CJI Legal Briefs

Volume 17, Issue 3 **Fall 2012**

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

Edited by Don Kidd

UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

Contents

ARREST: **Blood Alcohol Test; Territorial Jurisdiction**

Pickering v. State, No. CR12-19, 2012 Ark. 280, 6/21/12

On August 8, 2010, Deputy Shawn Harris of the Pope County Sheriff's Office initiated a traffic stop on a vehicle driven by Mackenzie Pickering after observing the vehicle travel onto the shoulder and cross the center line. Harris detected an odor of intoxicants on Pickering's breath and observed that Pickering's eyes were bloodshot and slightly glassy. After performing a series of field sobriety tests, Harris placed Pickering, who was nineteen years old at the time, under arrest for suspicion of underage driving under the influence (DUI). Harris then transported Pickering to the Dardanelle Police Department in Yell County where Harris read Pickering his DUI statement of rights. Pickering agreed to take a breathalyzer test, and the result revealed a blood-alcohol level of .065.1 Pickering was later found guilty of underage DUI in the Pope County District Court and timely appealed to the Pope County Circuit Court.

On May 24, 2011, Pickering filed a motion to suppress. In the motion, he argued that after his arrest, he was transported from Pope County to Yell County, which was outside of Harris's jurisdiction. He argued that he was illegally detained in Yell County and asked the court to suppress all evidence, namely the results of the breathalyzer test, stemming from this illegal detention. In response, the State argued that Arkansas law did not prevent a certified law-enforcement officer from transporting a lawfully arrested person outside the officer's

territorial jurisdiction to obtain evidence, or in the alternative, that Pickering had waived any argument regarding the seizure of this evidence by consenting to the breathalyzer test.

A hearing on the motion to suppress was held on July 18, 2011. At the hearing, Harris explained that he transported Pickering to the Dardanelle Police Department because he was not certified to operate the new blood-alcohol content (BAC) analysis machine, the BAC Intoxilyzer, which had been installed at the Pope County Sheriff's Office and the Russellville Police Department. Harris testified that these were the only two BAC analysis machines located in Pope County, and because he had only recently returned from medical leave, he had not yet been certified to operate the machines. Harris also explained that at the time of the arrest, which was approximately 2:33 a.m., there was only one other officer working, who was busy on another call, so there was no other option but to transport Pickering to another county to conduct the BAC test. Harris testified that once he and Pickering arrived at the Dardanelle Police Department, he read him his DUI statement of rights, he understood his rights, and he agreed to the test.

On cross-examination, Harris admitted that he had not checked with the Russellville Police Department to see whether it had an officer available that could administer the BAC test to Pickering. He also agreed that St. Mary's Hospital, which is in Pope County, could have performed a blood or urine test and that a urine sample could have been taken and sent to the State Crime Lab for testing. But Harris clarified that the standard policy is to use a BAC machine.

After hearing arguments from counsel, the court took the matter under advisement. In an order filed July 26, 2011, the court denied the motion to suppress and explained that "Deputy Harris was justified under these circumstances in transporting Defendant out of his jurisdiction and did not lose custody. The test had to be given without delay and in accordance with Health Department regulations." Thereafter, on September 12, 2011, a bench trial was held, at which Pickering was found guilty of underage DUI. In a judgment filed September 14, 2011, Pickering was sentenced to pay costs of $300, to pay a fine of $250, to perform twenty hours of community service, and to attend an alcohol-safety program for underage drivers. Pickering filed a timely notice of appeal on October 11, 2011, based on the denial of his motion to suppress the results of his breathalyzer test. On appeal, he argues that the arresting officer was acting outside of his territorial jurisdiction when he transported Pickering to a different county to perform the breathalyzer test and that the test results were thus unlawfully obtained. Upon review, the Arkansas Supreme Court cited *State v. Hagan*, 819 A.2d 1256 (R.I. 2003) and found, in part, as follows:

"In *Hagan*, the defendant was arrested by members of the Portsmouth, Rhode Island Police Department on suspicion of driving under the influence of alcohol and taken to the Portsmouth police station. Hagan consented to a chemical test; however, Officer Sullivan, the test operator, detected a problem with the breathalyzer machine. After notifying his supervisor of the problem, Sullivan was instructed to transport Hagan to the Middletown Police Department and to use that department's breathalyzer machine.

At trial, Hagan argued that the Portsmouth police had no authority to retain custody of him after crossing the town line into Middletown and that the breathalyzer test results obtained in Middletown should have been suppressed.

"The Rhode Island Supreme Court explained that they consistently have drawn the distinction between an arrest of a suspect that must, both constitutionally and by statute, rest upon probable cause, from the circumstance in which a prisoner, already in lawful custody, is taken outside a municipality for legitimate law enforcement purposes. In this case, Hagan had been lawfully arrested, based upon probable cause, and was in the legitimate custody of the Portsmouth police. It was only while acting in accordance with their duty to gather and preserve evidence for use at trial, that the officers drove Hagan to Middletown for a Breathalyzer test. We are thus satisfied that the Portsmouth police acted appropriately and did not relinquish lawful custody of their prisoner at the town line. This conclusion rests upon the distinction between an arrest and seizure of a suspect outside a municipality's borders—an authority that is limited in scope and recognized only in narrowly-defined circumstances—and the extraterritorial transport of a prisoner who is in lawful custody, for the performance of legitimate law enforcement duties, which we sanction today.

"As a matter of public policy, whether an officer's responsibilities include an extraterritorial transport for access to a blood-alcohol testing machine or any other duty in connection with an arrestee who is in lawful custody, we decline to handcuff the state's law enforcement officials in the performance of their legitimate duties. Most notably under the circumstances now before us, in which the officer acted in apparent good faith, upon consent, and in light of the urgency of obtaining blood alcohol evidence before it is metabolized in the blood, we are satisfied that Sullivan acted pursuant to his lawful authority."

The Arkansas Supreme Court affirmed the denial of the motion to suppress, stating that Deputy Harris's actions were both reasonable and lawful.

ARREST: **Hot Pursuit**

United States v. Anderson
CA8, No. 11-3599, 8/1/12

On August 21, 2008, Manuel Anchondo, an undercover detective with the Kansas City, Missouri, Police Department's Street Narcotics Unit ("SNU"), arranged to purchase cocaine base from Dion Brown in the approximate area of Ninth and Gladstone. Brown instructed Anchondo to call upon arrival. Anchondo had made two prior purchases of cocaine base from Brown, and he had obtained Brown's telephone number after the initial purchase. Anchondo called Brown when he arrived. Shortly after, Johun Anderson exited an apartment at 815½ Gladstone and approached the detective's undercover vehicle.

Anderson entered the officer's vehicle and sold several grams of cocaine base to the detective. Anchondo then notified police surveillance crews it was a "good deal" and to "send the crews for the buy/bust." As he drove away, he observed Anderson, through

his rearview mirror, walking back toward the apartment building.

Matthews Masters, a Kansas City, Missouri, police officer also assigned to the SNU, was positioned near Ninth and Gladstone with four other officers in two unmarked patrol vehicles. When they received confirmation the drug sale had occurred, Masters turned the corner and saw Anderson "standing on the sidewalk in front of the building." Masters did not witness the drug transaction, but identified Anderson by the description Anchondo had provided: a black male with braided hair, shirtless, and wearing blue bandanna-patterned slippers.

When Anderson observed the officers, he "took off running toward the common door of the apartment building." Two officers, Larry Weimhold and Justin Crump, immediately followed Anderson. Anderson proceeded to run up the stairs onto the front porch of the apartment building and entered the common door. Weimhold and Crump pursued Anderson into the building. As Masters approached the building, he observed, through an open window, Anderson running up the stairs. Masters then saw Anderson run up the second flight of stairs and enter the north apartment unit. Because Crump and Weimhold were initially unable to determine which upstairs apartment unit Anderson had entered, they began knocking on doors and announcing, "Police," repeatedly. Masters then ascended the stairs and told the two officers that Anderson had run into the north apartment.

Masters proceeded to open a window in the hallway of the second floor, and along with Weimhold, stepped onto the balcony of the north apartment unit. When the officers looked into the north apartment, they observed two black males and a white female moving "back and forth between rooms, and it was hurried movements."

At the same time, a woman later identified as Shiloh Horn, approached the apartment building and told the officers she was the renter of the north apartment. Masters then left the balcony and explained to Horn that the officers were conducting a "buy/bust" operation and the subject had fled into her apartment. Horn responded by saying the only person who should be in her apartment was her boyfriend, later identified as Anderson. Masters asked Horn if the officers could go into her apartment, and Horn said "she was more than willing to let the officers go in and get those people out of her apartment."

Before handing the key over to Masters, Horn asked if she could call her boyfriend and see if he was inside the apartment. Horn made the call and informed Masters that Anderson was inside the apartment. Masters then asked Horn if she would ask Anderson to come out of the apartment. Horn called Anderson again, and about one minute later, Anderson opened the apartment door.

The officers then detained Anderson and two other individuals, Brown and Samantha Tigner, just inside the front door of the apartment. The three individuals were taken out of the building. Anchondo then drove by on the street and identified Anderson as the person who had made the drug sale earlier that evening.

Masters asked Horn for consent to do a protective sweep to ensure that no other individuals were still in the apartment. Horn consented. During the sweep, the officers observed crack cocaine lying on a bed, plastic baggies swirling inside of a toilet bowl, and the butt of a rifle in an opened closet. The officers did not immediately seize the items, and Horn was told law enforcement officers were going to seek a search warrant for the apartment.

A search warrant was obtained later that evening. The search recovered the items previously mentioned, as well as a High-Point 9 mm rifle, a 9 mm Ruger handgun, twenty-three rounds of live 9 mm ammunition, two digital scales, two cell phones, and $2,900 in United States currency.

On May 20, 2009, Anderson and Brown were charged in a three-count indictment with (1) conspiracy to distribute fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, (2) possession with intent to distribute fifty grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), and (3) possession of two firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A).

Anderson filed a motion to suppress the evidence seized pursuant to the search warrant, which the district court denied. On April 26, 2011, as part of a conditional plea agreement, Anderson pleaded guilty to possession with intent to distribute five or more grams of cocaine base and possession of a firearm in furtherance of a drug trafficking crime. Anderson was sentenced to consecutive terms of 120 and 60 months' imprisonment, respectively.

In this case, the Court of Appeals for the Eighth Circuit stated police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. The Court found, in part, as follows:

"Hot pursuit can, without more, justify a warrantless entry. *United States v. Schmidt,* 403 F.3d 1009, 1015 (8th Cir. 2005). In *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984), the Supreme Court instructed us to consider two factors in determining whether 'hot pursuit' creates an exigency: (1) the gravity of the underlying offense, and (2) whether the government can demonstrate an 'immediate or continuous' pursuit of the suspect from the scene of the crime.

"The first factor, the gravity of the underlying offense, establishes the officers' entry onto the balcony of the apartment was lawful because Anderson had committed the 'serious offense' of drug trafficking prior to fleeing the scene of the exchange. In *United States v. Clement,* 854 F.2d 1116 (8th Cir. 1988), we held 'cocaine trafficking is…a serious offense.' Where the police attempt to make an arrest for a 'serious offense' in a public place, they may pursue the suspect into a private home or business without obtaining a warrant. *United States v. Santana*, 427 U.S. 38, (1976); *Minnesota v. Olson,* 495 U.S. 91, (1990); *Welsh*, 466 U.S. at 753 (1984). Therefore, because the police were in pursuit of Anderson for committing the 'serious offense' of drug trafficking, the government satisfies the first prong of the 'hot pursuit' inquiry.

