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CIVIL LIABILITY: Excessive Force; Police Dog

Edwards v. Shanley, CA11, No. 11-11512, 1/12/12

In this case, the issue was whether clearly established federal law prohibits police officers from allowing a police dog to conduct a five- to seven-minute attack against a person who ran from his car after a traffic stop, where he is lying face down with his hands exposed, no longer resisting arrest, and repeatedly pleading with the officers to call off the dog because he surrenders. The Court of Appeals for the Eleventh Circuit concluded that clearly established law *does not* permit this level of force. The case is as follows:

Justin Lovett, an Orlando, Florida Police Officer made a stop of a vehicle operated by Colin Edwards. After stopping his car, Edwards got out and ran. Officer Lovett chased Edwards on foot. Edwards first ran toward the street, but Officer Lovett interrupted, causing Edwards to about face and run towards a nearby fence. Edwards scaled the fence, which separated the parking lot from a wooded area, but had difficulty because of the thickness of the surrounding brush. He made it "not even half a mile into the bush," and then laid down on his stomach in an open area.

Officer Lovett did not immediately pursue Edwards into the woods, and instead called for backup. Officer Bryan Shanley responded to this call, and soon thereafter came to the scene with his K-9 partner, Rosco. The officers then both announced their

presence and warned that they were going to use the dog if Edwards did not surrender. Hearing no response, and after a second warning, the officers entered the wooded area. The dog lead the officers to Edwards, who remained lying on his stomach with his hands exposed. Officer Shanley saw Edwards lying on his stomach and again announced the presence of the K-9 unit. Although he saw their flashlights, Edwards did not hear or respond to Officer Shanley's announcements.

As the officers got closer, Edwards heard them command him to show his hands. Because his hands were already visible, Edwards made no movement. Instead, he shouted: "You got me. I only ran because of my license." Yet as Edwards finished making that statement, the dog, which had been released by Officer Shanley, began biting Edwards's leg. As the dog bit him, Edwards shouted, "I'm not resisting," and begged the officers to call off the dog.

According to Edwards, the dog repeatedly bit his leg for somewhere between five and seven minutes. Edwards did not resist. The officers did not instruct him to take any further actions demonstrating compliance with their commands. Yet they neither handcuffed nor arrested Edwards, and instead stood over him while the dog maintained its bite. Eventually, one of the officers placed his knee into Edwards's back, and secured handcuffs onto both of Edwards's hands. Once handcuffed, Officer Shanley gave the dog a verbal command to release the bite.

Edwards suffered serious injuries resulting from the dog attack. Again, according to Edwards, upon seeing his leg following the attack, one of the officers described his leg as looking like filet mignon, and joked that is why the police do not feed their dogs. Edwards was then transported via ambulance to the hospital.

The treating physician diagnosed him with "significant damage to his leg's muscles and tendons" resulting from a "very, very complex injury" that included the loss of "a large area, large chunks of full-thickness tissue along his leg." He received "urgent surgery" and was required to remain in the hospital for six days. Upon release, he underwent extensive follow-up care.

Edwards was charged with fleeing or attempting to elude a law enforcement officer, driving with a suspended license, resisting an officer without violence, and striking a police dog. Edwards pleaded no contest to the felony charge of fleeing or attempting to elude a law enforcement officer, and all remaining charges were dismissed.

In April 2010, Edwards brought this action against Officers Shanley and Lovett seeking damages under 42 U.S.C. § 1983. Specifically, Edwards alleged that Officer Shanley's use of a police dog constituted excessive force, and further that Officer Lovett failed to intervene and stop the dog attack, both in violation of the Fourth Amendment. The district court granted summary judgment for the officers based on qualified immunity. Upon appeal, the Court of Appeals for the Eleventh Circuit found, in part, as follows:

"The parties call our attention to two published cases applying *Graham v. Conner*, 490 U.S. 386 (1989) to instances of police use of dogs, and we agree these cases bear heavily on our analysis in this case. First, in *Crenshaw*,

we held that it was objectively reasonable for an officer to briefly use the force exerted by a police dog to subdue and detain an armed suspect until he could be handcuffed. 556 F.3d at 1291–93. The suspect in that case, Crenshaw, was thought to have committed at least one, possibly two, armed robberies, on the same night that he was spotted by police.

"Upon being pursued by the police, at night, Crenshaw actively fled—first in his vehicle and then, after crashing his vehicle into a marked patrol car, by foot. He entered a densely wooded area, laid on the ground, and shouted out his location in an attempt to surrender. After doing so, the dog located Crenshaw and bit him thirty one times. Within three to five seconds after releasing the dog, the officers surrounded Crenshaw and ordered him to give up his hands. Because Crenshaw "did not immediately give up his hands," the officer grabbed Crenshaw's right hand. The officer then handcuffed Crenshaw's left arm and called off the dog. We explained that all three *Graham* factors weighed against Crenshaw.

"First, Crenshaw was suspected of having committed one, and perhaps two, armed robberies, which can be characterized as a serious crime. Second, he actively fled from the police—first in his vehicle, and then by foot, after crashing his vehicle into a marked patrol car—and attempted to hide in a densely wooded area. Third, because Crenshaw was suspected of armed robbery and was a fugitive from the police, they had every reason to believe that Crenshaw was armed and dangerous. Thus, although the plaintiff attempted to surrender, we determined that "it was objectively reasonable for the officer to question Crenshaw's sincerity and use the canine to apprehend him" in light of his past conduct. *Crenshaw*, 556 F.3d at 1293.

"*Crenshaw* is thus somewhat on point to the first of Edwards' claims—that he is entitled to damages stemming from Officer Shanley's decision to use a police dog in the first instance. Indeed, given the factual similarities, *Crenshaw* at least precludes any conclusion that clearly established law prohibits the police from using a dog to track and subdue a fleeing suspect. But this is the extent of *Crenshaw*'s applicability to Edwards' case.

"On the other hand, we agree with Edwards that our decision in *Priester v. City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000), is on all fours with the constitutional violation alleged in this case. In Priester, we held that it was objectively unreasonable for police officers to allow a dog to bite and hold a suspect for two minutes, which we described as 'an eternity,' where that suspect was compliant with the officers' orders and not resisting arrest. Specifically, we applied the *Graham* factors and concluded that each weighed in Priester's favor because, he (1) was suspected of a non-serious offense—stealing $20 worth of snacks from a pro shop; (2) was compliant with the officers and lay down on the ground when ordered to, and thus 'did not pose a threat of bodily harm to the officers;' and (3) 'was not attempting to flee or to resist arrest.' We concluded that under these facts, 'no reasonable police officer could believe that this force was permissible given these straightforward circumstances.'

"The same is true here. Quite simply, after we held in *Priester* that it was unconstitutional to subject a compliant suspect to the 'eternity'

of two minutes of dog attack, it is plain that it is also unconstitutional to subject a similarly compliant suspect to a longer attack of five to seven minutes, especially where that suspect is pleading for surrender. Indeed, this case is in many regards easier than *Priester*, because while the same factors weigh against the need for extraordinary force—there was no confusion. Plaintiff did not pose a threat of bodily harm to the officers or to anyone else. And, he was not attempting to flee or to resist arrest. *Priester*, 208 F.3d at 927—Officer Shanley used greater force than did the officers arresting Priester. The record thus presents a concrete factual context so as to make it obvious to a reasonable government actor that his actions violate federal law. As a result, Officer Shanley cannot claim qualified immunity on the grounds that he did not know he was violating Edwards' constitutional rights.

"In sum, we hold that clearly established federal law prohibits the police from subjecting a compliant subject who is attempting to surrender to a lengthy dog attack. As a result, we reverse the grant of qualified immunity to Officer Shanley.

"Edwards also contends that Officer Lovett violated his right to be free from excessive force by failing to intervene and stop the dog attack. We have recognized that 'an officer can be liable for failing to intervene when another officer uses excessive force.' *Priester*, 208 F.3d at 924. There is no dispute that Officer Lovett was present for the entire attack, and taking Edwards' account as true, he made no effort to intervene and stop the ongoing constitutional violation. As such, Officer Lovett is no more entitled to qualified immunity than Officer Shanley."

CIVIL LIABILITY: **Jails; Deliberate Indifference**

Shields v. Dart, CA7, No. 11-2336, 12/14/11

In *Shields v. Dart*, a pretrial detainee in a maximum security area expressed concern for his safety and was moved to an area for detainees charged with possessing weapons in jail. He later reported that detainees were bringing weapons into particular cells, but a search uncovered no weapons.

The following week he was falsely identified by an officer, within hearing of other detainees, as a gang leader. He was stabbed days later. An officer called for back-up immediately. While waiting, she stood in a secure area and did not try to stop the attack. Additional officers arrived 15 or 20 minutes later.

The district court entered summary judgment for defendants in a suit under 42 U.S.C. 1983. The U.S Court of Appeals for the Seventh Circuit affirmed, finding, in part, as follows:

"The plaintiff failed to show that the defendants were deliberately indifferent to a substantial risk. A general risk of violence in a maximum security unit does not itself establish knowledge of a substantial risk; plaintiff did not report any problems with fellow detainees or fear of attacks after being moved. A prison guard, acting alone, is not required to take the unreasonable risk of attempting to break up a fight if circumstances indicate that such action would put her in significant jeopardy. The response delay is 'most troubling,' but insufficient to constitute deliberate indifference."

CIVIL LIABILITY: **Private Prisons**

Minneci v. Pollard, No. 10-1104, 1/10/12

Richard Lee Pollard was a prisoner at a federal facility operated by a private company, the Wackenhut Corrections Corporation. In 2002, he filed a *pro se* complaint in federal court against several Wackenhut employees, who (now) include a security officer, a food-services supervisor, and several members of the medical staff. As the Federal Magistrate Judge interpreted Pollard's complaint, he claimed that these employees had deprived him of adequate medical care, had thereby violated the Eighth Amendment's prohibition against "cruel and unusual" punishment, and had caused him injury. He sought damages.

Pollard said that a year earlier he had slipped on a cart left in the doorway of the prison's butcher shop. The prison medical staff took x rays, thought he might have fractured both elbows, brought him to an outside clinic for further orthopedic evaluation, and subsequently arranged for surgery. In particular, Pollard claimed:

(1) Despite his having told a prison guard that he could not extend his arm, the guard forced him to put on a jumpsuit (to travel to the outside clinic), causing him "the most excruciating pain," App. 32;

(2) During several visits to the outside clinic, prison guards made Pollard wear arm restraints that were connected in a way that caused him continued pain;

(3) Prison medical (and other) personnel failed to follow the outside clinic's instructions to put Pollard's left elbow in a posterior splint, failed to provide necessary physical therapy, and failed to conduct necessary studies, including nerve conduction studies;

(4) At times when Pollard's arms were in casts or similarly disabled, prison officials failed to make alternative arrangements for him to receive meals, with the result that (to avoid "being humiliated" in the general food service area, id., at 35) Pollard had to auction off personal items to obtain funds to buy food at the commissary;

(5) Prison officials deprived him of basic hygienic care to the point where he could not bathe for two weeks;

(6) Prison medical staff provided him with insufficient medicine, to the point where he was in pain and could not sleep; and

(7) Prison officials forced him to return to work before his injuries had healed.

At issue was whether the U.S. Supreme Court could imply the existence of an Eighth Amendment-based damages action against employees of a privately operated federal prison.

The Court stated that in the circumstances of this case: "where a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a *Bivens* remedy in such a case."

CIVIL LIABILITY:

Use of Deadly Force; Immunity

Rockwell v. City of Garland, Texas
CA5, No. 10-11053, 12/15/11

In February 2006, Richard and Cindy Rockwell lived with their son Scott Rockwell at their home in Garland, Texas. Scott had his own bedroom and contributed to the rent. Scott suffered from both bipolar disorder and schizophrenia. Scott had also been diagnosed as suicidal and had attempted suicide on more than one occasion. His mental condition and stability began to deteriorate in early February. He had quit taking his prescribed medication and refused to see a doctor. He began hearing voices and was behaving "unpredictably." His parents believed he may have been under the influence of illegal drugs.

On the evening of February 14, 2006, Scott was in his room hitting the walls and cursing through the door. At one point during the evening, Scott came out of his room and raised his fist as if to hit his mother. At approximately 8:38 p.m., Scott's parents called 911 because they believed that Scott ha[d] become a danger to himself and others. The 911 dispatcher dispatched Officers Ohlde and Raley to the Rockwell home. The dispatcher told the officers that Scott was bi-polar, schizophrenic, off his medication, and that he was pounding the walls of his room and refusing to come out. Officer Burleson offered over the radio to come "since there was a potentially dangerous subject there." Officer Ohlde accepted Burleson's offer of assistance. Officer Burleson was the first to arrive at the scene, arriving at approximately 8:45 p.m. Officers Ohlde and Raley arrived soon thereafter. At the Rockwell home, Mrs. Rockwell told the police that Scott had schizophrenia, was talking to himself, hadn't taken his medication for several days, refused to come out of his room, and that she believed that Scott was taking illegal drugs. When the officers asked Mrs. Rockwell what Scott would likely do if they were to leave without detaining Scott, she answered that she did not know.

