspected buyer kept walking up the street after spotting the approaching police. Immediately upon arriving, Officer Bannerman entered the restaurant and approached Johnson,

identified himself as a police officer, and asked to see Johnson's hands. Johnson, however, did not comply, instead throwing what Bannerman correctly believed to be a heroin gelcap over the restaurant counter. A struggle ensued, but Bannerman eventually gained the upper hand and Johnson was duly arrested and handcuffed. Bannerman recovered the gelcap and loaded Johnson into his patrol car. Johnson was found to be carrying \$102 in cash.

While this was taking place, Detective Green reviewed a recording of the earlier surveillance video. In doing so, he noticed something he had originally overlooked. The video showed that just before the suspected drug deals, Johnson had gone to a car parked along the street, opened the passenger door, shut it, paced back and forth, reached back into the car and emerged appearing to hold something in his hand. Concluding that Johnson was using the car to store drugs, Green radioed to Officer Bannerman and instructed him to return to the scene and secure the car.

Officer Bannerman arrived at the car and looked inside the passenger side window. On the floor of the car, he saw a plastic bag containing baggies of gelcaps like the one Johnson had thrown during their tussle. Bannerman also saw a set of keys on the car seat. He relayed this information to Detective Green, who told him to bring the car back to the police station. Bannerman then opened the car door and saw that in addition to the gelcaps the plastic bag contained vials of what he suspected to be cocaine. Officer Bannerman drove the car back to the police station, whereupon Detective Green conducted a full search. He found fifty-six

heroin gelcaps, thirty nine cocaine vials, a mirror and scale, both of which had what appeared to be drug residue on them, a razor blade, and a loaded Rossi .38 Special handgun.

Prior to trial, Johnson filed two motions to suppress evidence. The court held a hearing on the issue, at which it viewed the surveillance footage and heard testimony from Detective Green, Officer Bannerman, and the officer who had accompanied Bannerman, as well as from Johnson. At the conclusion of the hearing, the court denied Johnson's suppression motions. Following a three-day jury trial, Johnson was convicted of all three charges and thereafter sentenced to 360 months' imprisonment. He now appeals from the denial of his suppression motions.

The Court of Appeals for the Fourth Circuit stated that the police witnessed Johnson making what appeared to be a series of hand-to-hand exchanges with multiple people in a known open-air drug market. By this point, the facts known to the officers were at least sufficient to support a "reasonable suspicion" that Johnson was dealing drugs, justifying a brief investigatory detention under *Terry v. Ohio*, 392 U.S. 1 (1968). A police officer then approached Johnson and ordered him to show his hands. When Johnson responded by attempting in front of the officer to toss a heroin gelcap out of sight, reasonable suspicion ripened into probable cause to arrest. And when police later learned that Johnson had been back and forth to a nearby car just before the series of hand-to-hand contacts, probable cause to arrest in turn ripened into probable cause to search the car.

Johnson was not detained until police had a basis for a reasonable suspicion, he was not arrested until police had probable cause to arrest, and the car was not searched until police had probable cause to search it. Since no Fourth Amendment violation occurred at any point, the Court of Appeals for the Fourth Circuit affirmed the district court's rejection of Johnson's motions to suppress evidence arising out of these events.

SEARCH AND SEIZURE:
**Stop and Frisk; Removal of Individual
From a Vehicle; Officer Safety**

United States v. Newell,
CA8, No. 09-1957, 3/2/10

Sometime before February 2008, a confidential informant (CI) told Officer Joseph E. Baudler of the Omaha Police Department about a black male called Libra or Libray. The CI, who had provided useful information to Officer Baudler in the past, told him that this man was selling crack cocaine in a specific area of town, that he drove a white Cadillac with heavily-tinted windows with license plate number OOF 910, and that he lived with a handicapped white woman. Officer Baudler went to the neighborhood where the CI said the man lived. Speaking with residents there, Officer Baudler determined that Lee Newell was the person the CI was referring to. Officer Baudler showed Newell's photo to the CI, who confirmed that he was the person selling crack cocaine called Libra or Libray.

On the evening of March 18, 2008, the CI contacted Officer Baudler to say that he had seen Newell around an intersection that night with crack cocaine in his Cadillac. At 10:40

p.m., Officer Baudler, accompanied by Officer Kaylon Fancher, located the Cadillac parked on the side of the street with its headlights on. The officers pulled their marked cruiser behind the Cadillac. Officer Baudler approached the passenger side of the Cadillac while Officer Fancher approached the driver's side. Because of the heavily-tinted windows, the officers could not see inside the vehicle or its occupant.

Opening the driver's door, Officer Fancher told Newell to identify himself and to put his hands on the steering wheel. Officer Fancher could see Newell's left hand on the steering wheel, but could not see his right hand and believed it was reaching for something. Officer Baudler then opened the passenger door, reached in, and grabbed Newell's right arm. The officers removed Newell through the driver's side.

Once outside the vehicle, Officer Baudler observed a plastic bag protruding from Newell's right coat pocket. Believing it

“An investigatory, or Terry, stop without a warrant is valid only if police officers have a reasonable and articulable suspicion that criminal activity may be afoot. Officers must use the least intrusive means of detention and investigation, in terms of scope and duration, that are reasonably necessary to achieve the purpose of the Terry stop. A Terry stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force. However, as part of a lawful Terry stop, officers may take any measures that are reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.”

contained cocaine, Officer Baudler removed the bag from Newell's pocket and verified that it did contain what looked like cocaine. Newell was then handcuffed. After asking Newell if there was anything else on him, Newell responded there was. A second bag of cocaine was found in his pants pocket. Officer Fancher also found \$2,973 on him. After taking Newell to the police station and advising him of his *Miranda* rights, he provided consent to search his house, where additional contraband was found.