"The government must also demonstrate, however, there was an 'immediate or continuous' pursuit of Anderson that justified the officers entry onto the balcony of the

apartment. In *Welsh*, the Supreme Court held the pursuit of an individual suspected of operating a motor vehicle while intoxicated to his home and into his bedroom, after spending time discussing the events with the sole witness, was not 'immediate or continuous' pursuit of the suspect from the scene of the crime. The Court held the arrest to be unlawful because no adequate exigent circumstances existed to justify the warrantless entry into the suspect's home. This case, however, is distinguishable from *Welsh*. The 'buy/bust' cocaine transaction between Anchondo and Anderson occurred on a public street, and Anderson fled into Horn's apartment building upon seeing the police. The police immediately pursued Anderson into the apartment building and followed him to the upstairs apartment units. As the officers actively pursued Anderson, they entered the apartment balcony to get a visual on Anderson. Further, unlike the officers in *Welsh,* the officers here did not, at any point, give up the pursuit. The police immediately and continuously pursued Anderson after he fled the scene of the drug transaction, and the police were justified in entering the balcony of the apartment under the doctrine of 'hot pursuit.'"

CELLUAR TELEPHONE:
Reasonable Expectation of Privacy

United States v. Skinner
CA6, No. 09-6497, 8/14/12

After someone was stopped in Flagstaff, Arizona, carrying $362,000 to a marijuana supplier, DEA authorities learned that Phillip Apodaca of Tucson, Arizona, would send marijuana from Mexico to Tennessee via couriers, using pay-as-you-go cell phones for couriers to communicate. Apodaca provided false names and addresses and was unaware that these phones were equipped with GPS technology. Authorities obtained orders authorizing interception of wire communications from two phones subscribed in West's name and learned that a truck driver, Melvin Skinner, would meet Apodaca in Tucson to pick up marijuana in a "nice RV with a diesel engine," with his son driving an F-250 pickup truck. Authorities obtained an order authorizing the phone company to release data for two secret phones and discovered that one was in Candler, North Carolina, West's primary residence. Continuously "pinging" the other phone, authorities located Skinner and his son at a rest stop near Abilene, Texas, with a motor home containing 1,100 pounds of marijuana. The district court denied Skinner's motion to suppress; Skinner was convicted of drug trafficking and conspiracy to commit money laundering. The Sixth Circuit affirmed stating there is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay as-you-go cell phone:

"If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location technology does not change this. If

it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy in the context of this case, just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint."

CIVIL RIGHTS: **Unconstitutional Policy**

Crawford v. Van Buren County Arkansas
CA8, No. 11-1943, 5/21/12

Since 1995, Gloria Crawford has operated a kennel out of her Arkansas home. On March 15, 2005, Van Buren County Animal Control Officer Debby Fogle entered Crawford's property with a search warrant. After Crawford was taken into custody, Fogle and others seized approximately 163 dogs. Crawford ultimately pleaded guilty to 163 counts of animal cruelty. Pursuant to a plea agreement, Crawford forfeited the animals to the county, and provided Fogle with permission to access her property twice a month for a year. Under the agreement, Crawford received a twelve-month suspended sentence. *State v. Crawford,* 281 S.W.3d 736, 737 (Ark. 2008).

On December 13, 2006, Fogle executed another warrant, along with Kay Jordan, the shelter manager of the Humane Society of Pulaski County, Arkansas, and Jaxie Heppner, President of the Beebe, Arkansas, Humane Society. The officials seized 201 dogs, as well as crates, dog food, and other supplies. In a bench trial, Crawford was found guilty of one count of animal cruelty, and her property was forfeited to the county. Crawford was sentenced to one year in jail, with eight months suspended on the conditions that she pay the fines and costs, not keep animals for one year, and have a psychiatric examination within three months, along with treatment.

On appeal to the state circuit court, Crawford's unopposed motion to suppress was granted. After Fogle could not be located, the state's motion to nolle prosequi was granted in May 2009. By this time, the dogs subject to the motion had been adopted. In this section 1983 case, Crawford alleged the defendants violated her constitutional rights by taking her private property without just compensation in violation of the Fifth Amendment, unreasonably searching and seizing her property in violation of the Fourth Amendment, violating her due process rights by failing to timely bring her before a judicial officer while in custody, and violating her due process rights by failing to protect her property. Crawford also alleged certain defendants engaged in a civil conspiracy in violation of her constitutional rights and committed the state law torts of trespass and conversion.

All defendants moved for summary judgment. Considering the county defendants first, the district court construed Crawford's claims against Fogle as official capacity claims. The court concluded there was no evidence to show the seizure of Crawford's property was unconstitutional. Moreover, the court found Crawford failed to exhaust her administrative remedies as to her claims that the county violated her due process rights because she did not move in state court for the return of her property. As for the Humane Society defendants, the court found no evidence the defendants conspired to violate Crawford's constitutional rights. Finally, the court dismissed Crawford's state law claims.

Upon review, the Eighth Circuit Court of Appeals also concluded that the district court properly granted summary judgment on Crawford's claims against the county.

DEATH SENTENCE: **Lethal Injection**

Hobbs v. Jones, No. 11-1128, 6/22/12

In this case, the Arkansas Supreme Court held that Arkansas Statute, Arkansas Code Annotated § 5-4-617, violates the state constitution's separation-of-powers doctrine by granting the Arkansas Department of Corrections (ADC) discretion to determine the kind and amount of drugs to be used in executions by lethal injection.

The Court held that it is evident that the legislature has abdicated its responsibility and passed to the executive branch, in this case the ADC, the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution. The Court held that the statute grants ADC officials discretion to determine the state's lethal injection protocol and, thus, violates the state constitution's separation-of-powers doctrine.

DNA: **Collecting Samples from Individuals Not Convicted of a Crime**

Maryland v. King, No. 12A48, 7/30/12

In *Maryland v. King*, No. 12A48, 7/30/12, in an application for stay by Chief Justice John Roberts, he suspended an April ruling by Maryland's highest court.

Maryland's DNA Collection Act authorizes law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first-degree burglary. In 2009, police arrested Alonzo Jay King, Jr., for first-degree assault. When personnel at the booking facility collected his DNA, they found it matched DNA evidence from a rape committed in 2003. Relying on the match, the State charged and successfully convicted King of, among other things, first-degree rape. A divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests. Maryland filed an application for a stay of that judgment.

In this application, Chief Justice John Roberts of the U.S. Supreme Court stated:

"There is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U. S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. See *United States v. Mitchell*, 652 F. 3d 387 (CA3 2011), cert. denied, 566 U. S. ___ (2012); *Haskell v. Harris*, 669 F. 3d 1049 (CA9 2012), reh'g en banc granted, 2012 WL 3038593 (July 25, 2012); *Anderson v. Commonwealth*, 274 Va. 469, 650 S. E. 2d 702 (2007), cert. denied, 553 U. S. 1054 (2008).

"The decision has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the FBI's national DNA database, the decision renders the database less effective for other States and the Federal Government.

These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented. In addition, given the analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision.

"Finally, the decision subjects Maryland to ongoing irreparable harm. There is, in addition, an ongoing and concrete harm to Maryland's law enforcement and public safety interests. According to Maryland, from 2009—the year Maryland began collecting samples from arrestees—to 2011, 'matches from arrestee swabs from Maryland have resulted in 58 criminal prosecutions.' Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries. That Maryland may not employ a duly enacted statute to help prevent these injuries constitutes irreparable harm.

"King responds that Maryland's eight-week delay in applying for a stay undermines its allegation of irreparable harm. In addition, he points out that of the 10,666 samples Maryland seized last year, only 4,327 of them were eligible for entry into the federal database and only 19 led to an arrest (of which fewer than half led to a conviction). These are sound points. Nonetheless, in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool for several months—a tool used widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court.

"Accordingly, the judgment and mandate are hereby stayed pending the disposition of the petition for a writ of certiorari."

EVIDENCE: **Confrontation Clause**

Williams v. Illinois, No. 10-8505, 6/18/12

At Sandy Williams' bench trial for rape, Sandra Lambatos, a forensic specialist at the Illinois State Police lab, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of Williams' blood. She testified that Cellmark was an accredited laboratory and that business records showed that vaginal swabs taken from the victim, L. J., were sent to Cellmark and returned. She offered no other statement for the purpose of identifying the sample used for Cellmark's profile or establishing how Cellmark handled or tested the sample. Nor did she vouch for the accuracy of Cellmark's profile. The defense moved to exclude, on Confrontation Clause grounds, Lambatos' testimony insofar as it implicated events at Cellmark, but the prosecution said that Williams' confrontation rights were satisfied because he had the opportunity to cross-examine the expert who had testified as to the match.

The United States Supreme Court, by a divided majority, decided that the Constitution did not require require the testimony of Sandra Lambatos, the DNA expert, to be accompanied by the testimony of a Cellmark analysts who conducted the testing that produced the perpetrator's profile relied upon by the expert.

Editor's Note: *In most cases, an analyst who does the testing and prepares the report must go in court and testify and be subject to cross-examination. This case indicates that subsidiary reports or internal work product is not subject to the Confrontation Clause.*

EVIDENCE: **Confrontation Clause; Datamaster's Calibration**

Chambers v. State, CACR 11-1195
2012 Ark. App. 383, 6/13/12

In *Chambers v. State*, Derek Chambers contends that his rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States were violated by the State's failure to produce at trial the person who calibrated the machine used to administer his blood-alcohol-content test.

In support of his argument, Chambers relies upon the Supreme Court of the United States' decision in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). In *Melendez-Diaz*, the Court held that the defendant's right to confrontation was violated when the trial court admitted into evidence certificates of analysis showing that substances seized from the defendant were cocaine when the analysts who performed the testing were not called to testify. Chambers argues that the holding in *Melendez-Diaz* applies to the certificates reflecting Officer Steven Beck's certification and the BAC Datamaster's calibration. The trial court ruled that *Melendez-Diaz* was not applicable in this case and admitted the disputed evidence. Upon appeal, the Arkansas Court of Appeals found, in part, as follows:

"We hold that the trial court did not err in finding that *Melendez-Diaz* did not apply in this case and did not abuse its discretion in admitting the disputed evidence. Although the *Melendez-Diaz* court held that the certificates at issue in that case were testimonial statements subject to the Confrontation Clause because they were affidavits that the declarants would reasonably expect to be used prosecutorily, the majority noted in a footnote that documents pertaining to routine machine maintenance might not be considered testimonial. 129 S.Ct. at 2532 note1. In *Seely v. State,* 373 Ark. 141, 152, 282 S.W.3d 778, 787 (2008), our Supreme Court held that the test for determining whether the introduction of a statement violates the Confrontation Clause 'should remain focused on the circumstances surrounding the statement and whether those circumstances objectively indicate that the primary purpose of the statement is to prove events relevant to criminal prosecution.'

"The certificates at issue in this case are not testimonial statements. These particular certificates were not prepared for the purpose of prosecuting Chambers. They were prepared for the purposes of certifying that Officer Beck had received training on how to use the machine and certifying that the machine at issue was calibrated at a particular time and found to be accurate. The certificates are no more testimonial than a diploma or a certificate indicating that an elevator or a fire extinguisher has been tested and is operable. The certificates fall within the possible exception noted by the Melendez-Diaz court.

"As the certificates showing that Officer Beck is certified to administer the test and that the machine was calibrated are not testimonial

in nature and do not trigger the application of the Confrontation Clause, the trial court did not abuse its discretion in admitting the disputed evidence."