Officers Ohlde, Burleson, and Raley attempted to communicate with Scott through his bedroom door. Scott was threatening the officers from his room. Officer Raley advised Officers Ohlde and Burleson that the SWAT team had been called to respond to Scott on at least one prior occasion and had taken Scott into custody for threatening and assaulting his parents. At about this time, Officer Ohlde called Lieutenant Brown who then came to the scene. At some point after Lt. Brown was called, but before he arrived, Officer Raley called for another unit. Officers Garcia and Scicluna responded to this call.

While Officers Burleson, Raley, and Ohlde waited for the additional units, Scott continued to bang on the walls, shake his door, and make threats to the officers. At some point after Lt. Brown arrived, the decision was made to arrest Scott. The decision was made based on the assault by threat made earlier in the evening, Scott's history of violent and suicidal behavior, his unstable mental state, the possibility that Scott was high on drugs, and concern that Scott would harm his parents or himself if left in the residence.

When the Officers told Cindy Rockwell that they may have to breach the door to effectuate an arrest, she suggested that she would wait until morning to get a mental-health warrant. The Officers, having determined that Scott was a threat, decided that it would be unsafe to leave him in the home until morning. The Officers had determined that Scott had barricaded himself inside of his room. After making repeated unsuccessful attempts to convince Scott to come out of the room, the police decided to breach the door.

At the time that the breach was made, Officer Scicluna was positioned at the door to kick it in. Lt. Brown ordered Scicluna to get low to stay out of the line of possible gunfire. Lt. Brown was holding a pepperball gun, and stood in the doorway to the bathroom across the hall from Scott's bedroom, behind Officer Scicluna. From the perspective of somebody facing the door into Scott's room from the hallway, Officers Burleson and Ohlde were positioned on the right side of the door, and Officer Raley was positioned on the left side of the door, near Lt. Brown. Officer Garcia was positioned by the back door. Richard and Cindy Rockwell were in the converted garage. One of the officers had his gun drawn at the time of the breach. The door was breached sometime between 9:12 and 9:16 p.m.

Once the door was breached, Scott, holding two eight-inch serrated knives, rushed towards Lt. Brown and attacked him with the knives. Officer Burleson saw the knives and yelled "knives" to warn his fellow officers. Lt. Brown began to fire multiple rounds at Scott with the pepperball gun. Lt. Brown was able to deflect a number of these attacks with his pepperball gun. During the scuffle, Scott pushed Lt. Brown back into the bathroom with enough force that the commode broke. Scott then turned and began to run after Officer Scicluna while still swinging his knives. Scott swung the knives at Officer Scicluna, injuring him. At about this time, the officers shot at Scott.

Officer Burleson fired one shot which hit Scott in the abdomen. Officer Raley fired three shots, two of which hit Scott. One of Officer Raley's shots created stip[p]ling on Scott's neck, which is generally indicative of a shot fired two feet or less from the target. Scott fell down in front of Officer Scicluna. Officer Scicluna fired one shot, which hit Scott in the chin and neck. Officer Garcia fired either once or twice, but did not hit Scott. Officers Ohlde and Lt. Brown did not fire any shots from their firearms. In total six or seven shots were fired. The shots were mostly fired in rapid succession. Four of the shots hit Scott, and one hit Officer Raley. No party suggests that Scott had a gun or shot Officer Raley. Scott received wounds to the chin, neck, forearm, and abdomen.

At approximately 9:16, the Officers called for EMS and reported that Scott had been shot. Scott was pronounced dead at 10:04 p.m.

On February 13, 2008, the Rockwells, individually and on behalf of their son's estate, sued the officers for excessive force, and assault and battery. The Rockwells later amended their complaint to add claims against the officers for unlawful entry. On June 10, 2008, the magistrate judge recommended to the district court that the officers' motion for summary judgment be granted. On August 26, 2008, the district court adopted the magistrate judge's report and recommendation, overruled the Rockwells'

objections, and entered summary judgment in favor of the officers. The Rockwells appealed.

Upon appeal, the U.S. Court of Appeals for the Fifth District held that the officers' use of deadly force was objectively reasonable. Because the court held that Scott's Fourth Amendment right to be free from the use of excessive force was not violated, the court need not consider the issue of whether that right was clearly established. The court also affirmed the district court's grant of official immunity to the officers on plaintiffs' assault-and-battery claims, unlawful-entry claims, and warrantless arrest claims. Accordingly, the court affirmed the district court's grant of summary judgment on all claims.

DISCOVERY: **Failure to Disclose**

Smith v. Cain, No. 10-8145, 1/10/12

Juan Smith was convicted of first-degree murder based on the testimony of a single eyewitness. During state post-conviction proceedings, Smith obtained police files containing statements by the eyewitness contradicting his testimony. Smith argued that the prosecution's failure to disclose those statements violated *Brady v. Maryland.*

The United States Supreme Court held that *Brady* required that a petitioner's conviction be reversed where the eyewitness's testimony was the only evidence linking petitioner to the crime and the eyewitness's undisclosed statements contradicted his testimony. The Court found that the eyewitness's statements were plainly material, and the State's failure to disclose those statements to the defense thus violated *Brady*.

Editor's Note: ***Brady*** *held that due process bars a State from withholding evidence that is favorable to the defense and material to the defendant's guilt or punishment.*

DWI: **Sobriety Checkpoints; Secondary Screening**

State of Maine v. McPartland
2012 ME 12, 2/2/12

Between the hours of 9:00 p.m. on August 27 and about 3:00 a.m. on August 28, 2010, the Old Town Police Department in Maine conducted an OUI roadblock, or sobriety checkpoint, on Stillwater Avenue in Old Town. Officer Christine McAvoy was among six officers assigned to the roadblock detail. The officers on the roadblock detail were under instructions to stop every vehicle traveling in both the eastbound and westbound lanes on Stillwater Avenue that night. Officer McAvoy testified that officers were instructed to approach each vehicle as it stopped at the roadblock and have a "brief" conversation with the operator, which in most cases did not extend beyond two minutes.

At approximately 2:00 a.m., Officer McAvoy observed a vehicle approaching the roadblock faster than the vehicles she had observed earlier. She estimated its speed at thirty-five miles per hour, and she testified that the speed limit was twenty-five miles per hour. The vehicle stopped properly, however, and Officer McAvoy saw no other operation of the vehicle that concerned her. When the vehicle stopped, Officer McAvoy introduced herself to the driver, McPartland, and explained that the Old Town Police Department was conducting an OUI safety checkpoint that

night. The suppression court found that Officer McAvoy did not observe the "smell of alcohol, slurred speech, open container, watery eyes, or any other of the usual indicia of alcohol consumption."

In conversing with Officer McAvoy, McPartland stated that she had been to a Bangor restaurant or pub and consumed "a martini" at about 10:00 p.m. Based on McPartland's admission that she had consumed alcohol and the officer's observation that McPartland had been speeding as she approached the checkpoint, Officer McAvoy directed McPartland to pull to the side of the road for additional questioning and screening.

At the suppression hearing, the parties stipulated that McPartland was not challenging the constitutional validity of the roadblock. Rather, McPartland asserted that Officer McAvoy had not had sufficient justification to refer McPartland to the side of the roadway for additional screening.

The issue before the Maine Supreme Court was what constitutional standard law enforcement authorities must apply when deciding whether a motorist who has been lawfully stopped at a sobriety checkpoint may be detained for secondary screening. Upon review, the Court found, in part, as follows:

"Although properly executed roadblocks withstand constitutional scrutiny, we have not yet addressed what constitutional standard governs referral of a motorist to secondary screening at these checkpoints. When the United States Supreme Court decided *Michigan Department of State Police v. Sitz* in 1990, it addressed only the constitutionality of the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning. The *Sitz* Court did, however, suggest that continued detention of particular motorists for more extensive field sobriety testing *may* require satisfaction of an individualized suspicion standard.

"Since *Sitz*, several other appellate courts and a leading Fourth Amendment scholar have stated that the reasonable articulable suspicion standard applies when analyzing the appropriateness of an officer's decision to direct a motorist stopped at a sobriety checkpoint to secondary screening. *See, e.g., United States v. William*, 603 F.3d 66, 70 (1st Cir. 2010) (concluding that a sobriety checkpoint was reasonable in part because following an initial checkpoint stop 'further investigation occurred only if individualized suspicion developed'); *Mullinax v. State*, 938 S.W.2d 801, 806 (Ark. 1997); *People v. Bruni,* 940 N.E.2d 84, 86-87 (Ill. App. Ct. 2010); *Commonwealth v. Murphy*, 910 N.E.2d 281, 287-89 (Mass. 2009); *Commonwealth v. Bazinet*, 924 N.E.2d 755, 757 (Mass. App. Ct. 2010); *State v. Eggleston,* 671 N.E.2d 1325, 1331 (Ohio Ct. App. 1996); 5 Wayne R. LaFave, *Search and Seizure* § 10.8(d) at 378-79 (4th ed. 2004) (stating that a law enforcement officer conducting the initial sobriety checkpoint stop 'should have an articulable suspicion that the motorist is intoxicated before detaining the motorist for an extended DWI investigation.)"

The Maine Supreme Court concluded that an officer questioning a motorist stopped at the initial roadblock must have an objectively reasonable basis for suspecting that the motorist is driving under the influence before

the officer can refer the motorist to secondary screening for impairment.

The Court stated that a driver's admission that she has consumed alcohol may be considered by a police officer in determining whether the officer has a reasonable articulable suspicion that the driver might be impaired. In addition, operation of a vehicle during the early hours of the morning and speeding can both be suggestive of impairment. The totality of the circumstances in this case created a reasonable articulable suspicion that McPartland was operating her vehicle under the influence of intoxicating substances that was sufficient to justify the secondary screening. When McPartland approached the checkpoint at 2:00 a.m., traveling at a rate that was ten miles per hour over the speed limit, and then admitted to consuming alcohol, she created an objectively reasonable suspicion that she was driving while impaired.

DWI: **Substantial Evidence of Intoxication**

Graham v. State, CACR 11-712
2012 Ark. App. 90, 1/25/12

On July 17, 2010, at approximately 6:30 p.m., Trooper Derek Byrd with the Arkansas State Police came into contact with Darin Graham and a passenger in Graham's truck on a paved county road. Trooper Byrd had received a tip from an off-duty sheriff's deputy who saw Graham drinking beer earlier that day while riding an all-terrain vehicle with children aboard. Trooper Byrd initiated a traffic stop of Graham's truck, which was pulling a double-axle trailer.

According to Trooper Byrd, Graham was not wearing a seatbelt and had not activated the tail lights on the trailer. Upon approaching Graham, Trooper Byrd observed Graham's bloodshot eyes and smelled alcohol on Graham's breath. Trooper Byrd asked Graham if he had been drinking and whether he had any open containers inside the vehicle.

Graham told Trooper Byrd that he had drunk only three beers and had two open containers. Trooper Byrd administered a portable breath test and then conducted several field sobriety tests, including the horizontal-gaze nystagmus, the nine-step walk and turn, and the one-leg stand. Graham failed all three tests. Trooper Byrd also gave Graham what he called "the alphabet test" by asking Graham to recite his ABCs, starting with the letter "M." Trooper Byrd testified that Graham failed this unofficial test as well because Graham inserted an "L" after the "N." Graham then told Trooper Byrd that he had actually drunk a six-pack of beer. Trooper Byrd testified that, based on his training and experience, he believed Graham was impaired and not fit to safely operate a motor vehicle.

Trooper Byrd transported Graham to the Lake Village Police Department, where he read Graham his rights from a statement-of-rights form that was introduced into evidence. Trooper Byrd testified that he read each of Graham's rights to him after placing the form in front of Graham for him to read along with Trooper Byrd. The form provided in relevant part:

> *If you take the test or tests requested by law enforcement, you may also, at your own expense, have a physician, registered nurse, lab technician, or other qualified person*

> *administer an additional breath, blood, or urine test. This department will assist you in obtaining such a test. Pursuant to Act 561 of 2001, if you choose to have an additional test, and are later found "Not Guilty" of violation of the Omnibus DWI Act, for this arrest, the arresting law enforcement agency will reimburse you for the cost of the additional test.*

Graham placed his initials on blank lines beside other rights listed on the form; however, there was no space to initial beside the right regarding an additional test. Directly beneath the section explaining the right to an additional test, Graham initialed above "yes" in answer to the following question, which was presented in all caps: "DO YOU UNDERSTAND ALL PARTS OF THESE RIGHTS ?" Also, Graham initialed above "no" in answer to the question: "DO YOU WANT ANOTHER TEST AT YOUR EXPENSE ?" Graham's signature appears at the bottom of the form.

Trooper Byrd testified that detainees sometimes want an additional test "because they feel like they're innocent and maybe I've done something wrong." Graham was observed for thirty-one minutes before giving the first of two breath samples on the Intoximeter. Graham's breath registered .132 on the first sample and .125 on the second sample. Trooper Byrd informed Graham that the final result was .125. Trooper Byrd conceded that he did not ask Graham again whether he wanted an additional test and did not advise Graham that taking an additional test could help him. Trooper Byrd released Graham into the custody of Graham's wife. Trooper Byrd testified that, in the past, he had taken other detainees, at their request, to have additional tests administered and pointed out that, if Graham had wanted an additional test later, Graham's wife could have taken him to the hospital to obtain another test.