Newell appeals the denial of his motion to suppress the evidence found on the night of his arrest. The district court¹ determined that the officers' initial contact with Newell was an investigative detention supported by reasonable suspicion of criminal activity. The court also found that

the officers' act of removing Newell from the Cadillac after observing his right hand reaching for something was justified by officer safety. Finally, the district court determined

that probable cause existed to arrest Newell when Officer Baudler saw, in plain view, a bag of cocaine sticking out of Newell's pocket.

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

"An investigatory, or *Terry*, stop without a warrant is valid only if police officers have a reasonable and articulable suspicion that criminal activity may be afoot. *United States v. Navarrete-Barron*, 192 F.3d 786, 790 (8th Cir. 1999), citing *Terry v. Ohio*, 392 U.S. 1, 25-31 (1968). Officers must use the least intrusive means of detention and investigation, in terms of scope and duration, that are reasonably necessary to achieve the purpose of the *Terry* stop. A *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force. However, as part of a lawful *Terry* stop, officers may take any measures that are reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. *United States v. Hensley*, 469 U.S. 221, 235 (1985).

"Newell does not argue that the officers lacked reasonable suspicion to conduct an investigative detention on the night of March 18. Rather, he contends the officers' conduct of opening the car doors, ordering him to place his hands on the steering wheel, and grabbing his right arm, was an unreasonable use of force. Newell suggests that the officers should have first tried to get his attention to see if he would roll his window down and talk with them, and then ask him to step out of the car where he would not have access to weapons. He argues that because the officers did not use the least intrusive means, the initial encounter was an arrest, requiring probable cause.

"This court concludes that the officers acted reasonably and within the confines of a *Terry* stop when they opened the Cadillac's door to view Newell and told him to place his hands on the steering wheel. In *United States v. Navarrete-Barron*, officers had reasonable suspicion that the occupants of a truck were trafficking in drugs. *Navarrete-Barron*, 192 F.3d 786, 790-91 (8th Cir. 1999). Based on this suspicion, the officers stopped the truck, approached with their weapons drawn, ordered the occupants out with their hands in the air, and handcuffed them. Relying on the facts that drug traffickers often possess dangerous weapons and that the officers had some basis to believe the occupants had a 9-millimeter handgun, this court held that the officers were justified in approaching the truck with their guns drawn because it was reasonably necessary for their personal safety.

"Similarly, in *United States v. Ramirez*, this court held that officers did not exceed the bounds of a *Terry* stop based on a reasonable suspicion of drug manufacturing, when they ordered the defendants out of a crawl space at gunpoint and handcuffed them. *Ramirez*, 307 F.3d at 716. This court again noted that drug trafficking is often accompanied by dangerous weapons. ("Firearms are the tools of the drug trade providing protection and intimidation."). See also *United States v. Claxton*, 276 F.3d 420, 423 (8th Cir. 2002) ("There is a close and well-known connection between firearms and drugs...Firearms are known tools of the trade of narcotics dealing because of the dangers inherent in that line of work.")

"Approaching the Cadillac, Officers Baudler and Fancher could not see inside because of the heavily-tinted windows. While they lacked specific information that Newell was armed,

as discussed, dangerous weapons are often used by drug traffickers. The officers were not required to hope Newell was not arming himself behind the heavily-tinted windows while they asked him to roll down the window or step out of the Cadillac. See *Terry*, 392 U.S. at 33 (Harlan, J., concurring) (There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.) Their actions were more limited in scope than those upheld in *Navarrete-Baron* and *Ramires*. Therefore, the officers' acts of opening the car doors and instructing Newell to put his hands on the steering wheel were justified for their protection. When Newell failed to comply with their instruction to place both hands on the steering wheel and was observed reaching for something with his right hand, the officers acted reasonably by grabbing his right arm and removing him from the vehicle. The district court did not err in concluding that the officers did not exceed the bounds of a *Terry* stop.

"Removing Newell from the car, Officer Baudler saw a bag of cocaine hanging out of Newell's pocket. Seeing evidence of a crime provided probable cause to arrest Newell. See *United States v. Sherrill*, 27 F.3d 344, 347 (8th Cir. 1994) (Probable cause to make a warrantless arrest exists when police officers have trustworthy information that would lead a prudent person to believe that the suspect has committed a crime.); *United States v. Pennington*, 287 F.3d 739, 747 (8th Cir. 2002) (plain view of drug activity provides probable cause to arrest). The district court did not err in holding the officers had probable cause to arrest Newell after seeing contraband in plain view. Newell's motion to suppress was properly denied."

SEARCH AND SEIZURE: Stop and Frisk; Vehicle Passengers

United States v. Fernandez,
CA1, No. 09-1058, 4/1/10

In *United States v. Fernandez*, the United States Court of Appeals for the First Circuit dealt with the issue of whether a police officer may request identifying information from passengers in a vehicle stopped for a traffic violation without particularized suspicion that the passengers pose a safety risk or are violating the law. Appellant Lamont Fernandez conditionally pled guilty to being a felon in possession of a firearm after the district court refused to suppress a gun recovered from him following a traffic stop of a car in which he was a passenger. The handgun was discovered after a police officer asked Fernandez for identification, ostensibly to issue a citation under a state seat belt law, and a computer check revealed an active warrant for his arrest. On appeal, Fernandez argues that the district court erred in failing to find that the inquiry into his identity violated both state law and his Fourth Amendment rights.