FIRST AMENDMENT: **Medal of Honor; False Claims**

United States v. Alvarez, No. 11-210, 6/28/12

In this case, Xavier Alvarez challenged the Stolen Valor Act, which makes it a crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty if the Congressional Medal of Honor is involved. Alvarez pled guilty to falsely claiming that he had received the Medal of Honor but reserved the right to appeal. The Ninth Circuit held that the Act is invalid under the First Amendment and the United States Supreme Court affirmed that decision.

The Court held that falsity alone does not take speech outside the First Amendment, stating: "While the government's interest in protecting the integrity of the Medal of Honor is beyond question, the First Amendment requires a direct causal link between the restriction imposed and the injury to be prevented; that link was not established. The government had no evidence that the public's general perception of military awards is diluted by false claims or that counter-speech, such as the ridicule Alvarez received online and in the press, would not suffice to achieve its interest. The law does not represent the least restrictive means among available, effective alternatives. The government could likely protect the integrity of the military awards system by creating a database of Medal winners accessible and searchable."

IMPERSONATION OF A POLICE OFFICER: **First Amendment Challenge**

United States v. Chappell
CA4, No. 10-4740, 8/14/12

On October 6, 2009, Douglas Chappell was stopped for speeding by a U.S. Park Police Officer. In an attempt to avoid a speeding ticket, Chappell falsely told the officer that he was a Fairfax County Deputy Sheriff. In fact, Chappell had not been employed by the Fairfax County Sheriff's Office for approximately one year. The officer asked Chappell for his law enforcement credentials, and Chappell replied that he had left them at home. He then produced his Virginia driver's license, pointing out that the license photo depicted him in uniform.

In order to verify Chappell's employment, the officer called the Fairfax County Sheriff's Office, which requested an employee identification number. When asked for his employee identification number, Chappell made one up. He subsequently admitted his lie and was arrested for impersonating a police officer.

Chappell appealed his subsequent conviction, and on appeal, asked the Fourth Circuit to hold the statute under which he was charged as facially unconstitutional under the First Amendment. The Fourth Circuit declined the invitation and affirmed the judgment of the district court.

JAILS: **Medical Conditions; Deliberate Indifference**

King v. Kramer, CA7, No. 11-2204, 5/25/12

During his intake interview, John King informed the jail's nurse that he had asthma, diabetes, a heart problem, high blood pressure, seizures, and mental health problems. The jail contracted medical services from a private company. The doctor, 300 miles away, visited once a week. The doctor did not obtain details about King's existing prescriptions, but scheduled him to be quickly weaned off of a drug that was not on the company's formulary. The drug that was substituted was not normally appropriate for King's conditions. Although King suffered side effects and requested to see a doctor, he was not seen by the doctor for 10 days. Later, when he was convulsing on the floor, the nurse indicated that he was "faking" a seizure. He was left lying on the floor, then moved to a padded cell, where he later died. His widow brought an action under 42 U.S.C. 1983. The district court entered summary judgment for defendants. The Seventh Circuit reversed, in part, stating there was significant evidence that the jail's policies violated King's constitutional rights. They found as follows:

"King's estate must satisfy both an objective and a subjective element. *Estelle*, 429 U.S. at 105; *Roe v. Elyea,* 631 F.3d 843, 857 (7th Cir. 2011). He must first present evidence supporting the conclusion that he had an 'objectively serious medical need.' *Wynn v. Southward,* 251 F.3d 588, 593 (7th Cir. 2001). An objectively serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.' *Zentmyer v. Kendall Cnty.*, 220 F.3d 805, 810 (7th Cir. 2000). He must also demonstrate a genuine issue of fact on the question whether the nurses and officers were aware of this serious medical need and were deliberately indifferent to it. *Wynn,* 251 F.3d at 593. Negligence—even gross negligence—is insufficient to meet this standard, but the plaintiff is not required to show intentional harm. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). The standard is comparable to that required for criminal recklessness.

"A medical professional's deliberate indifference may be inferred when 'the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.' *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261-62 (7th Cir. 1996). Nevertheless, medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In evaluating the evidence, we must remain sensitive to the line between malpractice and treatment that is so far out of bounds that it was blatantly inappropriate or not even based on medical judgment. Although this is a high standard, King is not required to show that he was 'literally ignored.' *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005).

"There is a question of material fact whether Kramer's actions were so far afield from an appropriate medical response to King's seizures that they fell outside the bounds of her professional judgment. Kramer's statements to the nursing students suggests that she had already decided that King was

faking seizures even before she saw him. She was aware that he was withdrawing from alprazolam, and that seizures can result from withdrawal. Upon arriving at the cell, she was unable to get reliable oximeter and blood pressure readings because King's convulsions were too severe. When she then employed the smelling salts test, his response was consistent with a seizure. His face turned blue, which we note is one of the symptoms that requires immediate medical attention, according to the MedlinePlus service of the U.S. National Library of Medicine at the National Institutes of Health. Kramer deliberately ignored the results of the tests she was able to administer. This evidence is enough to raise a question of material fact whether Kramer was subjectively aware that King faced a serious risk of a medical emergency. *Collignon v. Milwaukee Cnty.,* 163 F.3d 982, 989 (7th Cir. 1998).

"If Kramer had chosen to leave King lying on the cell floor after she tried to check on him, perhaps we could have found that her actions amounted to nothing more than gross medical negligence. But Kramer took matters further when she chose to remove King from his cell—where his cellmates could call for help if he experienced another seizure—to a padded cell where the intercom system was difficult to hear, the camera image quality was too poor to clearly identify his movements, and the nurses did not have direct access to him. (And why put him in a padded cell if this was all an act? A jury might see this as evidence that she was aware of a high risk that the seizures were genuine.) This is not a case where reasonable medical minds may differ over the appropriate treatment for King. *Snipes v. DeTella,* 95 F.3d 586, 591 (7th Cir. 1996). It is, rather, analogous to the hypothetical nurse who knows that an inmate faces a serious risk of appendicitis, but nevertheless gives him nothing but an aspirin. *Sherrod v.Lingle,* 223 F.3d 605, 611-12 (7th Cir. 2000). Unlike an inmate suffering from a tooth abscess or broken arm, King was not suffering from a condition that allowed him to call for help. He depended on others to notice his severe hallucinations or seizures and to request emergency care on his behalf.

"King has pointed to significant evidence that the County's policies violated his constitutional rights. Mondry-Anderson was concerned about taking King off alprazolam at booking, but she was required to abide by HPL's policy of switching him to the formulary. King was prescribed dramatic changes in his medication by an 'on-call' physician nearly 300 miles away who took no steps to educate himself about King's condition. These policies caused King to suffer severe seizures that ultimately contributed to his death. We therefore hold that King has presented sufficient evidence to survive summary judgment with respect to the County."

JURY TRIAL: **Failure to Reach a Verdict**

Blueford v. Arkansas, No. 10-1320, 5/24/12

One-year-old Matthew McFadden, Jr., suffered a severe head injury on November 28, 2007, while home with his mother's boyfriend, Alex Blueford. Despite treatment at a hospital, McFadden died a few days later. The State of Arkansas charged Blueford with capital murder (but waived the death penalty). The State's theory at trial was that Blueford had injured McFadden inten¬tionally, causing the boy's

death "[u]nder circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. §5–10–101(a)(9)(A) (Supp. 2011). The defense, in contrast, portrayed the death as the result of Blueford accidentally knocking McFadden onto the ground.

Before the jury concluded deliberations, it reported that it was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. The trial court told the jury to continue to deliberate. The jury did so but still could not reach a verdict, and the trial court declared a mistrial.

All agreed that Blueford could be retried on charges of manslaughter and negligent homicide. At issue was whether he could also be retried on charges of capital and first-degree murder.

Upon review, the U.S. Supreme Court concluded that the jury in this case did not convict Blueford of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a consequence, the Double Jeopardy Clause did not stand in the way of a second trial on the same offenses. Accordingly, the U.S. Supreme Court affirmed the judgment of the Supreme Court of Arkansas.

JUVENILE LAW: **Homicide; Mandatory Life Sentences**

Miller v. Alabama, No. 10-9646, 6/25/12

The United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders.

JUVENILE LAW: **Juvenile Transfer Statute**

C.B. v. State, No. 11-1163
2012 Ark. 220, 5/24/12

In this case, sixteen-year-old C.B. was charged with the felony offenses of capital murder, aggravated robbery, first-degree escape, and theft of property. C.B. filed a motion to dismiss and to declare Ark. Code Ann. 9-27-318 unconstitutional and a motion to transfer to juvenile court.

Arkansas Statute Section 9-27-318(c)(1) provides that when a case involves a juvenile who is at least sixteen years old when he or she engages in conduct that, if committed by an adult, would be a felony, a prosecuting attorney may charge the juvenile in either the juvenile or criminal division of circuit court. Section 9-27-318(e) provides that, upon the motion of the court or of any party, the judge of the division of the circuit court in which a delinquency petition or criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of circuit court. Section 9-27-318(h)(2) provides that, upon a finding by clear and convincing evidence that a case should be transferred to another division of

circuit court, the judge shall enter an order to that effect.

In challenging the constitutionality of section 9-27-318, C.B. contended that the statute, among other things, violated the separation of powers doctrine by improperly vesting in the local prosecuting attorney power to determine which court has initial jurisdiction over certain classes of juveniles. The circuit court denied both motions. The Arkansas Supreme Court affirmed, holding (1) section 9-27-318 was constitutional; and (2) the circuit court did not clearly err in denying C.B.'s motion to transfer.

MIRANDA: **Custodial Interrogation**

United States v. Crooker
CA1, No. 10-2372, 7/27/12

The relevant series of events in this case was triggered by an ongoing Federal Bureau of Investigation ("FBI") investigation of Jake Crooker's uncle, Michael Crooker. The application and affidavit in support of a warrant to search the buildings and grounds of 62 Joseph Avenue, Jake Crooker's residence, were submitted by FBI Special Agent Richard Winfield. The documents primarily described the FBI's evidence against Michael, who does not live at 62 Joseph Avenue. The evidence suggested that Michael was involved in the unlawful manufacture, storage, and interstate shipping of explosives, biological toxins, and weapons. Although Michael did not live at 62 Joseph Avenue, Winfield's affidavit stated that the FBI had reason to believe that Michael had buried ricin near a stump in his brother Stephen's (and Crooker's) backyard at 62 Joseph Avenue. The warrant application included an attachment detailing the items the government sought to seize during the search, including specified firearms and evidence of explosives and biological weapons violations, as well as evidence related to those violations stored on one or more computers.

On July 14, 2004, a warrant was issued to search the grounds and residence at 62 Joseph Avenue for evidence, fruits or instrumentalities of the manufacturing of explosive materials without a license, in violation of Title 18, United States Code, Section 842(a)(1); shipping, transporting or receiving any explosive materials in interstate commerce, in violation of Title 18, United States Code, Section 842(i); illegal storage of explosive materials, in violation of Title 18, United States Code, Section 842(j); and possession and manufacture of biological weapons in violation of Title 18, United States Code, Section 175.

The warrant did not incorporate the affidavit or the list of items to be seized. Thus, the warrant did not authorize seizure of firearms, ammunition, drugs, or drug paraphernalia. See *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004) (stating that a warrant authorizes only the seizure of items described with particularity on the face of the warrant or in documents explicitly incorporated in the warrant).

Agents from the FBI and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and local police executed the search warrant on the afternoon of July 15, 2004. A team of agents consisting of between four and eight men led by FBI Special Agent Mark Karangekis (the "entry team") entered and cleared the house.

They were clad in black clothing and FBI attire and ran up the lawn single file with their weapons drawn. Karangekis knocked at the front screen door and announced the agents' purpose. After Crooker exited the house and chained up one of his dogs at the agents' request, the entry team went into the house and began clearing it. After the house had been cleared, the "search team" led by FBI Special Agent Robert Lewis entered the house. Lewis was responsible for coordinating the search, taking custody of seized evidence at the conclusion of the search, and maintaining contact with the individuals whose house was being searched.