Graham took the stand in his own defense and testified that he had drunk a six-pack of beer over the course of approximately six hours on the day he was stopped by Trooper Byrd. Graham stated that he informed Trooper Byrd prior to the field-sobriety tests that he had bad knees, which prevented him from maintaining his balance. Graham denied several aspects of Trooper Byrd's testimony with respect to Graham's actions during the field-sobriety tests. Graham testified that Trooper Byrd did not tell him at the police station that he might want to obtain an additional test at his own expense in order to dispute the results of the first one.

According to Graham, by the time he was told that he had failed the test, he had already given up his right to obtain an additional test. Graham testified that he would have obtained an additional test if he had known why he might want one.

In this appeal, Graham challenged the sufficiency of the evidence with regard to the issue of intoxication, Graham contends that there was no evidence that he was a clear and substantial danger to himself or others on the road. Graham points out that Trooper Derek Byrd stopped him for not wearing a seatbelt and not because Graham was driving erratically. Graham maintains that jurors would have had to speculate that Graham was so impaired that he could not safely operate a motor vehicle from the fact that his eyes twitched during the horizontal-gaze nystagmus test.

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

"The statute that sets forth the elements of driving while intoxicated, Arkansas Code Annotated section 5-65-103, doesn't require a showing that the defendant was 'driving the vehicle in a hazardous or negligent manner.' See *Stewart v. State,* 2010 Ark. App. 9, at 2, (citing *Beasley v. State,* 47 Ark. App. 92, 96, 885 S.W.2d 906, 908 (1994)). Rather, the statute requires only a showing that the defendant had 'actual physical control of the vehicle' while intoxicated, and Graham doesn't deny that he was in physical control of his vehicle when he was stopped by Trooper Byrd.

"Opinion testimony regarding intoxication is admissible, and it is then the jury's province to determine the weight and credibility of that evidence. *Henry v. State,* 2011 Ark. App. 169. Trooper Byrd testified that Graham had bloodshot eyes, smelled of alcohol, and failed three field-sobriety tests. *See Johnson v. State,* 337 Ark. 196, 987 S.W.2d 694 (1999) (holding that observations of police officers with regard to smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge).

"Further, Graham admitted that he had drunk a six-pack of beer prior to his arrest, and the breath-alcohol test results on the Intoximeter indicated that Graham was over the legal limit of alcohol in that the test's final result was .125."

In light of this evidence, the Arkansas Court of Appeals held that there was substantial evidence of intoxication to support Graham's conviction for driving while intoxicated.

ENTRAPMENT: **Defense Available Even if Elements of Crime Denied**

Smoak v. State, No. CR-71
2011 Ark. 529, 12/15/11

Van Buren Police Department Detective Donald Eversole created a profile on Yahoo, posing as a fifteen-year-old girl from Van Buren named Amanda Moore, with the online screen name *pageant_gurl433*. The profile included a picture of a teenaged girl. On September 8, 2009, at approximately 3:47 p.m., David Smoak, using the screen name *fire fighteremt987,* initiated a conversation with Amanda. Smoak told her that he was twenty-seven years old. Amanda told Smoak that she was fifteen years old. At 3:52 p.m., he responded, "free trip to jail lol [laugh out loud]." Smoak also stated, "when u get old enough u will be hell on wheels u will have boys lined up at your door 2 have a shot to go out with u just be pacient." At 4:08 p.m., Smoak asked about the age of the boys she dated and what they did. Amanda responded, "what do u think he was 24." Smoak replied, "well there no telling probley stayed in the bed most of the time most 24 year olds i knew was horney to be honest." Smoak added, "well most guys thats all they want is sex sum are more open about that but thats what they want i know u know that but its true." He further stated, at 4:22 p.m., "well i like it its fun feels good but when u don't have anyone to make love with you don't."

At 5:06 p.m., Amanda told Smoak she was hungry. She said that she liked "chicken mcnuggets." Smoak asked, "u want sum," "where u live at...to bring u nuggets." Amanda said, "well, i thought you liked me but i don't want u to drive all the way just to

give me chicken nuggets." Smoak said, "well my luck u would be a cop . . . and I would go to jail for bringing u chicken nuggets." When Amanda told Smoak that he had only offered chicken nuggets, he replied, "well could be more just trying to be safe." Smoak offered to bring dessert and said, "well i would give u more than dinner but u got to say u want it might be cream filled if u want it." Smoak said, "ok i ofered to cum over and let u eat and talk or whatever u have in mind,"..."u can do what u want to do with me."

For over an hour, Smoak continued to ask about her address or bringing her food, before she finally told him where she lived. At 6:32 p.m., Amanda said that she did not want to get pregnant, and Smoak responded, "have to meet first then u can deside if u do or don't." When Amanda suggested that they might postpone their meeting, Smoak told her not to "tease" him. Smoak asked, "u want me to cum or not," which Detective Eversole testified was a reference to semen. Amanda responded, "[how] many times . . . lol," and Smoak replied, "find out." Amanda then asked, "u got rubbers," and Smoak responded, "yep."

After they agreed to meet, Smoak picked up food at McDonald's and drove to the address given to him by Amanda. There, law enforcement officers arrested Smoak. Detective Eversole testified that several condoms were found above the driver's visor in Smoak's truck.

James David Smoak, Smoak's father, testified that Smoak was a high school graduate, but that he has "always been a special eds kid." According to his father, Smoak was "slow" and could be "easily led…by suggestion."

Smoak, who was twenty-eight years old when he communicated online with "Amanda," does not dispute that he believed he was communicating with a fifteen-year-old girl. Rather, he contends that, during this communication, he did not seduce, solicit, lure, or entice Amanda in an effort to arrange a meeting with her for the purpose of having sex with her. Smoak claims that a review of the chat log will reveal that he only sought to bring Amanda some food and perhaps strike up a friendship with her.

David James Smoak was convicted by a Crawford County jury of internet stalking of a child. Smoak appealed, arguing (1) the circuit court erred in denying his motion for a directed verdict because there was insufficient evidence to support his conviction; and (2) the circuit court erred as a matter of law by denying his attempt to utilize an entrapment defense and by failing to instruct the jury on entrapment. The Supreme Court of Arkansas affirmed the circuit court's holding that there was sufficient evidence to support Smoak's conviction; but reversed the court's denial of Smoak's attempt to utilize an entrapment defense, holding that a defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment, even if the defendant denies one or more elements of the crime. The Court found, in part, as follows:

"In Arkansas, the law has been that when the defense of entrapment is invoked, it is necessarily assumed that the act charged as an offense was committed. *E.g., Young v. State,* 308 Ark. 647, 826 S.W.2d 814 (1992). The Arkansas Supreme Court has stated that where an accused insists that he or she did not commit the offense, one of the bases of the

entrapment defense is absent and the accused is not entitled to that defense. In a long line of cases, this court has held that a defendant cannot deny the commission of an offense and simultaneously rely on the defense of entrapment. *E.g., Montgomery v. State,* 367 Ark. 485, 241 S.W.3d 753 (2006); *Pyle v. State,* 340 Ark. 53, 8 S.W.3d 491 (2000); *Weaver v. State,* 339 Ark. 97, 3 S.W.3d 323 (1999); *Heritage v. State,* 326 Ark. 839, 936 S.W.2d 499 (1996); *Young, supra; Morris v. State,* 300 Ark. 340, 779 S.W.2d 526 (1989); *Robinson v. State,* 255 Ark. 893, 503 S.W.2d 883 (1974); *Fight v. State,* 254 Ark. 927, 497 S.W.2d 262 (1973).

"In *Mathews v. United States,* 485 U.S. 58 (1988) , the United States Supreme Court was asked to determine whether a defendant in a federal criminal prosecution who denies commission of the offense may nonetheless have the jury instructed, where the evidence warrants, on the affirmative defense of entrapment. The defendant in *Mathews* filed a motion in limine seeking to raise an entrapment defense. The district court ruled that the entrapment defense was not available to the defendant because he had not admitted all of the elements of the offense charged.

"At the close of trial, the defendant moved for a mistrial based on the district court's refusal to instruct the jury on entrapment. The district court denied the motion and held that, as a matter of law, the defendant was not entitled to an entrapment instruction because he would not admit committing all elements of the crime charged. The United States Court of Appeals of the Seventh Circuit affirmed the district court's refusal to give the entrapment instruction to the jury. The Supreme Court reversed.

"The *Mathews* Court recognized that 'as a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.'

"In a dissenting opinion in *Young v. State,* supra, Justice Newbern concluded that the *Mathews* rule should be adopted by this court, explaining that while those theories of defense may be inconsistent, that should not deprive the trier of fact of the opportunity to consider both. A jury could readily decline to believe the accused's denial but believe the evidence of entrapment. Refusal to allow the defense may thus result in infliction of punishment upon a defendant which should not be inflicted upon one who was entrapped. The result may be that the defendant is punished for a serious crime when his 'offense' is only that he sought to require the State to prove its case against him in addition to offering an affirmative defense."

The Arkansas Supreme Court was persuaded that the purpose of the entrapment statute cannot be served when a defendant is required to admit all the elements of the crime, and the Court agreed with the reasoning of Justice Newbern's dissent in *Young*. Accordingly, the Court abolished the rule that a defendant cannot deny the commission of an offense and simultaneously assert the defense of entrapment. They adopted the *Mathews* rule and held that a defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment, even if the defendant denies one or more elements of the crime.

EYEWITNESS IDENTIFICATION: **Unduly Suggestive Procedure**

Perry v. New Hampshire, No. 10-8974, 1/11/12

On August 15, 2008, around 3:00 a.m. the Nashua, New Hampshire Police Department received a call reporting that an individual was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked eyewitness Nubia Blandon to describe the man, Blandon pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Barion Perry's arrest followed this identification.

Before trial, Perry moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. The New Hampshire trial court denied the motion. Upon review, the Court found, in part, as follows:

"To determine whether due process prohibits the introduction of an out-of-court identification at trial, this Court's decisions instruct a two-step inquiry: The trial court must first decide whether the police used an unnecessarily suggestive identification procedure; if they did, the court must next consider whether that procedure so tainted the resulting identification as to render it unreliable and thus inadmissible. Perry's challenge failed at step one, for Blandon's identification did not result from an unnecessarily suggestive procedure employed by the police."

On appeal, Perry argued that the trial court erred in requiring an initial showing that police arranged a suggestive identification procedure. Suggestive circumstances alone, Perry contended, suffice to require court evaluation of the reliability of eyewitness identification before allowing it to be presented to the jury. The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction.

The United States Supreme Court held in this case that the Due Process Clause did not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.

INFORMANTS: **Liability for Mishandling**

Davis v. United States
CA1, No. 10-1419, 1/20/12

In the 1970s, Louis Litif worked as a bookmaker in Boston and was involved with James Joseph "Whitey" Bulger's Winter Hill gang. In 1979, Litif was charged with murder. While out on bail, he offered to cooperate with police in the investigation of a drug conspiracy involving Bulger. His attorney met with Boston Police and FBI agent John Connolly to discuss this offer. Unbeknownst to Litif and his attorney, Bulger was a top echelon FBI informant and Connolly was his primary handler. Connolly and others were protecting Bulger from prosecution so that he could continue supplying information. Roughly three weeks later, Louis Litif was murdered.

Several years later, after a series of investigations disclosed leaks to Bulger, Litif's estate filed a claim under the Federal Tort

Claims Act, 28 U.S.C. 1346(b)(1), 2401(b), 2671, 2675. The court awarded $1.15 million.

The First Circuit affirmed, rejecting arguments that the administrative claim was filed after the statute of limitations had run and that there was insufficient admissible proof that the leak occurred and that Bulger killed Litif; and that the estate failed to meet its burden for liability based on conscious pain and suffering. Whatever they suspected, the family did not have actual or constructive knowledge of the claim until 1999.

MIRANDA: **Impeachment of Testimony**

Villagran v. State, No. CACR 11-261
2011 Ark. App. 769, 12/14/11

Christian Villagran was convicted of murder in the death of Carlos Estrada. He was also charged with a firearm enhancement for employing a firearm while committing the felony offense. Villagran was sentenced to thirty-five years in the Arkansas Department of Correction. On appeal, Villagran argued that the trial court erred in failing to suppress the statements he made after invoking his right to counsel. The trial court denied the request to suppress the statement that Villagran made during his custodial interrogation. The statement was not introduced at trial, but was used for impeachment when Villagran testified.

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

"The statement, even if obtained in violation of Villagran's right to counsel, can still be used to impeach his contradictory testimony. In other words, his trial testimony will not go unchallenged simply because his pretrial statements were inadmissible. In *Kansas v. Ventris*, 556 U.S. 586 (2009), the Supreme Court noted 'it is one thing to say the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can provide himself with a shield against contradictions and untruths. Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of the traditional truth-telling devices of the adversary process is a high price to pay for vindication of the right to counsel at the prior state.'