Upon review, the Court of Appeals for the First Circuit stated, in part, as follows:

"...The United States Supreme Court has long viewed the typical traffic stop to resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry v. Ohio*, 392 U.S. 1 (1968)]. *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984); see also *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009) (See: *CJI Legal Briefs*, Volume 14, Issue 1, Spring, 2009, at page 27. Like the reasonable suspicion that criminal activity is afoot in the *Terry* context, the

detection of a traffic violation permits officers to effect a limited seizure of the driver and any passengers consistently with the Fourth Amendment. See *Johnson*, 129 S. Ct. at 788; *Brendlin v. California*, 551 U.S. 249, 255 (2007) (holding that during a traffic stop an officer seizes everyone in the vehicle, not just the driver).

“The Court has explicitly extended *Terry* principles to the traffic-stop context and allowed officers to take similar measures to protect their safety, notwithstanding modest additional intrusion on the privacy rights of drivers and passengers. See generally *Johnson*, 129 S. Ct. at 786 (describing *Terry*’s application in a traffic-stop setting); also see also page 787 (noting that, ‘as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle, so the additional intrusion on the passenger is minimal). Thus, the Court has held that officers may order the driver and any passengers to get out of the car until the traffic stop is complete, see *Maryland v. Wilson*, 519 U.S. 408, 415 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 & n.6 (1977), and the officers may conduct a frisk for weapons upon reasonable suspicion that the car’s occupants are armed and dangerous, *Johnson*, 129 S. Ct. at 787.

“The Court has further “recognized that traffic stops are ‘especially fraught with danger to police officers,’ (quoting *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)), and that all occupants of a vehicle pose a safety risk, *Wilson*, 519 U.S. at 413. The Court acknowledged that the driver is in a unique position because there is probable cause to believe that [he or she] has committed a minor vehicular offense, while there is no such reason to stop or detain the passengers. Importantly, however, as

reiterated by the Court in *Johnson*,

the risk of a violent encounter in a traffic-stop setting stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. The motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

“Of particular significance in this case is the Court’s guidance in *Johnson*, its most recent traffic-stop decision, on the permissible scope of such stops. The passenger there, *Johnson*, was in a vehicle that had been stopped because of a suspected car-registration violation. *Johnson* was frisked by an officer who was concerned about the scanner she saw in his pocket, which the officer considered a possible indication of criminal activity, and his clothing, which the officer viewed as consistent with gang membership. The patdown revealed a gun, and *Johnson* was subsequently convicted for unlawful possession of the weapon. The Arizona Court of Appeals reversed the conviction, concluding that the frisk violated the Fourth Amendment because it resulted from an ‘unrelated investigation’ into *Johnson*’s possible gang affiliation, without reason to believe that he was involved in criminal activity.

“The Supreme Court reversed. It held that, because the traffic stop itself was proper, the frisk of *Johnson* would have been lawful if based on reasonable suspicion that he was armed and dangerous.

“Speaking unanimously, the justices rejected the Arizona court’s ruling that the officer’s encounter with *Johnson* was outside the

scope of the original traffic stop. The Court stated that the temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop, ending when the police have no further need to control the scene. The Court tersely asserted that its precedent made plain that an officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. (citing *Muehler v. Mena*, 544 U.S. 93, 100-101 (2005)); see also *Mena*, 544 U.S. at 101 (stating that mere police questioning does not on its own constitute a seizure that requires reasonable suspicion (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991))).

"The precedent leading to the Court's decision in *Johnson* establishes that the unrelated matters an officer may probe include the identity of the detained individuals. The Court repeatedly has held that police requests for identifying information typically do not trigger Fourth Amendment concerns. See *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177,(2004) (In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment); *INS v. Delgado*, 466 U.S. 210, 216 (1984) (Interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.). In *Mena*, the Supreme Court confirmed that independent justification for identity inquiries also is unnecessary when a lawful detention is underway, unless such questioning prolongs the detention. *Mena*, 544 U.S. at 101 (noting that, where questioning did not extend the detention, there was no

additional seizure within the meaning of the Fourth Amendment, and, hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status).

"Although the Court has not explicitly held that an inquiry into a *passenger's* identity is permissible, its precedent inevitably leads to that conclusion. The Court stated in *Hiibel* that obtaining a suspect's name in the course of a *Terry* stop serves important government interests because knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. To the extent a risk of violence may be tied to such background characteristics, the officer is equally vulnerable whether these characteristics apply to a driver or a passenger. Moreover, as we recently observed in rejecting a passenger's claim that inquiries into his identity unreasonably extended a traffic stop, the Supreme Court has allowed officers to, as a matter of course, take the arguably more intrusive step of ordering passengers out of a vehicle during a valid traffic stop without any individualized suspicion or justification.

"With these principles in mind, we consider Fernandez's contention that the inquiry into his identity violated his Fourth Amendment rights. Fernandez concedes the lawfulness of the traffic stop, which initiated the seizure of him and the two other occupants of the car. Officer Pistolese asked the driver and both passengers for their identifying information at the same time, and he then returned to his cruiser to check for active warrants. So far as the record shows—and Fernandez does not argue otherwise—Pistolese discovered

the active warrant for Fernandez as part of the same radio communication in which he learned that neither of the other two men had backgrounds requiring further action. Hence, neither the request for Fernandez's identity nor the records check prolonged the duration of the original stop. The encounter was extended only after the active warrant was discovered, at which point the further detention of Fernandez was independently justified. In these circumstances, no Fourth Amendment violation occurred.