During the multiple hour search, Lewis and Springfield Police Officer Ronald Sheehan had a conversation with Crooker in front of the house. At the beginning of the interaction, Sheehan frisked Crooker and seized a cigarette pack that held a bag containing a green leafy substance. The agents did not arrest Crooker or advise him of his Miranda rights, but instead asked him to consent to questioning. The conversation began in the front yard and, due to the heat, at least some part of the conversation occurred in Lewis's air-conditioned car. During the conversation, Crooker told the agents that there were four safes in the house Crooker had access to two, which contained his and his mother's weapons, and his father had access to the other two, which contained antique firearms. Lewis testified that he knew at the time of the search that the warrant did not authorize seizure of firearms or ammunition. Nevertheless, Lewis asked Crooker to open the two safes to which Crooker had access, and agents seized several weapons and ammunition from inside the safes. Lewis stated that he seized the weapons because he knew that: (1) Stephen Crooker's prior felony conviction made his possession of weapons and ammunition unlawful and he was unsure whether Stephen had access to the items, and (2) Crooker had confessed to using illegal drugs, making his possession of firearms unlawful.

Later in the search, ATF Special Agents Michael Curran and Debora Seifert interacted with Crooker, who was cooperative and again described the family members' varied access to the four safes. Crooker also mentioned that there was an unlocked tackle box containing ammunition that belonged to him in the living room. When Curran asked Crooker if he used drugs, Crooker said that he occasionally used marijuana and that there was some marijuana inside the house that belonged to him. Agents then seized bags of what appeared to be marijuana from the kitchen and basement. The tackle box containing ammunition and a cigarette rolling device was seized, along with all of its contents. Curran and Seifert testified that, although they knew that Crooker had a valid state license to possess firearms, they considered him a user of illegal narcotics, and thus it was unlawful for him to possess the weapons and ammunition.

After he was indicted, Crooker moved to suppress the statements he made during the search as well as various physical evidence seized that day. Crooker argued, among other things, that law enforcement agents failed to advise him of his Miranda rights, but nevertheless subjected him to a series of custodial interrogations on the day of the search.

Crooker argues that he was interrogated on more than one occasion and that, under the totality of the circumstances, a reasonable person in his situation would not have felt free to leave. He notes that the environment was "police-dominated," with approximately thirty officers present during the execution of the search warrant, some of whom "forced him outside, at gunpoint, and searched him." He claims that he was escorted and followed by agents and that soon after being searched by the entry team, he was again frisked by other agents. He adds that the fact that he asked agents if he could leave illustrates that a reasonable person in those circumstances would not have felt free to leave. Moreover, he points to the testimony of Agent Curran, who stated that at the time of the search, he was unsure if Crooker was free to leave. Because he was subjected to custodial interrogations without the benefit of Miranda warnings, Crooker insists that the statements admitted against him should have been suppressed.

The district court disagreed. It found that the agents' interactions with Crooker were consensual--the officers asked Crooker if they could talk to him and noted that there was "no testimony that there were any weapons drawn, any shouting, any use of profanity." The court found that Crooker freely walked around the property and that the officers were "fairly calm and polite and accommodating." The district court determined that "there was no evidence that there was any imposition of any custody on Mr. Jake Crooker at the time of the conversations. This was simply not a custodial interrogation, Miranda didn't apply, and Mr. Jake Crooker's statements were all perfectly voluntary and knowing and intelligent."

Upon review, the Court of Appeals for the First Circuit stated that their review leads to the same conclusion, finding in part as follows:

"Crooker was questioned in familiar surroundings where, in general, questioning tends to be significantly less intimidating than questioning in unfamiliar locations. See *Hughes,* 640 F.3d at 435-36 ('Though questioning in a suspect's dwelling may at times comprise a custodial interrogation, such a location generally presents a less intimidating atmosphere than, say, a police station.') Although there were numerous officers on the property, those officers holstered their guns after the entry team cleared the house and left them holstered throughout the afternoon long search. Moreover, although those officers were present inside and around Crooker's house, no more than two agents were in direct conversation with Crooker at one time. Crooker was never physically restrained, and, in fact, moved freely about his property throughout the search, even leaving the property for some time after he was questioned.

"By all accounts, Crooker's interactions with the agents were cooperative and relatively brief. See *Guerrier,* 669 F.3d at 6 (finding no custody where interview atmosphere was 'relatively calm and nonthreatening' and interview lasted approximately 20-25 minutes, 'a relatively short time'). Given the familiarity of the surroundings in which Crooker was questioned, the calm and peaceable nature of the conversations between Crooker and agents, and the lack of physical restraint or show of force during questioning, we conclude that Crooker was

not in custody for Miranda purposes. Thus, the agents' failure to advise Crooker of his Miranda rights was not a constitutional violation, and the district court did not err by denying Crooker's motion to suppress his statements."

SEARCH AND SEIZURE:
Abandoned Residence; Mistake of Fact

United States v. Harrison
CA3, No. 11-2566, 8/7/12

Philadelphia police officers entered a private residence without a warrant because they believed the house to be abandoned. Upon searching the house, they found Khayree Harrison sitting in a recliner with a gun, scales, pills, and cocaine base on the table next to him. The police took Harrison into custody, seized the gun, and obtained a warrant to seize the rest of the items. Harrison, who was charged with possession with intent to distribute five grams or more of cocaine base, moved to suppress the physical evidence. The district court denied the motion; although Harrison, a tenant, had a reasonable expectation of privacy in the house, the police officers were operating under the mistaken but reasonable belief that the house was abandoned.

The Third Circuit Court of Appeals affirmed: "A house can be abandoned for Fourth Amendment purposes; the officers did not make a mistake of law. Their mistake of fact was reasonable, based on their observations over several months that the house appeared unfit for human habitation. There was trash strewn about, the lawn was overgrown with weeds, and windows on both levels were either boarded up or exposed. The front door was left open, and the lock may have been broken."

SEARCH AND SEIZURE:
Consent Search; Scope of Consent

United States v. Saucedo
CA7, No. 11-2457, 8/6/12

Margarito Saucedo's tractor-trailer was stopped because its paper registration plate appeared to be expired. Trooper Nathan Miller of the Illinois State Police confirmed that the plate had expired, advised Saucedo that he would conduct a safety inspection, and requested Saucedo's driver's license, logbook, and paperwork for the truck, trailer, and load. Saucedo produced his license and other paperwork; his trailer was empty. Miller ran Saucedo's license and learned that it was invalid and that he had prior convictions for drug distribution and aggravated assault with a deadly weapon. Miller asked Saucedo whether he had any weapons or drugs. Saucedo volunteered that the trooper could "open it." Miller asked Saucedo if he could search his truck and trailer; and Saucedo said, "yes." With Saucedo still in the squad car and having obtained his consent to search, Trooper Miller conducted a search of the truck and trailer In the cab he found what he thought was an alteration to a small alcove in the sleeper/bunk area behind the driver's seat. He disassembled one screw, pulled back molding around the alcove, peered in, and found a hidden compartment in which he found 10 kilograms of cocaine. Sentenced to 240 months in prison, Saucedo appealed denial of his motion to suppress. The Seventh Circuit affirmed.

Saucedo argued that Trooper Miller exceeded the scope of his general consent to search the tractor-trailer by using a flashlight and screwdriver to remove screws holding the molding in place that covered a hidden compartment in the tractor. The Court of Appeals for the Seventh Circuit found, in part, as follows:

"Consent to search is an exception to the Fourth Amendment's warrant requirement, but the search must remain within the scope of consent. Whether a search remains within the scope of consent is a question of fact to be determined from the totality of all the circumstances. The standard for measuring the scope of consent under the Fourth Amendment is one of objective reasonableness and asks what the typical reasonable person would have understood by the exchange between the law enforcement agent and the person who gives consent.

"The scope of a search is generally defined by its expressed object. *Florida v. Jimeno,* 500 U.S. 248, (1991) (holding that suspect's general consent to search his car included consent to search containers within the car that might contain drugs where suspect placed no explicit limitation on the scope of the search and was aware that the officer would be looking for drugs). 'Where someone with actual or apparent authority consents to a general search, law enforcement may search anywhere within the general area where the sought-after item could be concealed.' *Jackson*, 598 F.3d at 348-49. We have stated, albeit in an unpublished order: 'When a person is informed that an officer is looking for drugs in his car and he gives consent without explicit limitation, the consent permits law enforcement to search inside compartments and containers within the car, so long as the compartment or container can be opened without causing damage.' *United States v. Calvo-Saucedo,* 409 F. App'x 21, 24 (7th Cir. 2011). And as the Supreme Court explained, 'a reasonable person may be expected to know that narcotics are generally carried in some form of a container. Contraband goods rarely are strewn across the trunk or floor of a [vehicle].' *Jimeno,* 500 U.S. at 252. Here, Trooper Miller asked Saucedo if he had any weapons, cannabis or cocaine in his truck or trailer, and Saucedo answered 'no.' At that point, Saucedo volunteered that Miller could search, even before Miller requested permission. Trooper Miller specifically asked Saucedo if he could search his truck and trailer, and Saucedo answered, 'yes.' So Saucedo was well aware that Miller was looking for drugs. And Saucedo gave his consent to search without any express limitation.

"Thus, his consent allowed Miller to search inside compartments in the tractor-trailer, including in the sleeper area, where drugs could be concealed. This necessarily included the hidden compartment, which one could reasonably think might, and in fact did, contain drugs. If Saucedo didn't want the hidden compartment to be searched, he could have limited the scope of the search to which he consented. A reasonable person would have understood that by consenting to a search of his tractor and trailer for drugs, Saucedo agreed to permit a search of any compartments or containers therein that might contain drugs, including the hidden compartment where the cocaine was ultimately found.

"Saucedo argues that the search exceeded the scope of his consent because Trooper Miller used a flashlight and screwdriver to look behind a TV, unscrew the molding, and remove the hidden compartment from the alcove. The trooper's actions, Saucedo claims, contradicted the principle that 'general permission to search does not include permission to inflict intentional damage to the places or things to be searched.' *United States v. Torres,* 32 F.3d 225, 231-32 (7th Cir. 1994); see also *United States v. Garcia,* 897 F.2d 1413, (7th Cir. 1994) (concluding that the dismantling of door panels extends beyond a general consent to search a vehicle because 'the opening of door panels is not normally included in this set of areas to be searched for drugs or weapons' and 'such a search is inherently invasive'). Saucedo did not assert in the district court that Trooper Miller damaged the truck and thus forfeited this argument. Forfeiture aside, the argument has no traction. Trooper Miller's actions were not as invasive as the dismantling of the doors in *Garcia.* Rather, this case is similar to *Torres* and *United States v. Garcia,* 604 F.3d 186 (5th Cir.), cert. denied, 131 S. Ct. 291 (2010). In *Torres,* an officer used a screwdriver to remove six screws that secured the cover of a wooden compartment in a trailer. We held that it was objectively reasonable for the officer to believe that the scope of consent allowed him to open the compartment by unscrewing the screws. We distinguished the officer's actions in merely releasing and removing the screws to allow inspection of the compartment's contents with a dismantling of the fabric of the trailer. In *Garcia*, while searching the cab of a truck, an officer used a screwdriver to remove screws securing a stereo speaker, removed the speaker cover, and found cocaine. In concluding that the search was within the scope of consent, the court noted that there was no structural demolition and the defendant knew the speaker cover was easy to unscrew and replace without causing damage.