"However, citing no authority, Villagran argues that the State improperly used his pretrial statements to impeach his trial testimony because the prior statements 'tended to significantly diminish his credibility.' However, this is the precise point of impeachment and goes to the very heart of the Supreme Court's logic in the *Ventris* case. Recognizing the limitations of his argument, Villagran more specifically claims that the State's impeachment of him (via the allegedly infirm custodial statements) should have been limited to the precise words in any denial or assertion he made. This hair-splitting argument, however, is not supported by any citation to authority or argument explaining why his credibility should not have been questioned, except to say that his credibility was 'the most important aspect of trial.' We do not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Roberts v. State,* 324 Ark. 68, 71, 919 S.W.2d 192, 194 (1996); *Cook v. State*, 321 Ark. 641, 906 S.W.2d 681 (1995)."

MIRANDA: **Custodial Interrogation**

United States v. Cavazos
CA5, No. 11-50094, 1/19/12

On September 1, 2010, between 5:30 a.m. and 6:00 a.m., Michael Angelo Cavazos woke to banging on his door and the shining of flashlights through his window. U.S. Immigration and Custom Enforcement ("ICE") Agents, assisted by U.S. Marshals, Texas Department of Public Safety personnel, and Crane Sheriff's Department personnel, were executing a search warrant on Cavazos's home. The warrant was issued on the belief that Cavazos had been texting sexually explicit material to a minor female. After Cavazos's wife answered the door, approximately fourteen law enforcement personnel entered Cavazos's residence.

Immediately upon entering, government agents ran into Cavazos's bedroom, identified him, and handcuffed him as he was stepping out of bed. Agents then let Cavazos put on pants before taking him to his kitchen. Cavazos's wife and children were taken to the living room. Cavazos remained handcuffed in the kitchen, away from his family, while the entry team cleared and secured the home. ICE Agents Le Andrew Mitchell and Eric Tarango then uncuffed Cavazos and sat with him in the kitchen for approximately five minutes while other officers secured the home.

Once the house was secured, agent Tarango asked Cavazos if there was a private room in which they could speak. Cavazos suggested his son's bedroom. In the bedroom, Cavazos sat on the bed while the two agents sat in two chairs facing him. The agents asked Cavazos if he wanted the door open, but Cavazos said to keep the door closed. Agents Mitchell and Tarango informed Cavazos that this was a "non-custodial interview," that he was free to get something to eat or drink during it, and that he was free to use the bathroom. The agents then began questioning Cavazos without reading him his *Miranda* rights.

About five minutes into the initial interrogation, Cavazos asked to use the restroom. Agents then searched the restroom for sharp objects and inculpatory evidence. Once cleared, they allowed Cavazos to use the bathroom, but one agent remained outside the door, which was left slightly open so the agent could observe Cavazos. Once finished, Cavazos, followed by an agent, went to the kitchen to wash his hands, as the restroom's sink was broken. Cavazos then returned to his son's bedroom, and the interrogation resumed.

After Cavazos returned to the bedroom, officers interrupted the interrogation several times to obtain clothing to dress Cavazos's children. The officer would ask Cavazos for an article of clothing, which Cavazos would retrieve from the drawers and hand to the officer. Agents Mitchell and Tarango would then continue the questioning.

At some point during the interrogation, Cavazos asked to speak with his brother, who was his supervisor at work. The agents brought Cavazos a phone and allowed him to make the call, instructing Cavazos to hold the phone so that the agents could hear the conversation. Cavazos told his brother that he would be late for work.

Finally, the agents asked Cavazos if he had been "sexting" the victim. Cavazos allegedly

admitted that he had, and also described communications with other minor females. After the interrogation was over, Cavazos agreed to write a statement for the agents in his kitchen. While Cavazos began writing the statement, an agent stood in the doorway and watched him. Cavazos wrote his statement for approximately five minutes before agents Mitchell and Tarango interrupted him. At that point, the agents formally arrested Cavazos and read him his *Miranda* rights. From beginning to end, the interrogation of Cavazos lasted for more than one hour, and the agents' conduct was always amiable and non-threatening. Subsequently, Cavazos was indicted for coercion and enticement of a child, and for transferring obscene material to a minor.

On November 2, 2010, Cavazos moved to suppress the statements he made before he was read his *Miranda* rights. On January 14, 2011, a suppression hearing was held. On January 19, 2011, Judge Robert A. Junell granted Cavazos's motion. The Government filed an interlocutory appeal of the district court's order. Upon review, the Fifth Circuit Court of Appeals found as follows:

"*Miranda* warnings must be administered prior to custodial interrogation. A suspect is in custody for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest. Two discrete inquires are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person feel he or she was at liberty to terminate the interrogation and leave. The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances.

"Here, the totality of circumstances, drawn from the record as seen in the light most favorable to Cavazos, indicates Cavazos was in custody at the time he made his incriminating statements. Just after 5:30 a.m., Cavazos was awakened from his bed, identified and handcuffed, while more than a dozen officers entered and searched his home; he was separated from his family and interrogated by two federal agents for at least an hour ; he was informed he was free to use the bathroom or get a snack, but followed and monitored when he sought to do so; and he was allowed to make a phone call, but only when holding the phone so that the agents could overhear the conversation. An interrogation under such circumstances, and those others discussed above, would lead a reasonable person to believe that he was not at liberty to terminate the interrogation and leave, notwithstanding the fact that the interrogation occurred in his home and he was informed the interrogation was 'non-custodial.'

"In arguing *Miranda* warnings were not necessary, the Government relies on the fact that Cavazos was interrogated in his own home, a fact which, taken alone, lessens the likelihood of coercion. *Miranda*, however, does not allow for a simple in-home vs. out-of-home dichotomic analysis. Here, significant facts weigh against the presumption that an

in-home interrogation is non-coercive: a large number of officers entered Cavazos's home, without his consent, early in the morning, and Cavazos's subsequent movement about the home was continually monitored.

"The Government places significant emphasis on the fact that the agents informed Cavazos that the interview was 'non-custodial.' Such statements, while clearly relevant to a *Miranda* analysis, must be analyzed for their effect on a reasonable person's perception, and weighed against opposing facts. Here, several facts act to weaken the agents' statement such that it does not tip the scales of the analysis.

"First, to a reasonable lay person, the statement that an interview is 'noncustodial' is not the equivalent of an assurance that he could terminate the interrogation and leave. Second, uttered in Cavazos's home, the statement would not have the same comforting effect as if the agents had offered to 'leave at any time upon request.' This is not to say that a statement by police to a defendant that an interrogation is 'non-custodial' does not inform our decision as to the necessity of a *Miranda* warning when an interrogation is conducted inside the home. Instead, we recognize the 'totality of circumstances' *Miranda* commands, and we note that statements made in different circumstances will have different meanings and differently affect the coercive element against which *Miranda* seeks to protect.

"In engaging in the inquiry required by *Miranda*, the Court is mindful that no single circumstance is determinative, and we make no categorical determinations. Reviewing, in totality, the unique circumstances presented in the record here, in the light most favorable to Cavazos, the party prevailing below, we find a reasonable person in Cavazos's position would not feel 'he or she was at liberty to terminate the interrogation and leave.' The order of the district court is affirmed."

MIRANDA: **Waiver of Rights**

United States v. Brown
CA7, No. 11-1344, 12/30/11

In *United States v. Brown*, the Court of Appeals for the Seventh Circuit reviewed a case concerning ways in which a defendant may acknowledge he has understood and waived his *Miranda* rights.

In March 2008, Officers Goodwin and McGrone stopped their squad car to investigate a gathering of men in front of a house. The officers saw one of the men, Brown, flee from the scene with a handgun in his waistband. After a chase, the officers arrested Brown in front of the residence of Gwendolyn Thompson.

The officers handcuffed Brown and placed him in the back of a squad car. Goodwin read Brown his rights under *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). When asked if he understood those rights, Brown bobbed his head and made a sighing sound. Goodwin interpreted this to mean "I know my rights" and began to interrogate Brown. Brown indicated that he had a gun due to a "murder hit" put on his head, that he did not want to go back to jail and that he would like to strike a deal to help himself. Goodwin asked who in particular from the "80s babies" ordered the "hit." Brown declined to answer. Goodwin and McGrone then took Brown to the police station.

At the station, Officer McGrone again informed Brown of his rights under *Miranda*. Brown responded "Yeah" when asked if he understood his rights. Brown also answered "Yeah" when asked if he wanted to continue speaking. Brown again admitted that he had had the handgun because the "80s babies" had a "hit" out on him.

The interview ended shortly thereafter as Brown required treatment for injuries he sustained during his flight from the police. At the hospital, Brown told Dr. Thomas Bajo that he hurt his arm by falling from a fence as he was trying to get away from the police.

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

"The government must show that a *Miranda* waiver was 'voluntary in the sense that it was the product of a free and deliberate choice.' *Berghuis v. Thompkins,* 130 S.Ct. 2250, 2260 (2010) (quoting *North Carolina v. Butler,* 441 U.S. 369, 373 (1979)). A *Miranda* 'waiver can be either express or implied.' *United States v. Upton,* 512 F.3d 394, 399 (7th Cir. 2008) (citing Butler, 441 U.S., at 375-76). A person may take actions that constitute a waiver of his rights 'without expressly saying so.' (quoting *Butler,* 441 U.S. at 373). Courts evaluate the voluntary nature of a defendant's actions in the context of his age, experience, education, background, intelligence, the length of questioning and other circumstances. See, e.g., *Johnson v. Pollard,* 559 F.3d 746, 753 (7th Cir. 2009) (citing *Gilbert v. Merchant,* 488 F.3d 780, 791 (7th Cir. 2007)).

"Looking at the totality of the circumstance, we feel it is clear that Brown understood and waived his rights. Officers gave *Miranda* warnings to Brown twice. After each recitation, he made it known that he understood those rights and proceeded to answer questions. It is immaterial that defendant did not sign a waiver form or even utter a clear yes in response to the first recitation of *Miranda.*

"Even if this Court were to dismiss Brown's upward nod as ambiguous, Brown's immediate actions constituted an implied waiver. Brown has had substantial experience with the criminal justice system due to six previous convictions. Despite his experience, Brown did not request a lawyer or that questioning cease. See *United States v. Banks,* 78 F.3d 1190, 1198 (7th Cir. 1996) (finding waiver where defendant had "prior experience with law enforcement officials") *vacated on other grounds by Mills v. United States,* 519 U.S. 990 (1996). Instead, it appears that Brown voluntarily provided information in the hope that he could make a deal with police. Thus, Brown asked Goodwin if there was anything Goodwin could do for him after Brown answered a few questions. In light of Brown's experience and eagerness to strike a deal, it is clear that Brown understood his rights and thought he might benefit from waiving them. *See United States v. Upton,* 512 F.3d 394, 399 (7th Cir. 2008).

"Brown also did not answer all of Goodwin's questions, indicating that Brown understood he had the right to remain silent. Brown told Goodwin that he was carrying the gun to protect himself because the '80s babies' had a 'hit' out on him. However, when Goodwin asked Brown to name a specific individual within that faction who ordered the 'hit,' Brown refused to answer. There can be an implied waiver where a defendant 'selectively

chose not to answer some of the questions that were put to him.' *Banks*, 78 F.3d at 1198.

"While Brown's immediate responses to his *Miranda* warnings may have been ambiguous, defendant's attempts to negotiate a deal and his selective answering of questions are evidence that he understood his rights and voluntarily waived them."

PRIVACY RIGHTS:
Internet Video of Accidental Shooting

Paige v. Drug Enforcement Administration
DCC, No. 11-5023, 1/17/12

Lee Paige is a special agent in the DEA's Orlando District Office. On Friday, April 9, 2004, he spoke to a group of about fifty children and parents at a community center in Orlando, Florida. At the time, Paige was an undercover agent who also often spoke to schools and other organizations to educate the public about the dangers of illegal drugs. During the presentation, Paige displayed his DEA-issued firearm while discussing gun safety and telling the audience that firearms should be handled only by professionals like himself. His firearm accidentally discharged and he shot himself in the thigh.

With Paige's knowledge, one of the parents in attendance video-recorded Paige's presentation—including the accidental discharge—on a mini-DV cassette tape (Mini-DV). The video was over one hour long and was the only video-recording of Paige's presentation. The parent turned the Mini-DV over to the DEA agents who arrived on the scene that night. Later that night, Robert Patterson, another DEA special agent from the Orlando District Office, copied the Mini-DV onto a VHS tape.

The DEA Office of Inspections (IN), headquartered in Arlington, Virginia, is responsible for investigating all shooting incidents involving DEA personnel. Upon receiving notification of a shooting, IN determines whether to immediately dispatch inspectors from IN headquarters to investigate the shooting or to delegate the investigation to the local DEA office. On April 12, after receiving notice of the shooting involving Paige, IN informed Steve Collins, the Assistant Special Agent in Charge in the Orlando District Office, that it did not intend to send inspectors to Orlando. IN also asked Collins to send IN a copy of the video recording. That same day, Collins gave the Mini-DV and the VHS to Peter Gruden, a DEA supervisor in the Orlando District Office. Collins instructed Gruden to mail the VHS to IN; Gruden mailed the VHS to IN later that week. On April 14 or 15, IN decided to send two inspectors from headquarters to investigate the shooting because an agent had been injured and because of concern about adverse publicity resulting from the incident.