"Other circuits had concluded before *Johnson* that officers could properly ask a passenger for identification in circumstances similar to those before us, and *Johnson's* discussion of the permissible scope of a traffic stop has only strengthened such precedent. See, *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir. 2007) (stating, in the context of a passenger inquiry, that the police may ask people who have legitimately been stopped for identification without conducting a separate Fourth Amendment search or seizure. (If an officer may 'as a matter of course' and in the interest of personal safety order a passenger physically to exit the vehicle, he may surely take the minimally intrusive step of requesting passenger identification.) (citing *Wilson*, 519 U.S. at 410); *United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (Because passengers present a risk to officer safety equal to the risk presented by the driver, an officer may ask for identification from passengers and run background checks on them as well.) (citing *Wilson*, 519 U.S. at 413-414).

"We therefore hold that, based on the record before us, no Fourth Amendment violation occurred."

SEARCH AND SEIZURE:
**Traffic Stop; Questions Unrelated
 to the Basis of the Traffic Stop**

United States v. Everett,
 CA6, No. 09-5111, 4/6/10

Editor's Note: *One of the most difficult legal areas for the patrol officer is questioning of an individual stopped for a traffic violation on matters unrelated to the basis for the stop. There is no bright line law for the patrol officer to follow and the courts review these questions in a totality of the circumstances approach. In the following case the Court of Appeals for the Sixth Circuit reviews several cases from the various circuits. Certain sentences have been highlighted in an attempt to provide some guidance for the reader. This case is followed by an Eighth Circuit Court of Appeals decision on a similar issue.*

In *United States v. Everett*, the Court of Appeals for the Sixth Circuit stated that this case presents them with an issue of first impression in this circuit: under *Muehler v. Mena*, 544 U.S. 93 (2005), and *Arizona v. Johnson*, 129 S. Ct. 781 (2009), when, if ever, may an officer conduct questioning during a traffic stop that (1) is unrelated to the underlying traffic violation, (2) is unsupported by independent reasonable suspicion, and (3) prolongs the stop by even a small amount?

Even before he was arrested, April 15, 2008 was shaping up to be a bad day for Harvey Everett. That evening, he had helped his estranged wife (with whom he was in the process of obtaining a divorce) move into a new house. At her insistence, Everett had retrieved some of the possessions that he had been storing with her, including a shotgun. By the time he had finished, it was approximately

8:30 p.m. This being tax day, however, Everett needed to get to the office of Advance Financial, a tax-preparation company, before closing time — which he believed to be 9:00 p.m. — in order to seek help filing for an extension.

A few minutes before 9:00, Detective Morgan Ford, sitting in her patrol car on a Nashville thoroughfare, saw Everett drive by at a high rate of speed. Ford was a member of the Nashville Police Department's "Flex Team," which she described as "an aggressive patrol unit designed to make traffic stops and *Terry* stops in high-crime areas to reduce crime." In other words, as Everett characterizes it, Ford was planning to make pretextual traffic stops "with the real purpose of trying to ferret out other types of crime."

Ford followed Everett to the Advance Financial office. As Everett parked, she pulled up next to him with her lights on and approached his vehicle. At that point, if not before, Ford would have seen that Everett was a middle-aged African-American male. She asked Everett (who was still in his car) for his license, registration, and proof of insurance. Everett admitted that his license was suspended, but produced alternate identification and proof that he was in the process of paying off the required fines to get his license back. At that point, Ford smelled alcohol on Everett's breath.

Ford then asked Everett to step out of the vehicle, and he readily complied. Ford did not immediately continue with what she testified was standard traffic-stop procedure — i.e., checking for registration and proof of insurance. Nor did she directly proceed to write Everett a speeding ticket. Instead, Ford

at once asked him "if he had anything illegal on his person, any weapons or narcotics or anything like that, or anything illegal in his vehicle." As the government concedes, Ford had no particularized basis to suspect that Everett possessed any weapons, drugs, or other contraband — although she testified that, in her experience, it was very common for people to have firearms in their vehicle after they have been drinking.

Everett responded that he "had an open forty-ounce beer and a .410 shotgun, which he knew he was not supposed to have because he was a convicted felon. Ford asked what his conviction was for, and he answered "drugs." Ford then asked if Everett had "any other weapons or anything else on his person she needed to know about." He said he did not. Ford asked if she could check; Everett agreed. Upon conducting a pat-down, she found two baggies of marijuana in his jacket pocket. Ford handcuffed Everett, Mirandized him, and placed him in her squad car. She then searched Everett's vehicle, where she found the .410 shotgun, which was unloaded and wrapped in a black trash bag, on the floorboard of the back seat. She also found the open forty-ounce beer, as well as a set of digital scales with white powder residue, which field-tested positive for crack cocaine.

Everett was indicted on one count of possessing a firearm as a felon. Everett moved to suppress the evidence and the statements obtained during the traffic stop. On July 14, 2008, the district court initially granted the motion, ruling that, in the absence of independent reasonable suspicion, Ford's questions on matters unrelated to the traffic stop rendered the stop unreasonable under the Fourth Amendment and that the

shotgun was therefore fruit of the poisonous tree. The government filed a motion for reconsideration, and on August 29, 2008, the district court vacated its prior order and denied Everett's suppression motion. Everett entered a conditional guilty plea, reserving the suppression issue for appeal.