"Saucedo suggests that Trooper Miller's actions caused damage, but without any evidence that either the compartment or tractor was damaged. The removal of the hidden compartment did not dismantle any functional part of the tractor; the compartment had no function other than to conceal drugs, as Saucedo conceded at oral argument. In contrast, the door panel removed during the search in *Garcia,* had a legitimate function.

"Furthermore, contrary to Saucedo's claim, upholding the district court's decision does not mean that whenever law enforcement officers mention drugs and then ask for consent to search a vehicle, they may take apart any portion of the vehicle in search of drugs. Officers would still be limited by what is objectively reasonable under the circumstances, and a general consent to search does not authorize them to inflict intentional damage to the places or things to be searched. Of course, as noted, suspects may limit the scope of a consent search. We affirm Saucedo's conviction and the district court's judgment."

SEARCH AND SEIZURE:
Drug Dogs; No Police Direction of Actions
United States v. Sharp
CA6, No. 10-6127, 7/27/12

After David W. Sharp was stopped and arrested on an outstanding warrant, a dog handler was called to the scene of the arrest. When a police dog and his officer-handler arrived, the driver's window of Sharp's car was down. The dog sniffed the exterior of the vehicle, stopped, walked to the driver's door, and, without formally alerting to the presence of narcotics, jumped through the open window, went into the back seat, then back to the front and looked up or alerted on the front passenger seat. The handler asked the dog to "show me," and, with his nose, the dog poked the shaving kit on the front seat. Sharp, sentenced to 360 months in prison, appealed denial of his motion to suppress.

The Sixth Circuit Court of Appeals affirmed: "A dog's sniff around the exterior of a car is not a search under the Fourth Amendment; the canine's jump and subsequent sniff inside the vehicle was not a search in violation of the Fourth Amendment because the jump was instinctive and not the product of police encouragement."

SEARCH AND SEIZURE:
Drug Dogs; Training and Reliability
United States v. Stubblefield
CA6, No. 10-3587, 6/19/12

In July 2009, Officer Michael Gerardi pulled over a speeding rental car near Cleveland, Ohio that was driven by Latorey Earvin. Cedrick Stubblefield and Brandon Spigner were passengers. Patrolman Ours backed up Gerardi during the traffic stop. While Ours explained the speeding ticket to Earvin, Gerardi deployed his drug-detection dog, Arrow. Arrow alerted to the presence of drugs and the police then searched the car for drugs. The police found over $700 in cash and a sealed envelope that bore a return address and name that did not match the names of any of the individuals in the car. Inside the envelope, the police found 10 false Texas driver's licenses with either Stubblefield's or Spigner's picture; 20 Chase Bank checks payable to the names on the driver's licenses; and maps and addresses of Wal-Mart stores located near Dayton and Columbus, Ohio.

The police arrested the car's occupants and towed the car to the station so the police could continue their search away from the freeway. During the continued search, the police found another envelope containing nine more false Texas driver's licenses, five with Spigner's picture and four with Stubblefield's; nineteen counterfeit checks that matched the names on the false driver's licenses; two Internet printouts of maps of Wal-Mart stores located near Cleveland, Ohio; and a list of 30 names, social security numbers, Texas driver's license numbers, and birth dates of actual Texas residents.

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

"We would uphold a district court's findings regarding the training and reliability of a drug-detection dog unless those findings are clearly erroneous. *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994). A dog's

training and reliability can be established by the testimony of the dog's handler alone. If the evidence adduced, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the 'credibility' of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability. As with the admissibility of evidence generally, the admissibility of evidence regarding a dog's training and reliability is committed to the trial court's sound discretion.

"The district court found that Arrow was certified as a drug-detection dog, that Arrow underwent extensive training to get this certification, that Gerardi's testimony that Arrow was 90% accurate was believable, and that this evidence established that Arrow was properly trained and reliable. The record provides more than enough evidence to conclude that the district court did not clearly err in making these findings. Gerardi testified at the suppression hearing that he began training with Arrow in September 2005; that Arrow was trained to detect the odors of marijuana, cocaine, heroin, and methamphetamine; that in order for Arrow to become certified to detect a particular drug, he was required to pass a test; that passing required successfully alerting on four to six targets containing that particular drug amidst targets that did not contain the drug, with one miss per odor allowed (including false alerts); that Arrow was certified by the State of Ohio in October 2005 and 2007 in both patrol work and drug detection; that the 2007 certifications were good for two years and thus applied on the date of the stop in question; that Arrow's alerts in the past where no drugs were found (hereafter, 'unconfirmed alerts')—including 22 such alerts between January 2008 and October 2009—do not indicate that Arrow is unreliable; that unconfirmed alerts by Arrow are not necessarily false alerts because Arrow can detect an odor of narcotics in places where narcotics were previously; and that based on Gerardi's experience, drugs are found 90% of the time Arrow alerts. The government also introduced copies of Arrow's certificates into the record.

"In the face of this evidence and the deference given to the district court's findings regarding Arrow's reliability and training, Earvin's arguments to the contrary are unpersuasive. As Earvin points out, Gerardi did not maintain complete records tracking each time Arrow was deployed in the field. But the reliability of a drug-detection dog can be established through the testimony of the dog's handler alone. And the district court specifically credited Gerardi's testimony that Arrow was reliable and alerted accurately 90% of the time. Although Earvin correctly points out that no drugs were discovered in Earvin's rental car following Arrow's positive alert, this fact is not dispositive. The crucial question for reliability is not whether a dog is actually correct in the specific instance at hand—no dog is infallible—but rather whether the dog is likely enough to be right so that a positive alert 'is sufficient to establish probable cause for the presence of a controlled substance.' 'This court has defined probable cause as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion, and is said to exist when there is a fair *probability*,

given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place.' *United States v. Howard*, 621 F.3d 433, 453 (6th Cir. 2010).

"Because Arrow's reliability and proper training have been established, Earvin's next argument—that Arrow's alert did not justify opening the envelope containing the first set of counterfeit documents—is easily dismissed. An alert by a properly trained and reliable drug-detection dog 'is sufficient to establish probable cause for the presence of a controlled substance.' If the police have probable cause to search a lawfully stopped vehicle for contraband, then the police have probable cause to search every part of the vehicle and all containers found therein in which the object of the search could be hidden. *United States v. Crotinger*, 928 F.2d 203, 205 (6th Cir. 1991). So Arrow's alert gave the officers probable cause to search the car and any containers capable of hiding drugs."

SEARCH AND SEIZURE:
Stops; Reasonable Suspicion; Drug Ruse

United States v. Neff
CA10, No. 10-3336, 6/5/12

Around noon on July 31, 2009, Dennis Dean Neff was driving eastbound on a rural stretch of Interstate 70 through Wabaunsee County, Kansas. He passed three signs, posted by Kansas Highway Patrol (KHP) troopers along the highway that read "Drug Check Ahead" and "Drug Dogs in Use" in English and Spanish. In reality, there was no checkpoint on the interstate. Instead, troopers had positioned themselves near the Spring Creek Road exit ramp, just beyond the signs, to watch for vehicles attempting to evade the purported drug check. The Spring Creek Road exit leads to "a rural, gravel road speckled with residences" but no businesses. KHP Lieutenant Kirk Simone was stationed on the far side of the eastbound exit ramp, where he used binoculars to monitor vehicles that used the exit. A second officer, Trooper Brian Smith, waited on the south side of the highway near the exit to observe vehicles "as they went off the exit ramp when Lieutenant Simone called them out."

When Lieutenant Simone saw Neff's red Chevrolet Monte Carlo take the exit ramp, he radioed Trooper Smith to watch for the vehicle. Trooper Smith, driving a marked patrol car, followed Neff after he took a left turn on to Spring Creek Road and began driving north. As he tailed Neff, he radioed the dispatcher to check the car's license plate number. The dispatcher responded that the tag was registered to an address in nearby Topeka, Kansas. Continuing his pursuit, the trooper followed Neff past one residential driveway before stopping to watch the car turn into a second driveway. Neff briefly stopped his car in the driveway and turned his head toward the road. Before he started to back out of the driveway, Neff looked at the trooper and gave him a "startled look." He then backed out of the driveway, turning the car back in the direction of the interstate. By this time, Trooper Smith had positioned his patrol car in the middle of the road and had gotten out of the vehicle. Now standing in the middle of the road, the trooper put out his hand to signal for Neff to stop. He had not observed Neff commit any traffic violations. Neff stopped and rolled down his window. Trooper Smith proceeded to investigate Neff and the vehicle's two passengers.

Neff told the trooper that they were driving from Junction City, Kansas, where they had gone to look at a car. The trooper asked Neff to get out of the car, and he conducted a brief patdown. Finding no weapons or contraband, the trooper continued to ask Neff questions. He explained that he thought it was odd for a car with Shawnee County tags to use the Spring Creek Road exit, implying that Neff had used the exit to avoid a drug checkpoint. Neff then volunteered, "I have a crack pipe on me." After first calling for backup, the trooper searched the passenger compartment of the car and found nothing. He then used the car's key fob to activate the trunk release. In the trunk, he found zippered duffel bags that contained seven kilogram-sized brick-shaped objects, later determined to contain cocaine, and $10,000 in U.S. currency. The trooper placed the three occupants of the car under arrest.

Dennis Dean Neff entered a conditional guilty plea on one count of traveling in interstate commerce with the intent to distribute cocaine. Under the terms of the plea agreement, Neff reserved his right to appeal the district court's denial of his motion to suppress evidence.

On appeal, Neff argues that the state trooper's initial stop of his vehicle was unconstitutional because the trooper lacked reasonable, articulable suspicion of criminal activity under Terry v. Ohio, 392 U.S. 1 (1968).

At the suppression hearing, Trooper Smith provided this testimony regarding the stop:

> *The reason I stopped him is they got off the interstate after seeing the drug check lane ahead signs, it was a Shawnee County car went into a rural Wabaunsee County area, pulling into a driveway where I don't think the vehicle belonged, the surprised look that the driver gave me, the short time that they stayed there, the surprised look that he gave me. I thought something is very suspicious about this that I didn't really care for or didn't like. Therefore, I stepped out of the vehicle when he pulled out. That's when I stopped them.*

The Court of Appeals for the Tenth Circuit concluded that the facts known to the trooper at the time of the initial stop did not rise to the level of reasonable, articulable suspicion by providing a particularized and objective basis for wrongdoing. They reversed the district court's denial of the motion to suppress and remanded with directions to vacate Neff's conviction, finding in part as follows:

"In reviewing an investigatory stop for reasonable suspicion, we must consider the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). While certain facts, taken in isolation, may be 'quite consistent with innocent travel,' these facts may, in the aggregate, add up to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1 (quoting *Terry v. Ohio,* 392 U.S. 1 (1968). Indeed, *Terry* itself involved 'a series of acts, each of them perhaps innocent' if viewed separately, 'but which taken together warranted further investigation.'

"While the legal framework for a *Terry* stop is familiar, we have never squarely confronted the 'ruse drug checkpoint' operation utilized by KHP in this case. At least some

of the conduct relied upon in the trooper's reasonable suspicion analysis was prompted by a law enforcement tactic that was designed to elicit, or at least expose, suspicious behavior.

"At the outset, we note that the Supreme Court has held 'actual' roadside drug checkpoints are unconstitutional. In *City of Indianapolis v. Edmond,* 531 U.S. 32, (2000), the Court held that a narcotics checkpoint whose primary purpose 'is ultimately indistinguishable from the general interest in crime control' violates the Fourth Amendment. In that case, Indianapolis police had established vehicle checkpoints in an effort to interdict illegal drugs.