Sometime during the week of April 12, Gruden directed technical personnel at the Orlando District Office to make "a few" additional copies of the Mini-DV The copies were made on compact discs (CDs). The video appearing on the CD was four minutes, nine seconds (4:09 video) in duration and it depicted only the accidental discharge portion of the Mini-DV. Gruden provided the 4:09 video to several individuals.

In late April and early May, Paige's accidental discharge was reported in the press. The

reports stated that a DEA agent had shot himself in the leg but Paige was not identified by name. A version of the 4:09 video began to appear on internet websites and on the DEA's internal e-mail system (known as Firebird) at some point between April 2004 and early March 2005. The DEA Office of Professional Review (OPR) conducted a one year long investigation into the release of the 4:09 video on the internet and on Firebird but was unable to determine who released it. Paige filed suit against the DEA in April 2006, alleging the disclosure of the 4:09 video violated the Privacy Act and the Federal Torts Claim Act (FTCA). The Federal District Court granted summary judgment for the Drug Enforcement Administration.

The Court of Appeals for the District of Columbia affirmed the judgment, holding that Paige failed to establish the elements of his Privacy Act claim—specifically, that the video was retrieved from a system of records and that the disclosure was intentional or willful. The court also held that plaintiff's FTCA claim failed because he did not establish all of the elements under Florida law for the tort of invasion of privacy by public disclosure of a private fact where the video contained no private facts and where the accidental discharge was a matter of public concern.

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

United States v. Searcy
CA7, No. 11-1662, 12/30/11

On July 1, 2009, Officer Andrew Matson of the Greater Racine Gang Task Force applied for a search warrant to search the home of defendant Corey D. Searcy. His supporting affidavit was based primarily on information provided by a confidential informant. The affidavit stated, in relevant part, that the confidential informant contacted Officer Matson and informed him that he observed Searcy with a firearm in the residence located at 2220 Harriet Street, Racine, Wisconsin, within the past 72 hours. The informant further stated that Searcy lives at that address with other family members and that the residence was shot at in the past two weeks by gang members due to an ongoing gang feud. Officer Matson's affidavit stated that he considered the informant reliable because the informant had provided information in the past six months that resulted in the arrest of three different individuals.

The affidavit also stated that Officer Matson was able to partially corroborate the informant's statements. Racine Police Department records showed that Searcy's primary address was 2220 Harriet Street. The utilities for that address were listed under Lenna Gardner, a family member of Searcy. Officer Matson's check of Searcy's criminal history confirmed that Searcy had a felony conviction (Possession of Cocaine with Intent to Deliver). Moreover, Officer Matson knew from his experience on the Greater Racine Gang Task Force that Searcy was an active member of the Vice Lords street gang, which, he stated, is known for illegal activities, including weapons-related offenses and illegal drug trafficking.

Based on this affidavit, a state court judge authorized a search warrant for Searcy's residence. Execution of the warrant recovered two firearms. On February 23, 2010, a grand

jury indicted Searcy with one count of felon in possession of a firearm. On March 16, 2010, Searcy filed a pre-trial motion to suppress evidence. He contended that the search warrant did not establish probable cause because the informant's statements lacked sufficient detail and independent corroboration.

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

"In the present case, we conclude that, based on the totality of circumstances, Officer Matson's affidavit provided sufficiently reliable information to support the issuance of a search warrant. We therefore affirm the district court's denial of the defendant's motion to suppress. Though we agree with the defendant that the informant's credibility is of prime importance here, an analysis of the totality-of-the-circumstances factors shows why the information contained in the affidavit was sufficiently reliable to support a finding of probable cause.

"First, the key information provided by the informant—that he or she observed Searcy with a gun in his home—was obtained through firsthand observation. This information was also transmitted within a relatively short period of time—72 hours—before the application for the search warrant and certainly was not stale. Moreover, the information furnished by the informant was largely corroborated by law enforcement. Officer Matson, by checking the police records, which listed that location as his primary address, verified that Searcy in fact resided at 2220 Harriet Street. Officer Matson also confirmed that the utilities serving that location were in the name of Lenna Gardner, whom Officer Matson knew to be a member of Searcy's family. Lastly, the informant's statement that Searcy's home was shot at by a rival gang was consistent with Officer's Matson's understanding that Searcy was an active member of the Vice Lords gang, which is often involved in weapons-related incidents.

"Searcy focuses on the affidavit's lack of detail about the physical location and circumstances of the informant's observations. Though we agree that the affidavit was lacking in specificity, this shortcoming, on balance, is not sufficient to overturn a finding of probable cause. Facts indicating how the informant came to be inside Searcy's home or where exactly in the home he saw Searcy with the gun would have been helpful, but they are by no means required to establish probable cause. *See Garcia*, 528 F.3d at 486. Rather, given the fact that the informant's previous dealings with the police led to three arrests in the past six months, and, as the magistrate judge in the current case noted, because the informant faced criminal prosecution for furnishing false information to police, the informant's information was sufficiently reliable to compensate for its lack of detail."

SEARCH AND SEIZURE:
Basis for Stop; Citizen Informant

Ashley v. State, CACR 11-613
2012 Ark. App. 131, 2/8/12

On February 2, 2010, Brent Cole, assistant police chief for the Sheridan Police Department, testified that he received a call from Carroll at the feed store stating that a white male had just purchased five one-pound bags of organic iodine. Cole, who

had been in law enforcement for sixteen years and was a certified methamphetamine-lab technician, testified that iodine could be used to manufacture methamphetamine and was also used to treat hoof rot in cows. The policy of the feed store was to have purchasers of iodine show identification and sign a logbook. Carroll gave Cole the license-plate number of the purchaser's vehicle.

Cole and Agent Eddie Keathley, supervisor of Group 6 Narcotics, responded in an unmarked truck and located Danny Ashley's vehicle as it was driving by. Cole and Keathley followed the vehicle through town for approximately a mile until the vehicle pulled into a bank. Brian Clark, the passenger in Ashley's vehicle, repeatedly looked back at the officers and was acting very suspicious. Cole and Keathley parked approximately thirty feet from the bank's entrance as Clark exited the vehicle and went inside the bank for a short time. Clark was watching the officers as he went in and out of the bank.

As Clark was exiting the bank, Cole and Keathley drove up and parked their truck near the rear of Ashley's car, but not blocking it. Cole walked to the passenger side of the vehicle as Clark was reentering the vehicle. Cole explained who he was and asked Clark to exit the vehicle. Cole asked Clark if he had any cows, and Clark responded that Cole needed to speak to Ashley. Cole went to the driver's side of the vehicle where Ashley was sitting and asked him to step out of the car. Cole testified that Ashley was not under arrest or in custody at this point. Cole asked Ashley how many cows he had in his apartment, and Ashley stated that he was buying the iodine for someone else. Cole then asked Ashley what he thought this other person was using the iodine for, and Ashley said it was to "cook dope."

Cole testified that at this point he considered Ashley to be under arrest. Cole then asked Ashley if he had anything illegal on him. Ashley did not verbally respond, but he looked down at his shirt pocket, took a deep breath, and did not look back up at Cole. Cole checked the shirt pocket and found two small containers that contained five baggies of methamphetamine. Cole then placed Ashley under arrest. The transaction lasted approximately twelve to fifteen minutes. Ashley's vehicle was subsequently searched, and five one-pound bags of iodine were found.

At the police department, Keathley advised Ashley of his *Miranda* rights using a rights form, which Ashley signed. Keathley testified that Ashley stated the iodine was being used to "cook dope" and that he was going to trade the iodine for meth. Ashley would not say who he was going to trade with.

Cole testified that Carroll from the feed store had previously called him about purchases such as this one. Cole stated that for the amount of iodine that was bought, the purchaser would have to have a big ranch. Cole admitted that he did not have any knowledge that Ashley had made purchases of other materials that could possibly be used for manufacturing methamphetamine. Cole testified that the men were free to leave when he approached them to talk. He stated that even though he knew Ashley did not have cows, if Ashley had told him the iodine was for cows, he could not have arrested him. Cole and Keathley were both in plain clothes at the time they talked to the men. Cole had

his badge on his belt and was wearing a weapon. Keathley was wearing his badge on a chain around his neck and was wearing a weapon. Cole acknowledged having his hand on his gun for safety purposes.

Ashley was found not guilty on the charge of possession of methamphetamine with intent to deliver but guilty of the lesser-included offense of possession of methamphetamine. The jury also found Ashley guilty of possession of drug paraphernalia with intent to manufacture methamphetamine. He was sentenced as a habitual offender and received ten-year sentences on both convictions to run consecutively. Ashley then moved to set aside the verdict for possession of methamphetamine because there was no proof that he possessed methamphetamine. The court denied the motion. Ashley filed a timely notice of appeal.

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

"The existence of a reasonable suspicion must be determined by an objective standard, and due weight must be given to the specific reasonable inferences an officer is entitled to derive from the situation in light of his experience as a police officer. *McConnell v. State,* 85 Ark. App. 77, 146 S.W.3d 370 (2004). When reasonable suspicion is based solely on a citizen-informant's report, there are three factors for determining reliability: (1) whether the informant is exposed to possible criminal or civil prosecution if the report is false; (2) whether the report is based on personal observations of the informant; and (3) whether the officer's personal observations corroborate the informant's observations.

"Ashley challenges only the third prong, arguing that there was a lack of personal observations by the police, and he claims that this case is very similar to *Summers v. State,* 90 Ark. App. 25, 203 S.W.3d 638 (2005). In the instant case, the informant told the police that a white male had bought five one-pound bags of iodine from the feed store just down the road from the police department, and he gave the police the vehicle's license-plate number.

"Officer Cole ran the license-plate number and determined that the registered owner was Danny Ashley. When the officers left the police department, the car with that license-plate number passed by them and its occupants were two white males. This is sufficient corroboration of the informant's observations. *See McConnell v. State*, 85 Ark. App. 77, 146 S.W.3d 370 (2004). While following the car, the police observed the passenger looking back at the officers and acting very suspicious. Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion, although nervousness alone does not constitute reasonable suspicion of criminal activity. *Lilley v. State,* 362 Ark. 436, 208 S.W.3d 785 (2005). Adding to Officer Cole's suspicion was his knowledge that Ashley lived in an apartment and did not own cows; thus, it was unlikely that Ashley had a legitimate purpose for buying such a large amount of iodine. We must give due weight to the reasonable inferences Officer Cole was entitled to derive in light of his sixteen years in law enforcement and qualifications as a certified methamphetamine-lab technician. Under these facts, there was reasonable suspicion for Officer Cole to detain Ashley."

SEARCH AND SEIZURE:

Consent Search; Search of Groin Area

United States v. Russell

CA9, No. 11-30030, 1/5/12

Officer Matt Bruch is a Port of Seattle Police Officer assigned as a task force officer with the Drug Enforcement Administration group at the Seattle-Tacoma International Airport. On August 12, 2010, Bruch received a phone call from an Alaska Airlines ticket agent reporting that Russell, described as a black male wearing a leather jacket and a large necklace, had paid cash for a last-minute, one-way ticket to Anchorage, Alaska. The Alaska Airlines agent also reported that Russell was traveling alone and did not check any luggage. In light of these circumstances, Bruch was suspicious that Russell might be a drug courier. Bruch, together with an assisting officer, proceeded to the departure gate for Russell's flight. En route to the gate, Bruch learned that Russell had prior drug and firearm-related convictions, and had also been implicated in a prior drug investigation in Alaska.

Once he approached Russell, Bruch displayed his badge and identified himself as a police officer investigating narcotics. Bruch told Russell that he was "free to go and he wasn't under arrest." Bruch asked Russell for permission to search his bag and his person; Russell consented. After taking possession of Russell's bag and handing it to the assisting officer to search, Bruch asked for permission to search Russell a second time. Russell again consented verbally and spread his arms and legs to facilitate the search.

Russell was wearing baggy pants. Bruch testified that he searched Russell beginning from the ankles and working his way up, using his "standard operating procedure" for a frisk. He squeezed the shin, knee and thigh. When Bruch reached into Russell's groin area he "lifted up to feel." After feeling something hard and unnatural, Bruch arrested Russell. The entire search occurred outside the clothing; Bruch never patted or reached inside the pants.

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

"It is well-established that consent is a recognized exception to the Fourth Amendment's protection against unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) ('A search to which an individual consents meets Fourth Amendment requirements.') Nonetheless, it is the government's burden to show consent was given 'freely and voluntarily.' *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). We have identified five factors to be considered in determining the voluntariness of consent to a search:

(1) whether defendant was in custody;

(2) whether the arresting officers have their guns drawn;

(3) whether *Miranda* warnings have been given;

(4) whether the defendant was told he has a right not to consent; and

(5) whether defendant was told a search warrant could be obtained.