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

"Everett does not argue—nor could he—that the traffic stop was invalid at its outset. Even if Ford's decision to stop him for a traffic violation was a pretext to fish for evidence of other crimes, as the record suggests was the case, the constitutional reasonableness of traffic stops under the Fourth Amendment does not depend on the actual motivations of the individual officers involved. *Whren v. United States*, 517 U.S. 806 (1996). Everett admits that he was speeding, and this alone is enough to render the stop lawful under the Fourth Amendment at its initiation.

"Of course, a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). We must therefore determine whether Ford's execution of the traffic stop complied with the standard for temporary detentions set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny. To qualify as reasonable seizures under the Fourth Amendment, *Terry* detentions must be limited in both scope and duration." *Florida v. Royer*, 460 U.S. 491, 500 (1983); see also *United States v. Hensley*, 469 U.S. 221, 235 (1985) (stating that 'length and intrusiveness' of a stop are relevant to *Terry* analysis). *Under Terry's duration prong, a stop must last no longer*

than is necessary to effectuate the purpose of the stop. Under its scope prong, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

"In this case, the district court initially concluded that Ford violated *Terry's* scope prong by inquiring about weapons or narcotics in the absence of independent reasonable suspicion of a *firearm or drug* offense. At first blush, this conclusion has some appeal: arguably, questions about weapons or drugs are not reasonably related to the circumstances which justified the traffic stop in the first place, and are not necessary to verify the officer's suspicion of a traffic violation. Indeed, for a time, this was the law of several of our sister circuits. See, e.g., *United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001) (An officer must...restrict the questions he asks during a stop to those that are reasonably related to the justification for the stop.); *United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999) ("Additional 'fishing expedition' questions...are simply irrelevant, and constitute a violation of *Terry*."). A contrary rule, the Tenth Circuit reasoned, would effectively write *Terry's* scope prong out of existence. See *United States v. Holt*, 264 F.3d 1215, 1228 & n.3 (10th Cir. 2001).

"We never joined those circuits in categorically restricting the topic of officers' questions during traffic stops. *In fact, in one case, we held that an officer did not violate Terry by asking "a few" off-topic questions during a traffic stop, including whether there was anything illegal inside the automobile, in the absence of any reasonable suspicion of illegal activity beyond the traffic violation.* See *United States v. Burton*, 334 F.3d 514, 515 (6th Cir. 2003). We took particular

note that the traffic stop took place in a known high-crime area at 11:30 p.m. and that the record provided no reason to suspect either that these questions were unusually intrusive or that asking them made this traffic stop any more coercive than a typical traffic stop. Other circuits went further, holding that officers could subject motorists to some degree of unrelated questioning during traffic stops as a matter of course.

“This circuit split was resolved in *Muehler v. Mena*, 544 U.S. 93 (2005), in which the Supreme Court gave its imprimatur to wide-ranging questioning during a police detention. There, the police had entered a house to execute a valid search warrant for deadly weapons and evidence of gang membership. Although the police did not possess reasonable suspicion that anyone in the house was an illegal immigrant, an Immigration and Naturalization Service officer accompanied the police during the search. The house’s occupants were lawfully detained while the police executed the warrant. While the search was being carried out, the INS officer asked the detained occupants various immigration-related questions. A unanimous Court reversed the appellate court’s holding that this off-topic questioning violated the Fourth Amendment, focusing on the fact that the questioning did not prolong the detention:

The appellate court’s holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have held repeatedly that mere

police questioning does not constitute a seizure.” *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); *see also INS v. Delgado*, 466 U.S. 210, 212, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984). “*Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual. As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment.”* Hence, *the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status. The initial detention was lawful; the Court of Appeals did not find that the questioning extended the time Mena was detained. Thus no additional Fourth Amendment justification for inquiring about Mena’s immigration status was required.*

“Although *Muehler* was not a traffic-stop case, its reasoning logically applies to traffic stops, and the federal courts of appeals readily extended its holding to the traffic-stop context. Most recently, in *Arizona v. Johnson*, 129 S. Ct. 781 (2009), another unanimous opinion, the Court removed all doubt that *Muehler’s* reasoning applies to traffic stops. (*An officer’s inquiries into matters unrelated to the justification for the traffic stop...do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.*) *Johnson* involved an officer’s questions to an automobile’s passenger about gang affiliation while a second officer was attending to the driver’s license, registration, and insurance information. Thus, as in *Muehler*, the questioning in *Johnson* had no effect on the overall duration of the seizure. *Muehler*

and *Johnson* are not absolutely on all fours with this case, however, as neither party disputes that Ford's initial question about 'weapons or narcotics or anything illegal' in theory extended the stop by a few seconds. Moreover, neither of those cases specifically addressed what the outcome would have been if the questioning at issue *had* prolonged the defendants' respective seizures. Therefore, we must look to the reasoning underlying *Muehler* and *Johnson*, and to the animating principles of the Supreme Court's Fourth Amendment case law as a whole, to determine whether the questioning here was permissible.