"In the wake of *Edmond's* rebuke of suspicionless drug checkpoints, some law enforcement organizations began the practice of setting up ruse drug checkpoints. In what may be understood as the first generation of post-*Edmond* drug checkpoints, police would set up 'drug checkpoint ahead' signs on the highway but then operate a full-scale checkpoint at the next (likely rural) off-ramp. The theory behind this alteration was that the police would have an element of individualized suspicion for every vehicle that took that ramp because there were few 'legitimate' reasons for using an exit in an isolated area.

"While this modification significantly minimizes the number of innocent drivers subjected to police intrusion, these ramp drug checkpoints remain problematic because their primary purpose is ultimately indistinguishable from the general interest in crime control. In *United States v. Yousif,* the Eighth Circuit held unconstitutional a scheme involving signs placed along the highway warning travelers that they were approaching a drug checkpoint further down the highway, yet the checkpoint was actually located on the ramp which exited the highway a short distance past the signs. 308 F.3d 820, 823 (8th Cir. 2002). The officers were instructed to stop every vehicle that took the exit after the ruse checkpoint signs. The court was unable to distinguish this ramp drug checkpoint program from the roadside drug checkpoint program held unconstitutional in *Edmond* because 'its primary purpose was the interdiction of drug trafficking' in the absence of any basis for individualized suspicion.

"In the wake of *Edmond* and *Yousif*, some law enforcement agencies began taking the approach employed by the KHP in this case. For example, in a more recent case, the police set up ruse drug checkpoint signs at the same point on the Missouri interstate as they did in Yousif, right before the Sugar Tree Road exit. See *United States v. Carpenter,* 462 F.3d 981, 983 (8th Cir. 2006). But instead of operating a full-blown checkpoint at the top of the exit ramp, the officers watched for any nonlocal traffic that would exit the interstate and tried to get reason to stop them.

"When Christopher Carpenter used the exit and turned onto the rural county road, an officer followed him. Carpenter soon realized there were no services at the exit, and when he looked in his rear view mirror, he saw that a police car was following him. Concerned that he had driven into a trap, he decided to make a U-turn and pulled onto the side of the road. The officer parked behind Carpenter's vehicle, activated his vehicle's emergency lights, and approached on foot. The Eighth Circuit concluded that

the stop was constitutional, finding *Yousif* readily distinguishable. Unlike *Yousif,* this police operation did not involve an illegal checkpoint at which all vehicles exiting the highway were stopped. The court reasoned that Carpenter's act of exiting just after the checkpoint signs may be considered as one factor in the totality of circumstances, although it is not a sufficient basis standing alone to justify a seizure.

"In forming reasonable suspicion, the officer also could have relied on Carpenter's out-of-state license plates and the fact that he pulled over and parked on the side of the road for no apparent reason. The court explained that while some innocent travelers with a quarter tank of gas may leave a highway after drug checkpoint signs looking for fuel at an exit with no signs for services, those circumstances are sufficiently unusual and suspicious that they eliminate a substantial portion of innocent travelers, and provide reasonable suspicion to justify the brief detention of a vehicle.

"More recently, in *United States v. Prokupek,* 632 F.3d 460 (8th Cir. 2011), officers set up ruse checkpoint signs on an interstate and waited for vehicles to take the next exit. An officer observed a vehicle take the exit and turn onto the rural road at the end of the off-ramp. The officer explained that he stopped the driver because he failed to indicate his turn off the highway, even though he had signaled his turn onto the rural road. The officer called in a drug dog, which alerted to the vehicle. A search revealed methamphetamine. The officer gave conflicting testimony at the suppression hearing that clearly and affirmatively contradicted his earlier statement to the driver that he made the stop because he failed to indicate his intention to take the exit. Also, on appeal, the government conceded that the officer had not been in a position to observe the vehicle's exit from the interstate. The government had not proffered an alternative justification for the stop. In light of these developments, the Eighth Circuit held that the stop was unconstitutional. The court noted that it had previously held that reasonable suspicion for a traffic stop cannot be based solely on the fact that a driver exits an interstate after seeing a sign indicating that a drug checkpoint lies ahead but a traffic stop pursuant to a ruse checkpoint does not violate the Fourth Amendment if the driver commits a traffic violation when exiting the interstate. The court concluded that, without an observed traffic violation or some other indicia of wrongdoing, the stop was unconstitutional.

"We agree with the Eighth Circuit that a driver's decision to use a rural highway exit after seeing drug checkpoint signs may serve as a valid, and indeed persuasive, factor in an officer's reasonable suspicion analysis. See, *United States v. Klinginsmith,* 25 F.3d 1507, 1510 n.1 (10th Cir. 1994) (listing as one valid factor that 'the defendants took an exit which was the first exit after a narcotics check lane sign, and an exit that was seldom used.') But standing alone, it is insufficient to justify even a brief investigatory detention of a vehicle.

"We join the Eighth Circuit in holding that a driver's decision to use a rural highway exit after passing drug checkpoint signs may be considered as one factor in an officer's reasonable suspicion analysis, although it is not a sufficient basis standing alone to justify a seizure. A Fourth Amendment seizure that

relies solely on a driver's decision to use a rural or 'dead exit' following checkpoint signs falls short of the requirement of individualized, articulable suspicion of criminal activity. We hold that an officer must identify additional suspicious circumstances or independently evasive behavior to justify stopping a vehicle that uses an exit after ruse drug checkpoint signs. On these facts, the trooper did not have reasonable suspicion to justify the initial stop of Neff's vehicle. For that reason, the district court should have suppressed the seized evidence as obtained in violation of the Fourth Amendment."

Editor's Note: *The Court in this case discussed the United States Supreme Court decision in* ***Indianapolis v. Edmond****. This case can be located in the CJI Archives at CJI Legal Briefs, December 2000, Volume 5, Issue 4, at page 16.* ***United States v. Yousif****, also cited in this case, can be found in the CJI Archives in CJI Legal Briefs, Winter 2003, Volume 7, Issue 4, at page 18.*

SEARCH AND SEIZURE:
Vehicle Stops; Collective Knowledge Rule

United States v. Lyon
CA6, No. 10-2402, 7/25/12

Katrina Lyons was stopped by Michigan State Troopers at the request of DEA agents who were watching a site and monitoring wiretaps while investigation a narcotics/Medicare fraud operation. The Troopers discovered large bundles of currency and a suspended Michigan driver's license in her purse. Between the car and the purse, troopers discovered over $11,000, cash, 39 bottles of codeine cough syrup, and mothballs. The incident report that indicated Lyons was pulled over for a vision obstruction (necklaces and air freshener hanging from rear view mirror) and was arrested based on the questionable status of her license and the illegal narcotics recovered from her vehicle. It did not mention the DEA's investigation or instructions. Lyons was charged with conspiracy to distribute and possess with intent to distribute controlled substances and possession with intent to distribute controlled substances. The district court granted her motion to suppress. The Sixth Circuit reversed and remanded, finding in part as follows:

"It is well established that an officer may conduct a stop based on information obtained by fellow officers. *United States v. Barnes*, 910 F.2d 1342, 1344 (6th Cir. 1990) (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985)). Variously called the 'collective knowledge' or 'fellow officer' rule, this doctrine recognizes the practical reality that 'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another.' *Hensley*, 469 U.S. at 231. Because officers 'must often act swiftly and cannot be expected to cross-examine their fellow officers about the foundation of transmitted information,' we impute collective knowledge among multiple law enforcement agencies, even when the evidence demonstrates that the responding officer was wholly unaware of the specific facts that established reasonable suspicion for the stop. See *Whitely v. Warden*, 401 U.S. 560, 568 (1971). Whether conveyed by police bulletin or dispatch, direct communication or indirect communication, the collective knowledge doctrine may apply whenever a responding officer executes a stop at the request of an officer who possesses the facts necessary to establish reasonable

suspicion. By imputing the investigating officer's suspicions onto the responding officer, without requiring the responding officer to independently weigh the reasonable suspicion analysis, the collective knowledge doctrine 'preserves the propriety of the stop' and avoids crippling restrictions on our law enforcement. *United States v. Ibarra-Sanchez,* 199 F.3d 753, 760 (5th Cir. 1999).

"Despite its flexibility, the collective knowledge doctrine is not without its restrictions. The doctrine's primary boundary is, of course, the Fourth Amendment itself. As with any traditional investigative stop, a traffic stop based on collective knowledge must be supported by a proper basis and must remain reasonably related in its scope to the situation at hand. See *Davis,* 430 F.3d at 354. Accordingly, if an investigating officer 'lacked sufficient information to satisfy the reasonable suspicion requirement, and the responding officer's subsequent observations did not produce reasonable suspicion,' then the stop violates the Fourth Amendment. *Feathers* 319 F.3d at 849. Likewise, if a responding officer exceeds the stop's scope because he was not provided with the facts necessary to stay within its proper bounds, then any evidence improperly obtained there from remains subject to the exclusionary rule, just as if the investigating officer committed the error. See, e.g., *United States v. Pineda-Buenaventura*, 622 F.3d 761, 776 n.5 (7th Cir. 2010) (finding that the exclusionary rule 'remained in play' when supervisors failed to communicate the proper bounds of a search warrant to executing officers). The taint of a stop effected without reasonable suspicion similarly cannot be cured by an after-the-fact relay of information. See *Blair,* 524 F.3d at 751–52. Applying traditional Fourth Amendment restrictions equally to the collective knowledge doctrine ensures that communications among law enforcement remain an efficient conduit of permissible police activity, rather than a prophylactic against behavior that violates constitutional rights.

"The Seventh Circuit has helpfully clarified the application of the collective knowledge doctrine by identifying three separate inquiries: (1) the officer taking the action must act in objective reliance on the information received; (2) the officer providing the information must have facts supporting the level of suspicion required; and (3) the stop must be no more intrusive than would have been permissible for the officer requesting it. *United States v. Williams,* 627 F.3d 247, 252–53 (7th Cir. 2010) (citing *United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir. 1992)). We are persuaded by the simplicity of this approach. Moreover, and from a purely functional standpoint, practical considerations naturally restrict the collective knowledge doctrine, because a responding officer is invariably in a better position when provided with the details helpful and necessary to perform his duties. The relay of sufficient information is critical to a responding officer who needs to, for example, report to the correct location, identify the correct suspect, respond appropriately to exigent circumstances, and protect his safety and the safety of others.

"Lyons maintains, however, that additional restrictions also limit the collective knowledge doctrine. First, she contends that the collective knowledge doctrine only applies where there is a 'direct investigative relationship between the various law enforcement agencies' or where the law enforcement

agents were in 'close communication.' *United States v. Pasquarille*, 20 F.3d 682, 689 (6th Cir. 1994); *Perkins,* 994 F.2d at1189; *United States v. Woods,* 544 F.2d 242, 260 (6th Cir. 1976). According to Lyons, because the troopers were not 'directly involved in the investigation that led to the search,' nor were they in 'close communication' with Agent Graber, they were not privy to the collective knowledge of the DEA's investigation or to the DEA's surveillance of the Stratford Road house. Lyons' arguments based on *Pasquarille, Perkins, and Woods* are without merit, because those cases do not require the type of relationship between law enforcement agencies that Lyons seeks to impose. As soon as Agent Graber spoke to the Michigan state police and informed them of the DEA's investigation, the requisite relationship was established, and the troopers could stop Lyons' minivan. While Lyons claims that the collective knowledge doctrine does not apply because the troopers had no prior investigative relationship with the DEA, none of the cases she cites require a pre-established relationship among law enforcement agencies. In short, there is no merit to Lyons' claim that the troopers were not sufficiently involved in the DEA's investigation to impute collective knowledge.