"The fact that some of these factors are not established does not automatically mean that consent was not voluntary. *United States v. Morning*, 64 F.3d 531, 533 (9th Cir. 1995) (quoting *United States v. Castillo*, 866 F.2d 1071, 1082 (9th Cir. 1988)).

"Application of these factors leads us to affirm the determination that Russell's consent was voluntary. To begin, Russell was not in custody when the search occurred, nor did the officers have their guns drawn, or even visible at any point during the encounter with Russell. The third factor, *Miranda* warnings, does not bear on this case because Russell was not under arrest at the time of the searches and once he was arrested, the warnings were provided. 'It would…make little sense to require that *Miranda* warnings…be given by police before requesting consent.' *United States v. Vongxay*, 594 F.3d 1111, 1120 (9th Cir. 2010) (quoting *United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985)). It bears noting that in Chan-Jimenez the *Miranda* warnings were pertinent because the defendant had already been seized. 125 F.3d at 1326. The fourth factor is either neutral or slightly favors Russell: he was *not* told that he could refuse to consent. However, the district court found that the officers told Russell he was free to leave, which is an instructive, but certainly less clear, way of saying that consent could be refused. In any event, consent to a search is not necessarily involuntary simply because officers failed to provide notice of the right to refuse. *United States v. Cormier*, 220 F.3d 1103, 1113 (9th Cir. 2000). Finally, the officers did not tell Russell that they could obtain a search warrant if he refused to consent. The district court's finding that Russell affirmatively consented to the search, coupled with consideration of this five-part inquiry, supports the district court's conclusion that the consent was free and voluntary. There was no error, let alone clear error, in this determination.

"Any search, even a consensual one, is constrained by the bounds of reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The question here is whether a request to conduct a search of the person for narcotics reasonably includes the groin area. In other words, when Russell consented to a search of his person, was it reasonable for Bruch to assume the consent included the groin area? The scope of consent is benchmarked against an 'objective reasonableness' test.

"The factual context is key to our decision. Bruch specifically advised Russell that he was looking for narcotics. After consenting to the search, Russell was more than cooperative. To facilitate the search, he lifted his arms to shoulder height and spread his legs. Russell could have objected either of the two times he gave verbal consent before the search, or while Bruch worked his way up from the ankles to the groin. *See, e.g., United States v. Sanders*, 424 F.3d 768, 776 (8th Cir. 2005) (granting a motion to suppress where the suspect consented to a search of his person but then withdrew consent by actively shielding his groin area from the officer's search). Indeed, Bruch purposely searched from the ankles up because 'it gives them an opportunity to say that they don't want the search…there is an opportunity to stop.' Instead Russell said nothing and certainly did nothing to manifest any change of heart about his consent to search. He never objected, expressed any concern, nor did he revoke consent or call a halt to the search, nor did he complain to the officer after the fact.

"We hold that the search was reasonable. Narcotics are often hidden on the body in locations that make discovery more difficult, including the groin area. The search here did not extend inside the clothing. Finally, this case does not present a question of a body pat-down by an officer of the opposite gender. *See, e.g., Hudson v. Hall*, 231 F.3d 1289, 1298 (11th Cir. 2000) (noting as a significant factor that the searching officer was the same gender as the suspect); *United States v. Rodney*, 956 F.2d 295, 298 n.3 (D.C. Cir. 1992) ('In particular, we do not address situations where, unlike here, the officer and the suspect are of opposite sexes.') Not only would a reasonable person in Bruch's situation understand that the general consent for a narcotics search of the person included a pat-down of all areas of the body, including the groin area, Russell's unrestricted consent to the search and conduct during the search suggested nothing different.

"We conclude that Russell voluntarily consented to a search of the person, encompassing a full-body frisk, including the groin area. We uphold the district court's denial of Russell's motion to suppress."

SEARCH AND SEIZURE:
Consent to Search; Spousal Consent

Colorado v. Strimple, No. 11SA217, 1/17/12

In *Colorado v. Strimple,* the State of Colorado charged Christopher Strimple with possession of an explosive or incendiary device and other crimes after a police search of the home he shared with his common law wife. Police responded to the home when Gabriele Thompson complained of domestic abuse. When police arrived, Strimple refused to let them in, threatened to kill officers if they entered, and engaged officers in a tense stand-off for nearly forty-five minutes.

He ultimately surrendered peacefully, and police took him into custody. Gabriele Thompson consented to an additional search during which the police discovered knives, a pipe bomb and drug paraphernalia. The trial court suppressed this evidence on the basis that, during the stand-off, Strimple had refused consent for entry into the home.

Upon review, the Colorado Supreme Court held that Thompson validly gave her consent to the second warrantless search because Strimple was no longer physically present, and the police did not remove him from the scene in order to avoid his objection to the search.

SEARCH AND SEIZURE:
Contraband in Blood

State of Utah v. Price, No. 20090990, 1/27/12

While driving, Jed Price struck another vehicle, killing a passenger in that vehicle. After he consented to accompany an officer to a police station, he refused to consent to a blood-alcohol test. A magistrate issued a warrant to seize Price's blood for testing to determine his blood-alcohol levels. The blood was tested for the presence of, among other things, tetrahydrocannabinol (THC), the principal psychoactive constituent of marijuana. The test results came back positive for the presence of THC. Price was subsequently charged with causing death while driving with a measurable controlled substance and

failing to yield the right of way. The district court denied Price's motion to suppress the evidence. Price appealed, arguing that testing for THC was outside the scope of the warrant because the magistrate's probable cause determination was based only on the suspicion that Price had been driving under the influence of alcohol. The Supreme Court of Utah affirmed, finding, in part, as follows:

"Mr. Price asserts that testing his blood for THC, rather than only alcohol, was outside the scope of the warrant for two reasons. First, the officer did not have probable cause to test for intoxicants other than alcohol. Second, the officer sought the warrant for the purpose of testing only the alcohol content of his blood. Mr. Price thus contends that testing for THC, rather than *only* alcohol, was a violation of his Fourth Amendment rights. The State counters that testing for intoxicants in Mr. Price's blood was valid because Mr. Price did not have a reasonable expectation of privacy in the presence of contraband in his lawfully obtained blood. As a result, the State argues that the Fourth Amendment's protections were not triggered by the search.

"The expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable. *Illinois v. Caballes*, 543 U.S. 405 (2005). In *Caballes*, the U.S. Supreme Court held that 'any interest in possessing contraband cannot be deemed 'legitimate.' Applying Caballes, the Supreme Court of South Dakota upheld a urine test that revealed the presence of cocaine when the warrant for the urine test was based on probable cause for the possession of only marijuana. *State v.Loveland,* 2005 SD 48. The court held that the government's conduct did not implicate the Fourth Amendment's protection against unreasonable searches and seizures because testing for cocaine did not compromise any legitimate interest in privacy. We similarly hold that once a blood sample has been legitimately seized, the individual from whom that sample was taken has no legitimate expectation of privacy in the contraband contents of his blood.

"Although there is no legitimate privacy interest in the presence of contraband in one's blood, we must nevertheless analyze whether the government's conduct went beyond a test for contraband and infringed on a legitimate privacy interest. It is undisputed that chemical analysis of blood can reveal a host of private medical facts about an [individual]." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989). Fourth Amendment protections may be implicated when tests are aimed at detecting contraband but also have the potential to reveal lawful intimate details—such as private medical facts—for which individuals retain legitimate privacy interests.

"Mr. Price certainly retained a legitimate privacy interest in the non-contraband contents of his blood. Testing Mr. Price's blood for HIV status, DNA information, blood type, or other private medical facts therefore would have infringed upon a legitimate privacy interest. But that did not occur here. The THC test conducted on Mr. Price's blood was limited to revealing only the blood's THC contents, for which Mr. Price retains no legitimate privacy interest. Tests for contraband that cannot reveal details regarding legitimate privacy interests do not implicate Fourth Amendment protections.

The Utah Supreme Court concluded that individuals don't have a privacy interest in the presence of contraband in their blood. Once lawfully seized, blood may be tested contraband without triggering Fourth Amendment protections so long as tests are conducted in a manner that cannot reveal details regarding legitimate privacy interests.

SEARCH AND SEIZURE: **GPS Tracking**

United States v. Jones, No. 10-1259, 1/23/12

In this case, the U.S. Supreme Court dealt with the issue of whether the attachment of a Global Positioning System (GPS) tracking device to an individual's vehicle, and the subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.

In this case, the Court simply stated that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search." The Court stated it is important to be clear about what occurred in this case: the Government physically occupied private proper¬ty for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

Justice Scallia delivered the opinion of the Court, in which Chief Justice Roberts, Kennedy, Thomas, and Sotomayor joined. Justice Sotomayor filed a concurring opinion. Justice Alito, filed an opinion concurring in the judgment, in which Justices Ginsburg, Breyer, and Kagan joined.

The majority decision was faulted by Justice Aito for appearing to rely on the law of trespass in reaching its decision. The majority in a footnote stated whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

The majority faulted the concurring opinion in applying an *exclusively Katz*'s "reasonable expectation of privacy test" to the facts of this case. They noted that the concurrence faults our approach for presenting particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

Editor's Note: *In* ***United States v/ Maynard,*** *DCC, No. 08-3030, 8/6/10,* ***CJI Legal Briefs,*** *Volume 15, Issue 3, Fall 2010 at page 25, Antoine Jones argues his conviction should be overturned because the police violated the Fourth Amendment prohibition of unreasonable searches by tracking his movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep without a valid search warrant. The Circuit Court of Appeals for the District of Columbia reversed Jones's conviction because it was obtained with evidence procured in violation of the Fourth Amendment. This was an appeal*

by the government of that decision. The majority of the decision in ***United States v. Jones****, supra, involves the courts discussion of the legal theory justifying its opinion. Also see,* ***CJI Management Quarterly,*** *Fall 2010:* ***GPS Tracking—A Tool for Law Enforcement.***

SEARCH AND SEIZURE:
Proctoscopic Examination

United States v. Gray
CA5, No. 10-11150, 2/1/12

In *United States v. Gray,* the Court of Appeals for the Fifth Circuit stated that this case forces them to balance the fundamental interest in a person's bodily integrity and dignity against the significant need of law enforcement officers to unearth evidence of crime. Specifically, Rondrick Gray, was forced to undergo a proctoscopic examination under sedation pursuant to a warrant obtained on the police's belief that he was concealing crack cocaine in his rectum.

A state judge found probable cause for a search based on Detective Hank Hethcock's affidavit. The judge ordered Gray to be presented to a qualified medical technician to examine Gray for the concealment of controlled substances and to remove said controlled substances from his body in accordance with recognized accepted medical procedure as described in Hethcock's affidavit. Hethcock's affidavit, while it did state that the police suspected Gray of concealing crack cocaine in his "anal cavity," did not describe the medical procedure to be performed at all. The only limitation on the procedure was the same as in the warrant itself—"in accordance with recognized medical procedures."

Gray argues that the proctoscopy violated his right to "'personal privacy and dignity,'" as delineated in *Winston v. Lee,* 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California,* 384 U.S. at 767 (1966)). There, the Supreme Court dealt with an appeal of a permanent injunction issued by the district court enjoining the enforcement of a state court search warrant that authorized surgery under general anesthesia to retrieve a bullet that lodged in a suspect's chest during a robbery. The Court affirmed the injunction because it found the ordering of the surgery to be unreasonable under the Fourth Amendment. It stated that the reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. The Court then elaborated a multi-factor balancing test, based on *Schmerber,* that guides the analysis of the reasonableness of a medical procedure to obtain evidence. It noted that the threshold requirements for surgical search and seizure were probable cause and the issuance of a warrant. Beyond these standards, a court reviewing the issuance of a warrant for medical searches should consider the "*magnitude* of the intrusion, defined as the *extent* to which the procedure may threaten the safety or health of the individual and the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. The countervailing consideration is the community's interest in fairly and accurately determining guilt or innocence. Additionally, the Court thought it noteworthy that the suspect was afforded a full measure of procedural protections; in fact, the state court held two evidentiary hearings before actually issuing the warrant.

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

"Applying the *Winston* factors to the present case, the magnitude/danger of the proctoscopy appears to be slight. Though the testimony reveals that there was some risk of respiratory depression or arrest associated with the sedatives administered and risk of anal bleeding or perforation associated with the use of the proctoscope, these risks were low in the hospital setting where the proctoscopy occurred. The risks here are obviously greater than the blood draw found permissible in Schmerber, 384 U.S. at 771 (allowing a blood draw to determine the blood alcohol level of a drunk driver), but they do not seem to rise to the level of the risks associated with the surgery found unreasonable in Winston.