"The first decision we must make is whether to construe *Muehler* and *Johnson* as establishing a bright-line 'no prolongation' rule, under which any extension of a traffic stop due to suspicionless extraneous questioning—no matter how brief—is per se unreasonable. Such a rule would not be without some textual basis: the *Johnson* Court stated that unrelated questions are permissible so long as those inquiries do not *measurably* extend the duration of the stop. In this age, when even cheap wristwatches accurately mark off time in milliseconds, there is no doubt that Ford's question took up a quantum of time large enough to be measured. Everett also argues that a strict no prolongation" rule is necessary to prevent abuse of the wide discretion to stop errant motorists that police officers already enjoy under *Whren*. This is a subject of legitimate concern.

"Nevertheless, the overwhelming weight of authority militates against a bright-line 'no prolongation' rule. First, with respect to the relevant passage from *Johnson*, we note that another definition of the word 'measurable' is 'significant' or 'great enough to

be worth consideration.' *Webster's Third New International Dictionary Unabridged*. Only this definition is consistent with *Johnson's* reliance on *Muehler*, which in turn relied on *Illinois v. Caballes*; in *Caballes*, the Court had held that a dog sniff performed during a traffic stop does not violate the Fourth Amendment if the dog sniff does not cause the stop to be prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. *Muehler*, 544 U.S. at 101.

"More broadly, the Supreme Court has repeatedly emphasized, across a variety of contexts, that the ultimate touchstone of the Fourth Amendment is 'reasonableness.' *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) Accordingly, the Court's Fourth Amendment jurisprudence has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. We also note that each of our sister circuits to confront this question since *Muehler* has refused to adopt a bright-line 'no prolongation' rule.

"Finally, we find it significant that Everett's proposed no-prolongation rule would provide little actual protection against police abuses. *Muehler* and *Johnson* make clear that an officer may ask unrelated questions to his heart's content, provided he does so during the supposedly dead time while he or another officer is completing a task related to the traffic violation. Thus, a police officer intent on asking extraneous questions could easily evade *Everett's* proposed rule—by delegating the standard traffic-stop routine to a backup officer, leaving himself free to conduct unrelated questioning all the while, or simply by learning to write and ask questions at the same time.

“Because the vast weight of authority is against a bright-line rule, and because such a rule would not even serve its intended purpose as a bulwark against pretextual police activity, we join our sister circuits in declining to construe *Muehler* and *Johnson* as imposing a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop.

“Of course, this raises a second important question: if *some* prolongation is permissible under *Muehler* and *Johnson*, how much is too much? Once again, those decisions themselves are silent, and commentators have noted the difficulty in formulating a principled rule.

“So far, our sister circuits have given their blessing to prolongations greater than the several seconds at issue here. See *Chaney*, 584 F.3d at 26 (holding that a ‘delay of approximately two minutes’ for unrelated questioning was minimal and did not measurably extend the duration of the stop); *Derverger*, 337 F. App’x at 36 (We conclude that the five minutes of unrelated questioning did not significantly extend the time *Derverger* was detained.); *Olivera-Mendez*, 484 F.3d at 511 (holding that a twenty-five-second delay to ask three brief unrelated questions did not violate the Fourth Amendment); *Alcaraz-Arellano*, 441 F.3d at 1259 (holding that a delay of less than ninety seconds did not appreciably lengthen the detention). Our sister circuits have also found significantly longer delays unlawful. See, e.g., *United States v. Peralez*, 526 F.3d 1115 (8th Cir. 2008) (holding that the Fourth Amendment was violated where, three minutes into a traffic stop, the officer told the driver he would receive a warning ticket, but then spent 13 minutes questioning him primarily about drugs, absent any

reasonable suspicion, without issuing a ticket). Nevertheless, having just refused to set a bright line at zero, we cannot very well select *another* arbitrary quantity of time and proclaim that any prolongation less than that amount is categorically ‘de minimis’—as convenient as such a rule might be.

“Rather, because the touchstone of any Fourth Amendment analysis is reasonableness, we must conduct a fact-bound, context-dependent inquiry in each case. Furthermore, we conclude that it would be inappropriate merely to evaluate the reasonableness of *the interval of prolongation* in isolation. Instead, *the proper inquiry is whether the totality of the circumstances surrounding the stop indicates that the duration of the stop as a whole—including any prolongation due to suspicionless unrelated questioning—was reasonable.*

“The Supreme Court has provided some abstract guidance, noting that in assessing whether a stop is too long in duration, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. *Sharpe*, 470 U.S. at 686. In other words, the overarching consideration is the officer’s diligence—his persevering or devoted application to accomplish the undertaking of ascertaining whether the suspected traffic violation occurred, and, if necessary, issuing a ticket. The question of the officer’s diligence, as with so much else in the Fourth Amendment context, is determined under the totality of the circumstances.

“Importantly, in evaluating whether an officer’s prolongation of a traffic stop through extraneous questions indicates a lack of

diligence, the *subject* of those questions, no less than their quantity, is part of the ‘totality of the circumstances’ of the stop, and is therefore a relevant consideration. That is to say, some questions are farther afield than others. For instance, even our sister circuits that, pre-*Muehler*, took the most restrictive view toward traffic-stop questioning permitted certain locomotion-related inquiries not strictly directed to the motorist’s conduct at the time of the stop, such as the motorist’s travel history and travel plans and the driver’s authority to operate the vehicle, because such questions may help explain, or put into context, why the motorist was committing the suspicious behavior the officer observed. Such context-framing questions will rarely suggest a lack of diligence.