"The seminal cases establishing the collective knowledge doctrine support this conclusion. In *Whiteley v. Warden, Wyo. State Penitentiary,* 401 U.S. 560 (1971), a county sheriff in Wyoming issued a statewide dispatch relaying the arrest warrant for an individual suspected of a burglary. Although the message went first through a state transmission network, was received by a different county's sheriff department, and then was relayed to the arresting police department, the Supreme Court imputed collective knowledge. Likewise, in *United States v. Hensley*, 469 U.S. 221 (1985), the sole communication between the law enforcement bodies was a flyer issued by the investigating authority that notified fellow police departments that the defendant was wanted for a bank robbery. A different police department independently discovered the defendant and performed a *Terry* stop on the basis of the flyer. The Supreme Court nevertheless applied the collective knowledge doctrine. Accordingly, we reject Lyons' argument regarding the type of law enforcement relationship required to apply the collective knowledge doctrine.

"Lyons next contends that, to the extent that the troopers and Agent Graber were in contact prior to the traffic stop, the information relayed was de minimis such that no knowledge was actually collectively shared. In support of this argument, Lyons relies heavily on this Court's opinion in *United States v. Blair,* 524 F.3d 740 (6th Cir. 2008). In *Blair,* this Court suppressed evidence recovered during a *Terry* stop that would have been valid had the supporting facts observed by the investigating officer—a hand-to-hand drug transaction—been communicated to the arresting officer prior to detaining the defendant. In deeming the stop illegal, this Court specifically distinguished *Blair* from *Hensley*, reasoning that the Hensley flyer at least contained reasonable, articulable facts that would justify a *Terry* stop, whereas the responding officer in *Blair* never received any information as to why Blair should be stopped, or even that he should be stopped at all. The only information he received prior to

the stop was that a car was leaving a suspect house.

"*Blair* proves that there may be instances in which the collective knowledge doctrine cannot be applied, because the officer who conducted the *Terry* stop could not feasibly have been aware of the information essential to the reasonable-suspicion determination at the time he effected the stop. Nevertheless, *Blair* does not establish a minimum on the amount of information that must be communicated among officers to impute collective knowledge. Rather, *Blair* stands only for the proposition that an officer who acts independently of another officer's request, and who acts in ignorance of any information that would establish reasonable suspicion, is not entitled to claim collective knowledge after the fact.

"Considering these principles, the collective knowledge doctrine clearly applies to this case. The record demonstrates that the troopers were not acting on their own initiative when they stopped Lyons. The troopers testified that they had no independent basis to target the minivan; rather, they did so based solely on Agent Graber's request. It is instructive that the troopers made no attempt to develop or to otherwise confirm the facts underlying the DEA's request, but instead objectively relied entirely on unverified information furnished to them by fellow law enforcement.

"Significantly, the troopers testified that Agent Graber's request was a fairly typical one and that they would have stopped the minivan in any event, even absent independent probable cause, based solely on the DEA's request. Moreover, it is immaterial that the troopers were unaware of all of the specific facts that supported the DEA's reasonable suspicion analysis. The troopers possessed all the information they needed to act—a request by the DEA (subsequently found to be well-supported) that they execute the traffic stop in the expectation that illegal narcotics would be found in the vehicle. To be sure, the troopers' testimony at the suppression hearing was skeletal at best. However, the lack of detail reflected in the troopers' testimony was perhaps understandable given the urgency of the circumstances. Trooper Wise was only able to vaguely recall that he and his partner were informed that the minivan was part of 'an ongoing investigation' by the DEA. Trooper Grubbs could not provide any specifics beyond his inference that obviously there was something more to this vehicle that the DEA wanted.' Agent Graber's testimony was somewhat more precise; however, he claimed only that the DEA provided the troopers with a 'brief synopsis of what was happening' with the DEA's investigation and why the DEA believed there would be narcotics in Lyons' vehicle. Although we would certainly prefer to see a better development of the record, especially to the extent that such testimony has the potential to affect whether the proper scope of the stop was respected, Lyons has made no such argument. Moreover, and as explained further below, our independent review leads us to conclude that the troopers did not exceed the proper scope of the stop when they asked Lyons a few basic investigatory questions before searching her vehicle.

"Responding officers are entitled to presume the accuracy of the information furnished to them by other law enforcement personnel.

They are also entitled to rely upon the investigating officer's representations of reasonable suspicion, and to the extent applicable, whatever exigent circumstances are claimed to support a stop. The interests of our law enforcement would be stifled without permitting such presumptions, and it is those interests that lie at the heart of the collective knowledge doctrine. Any later contentions by a Lyons that such presumptions were not justified, either because the investigating officer supplied false information or because he failed to act in good faith, may be subsequently reviewed by the court pursuant to a motion to suppress. In doing so, the court's primary attention should remain on the investigating officer's actions and knowledge, rather than on the quantity or quality of information supplied to the responding officer.

"The fact that the troopers failed to note the DEA's involvement in their incident report is also without consequence. The collective knowledge doctrine is unaffected by an officer's use of a cover story to disguise a stop as a mere traffic stop. *Williams*, 627 F.3d at 253 (citing *United States v. Chavez*, 534 F.3d 1338, 1341–42 (10th Cir. 2008)

"The district court mischaracterized the record when it concluded that there was 'no evidence' to show that 'the minivan was stopped based on the DEA's investigation and collective knowledge.' The troopers clearly acted on the DEA's directive and executed the stop within the bounds of the DEA's reasonable suspicion. Accordingly, the collective knowledge doctrine applies and the traffic stop was valid.

SEARCH AND SEIZURE:
Vehicle Stop; Estimate of Speed

United States v. Sowards
CA4, No. 10-4133, 6/26/12

In this case, Sean C. Sowards argues that the district court erred in denying his motion to suppress because the police lacked probable cause to initiate a traffic stop based exclusively on an officer's visual estimate—uncorroborated by radar or pacing and unsupported by any other indicia of reliability—that Sowards's vehicle was traveling 75 miles per hour ("mph") in a 70-mph zone.

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

"The Fourth Amendment does not allow, and the case law does not support, blanket approval for the proposition that an officer's visual speed estimate, in and of itself, will always suffice as a basis for probable cause to initiate a traffic stop. Instead, for the purposes of the Fourth Amendment, the question remains one of reasonableness. Critically, the reasonableness of an officer's visual speed estimate depends, in the first instance, on whether a vehicle's speed is estimated to be in significant excess or slight excess of the legal speed limit. If slight, then additional indicia of reliability are necessary to support the reasonableness of the officer's visual estimate.

"Where an officer estimates that a vehicle is traveling in significant excess of the legal speed limit, the speed differential—i.e., the percentage difference between the estimated speed and the legal speed limit—may itself provide sufficient 'indicia of

reliability' to support an officer's probable cause determination. For example, in *State v. Butts,* 269 P.3d 862, 873 (Kan. Ct. App. 2012) there was reasonable suspicion where officer 'estimated vehicle speed (45 mph in a 30-mph zone), was significantly higher than the posted speed limit and, as a result, a difference that would be discernable to an observant and trained law enforcement officer'; also, *People v. Olsen*, 239 N.E.2d 354, 355 (N.Y. 1968) (holding officer's visual speed estimate of vehicle traveling 50-55 mph in a 30-mph zone sufficient to support speeding conviction).

"However, where an officer estimates that a vehicle is traveling in only slight excess of the legal speed limit, and particularly where the alleged violation is at a speed differential difficult for the naked eye to discern, an officer's visual speed estimate requires additional indicia of reliability to support probable cause. See *State v. Kimes*, 234 S.W.3d 584, (Mo. Ct. App. 2007) (Where the officer's estimation of speed was 60 m.p.h., the court stated that a fact-finder cannot conclude with any degree of certainty that a defendant was exceeding a 55 m.p.h. speed limit because the accuracy of human estimation of speed cannot easily, readily, and accurately discriminate between such small variations in speed.)

"The reasonableness of an officer's visual estimate that a vehicle is traveling in slight excess of the legal speed limit may be supported by radar, pacing methods, or other indicia of reliability that establish, in the totality of the circumstances, the reasonableness of the officer's visual speed estimate. Such additional indicia of reliability need not require great exactions of time and mathematical skill that an officer may not have, but they do require some factual circumstance that supports a reasonable belief that a traffic violation has occurred. In the absence of sufficient additional indicia of reliability, an officer's visual approximation that a vehicle is traveling in slight excess of the legal speed limit is a guess that is merely conclusory and which lacks the necessary factual foundation to provide an officer with reasonably trustworthy information to initiate a traffic stop."

SEARCH AND SEIZURE:
Vehicle Stop; Identifying Occupants

United States v. Bohman
CA7, No. 10-3656, 6/28/12

A reliable informant stated that he saw known meth cook Jack Barttelt brew meth at a specific hunting cabin; he had seen an anhydrous ammonia tank at the cabin within the week; a locked cable blocked the drive; and that Barttelt drove a green Mercury Grand Marquis. At the property, the officer found a cable blocking a driveway. A vehicle approached the gate. Observing unusual movements, officers approached the maroon Chevrolet Beretta, recognized the driver but not the passenger, requested that they exit the car, learned that the passenger was Barttelt, and smelled anhydrous ammonia. The driver, Daniel Bohman, indicated that Barttelt was cooking meth. A search of the cabin, authorized by a warrant, based on information learned during the stop, revealed a lab.

The Court of Appeals for the Seventh Circuit stated that the question presented in this appeal is whether the police may stop a vehicle only because it emerged from a site suspected of drug activity. Upon review, the Court found, in part, as follows:

"A mere suspicion of illegal activity at a particular place is not enough to transfer that suspicion to anyone who leaves that property. See *United States v. Johnson*, 170 F.3d 708, 720 (7th Cir. 1999). The Fourth Amendment allows officers to 'stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot.' *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). This reasonableness standard typically requires a set of facts that we can measure against an objective standard such as 'probable cause or a less stringent test' such as reasonable suspicion. *Delaware v. Prouse*, 440 U.S. 648. In those circumstances where we do not insist on some quantum of individualized suspicion, we rely on other safeguards to assure that the reasonable expectation of privacy is not subject to the discretion of the official in the field. For instance, an officer with a warrant to search a place may stop anyone leaving that place without additional individualized suspicion, see *Michigan v. Summers*, 452 U.S. 692 (1981), but a mere suspicion of illegal activity about a place, without more, is not enough to justify stopping everyone emerging from that property, see *Johnson*, 170 F.3d at 720.

"The government's attempt to justify the stop based on reasonable suspicion despite the lack of *particular* suspicion about the car actually stopped ignores that the Supreme Court has only allowed such stops in narrow circumstances. Namely, when the police have a warrant to search a house, the detention of individuals found leaving that house is constitutionally reasonable because of 'the nature of the articulable and individualized suspicion on which the police base the detention of the occupant of a home subject to a search warrant.' *Summers*, 452 U.S. at 703. The impending warrant-authorized search of the home means that the detention, although a meaningful restraint on liberty, was surely less intrusive than the search itself, and represents only an incremental intrusion on personal liberty. But in this case there was no warrant and the reasoning of *Summers* can't be stretched to cover a case like this which involves, at most, reasonable suspicion.

"Contrary than to the district court's conclusion, stopping a car just to identify its occupants is deliberate enough to justify suppression when there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law. Although the circumstances may have supported a general suspicion about the Beretta, because the officers lacked that quantum of individualized, articulable suspicion, the evidence from the stop must be suppressed.