"On the extent of the intrusion factor, Gray argues that shy of full-on exploratory surgery [like in *Winston*], it is hard to imagine a more demeaning and intrusive invasion of Gray's interests in personal privacy and bodily integrity...This is an understatement: the proctoscopy here was a greater affront to Gray's dignitary interest than full-on exploratory surgery. Though sedated, Gray was conscious throughout the entire procedure. Moreover, the procedure targeted an area of the body that is highly personal and private. In our society, the thought of medical technicians, under the direction of police officers, involuntarily sedating and anally probing a conscious person is jarring. Such a procedure is degrading to the person being probed—both from his perspective and society's. This type of search resembles the physical vaginal cavity search that the First Circuit encountered in *Rodriques v. Furtado*, 950 F.2d 805 (1st Cir. 1991). There, the First Circuit said:

> *the invasion here was extreme, constituting a drastic and total intrusion of the personal privacy and security values shielded by the fourth amendment from unreasonable searches. Searches of this nature instinctively give us cause for concern as they implicate and threaten the highest degree of dignity that we are entrusted to protect.*

"In taking both of the individual interests into account, the magnitude of the intrusion from the proctoscopy was minimal, but the extent of intrusion from the proctoscopy was great. Society's interest here, like in *Winston*, is of great importance. The interest is even greater than in *Winston*, where there was other evidence of guilt, because the crack cocaine that Hethcock believed Gray was concealing in his anal cavity was the only direct evidence of Gray's possession. Unlike in *Schmerber* or *Winston*, however, there were other available avenues for obtaining this evidence, such as a cathartic or an enema.

"Such alternatives militate against society's great interest in conducting the procedure used in this case—proctoscopy. When balancing these interests and comparing them to our benchmarks of the permissible *Schmerber* blood draw and the impermissible *Winston* surgery, the medical danger here is slightly greater than in the former but nowhere near the danger of the latter. As to the dignitary interest, this is one of the greatest dignitary intrusions that could flow from a medical procedure—involuntary sedation for an anal probe where the person remains conscious. The last consideration is society's interests, which are not as great as in *Schmerber*

but greater than in *Winston.* On balance, we find the proctoscopic search unreasonable due to the exceeding affront to Gray's dignitary interest and society's diminished interest in that specific procedure in light of other less invasive means."

Weighing the competing interests, the Court of Appeals for the Fifth Circuit found that the search was unreasonable but that the evidence should not be suppressed because the police acted in good-faith reliance on a valid search warrant.

SEARCH AND SEIZURE:
Stop and Frisk; Hoax Call

United States v. Pontoo
CA1, No. 10-2455, 12/5/11

Officer Michaud began an overnight shift at 11:00 p.m. on August 19, 2009. Colleagues who had worked the previous shift told him that they had responded to 26 Knox Street to deal with a domestic disturbance involving Austin and Boston (neither of whom Michaud knew).

Officer Michaud's assignment obligated him to patrol alone in a squad car. Early in his shift, the police received a report that Austin was on a landing outside Boston's window. Two patrolling officers, including Michaud, repaired to the scene. They were unable to locate Austin.

Around 2:50 a.m., the same two officers responded to a call advising that Austin had returned to 26 Knox Street and was trying to gain access to his ex-girlfriend's apartment. The officers found Austin, visibly agitated, on the sidewalk in front of the apartment complex. They gave him both a disorderly conduct warning and a criminal trespass warning.

About fifteen minutes later, Officer Michaud spotted Austin (still visibly agitated) in a park several blocks from Knox Street. By virtue of a municipal ordinance, the park was closed during the early morning hours. At 3:05 a.m., Officer Michaud issued a civil citation to Austin for violating that ordinance. In this citation, he described Austin as a 33-year-old black male, standing five feet seven inches tall and weighing 190 pounds.

At 3:21 a.m., two squad cars — one driven by Officer Michaud and one by Officer Maillet — responded to an unrelated call on Main Street. Like Officer Michaud, Officer Maillet had been told upon beginning his shift about the ruckus at Knox Street. During his shift, he also overheard radio traffic concerning 26 Knox Street. His curiosity piqued, he questioned Officer Michaud concerning that domestic disturbance. Michaud explained that Austin had appeared to be harassing a former girlfriend. He added that he had given Austin a criminal trespass warning and sent him on his way. Michaud described Austin to Maillet somewhat differently than he had in the criminal trespass citation: as a black male standing about six feet tall and weighing approximately 200 pounds. This description was important because Officer Maillet did not know Austin.

While the two officers were conversing, a police dispatcher reported that a man identifying himself as "Tyrone Miller" had called from a payphone to proclaim that he had killed a woman at 26 Knox Street. Both Officer Michaud and Officer Maillet assumed,

based on the chain of events, that "Tyrone Miller" was Gary Austin.

At some point that morning, a dispatcher confirmed that "Tyrone Miller" was an alias of Gary Austin's. It is unclear exactly when this broadcast occurred but, given the officers' assumption that Miller and Austin were one and the same, the precise chronology does not matter.

As might be expected, the reported slaying galvanized the two officers into action. They traveled in their separate cars to Knox Street — a drive that took approximately one minute. Officer Michaud arrived first and parked at an intersection about 200 feet from 26 Knox Street. While positioning his cruiser, he noticed a man crossing the street. The man appeared to be of average build and about five feet ten inches or six feet tall. Officer Michaud thought that this man might be Austin, but the dim lighting prevented him from making a positive identification. Taking a middle ground, he radioed that he had seen "a subject" walking out of 26 Knox Street.

Officer Maillet heard this broadcast and understood his fellow officer to have said that "the suspect" was on the street. He took this comment as a reference to Austin.

As Officer Maillet proceeded down Knox Street, he spied the lone pedestrian. He noticed that the man fit the general description of Austin that he had been given minutes earlier by Officer Michaud. He did not see anyone else in the vicinity. Concluding that the man was Austin, he braked to a halt, stepped out of his squad car with his gun drawn, and ordered the man to raise his hands, get down on his knees, and then lie flat. The man complied.

Once the man was on his stomach, Officer Maillet handcuffed him and performed a pat-frisk. This protective search revealed a 9mm handgun tucked into the man's waistband. The weapon had not been visible when the officer first confronted the man.

Officer Michaud ran up while Officer Maillet was conducting the pat-down. He observed Officer Maillet remove the gun from the suspect's waistband. Officer Maillet handed the gun to Officer Michaud. It was only after those events had transpired that Officer Michaud realized that the person in handcuffs was not Austin but, rather, the appellant.

The officers arrested the appellant for possession of a concealed weapon. Only minutes had elapsed between the time of the "murder" dispatch and the time of the arrest.

Following the encounter, the police transported the appellant to the stationhouse and booked him. In the arrest report, the appellant is described as a 24-year-old black male of medium build, standing six feet tall and weighing 185 pounds.

When the dust settled, it became apparent both that the murder report was a hoax and that the appellant had nothing to do with the domestic dispute at 26 Knox Street. At about the time of the appellant's arrest, other officers stopped Austin some three blocks away and later charged him with making a false report of a crime. That arrest report described him as a 33-year-old black male of medium build, standing five feet eight inches tall and weighing between 160 and 180 pounds.

As matters turned out, Austin had a history of making false calls to the police department; but there is no evidence that either arresting officer knew of this history. Nor did they know, at the time of the stop, either that Austin had been apprehended or that the murder report was false. Based on these circumstances, the district court found that when Officer Maillet frisked the appellant, he believed that he was searching Austin and that Austin may have committed a murder.

When the authorities discovered that the appellant had a criminal record, a federal grand jury indicted him on a charge of being a felon in possession of a firearm. See 18 U.S.C. § 922(g)(1). The appellant moved to suppress the gun, arguing that the police had learned of it through an unlawful stop and arrest. The government opposed this motion.

The Court of Appeals for the First Circuit affirmed, holding that the arrest was based on probable cause, following a valid *Terry* stop that was brief and appropriate to the circumstances.

SEARCH AND SEIZURE:
Stop and Frisk; Instruments of Assault

United States v. Rochin
CA10, No. 11-2024, 12/13/11

This case was presented to the Court of Appeals for the Tenth Circuit. They found as follows:

"No one likes being pulled over for a traffic violation. Still, for most drivers the experience usually proves no more than an unwelcome (if often self-induced) detour from the daily routine. But not every traffic stop is so innocuous. Sometimes what begins innocently enough turns violent, often rapidly and unexpectedly. Every year, thousands of law enforcement officers are assaulted—and many are killed—in what seem at first to be routine stops for relatively minor traffic infractions. *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997); Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, 2010, Figure 4, available at http://www.fbi.gov/about-us/cjis/ucr/leoka. This case asks us to address what an officer may lawfully do to guard against adding himself to those regrettable statistics.

"The Fourth Amendment stands as a bulwark against unreasonable governmental searches and seizures. It applies during traffic stops just as it does to all encounters with law enforcement. But the Amendment's prohibition of *unreasonable* searches and seizures bears with it the implicit acknowledgment that *reasonable* searches and seizures are another matter. And Fourth Amendment jurisprudence has long recognized the reasonableness of allowing law enforcement officers to pat down or frisk lawfully detained individuals who might pose a threat to their safety or the safety of others nearby. *See Terry v. Ohio*, 392 U.S. 1, 23-24 (1968). Of course, the Amendment's ever-present reasonableness requirement places strict limits on the scope or nature of the frisk an officer may administer. Because the aim of a pat down is to ensure the physical safety of the officer and others, any frisk must be reasonably designed to discover 'concealed objects which might be used as instruments of assault.' *Sibron v. New York*, 392 U.S. 40, 65 (1968). But if a reasonably tailored pat down reveals an object that appears to meet that description, the officer may then (and only

then) 'reach inside the suspect's clothing and remove it' without offending the Fourth Amendment. *United States v. Harris*, 313 F.3d 1228, 1237 (10th Cir. 2002).

"In our case, Mr. Rochin doesn't dispute the legality of his initial traffic stop (everyone agrees his registration had long expired). Neither does he dispute Officer Joe Moreno had constitutionally sufficient reason to frisk him (Mr. Rochin concedes the officer had reason to believe he was armed and dangerous). Instead, and much more narrowly, Mr. Rochin argues that Officer Moreno exceeded the scope of a permissible protective frisk when he (Officer Moreno) removed objects from his (Mr. Rochin's) trouser pockets. By way of remedy, Mr. Rochin asks us to suppress the items the officer found and, of necessity, to dismiss the criminal charges against him that followed from the encounter. But narrow though Mr. Rochin's argument may be, it is no more persuasive for it. Working alone, Officer Moreno stopped Mr. Rochin's car for an expired registration at 2:30 in the morning. As the officer approached the vehicle, a radio dispatcher warned him that the vehicle and its driver were suspected of involvement in a drive-by shooting—and that the driver might be armed and dangerous. When the officer reached the car and asked for a driver's license, vehicle registration, or insurance information, Mr. Rochin could provide none. At this point Officer Moreno, fearing for his safety, asked Mr. Rochin to step out of his car for a protective pat down.

"During the brief frisk that followed, Officer Moreno felt two bulges, one filling each of Mr. Rochin's trouser pockets. The objects felt long and hard, but the officer couldn't tell exactly what they were. So he asked Mr. Rochin in Spanish, 'quien es?' or '*who* is this?' Of course, the officer meant to ask '*what* is this?' But the officer's garbled question led to an equally garbled reply, with Mr. Rochin responding 'no sabe,' or 'he doesn't know,' which the officer later said he understood to mean 'I don't know.' In any event, after this exchange left Officer Moreno none the wiser about the objects in Mr. Rochin's pockets, he decided to remove them for inspection. When they turned out to be glass pipes containing drugs, Officer Moreno arrested Mr. Rochin for drug possession and, after a later inventory search of the car turned up a gun, Mr. Rochin was charged with and eventually convicted of a federal firearm offense.

"Mr. Rochin argues that Officer Moreno violated the Fourth Amendment because he removed the items for inspection when he had no idea what they were. But this argument makes the common mistake of emphasizing the officer's (subjective) state of mind. Here, as is typically the case in the Fourth Amendment context, the subjective beliefs and knowledge of the officer are legally irrelevant. See *United States v. DeGasso*, 369 F.3d 1139, 1143 (10th Cir. 2004); *Whren v. United States*, 517 U.S. 806, 813 (1996). Instead, because reasonableness remains the Amendment's touchstone, the constitutional inquiry turns on whether an objectively reasonable officer could have feared that the detected objects might be used as instruments of assault. See *Sibron*, 392 U.S. at 65; *United States v. Holmes*, 385 F.3d 786, 790 (D.C. Cir. 2004). And we don't hesitate to hold that test satisfied here.

"A reasonable officer could have concluded that the long and hard objects detected in Mr. Rochin's pockets might be used as instruments

of assault, particularly given that an effort to ask Mr. Rochin about the identity of the objects had proved fruitless. To be sure, the pipes Mr. Rochin turned out to have aren't conventionally considered weapons. But a reasonable officer isn't credited with x-ray vision and can't be faulted for having failed to divine the true identity of the objects. And neither is 'the scope of a *Terry* frisk…limited to traditional weapons.' *Holmes*, 385 F.3d at 791. During a lawful pat down an officer may remove not just objects that seem to be guns, knives and the like, but also any other objects that he reasonably thinks 'might be used as instruments of assault' against him or others who may be in the area. *Sibron*, 392 U.S. at 65. And two hard and long objects filling a suspect's trouser pockets 'fit that description well,' better than the 'hard, square object' at issue in *Holmes,* 385 F.3d at 791, and better than many other objects courts have held officers may lawfully remove during *Terry* stops, see, e.g., *United States v. Rahman*, 189 F.3d 88, 120 (2d Cir. 1999) (envelope); *United States ex rel. McNeil v. Rundle*, 325 F. Supp. 672, 677 (E.D. Pa. 1971) (watch). None of this is to say we necessarily endorse (or reject) the conclusions reached about the objects at issue in these other cases. It is instead only to emphasize by comparison how much more (objectively reasonable) reason there was for an officer to worry about the objects in the case at hand.

"In arguing for a different result, Mr. Rochin draws our attention to *Minnesota v. Dickerson,* 508 U.S. 366 (1993), and *United States v. Albert*, 579 F.3d 1188 (10th Cir. 2009). But neither of these cases can save his cause. They simply hold that an officer cannot continue to explore a defendant's clothing after determining it doesn't contain any threatening object (except if, in the course of the frisk, he has identified objects he immediately recognizes as contraband). *Dickerson,* 508 U.S. at 377-78; *Albert,* 579 F.3d at 1195. By definition, exactly none of this speaks to the situation before us—where the identity of the objects felt remained unknown after the frisk and a reasonable officer could have thought they posed a threat. In these circumstances, *Dickerson*'s and *Albert*'s admonitions against further investigation simply do not apply. *United States v. Richardson,* 657 F.3d 521, 524 (7th Cir. 2011).

"Finally, Mr. Rochin suggests that a reasonable officer may not remove objects from a suspect's pockets unless and until he can confirm, through further tactile investigation, exactly what they are. Had Officer Moreno followed this procedure, Mr. Rochin submits, he would have realized eventually that he had no reason to be concerned about them. Mr. Rochin, however, cites no authority for his proposed protocol—and for good reason. The Fourth Amendment is not a game of blind man's bluff. It doesn't require an officer to risk his safety or the safety of those nearby while he fishes around in a suspect's pockets until he can correctly guess the identity of and risks associated with an unknown object. All while standing in extreme proximity to someone already suspected of being dangerous. The Fourth Amendment requires reasonableness, not such potentially reckless punctiliousness. And where (as here) an otherwise lawful protective frisk suggests an item an objectively reasonable officer could believe might be used as an instrument of assault, the officer may—reasonably and so consistently with the Fourth Amendment—'reach inside the suspect's clothing and remove it' without further delay. *Harris,* 313 F.3d at 1237.

SEARCH AND SEIZURE:
Stop and Frisk; Lack of Basis for Stop
United States v. Gaines
CA4, No. 11-4032, 1/27/11

On the afternoon of January 26, 2010, Baltimore City police officers Jimmy Shetterly, Frank Schneider, and Manuel Moro were in a marked police vehicle on patrol in the vicinity of Mosher Street and Pennsylvania Avenue, in Baltimore. The officers observed a white Ford Crown Victoria approaching Mosher Street on Pennsylvania Avenue from the opposite direction. Officer Moro, who was seated in the rear compartment of the police vehicle, later testified that as the Crown Victoria neared the Mosher Street intersection, he observed (from the other side of the intersection) a crack in the Crown Victoria's windshield and informed the other officers.

Officers Schneider and Shetterly testified that after the Crown Victoria turned right onto Mosher Street, they followed in the police vehicle and also observed the crack in the windshield. The police activated their vehicle's emergency lights and pulled over the Crown Victoria. In the course of the ensuing vehicle stop, Officer Shetterly observed Gaines (who was a passenger in the rear of the Crown Victoria) moving around in his seat and trying to climb over the front seats, despite commands to stop. Officer Shetterly then ordered Gaines to exit the vehicle and immediately began to pat him down.

As Officer Shetterly began to pat down Gaines in the area of Gaines' waistband, the officer testified that "[a]s I was reaching with my right hand, I could feel the trigger guard and the handle of a firearm. At that time, I yelled 'gun' very loudly to alert the officers of the other present danger." (J.A. 39.) Gaines then assaulted Shetterly, striking him in the face with his elbow. As Gaines turned to flee, Officer Shetterly clearly observed a silver firearm with a black handle in Gaines' waistband. Gaines then punched Officer Schneider before he was subdued by the officers. Officers Schneider and Shetterly pushed Gaines into the open trunk of the Crown Victoria as he continued to struggle. When the officers were eventually able to handcuff Gaines
and pull him from the trunk, Officer Shetterly observed the firearm fall from Gaines' waistband into the trunk. The police placed Gaines under arrest and seized the firearm, a .380 semi-automatic pistol.

A federal grand jury in United States District Court for The District of Maryland indicted Gaines on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Prior to trial, Gaines moved to suppress the firearm on the grounds that the stop and subsequent search of his person violated the Fourth Amendment.

After extensive argument by both parties, the district court granted Gaines' motion to suppress. The court initially concluded that the traffic stop was not supported by reasonable suspicion and was accordingly unlawful. The court found "as a factual matter that the officers could not have seen the very slight crack in the lower right portion of the Crown Victoria's windshield."

The Fourth Circuit affirmed, holding that Gaines' subsequent illegal acts did not purge the taint of the illegal stop. The gun was

discovered as a result of the stop, not as a result of that conduct.

SEARCH AND SEIZURE:
Vehicle Stops; Consent; Length of Stop

Menne v. State, No. CR10-1204
2012 Ark. 37, 2/2/12

On October 19, 2008, Trooper Phillip Roark of the Arkansas State Police pulled over a pickup truck driven by Lesa Diane Menne at approximately 10:57 p.m. outside of Walnut Ridge, Arkansas. Subsequent events led Roark to search Menne's vehicle where he found .0536 grams of marijuana, .0348 grams of methamphetamine, and a prescription bottle with the label torn off. Menne was charged with possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine, a felony.

Menne filed a motion to suppress the drug evidence located in her vehicle. After hearing all of the testimony and evidence, including the video and audio of the stop, and hearing argument from counsel, the circuit court denied the motion to suppress. The court gave no reason or explanation for doing so. After the subsequent jury trial, Menne was found guilty of possession of methamphetamine, possession of drug paraphernalia with the intent to use, and possession of marijuana. She was fined a total of $4500.00 for all of the charges and sentenced to thirty-six months' probation for the methamphetamine charge.

On appeal, Menne challenges only the circuit court's denial of her motion to suppress. The court of appeals reversed the ruling of the circuit court, *Menne v. State,* 2010 Ark. App. 806, and the Arkansas Supreme Court granted the State's petition for review, finding, in part, as follows:

"Menne's principal argument is that she was illegally detained after the purpose of the traffic stop was complete in contravention of this state's case law and Arkansas Rule of Criminal Procedure 3.1. We first observe that Trooper Roark's initial stop was legal, and Menne does not appear to contest that issue on appeal. Roark testified that Menne was traveling fifty-five miles per hour in a forty-five-mile-per-hour zone. See Ark. Code Ann. § 27-51-201. The legality of the stop, accordingly, is not an issue in this appeal.

"Two issues confront this court in the instant case. The first is whether the purpose of the traffic stop was over at the time Trooper Roark requested Menne's consent to search the vehicle. The second issue is whether Roark developed a reasonable suspicion during the course of the traffic stop that was a sufficient basis to detain Menne further. The parties agree that at the time Roark requested a consent to search, he had not given Menne the warning citation for speeding. According to Roark's testimony, he had not yet returned all of Menne's documents to her.

"Our case law suggests that a stop is not complete until the warning citation and other documents are delivered back to the driver. See *Yarbrough v. State,* 370 Ark. 31, 257 S.W.3d 50 (2007) (holding that it was permissible for a police officer to ask for consent to search the vehicle when the officer had determined that he would issue a warning ticket but had not yet returned the driver's identification papers or issued that ticket); see also *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004) (noting that the legitimate purpose of the traffic

stop ended after the officer handed back the driver's license and registration along with a warning ticket). Countering that, however, is Menne's assertion that the warning citation was not provided to her by Roark because he was waiting for the K-9 unit to begin the dog sniff. Because we conclude that Roark had reasonable suspicion to detain Menne, we need not resolve the first issue.

"We conclude that Roark had reasonable suspicion to detain Menne pursuant to Rule 3.1 of our Arkansas Rules of Criminal Procedure. Rule 3.1 requires the officer to possess reasonable suspicion that the person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property. *Malone v. State,* 364 Ark. 256, 262–63, 217 S.W.3d 810, 814 (2005). The officer must develop reasonable suspicion to detain before the legitimate purpose of the traffic stop has ended. Id. at 263, 217 S.W.3d at 814 (citing *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005)). Whether there is reasonable suspicion depends upon whether, under the totality of the circumstances, the police have "specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity." *Malone,* 364 Ark. at 263, 217 S.W.3d at 814 (citing *Laime v. State*, 347 Ark. 142, 155, 60 S.W.3d 464, 473 (2001)).

"The factors that combined to give Roark a reasonable suspicion that Menne was engaged in criminal activity are (1) one month earlier he had stopped the same truck and arrested Menne's passenger, Christopher Smith, for DWI and possession of marijuana; (2) during a criminal history check, Roark discovered Menne had been previously arrested; (3) he had information from a local police department that Menne was suspected of drug dealing; (4) Menne was nervous; and (5) the time of night.

"We are mindful that while one of these factors may not have been enough to lead to 'reasonable suspicion,' viewing the totality of these circumstances, we cannot say the circuit court erred in denying the suppression motion. See, e.g., *Laime*, 347 Ark. at 159, 60 S.W.3d at 475 (holding that under a totality-of-the-circumstances review, the officer legitimately entertained a reasonable suspicion of criminal activity but noting that mere nervousness, standing alone, was not sufficient to constitute reasonable suspicion of criminal activity and grounds for detention). Arkansas Code Annotated section 16-81-203 specifically mentions the demeanor of the suspect, knowledge of the suspect's background and character, time of night, and information received from third parties as factors to be considered by law enforcement officers to determine grounds for reasonable suspicion. See Ark. Code Ann. § 16-81-203(1), (3), (6), (9) (Repl. 2005). There is no requirement under the statute that a police officer need to have personally observed any or all of these factors.

"We further emphasize that the search by Roark occurred within fifteen minutes of the stop, even though the fifteen-minute time constraint under Rule 3.1 would not have begun running until after Roark completed his routine tasks associated with the traffic stop. We hold that Menne was reasonably detained at the time Roark made his request to search.

"Regarding the consent itself, the State had the burden of proving by clear and positive evidence that consent to a search was freely

and voluntarily given and that there was no actual or implied duress or coercion. Ark. R. Crim. P. 11.1 (2008). Roark testified that when he asked Menne if he could search her vehicle, she responded, 'if you want to, go ahead and look.' Roark acknowledged that at some point Menne alleged that he was harassing her.

"According to Roark's testimony, after she made that allegation, he informed her that she had the right to refuse consent. The video and audio of the stop does not contradict Roark's testimony. This exchange occurred while Roark and Menne were standing behind her truck on the side of the road. The circuit court apparently believed Roark's version of the events, which is supported by the video and audio. Hence, it denied Menne's motion to suppress. Credibility of witnesses is an issue for the finder of fact. *R.M.W. v. State*, 375 Ark. 1, 8, 289 S.W.3d 46, 51 (2008). We cannot say that the circuit court erred in finding that Menne's consent was voluntarily given and was not the product of harassment.

"We affirm the circuit court's denial of Menne's motion to suppress the evidence seized as a result of Roark's search of her truck, because that ruling is not clearly against the preponderance of the evidence."

Editor's Note: *The Arkansas Supreme Court vacated the Arkansas Court of Appeals decision in* ***Meene v. State****, CACR 10-577, 2010 Ark. App. 806, 12/8/10, and reinstated the circuit court conviction of Meene. The Arkansas Court of Appeals decision in this case can be reviewed at* ***CJI Legal Briefs,*** *Volume 15, Issue 4, Winter 2011 at page 36.*

SEX OFFENDERS: **Registration; Ban on Entering Public Library**

Doe v. City of Albuauerque
CA10, No. 10-2102, 1/20/12

In this case, John Doe, a registered sex offender, brought a facial challenge under the First and Fourteenth Amendments to a ban enacted by the City of Albuquerque that prohibited registered sex offenders from entering the City's public libraries. The district court denied a motion to dismiss brought by the City and ultimately granted summary judgment in favor of Doe.

The court concluded that the ban burdened Doe's fundamental right to receive information under the First Amendment and that the City failed sufficiently to controvert Doe's contention on summary judgment that the ban did not satisfy the time, place, or manner test applicable to restrictions in a designated public forum. The City appealed both the denial of its motion to dismiss and the grant of Doe's summary judgment motion. The City, relying on a mistaken interpretation of case law regarding facial challenges, erroneously contended that it had no burden to respond to Doe's motion. Consequently, the City failed to present any reasons for its ban. "Had the City done so, it is not difficult to imagine that the ban might have survived Doe's challenge," because the Court recognized the City's "significant interest in providing a safe environment for its library patrons, especially children." However, with no response, the Court was "bound by the record" and affirmed the district court's decision in favor of Doe.