“Additionally, the Supreme Court has emphasized that ‘the safety of the officer’ during a traffic stop is a ‘legitimate and weighty’ interest, *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977); accordingly, there has been widespread agreement—both before *Muehler* and since—that officers conducting a traffic stop may inquire about dangerous weapons. Questions directed toward officer safety, therefore, do not bespeak a lack of

“By contrast, if the totality of the circumstances, viewed objectively, establishes that the officer, without reasonable suspicion, definitively abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation, this would surely bespeak a lack of diligence. So, too, if the circumstances establish that, over the course of the entire stop, “questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the motorist.”

diligence. At other times, however, an officer’s questions will be relevant only to ferreting out unrelated criminal conduct. Because the reasonable diligence standard does not require an officer to move at top speed, here, too, some amount of questioning is permissible—so long as the officer’s overall course of action during a traffic stop, viewed objectively and in its totality, is reasonably directed toward the proper ends of the stop. By contrast, if the totality of the circumstances, viewed objectively, establishes that the officer, without reasonable suspicion, definitively

abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation, this would surely bespeak a lack of diligence. So, too, if the circumstances establish that, over the course of the entire stop, “questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the motorist.

“Judged by this standard, this case is not remotely close. First of all, Ford’s question specifically raised the subject of ‘weapons,’ which is reasonably related to the ‘legitimate and weighty’ consideration of officer

safety. *Mimms*, 434 U.S. at 110. While safety considerations are always relevant, they have even greater salience here, as Ford had grounds to suspect that Everett was intoxicated. See *Marvin v. City of Taylor*, 509 F.3d 234, 246 (6th Cir. 2007) (noting that drunk persons are generally unpredictable, such that extra police precautions may be justified in confronting an intoxicated suspect). And, while Ford also mentioned ‘narcotics’ and other ‘illegal’ items—which are less directly related to officer safety—the additional delay caused by the insertion of several extra words, under the totality of the circumstances, does not signify a lack of diligence. We emphasize that Ford asked only a single question before Everett confessed to possessing an illegal gun and an open container of alcohol, giving her probable cause to arrest him and search the car. It cannot be said that this single question, in the situation Ford confronted, constituted a *definitive* abandonment of the prosecution of the traffic stop in favor of a *sustained* investigation into drug or firearm offenses. Nor did this single question, taking up several seconds, constitute the bulk of the interaction between Ford and Everett. Accordingly, Ford’s questioning did not render the traffic stop an unreasonable seizure under the Fourth Amendment.

“In concluding, we caution that the rule of *Muehler* and *Johnson*—i.e., that extraneous questions are a Fourth Amendment nullity in the absence of prolongation—is premised upon the assumption that the motorist’s responses are voluntary and not coerced. *We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual... as long as the police do not convey a message that compliance with their requests is required.*

Bostick, 501 U.S. at 434-35. The Court that decided *Muehler* and *Johnson* clearly believed that questioning during a traffic stop is not *ipso facto* coercive under *Royer* and *Bostick*. See *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984) (recognizing that ‘the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions’). However, there is nothing in *Muehler* or *Johnson* that overrules the Court’s earlier statements that *sufficiently* coercive suspicionless questioning triggers the Fourth Amendment.

“Accordingly, as we construe *Muehler* and *Johnson*, sufficiently coercive unrelated questioning during a traffic stop, in the absence of separate reasonable suspicion, violates the Fourth Amendment—prolongation or no. See *Burton*, 334 F.3d at 518-19 (pre-*Muehler*, upholding brief unrelated questioning where, inter alia, the record provided no reason to suspect that asking the questions made this traffic stop any more coercive than a typical traffic stop”); cf. *United States v. Walton*, 258 F. App’x 753, 759 (6th Cir. 2007) (stating that, where officer falsely informed the driver that his detention would be indefinitely prolonged, driver’s subsequent consent to automobile search was not voluntarily given).

“As there were no allegations of especially heavy-handed police conduct in this case, however, we leave for another day the question of when suspicionless extraneous questioning during a traffic stop crosses the line from consensual into coercive.”

For the reasons described above, the Sixth Circuit Court of Appeals affirmed the district court's denial of Everett's suppression motion and held that the questioning here did not violate the Fourth Amendment.

SEARCH AND SEIZURE:
Traffic Stop; Minimal Delay

United States v. Norwood,
CA8, No. 09-3296, 3/28/10 [Unpublished]

The issue of traffic stops was also before the Court of Appeals for the Eighth Circuit in *United States v. Norwood*, where a deputy sheriff pulled Richard Norwood over and found a kilogram of cocaine in his car. Norwood moved to suppress the cocaine, arguing that the officers violated his Fourth Amendment rights both in the initial stop and by detaining him without probable cause.

Sergeant Edward Joseph Van Buren of the Douglas County (Nebraska) Sheriff's Department pulled Norwood over for following too closely and not traveling the minimum speed. Norwood said he was heading back home to Ohio after attending his brother's wedding over the weekend in California. This made Van Buren suspicious because it was a long way to drive for a weekend. Norwood was unable to locate the vehicle's registration, and after handing Van Buren his driver's license and insurance card, said the car belonged to his nephew. This too made Van Buren suspicious because the car was insured under Norwood's name, and in Van Buren's experience this is a classic tactic to distance oneself from a vehicle that has contraband. Van Buren testified that Norwood appeared more nervous than people normally do. Van Buren also stated the fast-food wrappers and lack of luggage in the car made

him suspicious, and that Norwood made inconsistent statements about whether his luggage was in the trunk or in the passenger compartment. Van Buren decided to check the vehicle's registration and Norwood's driver's license through the El Paso Intelligence Center because he suspected drug activity and the Center provides information on border crossings. This call took three minutes.

Eventually, Van Buren returned Norwood's license, issuing a verbal warning. He then asked: "Hey, before you leave, can I ask you some additional questions?" Norwood responded: "Go ahead." Van Buren asked if everything in the car belonged to Norwood, to which he again said the car wasn't his. About then, a second officer with a drug-sniffing dog arrived. Van Buren asked Norwood for permission to search the car. Norwood declined, saying "I just want to get home." Van Buren told him, "Wait right here." About a minute and a half later, the drug-sniffing dog went around Norwood's car, and indicated the trunk. Searching there, officers found a kilogram of cocaine.

Norwood moved to suppress the cocaine. A magistrate judge concluded that (1) the initial stop was valid as Van Buren witnessed two traffic violations, (2) Norwood's inconsistent statements about his luggage provided reasonable suspicion to prolong the stop for further investigation, (3) the canine sniff took place within minutes and caused a de minimis intrusion, and (4) the positive alert from the canine provided probable cause to search the vehicle. The magistrate recommended that the motion to suppress be denied.

Agreeing, the district court found that his nervousness, the fast-food wrappers, his

explanation for the trip, his inconsistent statements about the luggage, and his failure to produce the vehicle's registration, taken together, constituted reasonable suspicion to continue his detention. The district court also ruled that Norwood was detained only a minute and a half from the time he refused consent to search until the drug dog deployed, and that this detention was only a de minimis Fourth Amendment intrusion. Norwood appeals, arguing (1) there was no reasonable suspicion to continue the traffic stop after the officer issued his warning, and (2) despite this court's previous holdings, the Fourth Amendment does not allow de minimis intrusions.

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

"Norwood first argues that the dog sniff leading to the discovery of the cocaine resulted from an unconstitutionally prolonged traffic stop. 'Dog sniffs of the exterior of a vehicle are not searches under the Fourth Amendment.' *United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007). 'Such a dog sniff may be the product of an unconstitutional seizure, however, if the traffic stop is unreasonably prolonged before the dog is employed.' *Suitt*, 569 F.3d at 870, citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

"Norwood's detention was not unreasonably prolonged. Norwood was validly pulled over. He argues that Van Buren's questions during the stop about luggage, ownership of the car, and destination, along with his decision to call the El Paso Intelligence Center (rather than police dispatch), unreasonably extended the stop. However, having made a valid traffic stop, the police officer may

detain the offending motorist while the officer completes a number of routine but somewhat time-consuming tasks related to the traffic violation, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. 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. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999).

"Here, everything Van Buren did until issuing the warning was within the scope of a permissible traffic stop, and thus reasonable.

"After issuing the warning, Van Buren asked: 'Hey, before you leave, can I ask you some additional questions?' Norwood responded: 'Go ahead.' So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and implicates no Fourth Amendment interest. *United States v. White*, 81 F.3d 775, 779 (8th Cir. 1996) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). During the one-minute discussion after the issuance of the warning, the stop was consensual. Van Buren did not indicate that Norwood had to remain and talk with him, either implicitly or explicitly. On the contrary, Van Buren's question indicated that compliance was voluntary.

"However, the consensual encounter clearly became non-consensual after about a minute. Van Buren asked if he could search Norwood's car. Norwood stated 'I just want to get home.' Van Buren told him, 'Wait right here.' At that point, no reasonable person would have felt

free to go. The issue is whether Norwood was illegally detained for the minute and a half between the time he said he wanted to get home, and the time the dog found the cocaine. Norwood acknowledges that under this court's precedent a *de minimis* delay does not violate the Fourth Amendment. See *United States v. Rivera*, 570 F.3d 1009, 1014 (8th Cir. 2009) (holding that a two-minute delay while a dog sniffs around a car is *de minimis* and does not violate the Fourth Amendment); *United States v. Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (same); \$404,905.00 in *U.S. Currency*, 182 F.3d at 646. Norwood contends that the Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), calls this court's precedent into question. *Caballes* states, 'A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.' This court previously rejected this argument:

At most, Alexander's detention was extended some four minutes from the point at which he was notified that he would receive a warning ticket to the point at which the dog sniff was completed. Alexander contends that we should consider overruling \$404,905.00 and Martin because they are in conflict with the Supreme Court's decision in Caballes. Putting aside the fact that we are not free to reconsider the decisions of other panels of this court, we see no inconsistency between Caballes and those two cases. Because the parties agreed in Caballes that the dog sniff occurred during a legitimate traffic stop, the Court was not called upon to address the question of the length of time that a dog sniff can constitutionally be conducted following the conclusion of a legitimate stop. 543 U.S. at 407, 125 S.Ct. 834. Moreover, the Court

noted that conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise conducted in a reasonable manner. It is precisely this reasonableness inquiry that led us to recognize in \$404,905.00 that the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior.

United States v. Alexander, 448 F.3d 1014, 1017 (8th Cir. 2006), cert. denied, 549 U.S. 1118 (2007). See also *Suitt*, 569 F.3d at 873 ("We have repeatedly upheld dog sniffs that were conducted within a few minutes after a traffic stop ended.").

"Therefore, the minute-and-a-half detention here was a *de minimis* intrusion, and did not violate Norwood's Fourth Amendment rights."