SEARCH AND SEIZURE:
Vehicle Stop; Lane Change

United States v. Burciaga
CA10, No. 11-2109, 7/25/12

The New Mexico Supreme Court has construed section 66-7-325 N.M. Stat. Ann. to require a motorist changing lanes to signal "even when there is only a reasonable possibility that other traffic may be affected by the signaling driver's movement." The broader question in this case was whether

a New Mexico highway patrol officer lawfully stopped Francisco Burciaga's vehicle based on a suspected violation of 66-7-325, where Burciaga without timely engaging his turn signal, changed from the left to the right lane on the interstate after passing the officer's patrol car. The district court held the stop violated Burciaga's Fourth Amendment right to be free from unreasonable seizures because the officer's testimony failed to establish that traffic "could have been affected" by Burciaga's lane change absent facts not in evidence. Consequently, the court granted Burciaga's motion to suppress over 17 kilograms of heroin recovered as a result of the stop. The Government appealed. Upon review, the Tenth Circuit held that section 66-7-325 as applied to the facts of this case provided the officer with an objectively justifiable basis for stopping Burciaga's vehicle. Accordingly, the Court reversed.

SEARCH AND SEIZURE:
Warrantless Entry into Curtilage; Legitimate Law Enforcement Objective

United States v. Robbins
CA8, No. 11-3192, 6/29/12

On October 23, 2010, at 9:45 p.m., Cedar Rapids, Iowa, police dispatch received a "911" hang-up call. When the 911 operator attempted to call the number, the line was busy. The subscriber of that number was shown to the 911 operator as "Carl A. Nelson," and the "automatic location information" received by the 911 operator showed the subscriber as a business with an address of 960 60th Avenue SW in Cedar Rapids. The information displayed on the "computer aided dispatch" system, which was transmitted to the responding officers' in-car computer, simply identified the caller as "Carl A. Nelson" and did not reveal that the subscriber was associated with a business.

Officers Casey Hoeger and Jeff Holst, driving separate cars, responded to the scene. The officers were dispatched at 9:55 p.m. and arrived at the scene at 10:01 p.m. Hoeger arrived first. He approached the scene traveling westbound on 60th Avenue, primarily an industrial area. Hoeger noticed a residence in the 800 block of 60th Avenue, but his in-car GPS map showed the target address as originating midway between some railroad tracks and 11th Street. When Hoeger did not find a residence prior to arriving at 11th Street, he turned around and headed eastbound on 60th Avenue toward the railroad tracks. He pulled into a driveway on the south side of 60th Avenue, where he noticed lights on on a residence behind two industrial buildings. He pulled up the driveway a little bit further and stopped.

Hoeger then observed Holst drive by, proceeding west on 60th Avenue. Like Hoeger, Holst at first did not see the residence. Holst made a U-turn at 11th Street and spotted the reflector tape on Hoeger's car. Hoeger then flashed his flashlight to reveal his location to Holst, who turned into the driveway and joined Hoeger. Hoeger told Holst, "I can't find any other house in this area" and suggested that they "check this place."

Both officers then walked up the driveway and approached the residence. Holst observed that the exterior porch light and interior first and second floor lights were on, but the garage light was not. The officers saw no persons, heard no unusual sounds, and observed no indication of a disturbance.

Holst testified that as the officers approached the residence, the double-gate to the breezeway was wide open; it wasn't just unlatched. According to Holst, "It's as if the gate wasn't there, because I mean it's a very large gate. It's not like you're walking through a small narrow gate. The whole thing was open."

Hoeger testified that he could not remember if the gate was open, but he said that he did not open it. When asked whether Holst opened the gate, Hoeger responded, "He could have. I can't say whether he did or not." Based on its determination that Hoeger and Holst testified credibly, the district court found that neither Holst nor Hoeger opened the gate.

After entering the breezeway, the officers knocked on the front door but received no response. They then conducted a "quick perimeter check" by walking around the residence because, as Holst testified, there was so many lights on in the house it appeared to us there was somebody home. They did not see or hear anything amiss, but they could not effectively see in the windows.

The officers then returned to the front door and knocked again, receiving no response. While at the door, Holst smelled an odor of marijuana. Hoeger testified that he was "stuffed up" with a cold and initially did not smell marijuana.

When Holst mentioned the odor, however, Hoeger stuck his face up to the crevice of the door and could smell a "minor whiff" of marijuana. A K-9 officer was then called to the scene with a drug dog, which immediately "indicated" on the front door of the residence. Officer Fear, the K-9 officer, then sought a search warrant for the residence while Hoeger and Holst remained at the scene.

During the course of preparing the search warrant application, Fear called Holst for a detailed description of the residence, including the color of the address numbers on the house. At that point, Holst for the first time saw that the address was 925 60th Avenue rather than 960 60th Avenue. Although the numbers were displayed on the exterior wall between the garage door and the breezeway gates, Holst testified that the numbers were black and not easily seen at night, and the outside light above the address was off. In addition, when the gates are open, the numbers may be obstructed. During preparation of the search warrant, it was determined from the Linn County Assessor's records that Robbins owned the property.

Following the issuance of a state search warrant, the property was searched during the early morning of October 24, 2010, revealing the presence of a marijuana growing operation, along with 297 marijuana plants, in the basement. Two venting systems vented odors to the main floor and out the second-floor windows, including one that was open when Hoeger and Holst arrived.

On October 25, 2010, Sergeant Dostal of the Cedar Rapids Police Department attempted to call the phone number listed as making the 911 hang-up call, and "it just kept ringing. It never went to a voice mail or no one ever picked up." Upon further investigation, Sergeant Dostal identified a Carl A. Nelson Construction Company in Burlington, Iowa. The company had obtained the phone line for a construction trailer at a site in Cedar Rapids. After the work had been completed, the

company unsuccessfully had tried to cancel the telephone line. The company reported that the address of the construction trailer was 1030 60th Avenue SW. A Google search for 960 60th Avenue SW did, however, reflect a reference to a Carl A. Nelson business. Upon investigation, it was determined that there is no 960 60th Avenue SW or 1030 60th Avenue SW.

Terry Robbins was charged with manufacturing and attempting to manufacture 100 or more marijuana plants, in violation of 21 U.S.C. §§ 841 and 846. He moved to suppress the evidence derived from the search of his property. Following the issuance of the magistrate judge's report and recommendation that the motion be denied, Robbins entered a conditional guilty plea that reserved his right to appeal the denial of the motion.

Robbins argues that the police violated his Fourth Amendment right against unreasonable searches and seizures by walking to his front porch to knock on his front door, as well as by walking around the perimeter of the house and glancing at the windows. He contends that because the evidence providing probable cause for the search warrant was obtained within the constitutionally protected curtilage area of his residence, the evidence obtained through execution of the search warrant should be suppressed.

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

'Where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited. (citing *United States v. Raines,* 243 F.3d 419, 421 (8th Cir. 2001)); see *United States v. Anderson,* 552 F.2d 1296, (8th Cir. 1977) (police entry into area where a person holds a reasonable expectation of privacy is lawful so long as the intrusion was justified by 'some legitimate reason for being present unconnected with a search directed against the accused.') We have held that police entry through an unlocked gate on a driveway to approach the front door of a residence for a 'knock-and-talk' is a reasonable, limited intrusion for legitimate law enforcement objectives.

"The officers here acted in furtherance of a legitimate law enforcement objective and their intrusion upon Robbins's privacy was appropriately limited. Responding to a 911 call that they reasonably believed came from the property, Hoeger and Holst entered the normal access route for any visitor to the house—the driveway and an open gate to the front door. After receiving no response at the front door, they conducted a short, minimally intrusive exterior perimeter search and glance at the windows for someone in need of assistance.

"Proceeding around the perimeter in search of an occupant was reasonable based on facts giving rise to a reasonable belief that someone was home—the 911 call and the observation of many lights on in the house. To complete their good faith attempt to conduct a brief welfare check, they returned to knock again at the front door, at which point they noticed the odor of marijuana, leading to the seeking of a search warrant. See *United States v. Smith*, 783 F.2d 648, 651-52 (6th Cir. 1986) (holding that officers seeking to verify an informant's tip could enter a defendant's driveway and

proceed toward front door, then obtain a warrant based on the evidence they observed in the process). In light of these circumstances, we agree with the district court that the officers acted in a constitutionally reasonable manner and that the evidence need not be suppressed."

VIDEOTAPING OF POLICE: First Amendment

American Civil Liberties Union of Illinois v. Alvarez, CA7, No. 11-1286, 5/8/12

In this case, the Court of Appeals for the Seventh Circuit stated that the Illinois eavesdropping statute makes it a felony to audio record "all or any part of any conversation" unless all parties to the conversation give their consent. 720 Ill. Comp. Stat. 5/14-2(a)(1). The statute covers any oral communication regardless of whether the communication was intended to be private. The offense is normally a class 4 felony but is elevated to a class 1 felony—with a possible prison term of four to fifteen years—if one of the recorded individuals is performing duties as a law-enforcement officer. Illinois does not prohibit taking silent video of police officers performing their duties in public; turning on a microphone, however, triggers class 1 felony punishment.

The question here is whether the First Amendment prevents Illinois prosecutors from enforcing the eavesdropping statute against people who openly record police officers performing their official duties in public. More specifically, the American Civil Liberties Union of Illinois ("ACLU") challenges the statute as applied to the organization's Chicago-area "police accountability program," which includes a plan to openly make audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders. Concerned that its videographers would be prosecuted under the eavesdropping statute, the ACLU has not yet implemented the program. Instead, it filed this preenforcement action against Anita Alvarez, the Cook County State's Attorney, asking for declaratory and injunctive relief barring her from enforcing the statute on these facts. The ACLU moved for a preliminary injunction.

Faced with so obvious a test case, the district court proceeded with some skepticism. The judge dismissed the complaint for lack of standing, holding that the ACLU had not sufficiently alleged a threat of prosecution. The ACLU tried again, submitting a new complaint addressing the court's concerns. This time, the judge held that the ACLU had cured the original defect but had "not alleged a cognizable First Amendment injury" because the First Amendment does not protect a "right to audio record." The judge denied leave to amend. The ACLU appealed.

The Court of Appeals for the Seventh Circuit reversed the lower court and remanded with instructions to allow the amended complaint and enter a preliminary injunction blocking enforcement of the eavesdropping statute as applied to audio recording of the kind alleged here. The Court found, in part, as follows:

"The Illinois eavesdropping statute restricts a medium of expression commonly used for the preservation and communication of information and ideas, thus triggering First Amendment scrutiny. Illinois has criminalized the nonconsensual recording of most any

oral communication, including recordings of public officials doing the public's business in public and regardless of whether the recording is open or surreptitious. Defending the broad sweep of this statute, the State's Attorney relies on the government's interest in protecting conversational privacy, but that interest is not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events. Even under the more lenient intermediate standard of scrutiny applicable to content neutral burdens on speech, this application of the statute very likely flunks. The Illinois eavesdropping statute restricts far more speech than necessary to protect legitimate privacy interests; as applied to the facts alleged here, it likely violates the First Amendment's free speech and free-press guarantees.

"The ACLU's proposed audio recording will be lawful—that is, not disruptive of public order or safety, and carried out by people who have a legal right to be in a particular public location and to watch and listen to what is going on around them. The State's Attorney concedes that the ACLU's observers may lawfully watch and listen to the officers' public communications, take still photographs, make video recordings with microphones switched off, or take shorthand notes and transcribe the conversations or otherwise reconstruct the dialogue later. The ACLU may post all of this information on the internet or forward it to news outlets, all without violating the Illinois eavesdropping statute. The State's Attorney has not identified a substantial governmental interest that is served by banning audio recording of these same conversations.

"We acknowledge the difference in accuracy and immediacy that an audio recording provides as compared to notes or even silent videos or transcripts. But in terms of the privacy interests at stake, the difference is not sufficient to justify criminalizing this particular method of preserving and publishing the public communications of these public officials.

"It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations. While an officer surely cannot issue a "move on" order to a person because he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs. Nothing we have said here immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety."