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An incident at a restaurant resulted in the use of force by Lt. David Hudson against Chris Erwin. Erwin was charged with three misdemeanor offenses: criminal trespass, resisting arrest, and disorderly conduct. Hudson wrote a use-of-force report to his supervisor describing what force he used against Erwin. Erwin subsequently filed a petition against Stuart Thomas, Chief of Police, Little Rock Police Department, alleging that Thomas violated the Freedom of Information Act (FOIA) by failing to produce Hudson's report regarding the use-of-force reports where Lieutenant Hudson had been involved.

The City of Little Rock responded to the FOIA requests but withheld four use-of-force reports reasoning that the reports were exempt as employee evaluation or job performance records because they were created so that supervisors could evaluate whether the police officer performed his or her duties pursuant to departmental policy.

The circuit court concluded that the use-of-force reports did not fall within the FPIA exemption for employer evaluation or job performance records as set forth at Arkansas Code Annotated § 25-19-105(c)(1). The Arkansas Supreme Court affirmed holding that use-of-force reports made by Hudson did not constitute employee evaluation or job performance records within the

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meaning of section 25-19-105(c)(1), and were subject to disclosure under the FOIA.

CIVIL LIABILITY:
Grand Jury Testimony; Immunity

Rehberg v. Paulk, No. 10-788, 4/2/12

Charles Rehberg, a certified public accountant, sent anonymous faxes to several recipients, including the management of a hospital in Albany, Georgia, criticiz¬ing the hospital's management and activities. In response, the local district attorney's office, with the assistance of its chief investigator, James Paulk, launched a criminal investigation of Rehberg, allegedly as a favor to the hospital's leadership. Paulk testified before a grand jury, and Rehberg was then indicted for aggravated assault, burglary, and six counts of making harassing telephone calls. The indictment charged that Rehberg had assaulted a hospital physician, Dr. James Hotz, after unlawfully entering the doctor's home. Rehberg challenged the sufficiency of the indictment, and it was dismissed.

A few months later, Paulk returned to the grand jury, and Rehberg was indicted again, this time for assaulting Dr. Hotz on August 22, 2004, and for making harassing phone calls. On this occasion, both the doctor and Paulk testified. Rehberg challenged the sufficiency of this second indictment, claiming that he was "nowhere near Dr. Hotz" on the date in question and that "[t]here was no evidence whatsoever that [he] committed an assault on anybody." 611 F. 3d 828, 836 (CA11 2010). Again, the indictment was dismissed.

While the second indictment was still pending, Paulk appeared before a grand jury for a third time, and yet another indictment was returned. Rehberg was charged with assault and making harassing phone calls. This final indictment was ultimately dismissed as well.

After the indictments were dismissed, Rehberg brought an action under 42 U. S. C. §1983, alleging that Paulk had conspired to present and did present false testimony to the grand jury. The Federal District Court denied Paulk's motion to dismiss on immunity grounds, but the Eleventh Circuit reversed, holding that Paulk had absolute immunity from a §1983 claim based on his grand jury testimony.

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

"A witness in a grand jury proceeding is entitled to the same absolute immunity from suit under §1983 as a witness who testifies at trial. A trial witness sued under §1983 enjoys absolute immunity from any claim based on his testimony. *Briscoe v. LaHue*, 460 U. S. 352 (1983). For the reasons identified in *Briscoe*, there is no reason to distinguish law enforcement witnesses from lay witnesses in §1983 actions. It would be anomalous to permit a police officer testifying before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to initiate a prosecution."

CIVIL LIABILITY:

Identification Procedure; Probable Cause

Phillip v. Allen, CA7, No. 10-3559, 2/10/12

As Ruby Graham entered a public library, her purse, containing $5,000 in cash, was grabbed. She struggled with the individual attempting to snatch the purse. The robber then shot Ruby Graham in the head but the shot only grazed her. He then shot her mother, Elizabeth Graham, in the chest, before fleeing. Ruby Graham described the attacker to police officers, but did not say that she knew her assailant. A neighbor, visiting Elizabeth Graham in the hospital, told police that he had heard a rumor that Wydrick Phillips, who lived in Graham's neighborhood, had been watching currency exchanges and robbing people who cashed tax-refund checks as Ruby Graham had done. Ruby Graham later identified Phillips from a photo array and a lineup. Phillips had a strong alibi and there was no other evidence against him. After his acquittal, he filed suit under 42 U.S.C. § 1983 against the village and its officers. The district court entered summary judgment for defendants, holding that the identification established probable cause. The Seventh Circuit affirmed.

Wydrick contended that the police needed to have conducted additional investigation before arresting him. The Seventh Circuit Court of Appeals stated that "police need not run down all leads before making an arrest—especially not when a crime is violent and leaving the perpetrator at large may endanger other persons. Probable cause is established by a reasonable belief that a person committed a crime. See *Illinois v.Gates*, 462 U.S. 213 (1983). Police are entitled to leave to the criminal process the full examination of potential defenses. See *Hebron v. Touhy,* 18 F.3d 421 (7th Cir. 1994)."

CIVIL LIABILITY:

Strip Searches of Pretrial Detainees

Florence v. Board of Chosen Freeholders of County of Burlington, No. 10-945, 4/2/12

Albert Florence was arrested during traffic stop by a New Jersey state trooper who checked a statewide computer database and found a bench warrant issued for Florence's arrest after he failed to appear at a hearing to enforce a fine. He was initially detained in the Burlington County Detention Center and later in the Essex County Correctional Facility, but was released once it was determined that the fine had been paid. At the first jail, Florence, like every incoming detainee, had to shower with a delousing agent and was checked for scars, marks, gang tattoos, and contraband as he disrobed. Florence claims that he also had to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. At the second jail, Florence, like other arriving detainees, had to remove his clothing while an officer looked for body markings, wounds, and contraband; had an officer look at his ears, nose, mouth, hair, scalp, fingers, hands, armpits, and other body openings; had a mandatory shower; and had his clothes examined. Florence claims that he was also required to lift his genitals, turn around, and cough while squatting.

He filed a 42 U. S. C. §1983 action in the Federal District Court against the government entities that ran the jails and other defendants, alleging Fourth and Fourteenth Amendment

violations, and arguing that persons arrested for minor offenses cannot be subjected to invasive searches unless prison officials have reason to suspect concealment of weapons, drugs, or other contraband. The court granted him summary judgment, ruling that "strip-searching" nonindictable offenders without reasonable suspicion violates the Fourth Amendment. The Third Circuit reversed. The United States Supreme Court affirmed the judgment of the Third Circuit finding, in part, as follows:

"Maintaining safety and order at detention centers requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to problems. A regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.' *Turner v. Safley*, 482 U. S. 78. This Court, in *Bell v. Wolfish,* 441 U. S. 520, 558, upheld a rule requiring pretrial detainees in federal correctional facilities 'to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institutions,' deferring to the judgment of correctional officials that the inspections served not only to discover but also to deter the smuggling of weapons, drugs, and other prohibited items. In *Block v. Rutherford*, 468 U. S. 576, 586–587, the Court upheld a general ban on contact visits in a county jail, noting the smuggling threat posed by such visits and the difficulty of carving out exceptions for certain detainees. The Court, in *Hudson v. Palmer,* 468 U. S. 517, 522–523, also recognized that deterring the possession of contraband depends in part on the ability to conduct searches without predictable exceptions when it upheld the constitutionality of random searches of inmate lockers and cells even without suspicion that an inmate is concealing a prohibited item. These cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities, and that 'in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.'

"The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. The admission of new inmates creates risks for staff, the existing detainee population and the new detainees themselves. Officials therefore must screen for contagious infections and for wounds or injuries requiring immediate medical attention. It may be difficult to identify and treat medical problems until detainees remove their clothes for a visual inspection. Jails and prisons also face potential gang violence, giving them reasonable justification for a visual inspection of detainees for signs of gang affiliation as part of the intake process. Additionally, correctional officials have to detect weapons, drugs, alcohol, and other prohibited items new detainees may possess. Drugs can make inmates aggressive toward officers or each other, and drug trading can lead to violent confrontations. Contraband has value in a jail's culture and underground economy,

and competition for scarce goods can lead to violence, extortion, and disorder.

"Florence's proposal—that new detainees not arrested for serious crimes or for offenses involving weapons or drugs be exempt from invasive searches unless they give officers a particular reason to suspect them of hiding contraband—is unworkable. The seriousness of an offense is a poor predictor of who has contraband, and it would be difficult to determine whether individual detainees fall within the proposed exemption. Even persons arrested for a minor offense maybe coerced by others into concealing contraband. Exempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility.

"It also may be difficult to classify inmates by their current and prior offenses before the intake search. Jail officials know little at the outset about an arrestee, who may be carrying a false ID or lie about his identity. The officers conducting an initial search often do not have access to criminal history records. And those records can be inaccurate or incomplete. Even with accurate information, officers would encounter serious implementation difficulties. They would be required to determine quickly whether any underlying offenses were serious enough to authorize the more invasive search protocol. Other possible classifications based on characteristics of individual detainees also might prove to be unworkable or even give rise to charges of discriminatory application. To avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population. While the restrictions Florence suggests would limit the intrusion on the privacy of some detainees, it would be at the risk of increased danger to everyone in the facility, including the less serious offenders. The Fourth and Fourteenth Amendments do not require adoption of the proposed framework."

Editor's Note: The decision of the Court of Appeals for the Third Circuit in *Florence v. Board of Chosen Freeholders of the County of Burlington*, CA3, No. 09-3603, 9/21/10, is set forth in *CJI Legal Briefs*, Volume 15, Issue 4, Winter 2011 at page 11. It is of note that for decades, federal appeals courts have held it unconstitutional to strip search individuals arrested on minor charges without cause to suspect weapons or drugs were hidden in their body cavities. The Court of Appeals for the Third Circuit ruling effectively ended class action strip search cases in three states. The *Wall Street Journal*, Friday 11/4/11, at page A4 noted that there had been over $36 million in class-action settlements with jails across the Northeast and as far away as Texas that routinely strip searched inmates. The payoff for ex-inmates ranged from $100 to $3,000 but the mainline figure was $1,000. Roughly 30% of the settlements were for attorney's fees. Elmer Robert Keach, III, who brought many of these suits, stated that the attorney who handled Albert Florence's case killed the golden goose.

CIVIL LIABILITY: **Use of Force**

Elizondo v. City of Garland Police Department
CA5, No. 11-10309, 2/14/12

On March 18, 2009, Ruddy Elizondo, a 17-year-old, came home at around midnight after a night out with friends. Ruddy had been drinking and was emotional.

He began playing loud music in his bedroom, called a friend on the phone, and went out to the front porch. Ruddy's mother, Alicia Elizondo, who had been asleep, got up and told Ruddy to go to bed. After Ruddy had returned to his room, his mother heard him crying. She went to check on him and found him holding a knife to his abdomen. Ruddy had attempted suicide by stabbing himself just over a month earlier, so Alicia was understandably concerned. She began to cry and plead with Ruddy. The commotion woke Claudia Elizondo, Ruddy's sister, who called 911 because she was afraid Ruddy might hurt their mother, who was trying to take the knife away from Ruddy.

Green, who was on patrol nearby, received a dispatch that a man had stabbed himself and needed medical attention. The dispatcher mistakenly informed Green that Ruddy had already stabbed himself and the knife was still lodged in his abdomen. On this information, Green went to the house to clear and secure the scene for the paramedics. When he arrived at the house, Alicia directed Green to Ruddy's room, where he found Ruddy unhurt and still holding the knife to his stomach. Green drew his weapon, backed out of Ruddy's room, and repeatedly ordered him to put down the knife. Ruddy refused to comply. He tried to close the door on Green, but Green did not let him. Several times, Ruddy cursed at Green and yelled, "F…..g shoot me." Green told Ruddy that he did not want to shoot him, but that he would be forced to if Ruddy came any closer.

Despite Green's warning, Ruddy moved closer to Green and raised the knife in a threatening motion. Green fired his gun three times, hitting Ruddy in the chest, shoulder and abdomen. Green immediately called in the paramedics, who had been waiting outside, but Ruddy died from his wounds.

The plaintiffs, individually and on behalf of Ruddy Elizondo, appealed from two separate district court orders granting summary judgment to Officer W.M. Green and the City of Garland, Texas, on their claims pursuant to 42 U.S.C. 1983 that Green used excessive force against Ruddy in violation of the Fourth Amendment. The court agreed with the district court's conclusion that Green's use of deadly force was not clearly unreasonable when Ruddy ignored repeated instructions to put down the knife he was holding and seemed intent on provoking Green; at the time Green discharged his weapon, Ruddy was hostile, armed with a knife, in close proximity to Green, and moving closer; and in considering the totality of the circumstances in which Green found himself, it was reasonable for him to conclude that Ruddy posed a threat of serious harm. Finally, in the absence of a constitutional violation, there was no municipal liability for the City. Accordingly, the court affirmed the judgment of the district court.

CIVIL LIABILITY:
Reliance on Search Warrant

Messerschmidt v. Millender
No. 10-704, 2/22/12

Shelly Kelly was afraid that she would be attacked by her boyfriend, Jerry Ray Bowen, while she moved out of her apartment. She therefore requested police protection. Two officers arrived, but they were called away to an emergency. As soon as the officers left, Bowen showed

up at the apartment, yelled "I told you never to call the cops on me bitch!" and attacked Kelly, attempting to throw her over a second-story landing. After Kelly escaped to her car, Bowen pointed a sawed-off shotgun at her and threatened to kill her if she tried to leave. Kelly nonetheless sped away as Bowen fired five shots at the car, blowing out one of its tires. Kelly later met with Detective Curt Messerschmidt to discuss the incident. She described the attack in detail, mentioned that Bowen had previously assaulted her, that he had ties to the Mona Park Crips gang, and that he might be staying at the home of his former foster mother, Augusta Millender. Following this conversation, Messerschmidt conducted a detailed investigation, during which he confirmed Bowen's connection to the Millenders' home, verified his membership in two gangs, and learned that Bowen had been arrested and convicted for numerous violent and firearm-related offenses. Based on this investigation, Messerschmidt drafted an application for a warrant authorizing a search of the Millenders' home for all firearms and ammunition, as well as evidence indicating gang membership. Messerschmidt included two affidavits in the warrant application. The first detailed his extensive law enforcement experience and his specialized training in gang-related crimes. The second, expressly incorporated into the search warrant, described the incident and explained why Messerschmidt believed there was probable cause for the search. It also requested that the warrant be endorsed for night service because of Bowen's gang ties. Before submitting the application to a magistrate for approval, Messerschmidt had it reviewed by his supervisor, Sergeant Robert Lawrence, as well as a police lieutenant and a deputy district attorney. Messerschmidt then submitted the application to a magistrate, who issued the warrant. The ensuing search uncovered only Millender's shotgun, a California Social Services letter addressed to Bowen, and a box of .45-caliber ammunition.

The Millenders filed an action under 42 U. S. C. §1983 against petitioners Messerschmidt and Lawrence, alleging that the officers had subjected them to an unreasonable search in violation of the Fourth Amendment. The District Court granted summary judgment to the Millenders, concluding that the firearm and gang-material aspects of the search warrant were overbroad and that the officers were not entitled to qualified immunity from damages. The Ninth Circuit affirmed the denial of qualified immunity. The court held that the warrant's authorization was unconstitutionally overbroad because the affidavits and warrant failed to establish probable cause that the broad categories of firearms, firearm-related material, and gang-related material were contraband or evidence of a crime, and that a reasonable officer would have been aware of the warrant's deficiency.

The United States Supreme Court reversed holding that the officers are entitled to qualified immunity. The Court stated, in part, as follows:

"Qualified immunity 'protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Pearson v. Callahan,* 555 U. S. 223. Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral

magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner, or in objective good faith. *United States v. Leon*, 468 U. S. 897. Nonetheless, that fact does not end the inquiry into objective reasonableness. The Court has recognized an exception allowing suit when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.' *Malley v. Briggs*, 475 U. S. 335. The 'shield of immunity' otherwise conferred by the warrant, will be lost, for example, where the warrant was 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' *Leon*, 468 U. S. at 923. The threshold for establishing this exception is high. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination because it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.

"This case does not fall within that narrow exception. It would not be entirely unreasonable for an officer to believe that there was probable cause to search for all firearms and firearm-related materials. Under the circumstances set forth in the warrant, an officer could reasonably conclude that there was a 'fair probability' that the sawed-off shotgun was not the only firearm Bowen owned, *Illinois v. Gates*, 462 U. S. 213, and that Bowen's sawed-off shotgun was illegal. Given Bowen's possession of one illegal gun, his gang membership, willingness to use the gun to kill someone, and concern about the police, it would not be unreasonable for an officer to conclude that Bowen owned other illegal guns. An officer also could reasonably believe that seizure of firearms was necessary to prevent further assaults on Kelly. California law allows a magistrate to issue a search warrant for items 'in the possession of any person with the intent to use them as a means of committing a public offense,' Cal. Penal Code Ann. §1524(a)(3), and the warrant application submitted by the officers specifically referenced this provision as a basis for the search.

"Regarding the warrant's authorization to search for gang-related materials, a reasonable officer could view Bowen's attack as motivated not by the souring of his romantic relationship with Kelly but by a desire to prevent her from disclosing details of his gang activity to the police. It would therefore not be unreasonable—based on the facts set out in the affidavit—for an officer to believe that evidence of Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly, in supporting additional, related charges against Bowen for the assault, or in impeaching Bowen or rebutting his defenses. Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence could demonstrate Bowen's control over the premises or his connection to other evidence found there.

"The fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. A contrary conclusion

would mean not only that Messerschmidt and Lawrence were 'plainly incompetent' in concluding that the warrant was supported by probable cause, but that their supervisor, the deputy district attorney, and the magistrate were as well.

"In holding that the warrant in this case was so obviously defective that no reasonable officer could have believed it to be valid, the court below erred in relying on *Groh v. Ramirez*, 540 U. S. 551. There, officers who carried out a warrant-approved search were not entitled to qualified immunity because the warrant failed to describe any of the items to be seized and 'even a cursory reading of the warrant' would have revealed this defect. Here, in contrast, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the supporting affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. Unlike in *Groh*, any error here would not be one that 'just a simple glance' would have revealed.

COCKFIGHTING:
Federal Animal Welfare Act

United States v. Gilbert,
CA4, No. 10-4851, 4/20/12

In this case, the defendants were indicted for their roles in organizing, operating, and participating in "gamefowl derbies," otherwise known as "cockfighting." The defendants entered a conditional plea of guilty to the charge of conspiring to violate the Animal Welfare Act, 7 U.S.C. 2156 (the animal fighting statute). At issue was whether Congress exceeded its power under the Commerce Clause in enacting a criminal prohibition against animal fighting. The Court held that the animal fighting statute prohibits activities that substantially affect interstate commerce and thus, was a legitimate exercise of Congress' power under the Commerce Clause. The Court also held that the statute did not require the government to prove defendants' knowledge regarding the particular venture's nexus to interstate commerce. Accordingly, the Court affirmed the convictions.

FIRST AMENDMENT:
Comment by Public Employees; Public Safety

Mosholder v. Barnhardt
CA6, No. 10-2586, 5/11/12

Since 2001, Ruth Mosholder served as a corrections school officer, patrolling the school and, as necessary, disciplining inmates. In 2005, the facility began housing youthful offenders. Mosholder believed that these offenders were coddled. She claimed that during a 2008 rap competition, they referred to gangs and flashed signs. The defendants claim otherwise.

Mosholder sent a letter to Michigan state legislators, expressing concerns that the competition created a volatile situation, with promotion of gangs, and that loss of control over youthful offenders increased incidents at the facility. She urged legislators to attend a rap event. The warden responded to inquiries, explaining the purposes of the events. In the meantime, Mosholder had multiple run-ins with the school's new administrator, who viewed Mosholder as too strict. Inmates

complained about Mosholder, who was transferred to a general corrections position, where she would come into contact with more prisoners and no longer have weekends and holidays off. The district court entered summary judgment for defendants on her First Amendment retaliation claim. The Sixth Circuit reversed, finding as follows:

"Mosholder brings a retaliation claim under the First Amendment. To prove her claim, she must show: 1) she engaged in constitutionally protected conduct; 2) an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in that conduct; and 3) the adverse action was motivated at least in part by her protected conduct.

"The district court's summary judgment opinion concluded Mosholder's speech was not on a matter of public concern. It weighed the competing interests of the parties under *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and found that Appellees' institutional interest in safety and security outweighed Mosholder's free speech interests.

"The First Amendment may afford protection to a public employee's speech about her employer's activities where the speech relates to a matter of public concern. In determining whether such speech has First Amendment protection, a court must, under Pickering, 391 U.S. at 568, balance the individual's interest in free expression with the employer's interest in effectively operating its public institutions.

"The boundaries of the public concern test are not well defined. *San Diego v. Roe*, 543 U.S. 77, 83 (2004). Generally, an employee speaking as a citizen is speaking on a matter of public concern when that speech can 'be fairly considered as relating to any matter of political, social, or other concern to the community.' *Connick v. Myers*, 461 U.S. 138, 146 (1983). Another consideration is whether the speech involves 'a subject of general interest and of value and concern to the public.' *Roe*, 543 U.S. at 83-84.

"The district court relied heavily on *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989), in reaching its finding that Mosholder did not speak on a matter of public concern. In that case, a group of disgruntled police officers serving on the Emergency Response Tactical Team sent a letter to the city's police chief; they also sent copies to several other public officials. The letter contained rather extensive complaints about the management of their team, particular decisions by police administrators, and accusations of administrative jealousy and betrayal. The letter ended with an implied endorsement of a change in administration and an offer to return all of their gear and resign. The officers later resigned.

"This court held that the letter concerned a matter of limited interest to members of the general public. Finding no hint of any actual or potential wrongdoing or breach of public trust, the court affirmed the district court's grant of summary judgment to the city.

"The district court determined that Mosholder's letter was little more than a quintessential employee beef,' see *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 349 (6th Cir. 2010) (quoting *Barnes v. McDowell*, 848 F.2d 725, 735 (6th Cir. 1988)), and, as such, did not touch on a matter of public concern. This analysis was incorrect.

"The district court found that, even if Mosholder were speaking on a matter of public concern, the administration's interests in maintaining order and discipline in a prison setting would outweigh Mosholder's interest.

"This interpretation of *Brown* goes too far. Even where the speech criticizes the operations of a public safety official or entity, the *Pickering* analysis requires a balancing of the 'public and social importance' of the speech against the dissension it would cause in the workplace. It was not the purpose of *Brown*, nor is it the rule of this Circuit, that public safety employers have a greater weight placed on their interests in order and discipline than other employers have in their institutional interests. This court is to consider whether an employee's comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees.

"Mosholder claims an interest in expressing the need for safe, properly rehabilitative spaces and programs to help prisoners. The wardens point to their interests in promoting order and discipline. On balance, Mosholder's letter did not undermine or threaten to undermine the prison's interests so substantially as to justify prohibiting or punishing her speech. Mosholder's speech did not interfere with her duties, advocate any disruption or defiance on the part of employees, prevent discipline by superiors, and she is not, in this regard, a confidential employee breaking a confidence. She simply raised her concern about a matter of public importance—that the prison be run in a manner more effectively providing for the safety and rehabilitation of prisoners. Her letter, moreover, contains no request for any personal preference or exemption.

"There is no indication that Mosholder's letter would materially disrupt her work environment or the performance of her duties. This is bolstered by the time Mosholder served as school officer between the composition of the letter and her transfer to general corrections officer duty, during which any issues that arose were continuations of issues predating the composition of the letter.

"The *Pickering* balancing test favors Mosholder."

MIRANDA: **Custody; Interview of Individual in Prison**

Howes v. Fields, No. 10-680, 2/21/12

In this case, the U.S. Supreme Court dealt with the issue of custodial interrogation within the context of a prison facility. Randal Lee Fields, a Michigan state prisoner, was escorted from his prison cell by a corrections officer to a conference room where he was questioned by two sheriff's deputies about criminal activity he had allegedly engaged in before coming to prison. At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies. As relevant here: Fields was questioned for between five and seven hours; Fields was told more than once that he was free to leave and return to his cell; the deputies were armed, but Fields remained free of restraints; the conference room door

was sometimes open and sometimes shut; several times during the interview Fields stated that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell; after Fields confessed and the interview concluded, he had to wait an additional 20 minutes for an escort and returned to his cell well after the hour when he generally retired. The trial court denied Fields' motion to suppress his confession under *Miranda v. Arizona*, 384 U. S. 436, and he was convicted. The Michigan Court of Appeals affirmed, rejecting Fields' contention that his statements should have been suppressed because he was subjected to custodial interrogation without a *Miranda* warning. The United States District Court for the Eastern District of Michigan subsequently granted Fields habeas relief under 28 U. S. C. §2254(d)(1). Affirming, the Sixth Circuit held that the interview was a custodial interrogation within the meaning of *Miranda,* stating that isolation from the general prison population, combined with questioning about conduct occurring outside the prison, makes any such interrogation custodial *per se*. Finally, the U.S. Supreme Court stated that the "Sixth Circuit's categorical rule—that imprisonment, ques¬tioning in private, and questioning about events in the outside world create a custodial situation for *Miranda* purposes—is simply wrong." The Court found, in part, as follows:

"The initial step in determining whether a person is in *Miranda* custody is to ascertain, given all of the circumstances surrounding the interrogation, how a suspect would have gauged his freedom of movement. However, not all restraints on freedom of movement amount to *Miranda* custody. Questioning a person who is already in prison does not generally involve the shock that very often accompanies arrest; a prisoner is unlikely to be lured into speaking by a longing for prompt release; and a prisoner knows that his questioners probably lack authority to affect the duration of his sentence. Thus, service of a prison term, without more, is not enough to constitute *Miranda* custody.

"The other two elements in the Sixth Circuit's rule are likewise insufficient. Taking a prisoner aside for questioning may necessitate some additional limitations on the prisoner's freedom of movement, but it does not necessarily convert a noncustodial situation into *Miranda* custody. Isolation may contribute to a coercive atmosphere when a non-prisoner is questioned, but questioning a prisoner in private does not generally remove him from a supportive atmosphere and may be in his best interest. Neither does questioning a prisoner about criminal activity outside the prison have a significantly greater potential for coercion than questioning under otherwise identical circumstances about criminal activity within the prison walls. The coercive pressure that *Miranda* guards against is neither mitigated nor magnified by the location of the conduct about which questions are asked.

"When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. The record in this case reveals that respondent was not taken into custody for *Miranda* purposes. While some of the facts lend support to his argument that *Miranda's* custody requirement was met, they are offset by others. Most important, he was told at the outset of the interrogation, and reminded thereafter, that he was free to leave and could go back to

his cell whenever he wanted. Moreover, he was not physically restrained or threatened, was interviewed in a well-lit, average-sized conference room where the door was sometimes left open, and was offered food and water. These facts are consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave, subject to the ordinary restraints of life behind bars.

"Taking into account all of the circumstances of the questioning—including especially the undisputed fact that Fields was told that he was free to end the questioning and to return to his cell—we hold that he was not in custody within the meaning of *Miranda*."

MIRANDA: **Request for Counsel; Reinitiating the Interview**

United States v. Hampton
CA7, No. 10-1479, 3/27/12

Deandre Hampton was arrested for unlawfully possessing a firearm as a felon after he discarded a loaded handgun during a foot chase with police in Kankakee, Illinois. At the jail, Hampton signed a *Miranda* waiver and began to give a statement, but soon invoked his right to counsel. The Kankakee officers halted the interview and summoned a guard to take Hampton back to his cell. Hampton then changed his mind and asked to speak with the officers without counsel present. The rest of the interview was audio-recorded.

After new *Miranda* warnings, the officers again asked Hampton if he wanted a lawyer. He replied, "Yeah, I do, but you…" On hearing this, the officers reminded him that they couldn't talk if he was asking for counsel. After a long pause, Hampton continued the conversation, hemming for a few minutes more before saying unambiguously that he wanted to continue without a lawyer. He then gave a statement denying the gun was his, saying it belonged to an acquaintance who was at the scene of the encounter with the police. Hampton admitted that he held the gun for a moment before the police arrived, but said he gave it back to the acquaintance and did not toss it during the foot chase.

Hampton was charged with one count of possession of a firearm by a felon. He moved to suppress his custodial statement, claiming that the officers violated *Miranda* and *Edwards* by questioning him after he invoked his right to counsel. See *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981); *Miranda v. Arizona,* 384 U.S. 436, 471-72 (1966). The district court denied the motion, holding that (1) the officers appropriately stopped the interview when Hampton asked for an attorney; and (2) Hampton himself reinitiated the interview and did not thereafter unequivocally invoke his right to counsel. Hampton's statement was admitted at trial, and a jury found him guilty.

The Court of Appeals for the Seventh Circuit affirmed the conviction: "The Kankakee officers did not violate the *Miranda*/*Edwards* rule. They honored Hampton's initial request for counsel and immediately stopped questioning him. Hampton himself reinitiated the interview, and the record supports the district court's conclusion that he did not thereafter make an unambiguous request for counsel as required by *Davis v. United States*, 512 U.S. 452, 459 (1994)."

MIRANDA: **Two-Stage Interrogation**

United States v. Williams
CA2, No. 11-324cr, 5/17/12

In October 2009, Robert Steven Brodie Williams, along with his cousin Forenzo Walker, was arrested in a Bronx, New York, apartment following the execution of a search warrant that led to the recovery of four firearms. According to Williams's subsequent confession, he, Walker, and a man named Charles Smith had arrived in New York City the previous morning from Birmingham, Alabama. Williams and Smith planned to sell thirteen guns they had procured in Alabama. Williams was not the primary target of the search warrant; Smith was. For a year and a half, officers of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and the New York City Police Department ("NYPD") had, based on the report of a confidential informant, been investigating a man known to the informant as "Alabama" whom they suspected of buying firearms in Alabama for resale in New York. On the day of Williams' arrest, the informant spotted "Alabama" and two other men selling firearms at the Bronx apartment, and notified an NYPD detective. At the detective's instruction, the informant returned to the apartment and purchased a firearm from "Alabama" in the presence of the two other men. He then reported to the detective that multiple firearms were being sold by the three men at the apartment.

The detective relayed the information to ATF Special Agent Peter D'Antonio, who prepared an application for a search warrant that was issued around 8:30 p.m. that evening. D'Antonio, whom the district court found credible, testified at a suppression hearing "that it was important to obtain the search warrant promptly because we had information that there was multiple firearms at the location being sold by two or three of those individuals. And there were totaling over 10 firearms. At that point, we wanted to get the firearms off the street. We did not want them to get out of the apartment and sold and used for illegal purposes up there."

Law enforcement officers executed the search warrant at approximately 10:30 p.m. NYPD personnel entered the apartment first and secured its four occupants: Williams, Walker, and two women. Five ATF agents, including D'Antonio and Special Agent Thomas Kelly, and several more NYPD police officers then entered the apartment. They found Williams and Walker seated and handcuffed on the floor of the living room. Four semi-automatic handguns and ammunition lay beside them. They also observed one of the women "afraid" and "shaking" in the kitchen.

On entering the apartment and observing the guns, D'Antonio asked Williams "whose firearms they were?" Williams responded "that the firearms were all his" and "that he didn't want to get his cousin—Walker—involved." Expecting to find closer to ten firearms in the apartment, D'Antonio also asked where the other firearms were, and where the third gun trafficker was. The record indicates no response from Williams to these latter two questions.

Approximately an hour later, following a search of the apartment, Williams was transported to the police station by D'Antonio. Once at the station house, D'Antonio took Williams to a small

interview room containing a desk and three to four chairs and removed the handcuffs. D'Antonio, in the presence of Kelly, then read Williams, who was "relatively calm," his *Miranda* rights, and he signed a form waiving them. At that point, nearly two hours after Williams had initially been arrested, Kelly left the room and D'Antonio and Santiago proceeded to question him.

According to D'Antonio, Williams then gave a detailed statement. The statement contained information on a range of incriminating activity in connection with his conspiracy with Smith to buy guns in Alabama, transport them to New York, sell them, and divide the proceeds. During the interrogation, Williams did not ask the officers to stop the questioning, nor did he ask to speak to a lawyer.

When asked at the suppression hearing why he did not administer Williams *Miranda* warnings before questioning him at the apartment, D'Antonio responded, "Because we were still trying to find who we thought was 'Alabama'. We thought he would still be around and would lead to multiple firearms that were not present at that location." When asked by defense counsel, "I guess what you're trying to do here is get the guns off the street, right?" D'Antonio responded, "It's a public safety issue at that point. We had information that there were more than four guns, that there were approximately nine guns. And there was one individual and approximately five guns that were not there, so we were trying to mitigate the exposure to any other violence by trying to locate those additional five guns."

D'Antonio further testified that he viewed the station house interrogation as "a separate interview from the one he conducted in the apartment," not as "a continuation" of it: The Government does not appeal the exclusion of Williams's statement in the Bronx apartment acknowledging ownership of the four guns recovered there.

Following his indictment, Williams moved to suppress his station house confession as the product of a two-step interrogation practice proscribed by Missouri v. Seibert, 542 U.S. 600 (2004). In Seibert, arresting officers were taught to intentionally omit Miranda warnings until their interrogation produced a confession, administer the warnings, and then question the defendant based on his pre-Miranda confession, in order to get him to restate it. Williams argued that D'Antonio was required to administer Miranda warnings prior to questioning him in the apartment and that, under Seibert, his failure to do so required suppression of the later "step two" station house confession. The district court granted Williams' motion to suppress.

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

"The Government's main contention is that the district court erred in suppressing Williams' station house confession as the product of a deliberate two-step interrogation strategy. In *Seibert*, the Supreme Court found unconstitutional a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. The 'manifest purpose' of such a protocol, a plurality of the Court explained, is to get a confession at the outset,

because with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. This technique, according to the plurality, evinced a police strategy adapted to undermine the effectiveness of the warnings when given.

"We hold that the Government has established, in light of the objective and subjective evidence, that D'Antonio did not engage in a deliberate two-step interrogation. There is no subjective evidence that D'Antonio asked Williams about the ownership of the guns, or the location of the missing guns or third gun trafficker, in a way calculated to undermine the *Miranda* warning given later at the station house.

"Instead, 'public safety considerations plausibly account' for D'Antonio's limited questioning of Williams at the apartment 'in a way that militates against finding that the first interview was a premeditated attempt to evade *Miranda*.' D'Antonio asked Williams three questions within a minute of entering an apartment that had only moments earlier been secured by NYPD personnel. Observing only four guns on the floor when he expected to find somewhere closer to nine or ten, and only two men handcuffed when he expected to find three, D'Antonio asked questions to determine the location of the missing guns and the third trafficker. In this context, his question about who owned the guns is most plausibly understood as an attempt to ascertain which man was 'Alabama'—the primary target of the search warrant and the man whom law enforcement agents had been investigating for a year and a half. Had Williams denied his (or Walker's) ownership of the guns, D'Antonio may have been able to conclude that neither man was his target, and that his search for 'Alabama' should continue. Instead, Williams claimed ownership of the guns, leading to the logical inference that he might be 'Alabama,' and prompting reasonable followup questions about the location of the other guns and the third trafficker.

"We are not required to decide whether the public safety exception actually excused this line of questioning. The point is that none of it evinced a deliberate strategy of trying to elicit incriminating statements that D'Antonio could then use later to cross-examine the defendant after administering *Miranda* warnings. Nevertheless, we have held, public safety considerations plausibly accounted for the conduct of the police in a way that militates against finding that the first interview was a premeditated attempt to evade *Miranda*."

"We conclude that the Government has met its burden of demonstrating that it did not engage in a deliberate two-step process intended to undermine Williams's Fifth Amendment rights."

SEARCH AND SEIZURE:
Affidavit; Probable Cause; Nexus

United States v. Carney
CA6, No. 10-5638, 4/10/12

On November 21, 2008, Aaron Williams sold his Nintendo Wii for $300 to a man in a bank parking lot. After the transaction was complete and the buyer drove away in his white Chevy SUV, Williams realized that the three $100 bills he received were counterfeit. Williams called the police

and told them about the incident. Later, either Williams or his mother, who was also present during the sale of the Wii, told the police that the same white Chevy SUV was parked in front of 4902 Saddlebrook Court and that it had license plate number 871-JKC. The police showed Williams and his mother three photos, and both identified Jerry King as the man they thought had given Williams the counterfeit money. Carney's picture was not included in the photo lineup.

In a separate incident on November 28, 2008, a man tried to use a counterfeit $20 bill to purchase merchandise at a Circle K convenience store. The cashier was on alert for such bills because the store had unknowingly accepted counterfeit $20 bills in the past. When the cashier became suspicious of the bill, he called his manager, Amy Forsythe, over to the counter. Forsythe looked at the bill and told the customer that it was counterfeit. The customer took the counterfeit bill, paid with another bill, and left the store. Forsythe saw the customer leave the store, get into a white Chevy SUV with license plate number 871-JKC, and drive away.

Forsythe later spoke to Secret Service Agent Ken McNaughton and Louisville Police Detective Stephen Glauber about the incident. In describing what had happened, Forsythe said that when she told the customer that the bill was counterfeit, he snatched it from her hands and fled the store. Agent McNaughton showed Forsythe three photos and she identified Carney as the customer who presented the counterfeit bill. Forsythe also told McNaughton that on two separate occasions she and her employees unknowingly accepted counterfeit $20 bills as payment from Carney for merchandise. The cashier at the Circle K, however, identified another individual from the same photo lineup. Jerry King's picture was not included in this photo lineup.

Agent McNaughton watched the surveillance video from the Circle K and confirmed that the customer appeared to be Carney, although McNaughton later acknowledged that the customer could have been King. Agent McNaughton continued his investigation and learned that the white Chevy SUV was registered to a Jenny McQuillen who lived at 4902 Saddlebrook Court.

Agent McNaughton conducted surveillance of 4902 Saddlebrook Court and saw Carney get into the white Chevy SUV and drive away. Agent McNaughton followed Carney as he drove to the Jefferson County Probation and Parole Office. Agent McNaughton later contacted a parole officer who confirmed that Carney had visited the office that day and had previously listed his residence as 4902 Saddlebrook Court #1. On December 8, 2008, Agent McNaughton, Detective Glauber, and two other police officers drove to 4902 Saddlebrook Court #1 and knocked on the door. Carney opened the door. The officers asked Carney if they could search the apartment and the white Chevy SUV, but Carney said no. The officers then asked Carney questions regarding the alleged counterfeit transactions they had been investigating, but Carney refused to answer their questions. Based on the evidence they had gathered to date, the officers determined that they had probable cause to arrest Carney on state counterfeiting charges related to the Circle K incident. They arrested Carney; Agent McNaughton and Detective Glauber then transported Carney to the Jefferson

County Detention Center before going to get a warrant to search the apartment and the white Chevy SUV. The two other officers remained at the scene in order to secure the apartment. While they waited for Agent McNaughton and Detective Glauber to return with the search warrant, the two officers heard someone inside the apartment. The officers called Agent McNaughton and told him what they heard. Agent McNaughton asked Carney if anyone had permission to be in the apartment and Carney said no. Based on this information, and a concern that someone might be inside destroying evidence, the officers entered the apartment and found James Dewitt. The officers detained Dewitt, interviewed him, checked him for weapons, and then released him. The officers did not search the apartment at that time and nothing they saw while in the apartment was included in the affidavit for the search warrant.

Detective Glauber wrote an affidavit in order to obtain a warrant to search the apartment and the white Chevy SUV. In the affidavit, Detective Glauber discussed, at length, the transactions on November 21 and 28, as well as the evidence gathered through the subsequent investigation. Detective Glauber stated that the police were looking for counterfeit money, anything used to make it, and a Nintendo gaming system, among other things. A state court judge issued the search warrant, and the police executed it.

Agent McNaughton later testified that, during the search of the apartment, the police found a handgun in the tank of a toilet, but no counterfeit money. A Presentence Report (PSR) prepared later in this case, however, states that the police found two firearms, ammunition, several counterfeit $100, $20, and $10 bills, and an all-in-one printer with genuine federal reserve notes taped to the scanner bed. The PSR also states that the police found a third firearm in the white Chevy SUV. In a filing before the district court, the Government stated that the police also found a Nintendo Wii in the apartment.

A federal grand jury indicted Carney, charging him with being a felon in possession of a firearm in violation 18 U.S.C. § 922(g), making counterfeit money in violation of 18 U.S.C. § 471, and passing counterfeit money in violation of 18 U.S.C. § 472.

Carney moved to suppress the evidence obtained from the apartment and the white Chevy SUV, arguing that the police seized this evidence unlawfully. After an evidentiary hearing, the district court granted Carney's motion, finding that the search warrant was not supported by probable cause. However, after the Government moved for reconsideration, the district court found that the good faith exception to the warrant requirement applied. Therefore, the district court refused to bar the admission of the evidence found as a result of the search warrant.

Carney then entered a conditional guilty plea to the charges against him, reserving the right to appeal the district court's ruling with respect to his suppression motion. The district sentenced Carney to 51 months' imprisonment.

On appeal, Carney argues that the district court should have granted his suppression motion for three reasons: (1) the police did not have probable cause to arrest him; (2) the search warrant was constitutionally defective

because it was based on misstatements in and omissions from the supporting affidavit; and (3) the search warrant was not supported by probable cause, and the good faith exception to the warrant requirement does not apply. All of Carney's claims lack merit. Upon review, the Sixth Circuit Court of Appeals found, in part, as follows:

"As an initial matter, it is immaterial, for purposes of this appeal, whether the police had probable cause to arrest Carney on state counterfeiting charges. The police did not seize any evidence at the time of, or incident to, Carney's arrest, and thus did not use anything from that arrest as a basis for obtaining the search warrant. Although two officers entered the apartment soon after arresting Carney, they did not search the apartment at that time and nothing they saw while in the apartment was included in the affidavit for the search warrant. In short, the search warrant was issued based on evidence gathered independent of Carney's arrest. Therefore, Carney's argument that the district court should have granted his suppression motion because the police did not have probable cause to arrest him is without merit…

"The affidavit stated that Forsythe picked Carney out of a photo lineup as the individual who passed a counterfeit $20 bill at the Circle K and then left the scene in a Chevy SUV with license plate number 871-JKC. The affidavit stated that Forsythe told Agent McNaughton and Detective Glauber that on two separate occasions she and her employees unknowingly received counterfeit $20 bills as payment for merchandise from Carney. The affidavit stated that Agent McNaughton confirmed that Carney appeared in the Circle K surveillance video. The affidavit stated that the police confirmed with both the Kentucky Department of Probation and Parole and state court records that Carney's personal residence was 4902 Saddlebrook Court #1. Finally, the affidavit stated that the police drove to 4902 Saddlebrook Court #1, knocked on the door, and Carney answered the door. Taken together, all of this information reveals interweaving connections among Carney, multiple alleged transactions involving different denominations of counterfeit money, the white Chevy SUV, and the apartment. In other words, based on the totality of the circumstances, the supporting affidavit established a fair probability that evidence of counterfeiting would be found in the apartment and car.

"Thus several investigative facts independently pointed to the probable presence of evidence of counterfeiting in the Chevy. The car was driven by a person proffering counterfeit money on at least two separate occasions. Moreover, several investigative facts pointed to the probable presence of evidence of counterfeiting in the apartment. The car that was linked to two instances of using counterfeit money was seen parked in front of the apartment and was registered to an individual who lived at an apartment at that address. The police had evidence to believe that Carney was the perpetrator of the Circle K incident, and Carney resided in the apartment.

"As we explained in *United States v. Sneed*, 385 F. App'x 551, 556 (6th Cir. 2010): a nexus can be inferred based on the nature of the evidence sought and the type of offense that the defendant is suspected of having committed. *See, e.g., United States*

v. Gunter, 551 F.3d 472, 481 (6th Cir. 2009) (It was reasonable to infer that evidence of illegal activity would be found at Gunter's residence); see also *United States v. Stearn,* 597 F.3d 540, 554 (3d Cir. 2010) (Probable cause can be inferred from 'the type of crime, the nature of the items sought, the suspect's opportunity for concealment, and normal inferences about where a criminal might hide evidence.'); *United States v. Tate,* 586 F.3d 936, 943 (11th Cir. 2009) ('Evidence that a defendant has stolen material which one normally would expect him to hide at his residence will support a search of his residence.'); *United States v. Orozco,* 576 F.3d 745, 749 (7th Cir. 2009) ('Warrants may be issued even in the absence of direct evidence linking criminal objects to a particular site.'); *United States v. Thompson,* 263 F. App'x. 374, 378 (4th Cir. 2008). ('This court has observed that it is reasonable to assume that individuals store weapons in their homes.'); *United States v. Ribeiro,* 397 F.3d 43, 49 (1st Cir. 2005) ('The probable-cause nexus can be inferred from the type of crime, the nature of the items sought.)'

"Just as a thief may be expected to have stolen goods in his home, see *Tate,* 586 F.3d at 943, or a drug dealer may be expected to have evidence of drug activity in his home, see *Gunter*, 551 F.3d at 481, a purveyor of counterfeit bills of different denominations on different occasions may be expected to have evidence of that activity in his home."

SEARCH AND SEIZURE: **Citizen Informant; Particularized Suspicion**

State of Montana v. Gill
No. DA 11-0309, 2012 MT 36, 2/14/12

Shortly before 9:00 p.m. on April 30, 2010, Susan Brady was traveling eastbound on Interstate 90 near Missoula when she spotted what she described as a "very intoxicated driver." Brady used a cell phone to call 911. She reported to the dispatcher that the driver was also heading eastbound on Interstate 90, and that he was unable to stay in his own lane. She stated that the vehicle had hit the cement barrier separating the opposing lanes of traffic on the freeway.

Brady described the vehicle as a dark green Chevy pickup that was probably manufactured during the 1990s. She also described the pickup as having more of a square appearance than a rounded one and that in the bed of the pickup was an unsecured load of wooden pallets. Brady told the dispatcher that there was debris flying out of the back of the truck, thus she was afraid to pull in behind the pickup to obtain its license plate number. Brady reported that there were two males in the pickup and that the passenger was drinking a beer. Brady further reported that she exited the freeway at the Van Buren Street exit, and that she last saw the pickup still heading eastbound on Interstate 90 towards the city of East Missoula.

Brady gave the dispatcher her name, home address, and the number of the cell phone from which she had placed the 911 call. Brady also indicated that she was willing to sign a complaint if the vehicle could be located.

A few minutes after Brady's tip, Missoula dispatch broadcast a report that there was a green Chevy pickup with a load of pallets traveling eastbound from the Van Buren exit on I-90 that was "all over the road." The report described the occupants of the pickup.

At 9:46 p.m., Montana Highway Patrol Trooper Richard Salois saw a dark green 1998 Chevy pickup matching the description in the dispatch report parked near the entrance of the Town Pump in Bonner. The Bonner Town Pump is located just off Interstate 90 east of Missoula. As the pickup pulled out of the Town Pump, Trooper Salois followed it and activated his emergency lights. He did not observe any visible damage to the pickup either before or after he initiated the traffic stop. Trooper Salois made contact with the driver whom he later identified as Gill. There were two other males inside the pickup. Trooper Salois observed various open containers of alcohol in the pickup and he detected a strong odor of alcohol, thus he initiated a DUI investigation.

Gill received citations for DUI and possession of alcohol while under the age of 21.Gill filed a motion to suppress all of the evidence in this case arguing that law enforcement did not have particularized suspicion to support an investigative stop of his vehicle. The District Court denied his motion to suppress and he appealed to the Montana Supreme Court. Gill argues that the District Court erred in denying his motion to suppress because Brady's report to 911 was unreliable as the truck stopped by Trooper Salois showed no signs of damage from hitting the median cement barrier on Interstate 90. Thus, Trooper Salois was unable to corroborate Brady's report.

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

"Both the United States Constitution and the Montana Constitution protect individuals from unreasonable searches and seizures. These constitutional protections extend to investigative stops of vehicles made by law enforcement officers. Under Montana Law, a law enforcement officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.

"We held in *Brown v. State*, 349 Mont. 408, 203 P.3d 842, that to establish particularized suspicion for a stop, the State must show that the officer possessed (1) objective data and articulable facts from which the officer can make certain reasonable inferences, and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense. Furthermore, whether particularized suspicion exists is evaluated under the totality of the circumstances and requires consideration of the quantity or content of the information available to the officer and the quality or degree of reliability of that information.

"In addition, an officer may rely on information conveyed by a third person to formulate particularized suspicion to stop a person. When an officer's particularized suspicion is based upon a citizen informant's report, that report must contain some indicia of reliability. We have identified three factors to be considered when assessing the reliability of a citizen informant's report: (1) whether the informant identified herself to

law enforcement thereby exposing her to criminal and civil liability if the report is false; (2) whether the informant's report was based on the personal observations of the informant; and (3) whether the officer's own observations corroborated the informant's information.

"A citizen informant who is motivated by good citizenship and who is willing to disclose the circumstances by which the incriminating information became known is presumed to be telling the truth. Information provided by the citizen informant, such as the informant's name, address, and telephone number, lends a high indicia of reliability to the informant's report.

"Gill concedes that Brady provided dispatch with sufficient information to meet this prong of the test. She gave dispatch her first and last name, her home address, the number of the cellular phone from which she placed the call, and the location from which she was calling. She even agreed to continue to work with law enforcement on the case and sign a complaint if officers located the pickup. By identifying herself to law enforcement, Brady exposed herself to civil and criminal liability if her report turned out to be false. Consequently, Trooper Salois was justified in presuming that the information Brady provided was truthful and had a high indicia of reliability.

"A citizen informant's belief that a person is driving under the influence must be based, in part, on his or her personal observations. An officer is allowed to infer that a report is based on a citizen informant's personal observations if the report contains sufficient detail that it is apparent the informant has not fabricated the report out of whole cloth and the report is of the sort which in common experience may be recognized as having been obtained in a reliable way. Innocent details personally observed by the informant are also relevant in assessing the reliability of the report.

"In this case, Gill argues that the second factor of the *Pratt* test has not been met as Brady's information was not reliable. Gill points out that Brady stated that she observed the pickup hit the cement barrier on Interstate 90; however, Trooper Salois did not observe any damage to the pickup Gill was driving.

"The State points out that Brady was traveling in a vehicle on I-90 in the same direction of travel as Gill when she observed his dangerous driving behavior and placed the call to dispatch. Brady provided dispatch with her own personal observations of Gill's driving behavior including that he was unable to stay in his own lane of traffic, leading her to believe that he was very intoxicated. Brady told dispatch that although she did not observe Gill take a drink, she did observe Gill's passenger drinking from a container of beer.

"In addition, Brady was able to provide dispatch with a detailed description of the pickup including its make, model-type, color, approximate age, and general body shape, as well as its last known location and direction of travel. She also reported to dispatch that there were two male occupants in the pickup and that it carried a load of wooden pallets.

"As for Brady's observation that Gill's pickup hit the cement barrier separating the lanes of traffic, the State points out that cement barriers such as the one on Interstate 90 are specifically designed, not only to prevent vehicles from crossing into the oncoming

lanes of traffic, but also to prevent or minimize vehicle damage if a vehicle does come in contact with those barriers. Such barriers are wider at the base than they are at the top to allow a vehicle's tires to ride up the barrier and to funnel the tires back into the proper lane of travel. Thus, according to the State, a vehicle's tires can hit a concrete barrier of this type without the vehicle's body ever coming into contact with the barrier and without the vehicle sustaining any damage.

"Moreover, Brady never stated that the pickup was damaged in anyway after hitting the cement barrier. Consequently, the fact that Trooper Salois did not observe any damage to Gill's pickup does not call into question the reliability of Brady's report under this factor of the test.

"We conclude that Brady's own contemporaneous personal observations of Gill's pickup, its occupants, and Gill's driving behavior provided specific, articulable and objective facts that justified Trooper Salois' reliance upon the information Brady provided.

"An officer corroborates an informant's report by observing illegal activity *or* by finding the person, the vehicle, and the vehicle's location substantially as described by the informant. Furthermore, as we have stated if the first and second factors are met, an officer may corroborate an informant's tip by observing wholly innocent behavior.

"Gill argues that in this case, Trooper Salois did not corroborate the informant's report because he did not locate a similarly described truck 'until 45 minutes later, yet only five miles from where the truck was first reported.' Gill maintains that this time frame is too large for the requisite particularized suspicion that his pickup was the same pickup observed by Brady. He claims that based on the passage of time, the reported truck would have been found further down the road near Drummond, not at Bonner. In addition, Gill contends that his pickup was not 'substantially as described by the informant' because there was no damage to his pickup.

"The State argues that Gill has not pointed to any cases where this Court has determined that particularized suspicion was extinguished due to the passage of time between the receipt of an informant's tip regarding an individual driving under the influence and the discovery of the vehicle in question. In addition, the State contends that the delay of 50 minutes between Brady's report and Trooper Salois' discovery of Gill's pickup was not so unreasonably long as to render Brady's report stale.

"We agree with the State. Moreover, Gill's argument that his pickup could not possibly be the pickup reported by Brady 50 minutes earlier because he was found only a few miles away, makes no sense. Trooper Salois found the pickup parked at the Town Pump, a casino and convenience store. It is unknown how long Gill was there, but it is not unreasonable to assume that he stopped there shortly after Brady observed the pickup and then remained there for some time.

"Trooper Salois confirmed the make, model-type, color, approximate age, and general body shape of the vehicle described by Brady. Trooper Salois also confirmed the sex of the driver, that the vehicle was in an expected

location based on its last known direction of travel, and that it was carrying the same distinctive and unusual payload described by Brady. In addition, contrary to Gill's contentions, Trooper Salois did not need to corroborate that the pickup was damaged because Brady did not report that the pickup sustained any damage when it hit the cement barrier.

"As we noted earlier in this opinion, an officer corroborates an informant's report by observing illegal activity or by finding the person, the vehicle, and the vehicle's location substantially as described by the informant. We conclude in this case, that Trooper Salois sufficiently corroborated Brady's report when less than an hour after Brady's call, Trooper Salois found a vehicle substantially as described by Brady in the general area also described by Brady.

"Based on the totality of the circumstances, we conclude that the information provided to Trooper Salois contained sufficient indicia of reliability to form the basis for his particularized suspicion that Gill's pickup was the same one that Brady observed engaged in criminal activity thereby warranting further investigation. Accordingly, we hold that the District Court did not err in denying Gill's motion."

SEARCH AND SEIZURE: **Emergency Searches; Evidence Destruction**

United States v. Ramirez
CA7, No. 10-3648, 4/26/12

On June 29, 2009, officers conducting surveillance at the Greyhound bus terminal in Omaha arrested Juan Perez and Juan Amaya-Armenta carrying heroin in their shoes. Perez informed officers that he was traveling with a third male wearing a dark shirt with a white logo, who also had heroin in his shoes. Following the arrests, the officers tried to uncover additional evidence to locate this third man and identified and removed several bags from under the bus. They then attempted to locate the owners of the retrieved bags by approaching the bus passengers, but nobody claimed ownership. A search of the abandoned bags uncovered an identification card belonging to Hector Cruz. The investigators spoke to the bus driver who reported that he was missing five passengers, two of whom the officers determined were the already-arrested men. The officers were then able to obtain the ticket information for the remaining three, identifying Luis Ibarra-Penuelas, Hector Cruz, and Carlos Ramirez.

From the ticket information, officers learned that Ramirez and Ibarra-Penuelas were traveling from San Diego to Newark, on cash, one-way tickets, purchased in much the same fashion Perez and Amaya-Armenta– who also were traveling on cash, one-way tickets, purchased about the same time or within minutes of each other. Cruz traveled in a similar fashion on a nearly identical route with a ticket purchased with cash, and accompanied Ramirez and Ibarra-Penuelas.

A bit of a goose chase ensued. After an officer contacted local cab companies to see if there was a recent pickup from the bus station, the officers went to a nearby Best Western hotel to determine if the men possibly went there. There, the officers learned that three individuals arrived at the Best Western in a cab but did not stay. After questioning employees of the Best Western, officers

learned that one of those individuals matched the description of the traveling companion provided by Perez and another matched the photo of Cruz retrieved from the abandoned bag. Further investigation revealed that the men had then taken a cab to the Comfort Inn. At the Comfort Inn, video surveillance revealed that three individuals, one of whom matched the description given by Perez, and another that matched Cruz's identification card, exited a cab in front of the hotel but did not enter the hotel. Instead, they walked to a nearby McDonald's and officers noticed from the video that two of them walked "heavily-footed," or not normal. At the McDonald's, the officers learned from an employee that she had provided three individuals with a phone book and noted that the men were looking for a cab. The officers contacted various local cab companies again and were told three individuals were picked up from the McDonald's area and taken to the Econo Lodge.

At the Econo Lodge, an officer learned from the desk clerk that three men checked in about a half hour earlier and that one of the men looked like the person on Cruz's identification card. The clerk told the police that these men were in room 220 and gave the officers a key card to the room, as well as a copy of the receipt showing the room was rented to Cruz. Officers then went to room 220; in all, six officers responded at the Econo Lodge, at least one of whom established perimeter surveillance. An officer close to the door testified that the only sound he heard from the room was, after he ultimately knocked on the door, the sound of an individual approaching the door. There is no evidence that the men inside room 220 even knew the police were on their trail.

Once at room 220, an officer attempted to swipe the key card to gain entry into the room but the card did not work. At that point, the officer blocked the peephole, knocked on the door, and announced "housekeeping." Cruz partially opened the door and when the officer announced his presence and flashed his badge, Cruz attempted to push the door shut. The officers used a ram, which they had brought along apparently anticipating a forced entry, to force the door open. The officers found Ramirez, Ibarra-Penuelas, and Cruz inside. After conducting a cursory sweep and securing the three men, an investigator noticed two pairs of shoes on the side of the bed similar to those packed with heroin and worn by Perez and Amaya-Armenta.

Ramirez and Ibarra-Penuelas denied that these shoes belonged to them, and Cruz claimed a pair of boots located elsewhere in the room as his. After the men denied ownership of the two pair of shoes by the bed, the investigators searched the shoesfor contraband and found heroin in each. The entire course of events from the time officers approached Perez and Amaya-Armenta at the bus station, and the officers' arrival at the Econo Lodge was approximately two and a half hours.

Before the district court, Ramirez argued that the search of the hotel room was illegal and conducted without a search warrant. The magistrate judge recommended, and the district court found, that the officers' entry was justified by an exigent circumstance: the officers' reasonable fear that the evidence would be imminently destroyed. The magistrate judge's analysis (also adopted by the district court) focused on the following

facts known to the police prior to the entry: 1) one of the investigators reasonably believed the men were attempting to elude the officers after they witnessed the officers arrest the two men at the bus stop; 2) the men in room 220 had purchased one-way tickets to Newark, New Jersey, with cash, and were not from Omaha; and 3) after the officers announced their presence, Cruz attempted to shut the door to prevent the officers from entering the room. Once inside, because the men did not claim ownership of the shoes, the court determined they were abandoned and thus the men had no expectation of privacy in them. Accordingly, the court denied Ramirez's motion to suppress.

Upon review, the Court of Appeals for the Eighth Circuit noted a U.S. Supreme Court decision in *Kentucky v. King*, 131 S.Ct. 1849 (2011) where the Court held that the officers' conduct in King was entirely consistent with the Fourth Amendment and in doing so, likewise discussed the privacy rights of occupants who have no obligation whatsoever to respond. They found, in part, as follows:

"No matter that the officers in King banged on the door and loudly announced their presence, the Court held that when law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person at the door is an officer or a private person, the occupant has no obligation to open the door or to speak. The occupant, now alerted to the police presence, may even choose to open the door and speak but need not allow the officers to enter and may refuse to answer questions at any time. But, cautioned the Court, if the occupants choose not to stand on their constitutional rights and instead elect to attempt to destroy evidence, they 'have only themselves to blame for the warrantless exigent-circumstances search that may ensue.'

"In this case prior to using the key card, the officers heard no sounds at all in room 220–no dead bolt lock being engaged, no toilet flushing or a shower or faucet running, and no shuffling noises or verbal threats emanating from the room; nor did the officers have any information that an occupant of room 220 had attempted to escape through a window, nor any indication that these individuals were armed or dangerous. In fact, the officer closest to the door heard only the sound of someone approaching after he had knocked. Accordingly, at the time these officers sought to gain entry by swiping the key card, they had no indication whatsoever that there was any activity at all in the hotel room, let alone any activity that might lead them to believe that the occupants inside might imminently destroy evidence. Especially given the fact that the occupants/suspects checked in thirty minutes prior, and there was nothing to lead the officers to believe that they had since left, the silence in the room nearly solidifies the inference that *nothing* was going on in room 220. But see *United States v. Granados*, 596 F.3d 970, 973-74 (8th Cir. 2010) (upholding warrantless entry into a hotel room when officers were aware occupant of room accompanied a known drug supplier that had just been arrested in the parking lot, officers reasonably believed weapons were in the room and that the occupant had been surveilling the parking lot activity, officers smelled marijuana in the hallway just outside the room, and they were

concerned for the safety of an informant's family); *United States v. Leveringston*, 397 F.3d 1112, 1116 (8th Cir. 2005) (warrantless entry to hotel room justified by risk that evidence would be destroyed when hotel management complained of suspicious drug activity in the room, occupant opened curtains and saw police and then officers heard sounds of pots and pans slamming, dishes breaking, water flowing, and garbage disposal grinding); *United States v. Marin-Cifuentes*, 866 F.2d 988, 991-92 (8th Cir. 1989) (exigent circumstances supported warrantless search given police surveillance of meetings between dealers prior to drug delivery, identification of a 'load' vehicle, surveillance of phone calls to hotel room occupant from known drug dealers, and the arrest of two cohorts, which would likely tip off the hotel occupant who was known to be 'surveillance conscious').

"The government almost wholly relies on cases involving situations where this court has found exigency based upon facts where the failure of one party's return might tip off an occupant that a deal had gone 'sour' or law enforcement was involved, thus prompting the imminent destruction of evidence. For example, the government cites *United States v. Kulcsar*, 586 F.2d 1283 (8th Cir. 1978), where officers arrived at a known drug supplier's home after arresting a drug dealer en route to the home, and saw a man fitting the description of the supplier look out of a window and then quickly move out of view.

"Accordingly, the officers believed the supplier was inside and knew of their presence, and thus entered the home without a warrant and arrested him. This court condoned the entry, noting that if the officers waited the several hours the record indicated it would have taken to obtain a warrant, the drug courier arrested en route to that supplier's house would not have returned, and the supplier would have been on notice that something was up, which would have likely precipitated the removal or destruction of the narcotics therein. The government offers no facts of the sort in this case.

"In each of the other cases cited by the government, facts in the record supported the theory of exigency advanced by the government. In each instance, the arrest of a single suspect outside of the location searched likely would have alerted a second suspect, who had the evidence and was within the location at issue, that something was awry. In each case, it was thus reasonable for the officers to conclude that discovery of pursuit was imminent, resulting in destruction of evidence. *United States v. Wentz*, 686 F.2d 653 (8th Cir. 1982) (condoning a warrantless entry into a home where a prior drug transaction occurred because the occupants would grow suspicious when one of the dealers failed to return, having been arrested while away from the house but on his way back); *United States v. Palumbo*, 735 F.2d 1095 (8th Cir. 1984) (same, concluding that when one individual failed to return to a hotel room as expected, the undercover operation would be revealed, thus supporting the exigency of the circumstances).

"Based upon a review and compilation of the precedent on which the government relies, the crux of its argument on appeal is that because the two men who were arrested at the bus terminal were allegedly accompanying a third man who was with another two in the hotel room, the three men in room 220 would become suspicious somehow, prompting

them to imminently destroy the evidence in their possession. Indeed, the government argued to the district court that the 'hallmark' of this case is the separation of the men arrested at the bus stop and the man alleged to be traveling with them. The government states that the fact co-conspirators had been previously arrested justified the exigency. Yet, the facts of the instant case do not comport with the precedent upon which the government relies. This record is devoid of evidence that these five men were scheduled to rendezvous at some point–i.e., that these three men were 'waiting' for the other two. Nor was there any other evidence that would lead a reasonable officer to conclude that the absence of, or detainment of, the two men arrested at the bus stop would somehow alert or 'tip off' these three men that something was afoot, or that law enforcement was close.

"The evidence supports the proposition that the officers tracked these men because the officers believed the men were part of the conspiracy at the bus station and possessed additional contraband. But following leads in a narcotics investigation is not enough. The facts relied upon by the district court—the suspects alleged 'elusion,' the suspects' ticket information, and Cruz's attempt to close the door—do not establish exigent circumstances. Of course, officers need not always get a warrant even if they have probable cause to do so. But, to effect a warrantless entry in violation of a person's rights under the Fourth Amendment, a reasonable exception must apply. Here, viewed objectively, the government fails to establish that it was reasonable for the officers to conclude that destruction of evidence was imminent, thereby establishing exigent circumstances warranting the forced entry into room 220.

"Because we find no exigent circumstances here, we need not determine whether the officers in this case 'created' any exigency, which itself would have necessarily precluded the warrantless entry. Accordingly, we reverse Ramirez's conviction because the evidence used to convict him was the fruit of a warrantless entry without exigent circumstances."

Editor's Note: The U.S. Supreme Court decision in *Kentucky v. King*, 131 S.Ct. 1849 (2011) can be reviewed in the CJI Publication Legal Briefs Archives at *CJI Legal Briefs*, Volume 16, Issue 2, Summer 2011 at page 32.

SEARCH AND SEIZURE:
Nighttime Searches; Safety of Officers

State v. Tyson
CR 11-713, 2012 Ark. 107, 3/8/12

On the evening of September 4, 2010, after receiving complaints of narcotic activity, patrol officers began to watch the area around trailer number 23 in the Lamplighter Trailer Park located in Jacksonville. At approximately 8:30 p.m., an officer observed a male carry three black trash bags from that trailer to a nearby dumpster. The officer retrieved those three trash bags to investigate the names of the adults living in the trailer. The manager of the trailer park had informed the officer that there were three small children living there and two adults, but the manager did not know the adults' names. Upon opening the bags, the officer found items relating to narcotics, specifically methamphetamine. The officer then contacted narcotics officers, Detective Cindy Harbor and her supervisor, Sergeant Amanda Temple, to further investigate.

Detective Harbor and Sergeant Temple found several items in the trash bags used to manufacture methamphetamine, such as organic iodine packages, a bottle of Heet, rubber gloves, red stained paper towels from a pill soak, two boxes of pseudoephedrine, a milk jug that was used for the pill soak, several empty blister packs, and coffee filters. The coffee filters they found were wet, and the HC Generator and other "actual lab components" were not in the trash; therefore, the officers believed that the occupants of the trailer were still in the active process of manufacturing methamphetamine. Additionally, the officers found what Detective Harbor described as "fresh" baby diapers in the trash and observed toys around the trailer.

Detective Harbor immediately typed up a search warrant and included a nighttime clause because it would be after 8:00 p.m. when the search was executed. The affidavit supporting the search warrant contained the following "Justification for the Nighttime Clause:"

> THE CONTENTS OF THE TRASHBAGS REVEALED SEVERAL BABY DIAPERS. OFFICER TEMPLE WAS ADVISED BY THE TRAILER PARK MANAGER THAT THERE ARE THREE SMALL CHILDREN BETWEEN THE AGES OF 3 AND 8 YEARS OF AGE LIVING IN TRAILER NUMBER 23. THE MANAGER WAS UNCERTAIN OF THE NAMES OF THE ADULTS WITHOUT GOING TO THE OFFICE TO PULL THE LEASE AGREEMENTS. IT IS BELIEVED BECAUSE OF THE LACK OF THE ACTUAL LAB COMPONENTS IN THE TRASH THAT THEY MAY BE IN THE ACTUAL PROCESS OF COOKING THE METHAMPHETAMINE AT THIS TIME.

A judge signed the warrant, including the nighttime clause, at 9:42 p.m. on September 4, 2010. Detective Harbor immediately executed the warrant after getting it signed. Tyson was present when officers entered the trailer. Officers discovered methamphetamine being manufactured in the bathroom, while three small children were asleep inside the trailer.

Tyson moved to suppress any evidence found in the trailer, arguing that the issuing judge lacked probable cause to issue the warrant and that the nighttime search clause in the warrant did not meet the requirements of Ark. R. Crim. P. 13.2(c). The circuit court granted Tyson's motion to suppress, finding that none of the nighttime-search conditions in Rule 13.2(c) applied to the search in the instant case. The State timely filed this appeal. Upon review, the Arkansas Supreme Court found, in part, as follows:

"The issue presented in the instant case is whether the circuit court erroneously concluded that the third circumstance that allows the issuance of a nighttime search warrant—the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy—only applies to officer safety and, therefore, that none of the nighttime search conditions of Rule 13.2(c) of the Arkansas Rules of Criminal Procedure applied.

"Rule 13.2(c)(iii) of the Arkansas Rules of Criminal Procedure does not expressly limit the safety concern to the safety of police officers. Subsection (c)(iii) simply allows for a judicial officer to issue a nighttime search warrant when there is reasonable cause to believe that 'the warrant can only be *safely or successfully executed* at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.' Nothing in that language suggests that the only safety concern in executing the warrant is the officers' safety.

"The problem with the affidavit in the instant case is that there were not facts to support a finding that the children, or anyone else, would only be safe during the execution of the warrant if the execution took place in the cover of darkness that nighttime affords. Rather, it appears that the officers included facts to support a finding that, in order to keep the children on the premises safe, who might have been at risk of serious bodily injury, they had probable cause to go in immediately, which happened to be nighttime. These scenarios are factually different and, currently, Rule 13.2 does not include an exception that applies to the second scenario. Therefore, the issuing judicial officer was mistaken by finding reasonable cause pursuant to Rule 13.2 and erred by issuing the nighttime search warrant.

"The final issue is whether the executing officers operated in good faith under *United States v. Leon*, 468 U.S. 897 (1984), and if so, whether that salvages an otherwise defective search and seizure.

"…We cannot hold that an officer should have known that the threat of immediate harm to the children inside a trailer with an active methamphetamine lab was not the type of reasonable cause covered by Rule 13.2(c)(iii) to execute the search warrant in hand that had been considered and signed by a judge. Accordingly, we hold that the *Leon* good-faith exception applies under these circumstances and that the circuit court erred in suppressing the evidence from the nighttime search and seizure."

SEARCH AND SEIZURE: **Reasonable Suspicion; Avoidance of Checkpoint**

State of South Dakota v. Rademaker
No. 26095, 4/18/12

At approximately 1 a.m. on a Sunday morning, Ryan Rademaker drove a friend to her home east of Milbank. A police officer and a highway patrol officer were conducting a sobriety checkpoint on the highway Rademaker was traveling. The officers had placed signs with flashing amber lights approximately 100 yards north and south of the checkpoint indicating to drivers that there was a checkpoint ahead.

The officers observed Rademaker approach the checkpoint from the north, drive past the northern sign, and turn onto a gravel road which allowed him to travel away from the checkpoint. Rademaker would later testify that he was not avoiding the checkpoint but rather following his usual route when taking his friend home.

The highway patrol officer instructed the police officer to make contact with Rademaker to determine why he was avoiding the checkpoint. The police officer later testified that he understood "make contact" to mean

he should stop Rademaker's car for avoiding the checkpoint. The police officer also testified that, after he got into his patrol car and followed Rademaker, he observed Rademaker make a wide turn, but that he was unsure if the turn violated the law.

Additionally, while following Rademaker, the officer observed that Rademaker was driving at an excessive speed for the conditions, perhaps as fast as 70 miles per hour. However, although the trial court noted in its memorandum opinion that it was aware of this observation, it reasoned that because the officer "was unable to testify that he observed the excessive speed prior to activating his red lights," the observation could not serve as a legal basis for the stop.

Approximately three-quarters of a mile east of the highway, the police officer caught up to Rademaker and stopped his car. Upon approaching Rademaker, the police officer noted that Rademaker smelled of alcohol and exhibited various other signs of intoxication. Rademaker later admitted to the police officer that he had been drinking and submitted to a preliminary breath test which indicated his blood alcohol level was .185. A subsequent blood test indicated a blood alcohol level of .182.

The police officer arrested Rademaker for driving under the influence. Rademaker moved to suppress all evidence obtained from the stop arguing that the stop of his car violated his Fourth Amendment right to be free from unreasonable search and seizures. The trial court denied his motion and convicted Rademaker of driving under the influence.

Upon review, the South Dakota Supreme Court joined the Eighth Circuit in holding that avoidance of a checkpoint is insufficient to form a basis for reasonable suspicion. See *United States v. Yousif*, 308 F.3d 820 (8th Cir. 2002). The Court decided, however, that other circumstances and behavior on the part of drunk driver in this case did furnish reasonable suspicion for the stop:

"Given the totality of the circumstances at the time the officer made the stop of Rademaker's vehicle, an officer of reasonable caution could have concluded that an individual who turns away from a checkpoint at one (1) a.m., executes an unusually wide turn, and is driving at an excessive speed for the conditions may be intoxicated or engaged in some other sort of criminal behavior."

SEARCH AND SEIZURE: **Search Incident to Arrest; Cell Phones Call History**

United States v. Flores-Lopez
CA7, No. 10-3803, 2/29/12

In this case, the Court of Appeals for the Seventh Circuit considered the circumstances in which the search of a cell phone is permitted by the Fourth Amendment. At the scene of a drug sale and arrests, an officer searched each cell phone for its telephone number, which the government later used to subpoena three months of each cell phone's call history from the telephone company. The defendant argues that the search of his cell phone was unreasonable because not conducted pursuant to a warrant.

The Seventh Circuit Court of Appeals found, in part, as follows:

"A diary is a container—and not only of pages between which a razor blade or a sheet of LSD could be concealed—a possibility that justifies the police in turning each page. It is also a container of information, as is a cell phone or other computer. And since a container found on the person of someone who is arrested may be searched as an incident to the arrest even if the arresting officers don't suspect that the container holds a weapon or contraband, and thus without any justification specific to that container, *United States v. Robinson*, 414 U.S. 218, 236 (1973). The government urges that a cell phone seized as an incident to an arrest can likewise be freely searched.

"A modern cell phone is in one aspect a diary writ large. Even when used primarily for business it is quite likely to contain, or provide ready access to, a vast body of personal data. The potential invasion of privacy in a search of a cell phone is greater than in a search of a 'container' in a conventional sense even when the conventional container is a purse that contains an address book (itself a container) and photos. Judges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book. Analogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life. There is a far greater potential for the 'intermingling' of documents and a consequent invasion of privacy when police execute a search for evidence on a computer. *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011).

"The authority to search a person incident to an arrest, without a warrant, requires justification. The usual justification offered is the need of the arresting officers to disarm and to discover evidence, *United States v. Robinson*, supra, 414 U.S. at 235, or, more exactingly, evidence that the defendant or his accomplices might destroy, discard, or conceal. *Chimel v. California*, 395 U.S. 752, 763 (1969).

"In some cases, a search of a cell phone, though not authorized by a warrant, is justified by police officers' reasonable concerns for their safety. One can buy a stun gun that looks like a cell phone. But the defendant's cell phone, once securely in the hands of an arresting officer, endangered no one. It did, however, contain evidence or leads to evidence—as the officers knew was likely because they knew from their informant that as is typical of drug dealers the defendant had used cell phones to talk to other coconspirators. But was there any *urgency* about searching the cell phone for its phone number? Yet even if there wasn't, that bit of information might be so trivial that its seizure would not infringe the Fourth Amendment. In *United States v. Concepcion*, 942 F.2d 1170, 1172-73 (7th Cir.1991), police officers tested the keys of a person they had arrested on various locks to discover which door gave ingress to his residence, and this we said was a search. But we went on to hold in *Concepcion* that a minimally invasive search may be lawful in the absence of a warrant

"So opening the diary found on the suspect whom the police have arrested, to verify his name and address and discover whether the diary contains information relevant to the crime for which he has been arrested, clearly is permissible; and what happened in this case was similar but even less intrusive, since a cell phone's phone number can be found without

searching the phone's contents. Moreover, the phone company knows a phone's number as soon as the call is connected to the telephone network; and obtaining that information from the phone company isn't a search because by subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number. *Smith v. Maryland*, 442 U.S. 735, 742-43 (1979).

"It's not even clear that we need a rule of law specific to cell phones or other computers. If police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number. If allowed to leaf through a pocket address book, as they are, *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993), they should be entitled to read the address book in a cell phone. If forbidden to peruse love letters recognized as such found wedged between the pages of the address book, they should be forbidden to read love letters in the files of a cell phone.

"It is conceivable, not probable, that a confederate of the defendant would have wiped the data from the defendant's cell phone before the government could obtain a search warrant; and it could be argued that the risk of destruction of evidence was indeed so slight as to be outweighed by the invasion of privacy from the search. But the 'invasion,' limited as it was to the cell phone's number, was also slight. And in deciding whether a search is properly incident to an arrest and therefore does not require a warrant, the courts do not conduct a cost-benefit analysis, with the invasion of privacy on the cost side and the risk of destruction of evidence (or of an assault on the arresting officers) on the benefit side of allowing the immediate search. Toting up costs and benefits is not a feasible undertaking to require of police officers conducting a search incident to an arrest. Thus, even when the risk either to the police officers or to the existence of the evidence is negligible, the search is allowed, *United States v. Robinson, supra*, 414 U.S. at 235, provided it's no more invasive than, say, a frisk, or the search of a conventional container, such as Robinson's cigarette pack, in which heroin was found. If instead of a frisk it's a strip search, the risk to the officers' safety or to the preservation of evidence of crime must be greater to justify the search. Looking in a cell phone for just the cell phone's phone number does not exceed what decisions like *Robinson* and *Concepcion* allow.

"We need not consider what level of risk to personal safety or to the preservation of evidence would be necessary to justify a more extensive search of a cell phone without a warrant, especially when we factor in the burden on the police of having to traipse about with Faraday bags or mirror-copying technology and having to be instructed in the use of these methods for preventing remote wiping or rendering it ineffectual. We can certainly imagine justifications for a more extensive search. The arrested suspect might have prearranged with coconspirators to call them periodically and if they didn't hear from him on schedule to take that as a warning that he had been seized, and to scatter. Or if conspirators buy prepaid SIM (subscriber identity module) cards, each of which assigns a different phone number to the cell phone in which the card is inserted, and replace the SIM card each day, a police officer who seizes one of the cell phones will have only a short interval within which to discover the phone

numbers of the other conspirators. The officer who doesn't make a quick search of the cell phone won't find other conspirators' phone numbers that are still in use. But these are questions for another day, since the police did not search the contents of the defendant's cell phone, but were content to obtain the cell phone's phone number."

Editor's Note: There have been a variety of decisions dealing with the search of a cell telephone seized incidental to an arrest. Some federal district courts and a state court view these telephones as computers which can contain a large amount of information which should be searched by use of a traditional search warrant. See *State v. Smith,* 920 N.E.2d 949 (Ohio 2009). The federal courts of appeal that have dealt with this issue have allowed warrantless searches of cell telephones pursuant to the search incident to arrest doctrine. See *United States v. Curtis,* 635 F.3d 704 (5th Cir. 2011). Also see *People v. Diaz,* No. S166600 (CA Supreme Court, 1/13/11), at *CJI Legal Briefs,* Volume 16, Issue 2, Summer, 2011, at page 21; *United States v. Murphy,* CA4, No. 07-4607, 1/15/09, *CJI Legal Briefs,* Volume 14, Issue 1, Spring, 2009, at page 10; and *United States v. Findley,* CA5, No. 06-50160, 1/26/07, *CJI Legal Briefs,* Volume 12, Issue 4, Winter, 2008, at page 16, for decisions dealing with this issue.

SEARCH AND SEIZURE: **Search Warrant Affidavits; Thermal-Imaging Scan**

United States v. Henry
CA4, No. 10-5201 and 10-5219, 3/8/12

Kimberley Henry and her husband Edgar Henry were convicted in a jury trial of two offenses related to growing marijuana at their home in a rural area of West Virginia. On appeal, they contend a thermal-imaging search warrant that led to the seizure of marijuana on their property was invalid.

On July 13, 2004, Sergeant James W. Manning of the West Virginia State Police filed an application for a search warrant to conduct a thermal-imaging scan of the Henrys' property. In his affidavit filed with the warrant application, Manning stated that he received information from a deputy sheriff that a confidential informant had revealed that the Henrys had been growing and distributing marijuana in the Rosedale area for the past four years.

The affidavit also contained information that Manning received from Sergeant Steve Jones of the West Virginia State Police which included an account from an anonymous source who stated in 2003 that the Henrys maintained a large indoor marijuana "grow operation" at their residence near Rosedale. This source also stated that the Henrys once had lived in New Jersey. Manning confirmed with the West Virginia Department of Motor Vehicles that the Henrys' physical address was in Rosedale, West Virginia, which is located in Gilmer County. Manning additionally confirmed that Kimberley Henry's social security number was issued in New Jersey.

Also in the affidavit, Manning stated that in November 2002, two West Virginia State Police officers interviewed an inmate named Phillip Lee Sandy in a jail in Braxton County, West Virginia, regarding his knowledge of drug-related activity. Sandy told the officers that he had purchased small quantities of high-quality marijuana from Kimberley Henry on four or five occasions. Sandy also stated

that the Henrys had constructed a building behind their residence to grow marijuana hydroponically, and Sandy provided the officers with a hand-drawn map of the Henrys' property. According to Sandy, the Henrys moved to West Virginia from the Washington, D.C. area. Manning corroborated this information when he conducted a criminal history review and learned that Edgar Henry had an arrest record in certain areas of Maryland located near Washington, D.C. Manning's investigation further revealed that Edgar Henry's first arrest in that area, in 1972, was based on drug-related charges, and that his second arrest in Maryland, in 1993, was for possession of marijuana.

Manning corroborated Sandy's description of the Henrys' property by conducting an aerial surveillance of the property in February 2004. During that surveillance, Manning observed a tan-colored residence with an attached, enclosed walkway leading to a building behind the residence. As stated in the affidavit, several weeks after conducting the aerial surveillance, Manning and two other officers walked along the roadway in the area of the Henrys' residence to view the property. Manning observed in the rear building two large hooded lights and two ceiling fans, and heard the sound of a large ventilation fan emanating from the roof of the building.

The affidavit also stated that in May 2004, Manning learned that Edgar Henry had been charged with assault and disorderly conduct after threatening individuals at a grocery store in Rosedale who were trying to organize a "neighborhood watch program." Following Henry's arrest, police discovered marijuana on his person, and Henry later was charged with possession of marijuana.

Manning also included in the affidavit the fact that Kimberley Henry did not have an arrest record. However, Manning further stated that Kimberley Henry appeared to have a particular interest in a 2002 federal prosecution of another individual from Rosedale who was charged with growing marijuana. A West Virginia State police officer had informed Manning that Kimberley Henry was present for every court appearance made by that defendant.

Finally, Manning stated in the affidavit that he received power usage records for the Henrys' residence, which revealed an average bi-monthly electric usage of 10,870 kilowatt hours, with an average cost of about $728 for each bimonthly billing period. Additionally, Manning confirmed that the Henry residence was not heated by electric power, but by gas.

After reviewing this affidavit along with Manning's application, a magistrate judge concluded that there was probable cause to support a thermal-imaging scan of the Henrys' property, and issued the requested search warrant. Manning executed the thermal-imaging search warrant in July 2004. During the search, although the outside temperature in the area was about 58 degrees Fahrenheit, an air conditioning unit was operating in the rear building. However, the air conditioning unit in the residential portion of the property was not operating. Using night-vision goggles and a thermal-imaging unit, Manning and another officer determined that the rear building emitted a high amount of heat, which was much greater than the residential portion of the structure.

Relying on the information obtained during this search, along with the information

provided in his initial affidavit, Manning applied for a second search warrant to conduct a physical search of the Henrys' property. The magistrate judge issued the requested warrant. During the physical search of the Henrys' property, the police seized numerous items, including a total of 85 marijuana plants in various stages of development. The police also seized evidence of a recent harvest, including 31 marijuana plant roots. Additionally, the police discovered various types of "growing equipment," processed marijuana, triple-beam scales, gallon-sized plastic bags, drug usage paraphernalia, and a binder containing handwritten notes, most of which were entered by Kimberley Henry and involved the growing of marijuana from 2000 through 2002. Finally, the police seized $1,800 in cash, in the form of $100 bills.

The Henrys assert that the affidavit at issue failed to meet this probable cause standard. The Henrys focus their argument on the information provided by the two unidentified sources and by Sandy, the cooperating inmate. According to the Henrys, these sources failed to explain how they obtained the information they relayed to the authorities, and failed to provide sufficient details to demonstrate that they were credible and reliable sources. The Henrys further contend that Sandy's information was "stale," because he was interviewed by the police more than twenty months before the thermal-imaging search warrant was issued. Additionally, the Henrys argue that although Manning submitted information to the magistrate judge regarding power usage at the Henrys' property, Manning failed to show that such usage was irregular.

The Court of Appeals for the Fourth Circuit disagreed with the Henrys' arguments, because they isolate certain aspects of the affidavit to the exclusion of other supporting facts and circumstances. Upon review, the Court of Appeals for the Fourth Circuit found, in part, as follows:

"Initially, we observe that the Henrys accurately identify certain weaknesses in the affidavit concerning the information obtained from Sandy and the two unidentified sources. The individual statements from each of these three sources were not based on recent information. Rather, the sources only were able to state that the Henrys had grown large amounts of marijuana at their residence in the past, and that the sources had purchased marijuana from the Henrys at some unidentified earlier time.

"Because these accounts were not based on recently acquired information, the accounts, if considered separately, may well have been insufficient to establish probable cause. However, when considered collectively, that information demonstrated that three individuals with no connection to one another provided consistent statements regarding the Henrys' alleged illegal conduct involving the manufacture and distribution of marijuana.

"We also observe that many details provided by these three sources were corroborated by Manning's independent investigation. Manning confirmed that Kimberley Henry had lived in New Jersey, that the Henrys likely moved to West Virginia from the Washington D.C. area, and that the Henrys' property, when viewed by Manning during an aerial surveillance, appeared as described by Sandy. In addition, the magistrate judge's

determination was supported by other details, including Edgar Henry's threats to residents seeking to organize a neighborhood watch program, and Kimberley Henry's acute interest in court proceedings involving a person accused of manufacturing marijuana in the Rosedale area.

"Regarding the electric power usage information submitted to the magistrate judge, the Henrys correctly observe that Manning failed to provide information to assist the magistrate judge in determining whether the Henrys' power usage was excessive for a property of that size. However, Manning did determine that the residence was heated by gas, rather than by electric power. Therefore, the magistrate judge was able to consider the Henrys' electric power usage information in that relevant context.

"In view of the collective strength of this information, we conclude that the affidavit provided a sufficient basis to establish probable cause for issuance of the thermal-imaging search warrant. Therefore, we hold that the district court did not err in denying the Henrys' motion to suppress."

SEARCH AND SEIZURE: **Seizure of Cell Phone; Delay in Searching**

United States v. Burgard
CA7, No. 10-CR-30085, 4/2/12

A friend of the defendant, Joshua Burgard, told Sergeant Louis Wilson of the Smithton, Illinois, Police Department that he had seen sexual images of young girls on Burgard's cell phone, and that Burgard, 21 years old, had bragged about having sex with them. The friend later texted Wilson that he and Burgard were together in a car. Wilson stopped the car and seized Burgard's phone, but did not immediately apply for a search warrant.

He sent a report to Detective Krug, who worked with the FBI Cyber Crimes Task Force. Krug tried to contact Wilson for more details, but shift differences and other delays resulted in a six-day gap before Krug obtained a federal warrant, searched the phone, and found the images. The district court denied a motion to suppress, finding the delay not unreasonable, and that, if were unreasonable, the good-faith exception to the exclusionary rule would apply. The Seventh Circuit affirmed finding, in part, as follows:

"This case requires us to address one narrow question: did the six-day delay in securing a warrant render the seizure of Burgard's phone unreasonable for purposes of the Fourth Amendment? An officer may temporarily seize property without a warrant if they have probable cause to believe that a container holds contraband or evidence of a crime and the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. Even a permissible warrantless seizure, such as the initial seizure here, must comply with the Fourth Amendment's reasonableness requirement. Thus, the Supreme Court has held that after seizing an item, police must obtain a search warrant within a reasonable period of time. See, e.g., *Segura v. United States*, 468 U.S. 796, 812 (1984).

"Here, in contrast, the police needed within a reasonable time to obtain a warrant before they could undertake a new search and seizure—that of the contents of the cell phone.

This is the essence of Burgard's complaint. No other recognized exception to the warrant requirement covered the police detention of the contents of Burgard's phone.

"Burgard has conceded that police had probable cause to believe that the phone would contain evidence of a crime. Given these facts, Burgard leans heavily on the diligence factor, arguing that the officer was not diligent because he should have been able to submit the warrant application more quickly. We are willing to assume that Burgard is correct on this point. It strikes us as implausible that an officer with over 14 years of experience, like Krug, could not write a two-page affidavit in fewer than six days, especially when the affidavit drew largely on information that was contained in the initial report that he received from Wilson. The government argues that the delay was attributable to Krug's lack of familiarity with federal cell-phone warrants, but that explanation is not persuasive given the fact that the bulk of the warrant appears to be boilerplate. And although it is true that the detective's attention was diverted by a more serious robbery case, this did not take place until Friday, after three days had already passed.

"But police imperfection is not enough to warrant reversal. With the benefit of hindsight, courts can almost always imagine some alternative means by which the objectives of the police might have been accomplished, but that does not necessarily mean that the police conduct was unreasonable. *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985). Krug may theoretically have been able to work more quickly, but his delay was not the result of complete abdication of his work or failure to see any urgency. He wanted to be sure that he had all the information he needed from the seizing officer and he wanted to consult with the AUSA, all the while attending to his other law enforcement duties. We do not want to discourage this sort of careful, attentive police work, even if it appears to us that it could or should have moved more quickly. Encouraging slapdash work could lead to a variety of other problems.

"After seizing an item without a warrant, an officer must make it a priority to secure a search warrant that complies with the Fourth Amendment. This will entail diligent work to present a warrant application to the judicial officer at the earliest reasonable time. We find that this standard was met here and that the six-day delay was not so unreasonable as to violate the Constitution. Burgard argues that this outcome could give authorities license to retain seized property for long periods of time merely because they chose not to devote a reasonable amount of resources and sufficient experienced personnel to the task of obtaining warrants. Given the fact-specific nature of these inquiries, we think these fears are overblown. It remains possible that a police department's failure to staff its offices adequately or to give officers sufficient resources to process warrant applications could lead to unreasonable delays. But this case does not present that sort of egregious abdication of duties."

SEARCH AND SEIZURE:
Stop and Frisk; Free to Leave
United States v. Jones
CA4, No. 11-4268, 5/10/12

Two police officers, in a marked patrol cruiser, closely followed a car from a public road onto private property, and then blocked the car's exit. The officers observed no traffic violation. The only suspicious activity they could point to was the car's presence in a high-crime neighborhood with out-of-state tags. These facts alone led the officers to suspect that the car's occupants, four African American men, were involved in drug trafficking. Immediately after the driver, Frederick Jones, exited his car, the officers approached him and asked that he lift his shirt, which he did. The officers then asked him to consent to a pat down search, which he did. After neither the shirt lift nor the search revealed anything, the officers discovered that Jones had no license and thus had committed a traffic violation, and so detained him. Subsequently, they searched his person and found he possessed a firearm and a small quantity of marijuana.

Jones was convicted of one count of possession of a firearm by an unlawful user of controlled substances. He moved to suppress the gun and marijuana and subsequent statements to the police, alleging that the officers had illegally seized him when a detective asked him first to lift his shirt and then submit to a pat down search.

The Court of Appeals for the Fourth Circuit held that, because a reasonable person in Jones's position would not have felt free to terminate the initial encounter with the officers, the district court's denial of his motion to suppress should be reversed.

SEARCH AND SEIZURE:
Trash Pull
United States v. Williams
CA8, No. 11-1890, 2/28/12

Detective Matthew Miller of the Lee's Summit, Missouri Police Department received a tip on October 27, 2008 that Kody R. Williams was selling drugs at an identified address. The tip also stated that Williams had prior convictions for drug trafficking and other felonies, and that the house at the identified address might also be occupied by an individual named Sherry Mitchell.

The affidavit stated nothing regarding the reliability of any information previously provided to law enforcement by the source. The affidavit further stated that the water utilities account for the identified address showed an active account in the name of Sherry Mitchell. It also noted that Detective Miller had "retrieved three bags of trash that had been left at the curb for pick-up by a trash company" at the identified address. Within that trash were two torn pieces of a plastic bag coated with cocaine residue, several pieces of mail addressed to Sherry Mitchell at that address, and a blank card of a type for use by individuals on probation or parole with the Missouri Department of Corrections.

After discovering that Sherry Mitchell had no criminal history, Detective Miller averred his belief that someone on probation or parole, such as Williams, likely also resided at the identified address. Finally, Detective Miller

stated that Williams had given the identified address as his home address during at least six interactions with police. A search executed pursuant to the ensuing search warrant yielded the handgun and ammunition that served as the predicate for the charges and Williams's subsequent conditional guilty plea.

On appeal, Williams argues that the district court erred in denying the motion to suppress because the trash was pulled from a location in which Williams retained some expectation of privacy.

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

"The constitutionality of a trash pull depends upon 'whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable.' *United States v. Comeaux*, 955 F.2d 586, 589 (8th Cir. 1992) (quoting *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991)). Once again, the only evidence in the record as to the location from which the trash was pulled is Detective Miller's statement in the affidavit that he 'retrieved three bags of trash that had been left at the curb for pickup by a trash company.' It is well settled that there is no reasonable expectation of privacy in trash left at the curb in an area accessible to the public for pick-up by a trash company. See, e.g., *United States v. Trice*, 864 F.2d 1421, 1423 (8th Cir. 1988) (citing *California v. Greenwood*, 486 U.S. 35, 40-41 (1988)). Therefore, the district court did not err in denying the motion to suppress."

SEARCH AND SEIZURE:
Vehicle Stop; Open Container

United States v. Washington
CDC, No. 11-3020, 2/24/12

Police stopped Russell C. Washington for driving at night with no car lights on, a minor traffic offense, and they then noticed a strong smell of alcohol coming from the car, saw a small amount of red liquid in an open cup in the car, and arrested him for violating the District of Columbia open container law. Upon searching the car, the police found a loaded gun under the driver's seat.

On appeal, Washington challenges the denial of his motion to suppress evidence. His Fourth Amendment challenge is based on the contention that the "infinitesimal" amount of red liquid observed by the police in the cup was insufficient to establish probable cause to arrest him and therefore to search the car.

The district court, however, credited police testimony about the strong odor of alcohol coming from the car, the red liquid in the uncovered cup, a puddle on the car floorboard near the driver's seat, and Washington's movements after he was ordered to stop the car. This testimony supported the district court's conclusion that a reasonable police officer could infer that Washington had poured the liquid from the cup while driving. Upon arresting Washington with probable cause to believe he was driving in possession of an open container of alcohol, the police had an objectively reasonable basis to search the car for evidence of that offense. Therefore, the district court did not err in denying Washington's motion to suppress evidence.

SEARCH AND SEIZURE:
Vehicle Stop; Reasonable Suspicion; Length of Detention

Johnson v. State
CACR 11-991, 2012 Ark. App. 167 (2/22/12)

Officer Chris Jones of the Carroll County Sheriff's Department testified that he was on duty at 2:20 a.m. on December 6, 2010, when he observed a vehicle traveling on Highway 103 with a broken tail light. Officer Jones also received information from another officer via radio that the vehicle had passed him on the highway and failed to dim its lights. Officer Jones initiated his blue lights and stopped the vehicle for these violations.

Officer Jones testified that after he made the stop he approached the driver's side of the car. Johnson was driving and a woman named Ms. Scofield was riding as a passenger. Officer Jones indicated that he was familiar with Johnson because he had stopped him several times before, and that he had stopped him within the past month for the same broken tail light. According to Officer Jones, Johnson was talkative and "easy to get along with" the previous times he stopped him, but on this occasion he exhibited completely different behavior.

Officer Jones testified that while he made contact with Johnson at the driver's side door, Johnson looked straight ahead and would not make eye contact. Officer Jones said that "his hands were shaking, and his whole demeanor had changed." Officer Jones identified himself and, after going back and speaking with another officer, he asked Johnson for identification, registration, and insurance. Johnson handed Officer Jones identification, and Officer Jones ran a check and found that his driver's license was valid. Upon request, Ms. Scofield also produced a valid driver's license. After that, Officer Jones asked dispatch for outstanding warrants but evidently found none. Officer Jones testified that he did not remember if there had been any convictions, but he knew that Johnson had prior drug problems. Officer Jones believed that past drug abuse had caused Johnson to have a heart attack. He further testified that Ms. Scofield had a history with drugs and had been arrested within the past couple of months for possession of a controlled substance. Officer Jones said that there had been reports of drug activity along Highway 103, although he acknowledged that he was not there that night because of drugs in the area and that there was probably drug activity along every road in the county.

Officer Jones asked Johnson to step out of the car, and Johnson complied but did not make eye contact and was violently shaking. Officer Jones acknowledged that it was very cold that night (about fifteen to twenty degrees) but said that Johnson appeared nervous and looked more nervous the more they talked. Officer Jones asked both passengers what they were doing that night, and they both responded that they were out riding country roads. Officer Jones thought it very strange to be riding back roads when it was below freezing. He testified that Johnson and Ms. Scofield gave stories that were inconsistent, but he could not remember what the inconsistencies were. Officer Jones asked if there was anything illegal in the car, and Johnson said not to his knowledge. Officer Jones asked for consent to look inside the car but Johnson refused.

At 2:33 a.m., which was thirteen minutes into the stop, Officer Jones called Officer Zimmerman, a canine officer, and requested a canine sniff of the car. At that point Officer Jones had not determined whether he was going to ticket Johnson, and he said he probably would have just issued a warning had no other incriminating evidence been found. Officer Jones stated, "I felt like I needed more because of what was there."

Officer Zimmerman testified that he was not working that night and that when he received the call from Officer Jones he was at home. After getting dressed and getting the dog, Officer Zimmerman left his house about five minutes later. He arrived at the scene at 2:52 a.m., which was thirty-two minutes after the initial stop. After he arrived, Officer Zimmerman conducted a canine sniff, and the canine alerted to drugs in the vehicle, resulting in Johnson's arrest.

On appeal, Johnson argues that his motion to suppress should have been granted because the legitimate purpose of the stop had ended and his continued detention was unlawful. Johnson submits that the purpose of the traffic stop had ended at 2:33 a.m. and that there was no reasonable suspicion for his detention beyond that time. Because the canine sniff detecting the drugs occurred nineteen minutes after that, Johnson argues that the incriminating evidence was illegally obtained and should have been suppressed.

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

"Our Supreme Court has stated that a law-enforcement officer, as part of a valid traffic stop, may detain a traffic offender while completing certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered. However, after these routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable. . In *Sims,* the Arkansas Supreme Court held 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.

"We agree with Mr. Johnson's assertion that the purpose of the traffic stop was over thirteen minutes after the stop when Officer Jones called for the canine officer. This is because, at that time, Officer Jones had completed the routine tasks associated with the stop and, absent reasonable suspicion, the officer was required to issue a citation or warning if necessary and discontinue the detention. However, we conclude that Officer Jones had reasonable suspicion to detain Mr. Johnson pursuant to Rule 3.1 of the 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 misdemeanor involving danger to persons or property. *Malone v. State,*

364 Ark. 256, 217 S.W.3d 810 (2005). The officer must develop reasonable suspicion to detain before the legitimate purpose of the traffic stop has ended. Whether there is reasonable suspicion depends on 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. *Laime v. State,* 347 Ark. 142, 60 S.W.3d 464 (2001).

"In holding that there was reasonable suspicion for Mr. Johnson's continued detention, we are guided by our Supreme Court's recent decision in *Menne v. State*, 2012 Ark. 37. In that case, the Supreme Court held that the factors that combined to give the officer reasonable suspicion that Ms. Menne was engaged in criminal activity were (1) one month earlier, he had stopped the same vehicle and arrested Ms. Menne's passenger for DWI and possession of marijuana; (2) during a criminal history check, the officer discovered that Ms. Menne had previously been arrested; (3) the officer had information from a local police department that Ms. Menne was suspected of drug dealing; (4) Ms. Menne was nervous; and (5) the time of night. The Supreme Court stated that while one of these factors may not have been enough to lead to reasonable suspicion, viewing the totality of the circumstances, the trial court did not err in denying the suppression motion.

"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. Ark. Code Ann. § 16-81-203(1), (3), (6), (9) (Repl. 2005); *Menne, supra.* There is no requirement under the statute that a police officer need to have personally observed any or all of these factors. *Menne, supra.*

"In the present case, during the legitimate purpose of the traffic stop, Officer Jones observed that Mr. Johnson exhibited completely different behavior than during previous encounters, refusing to make eye contact and exhibiting increased nervousness the longer they talked. The stop occurred at 2:20 a.m., and there were inconsistencies in Mr. Johnson's and his passenger's versions of what they were doing that morning. Officer Jones testified that he knew that Mr. Johnson had prior drug problems, and that he believed Mr. Johnson's previous drug abuse had resulted in a heart attack. Finally, the officer had knowledge that Mr. Johnson's passenger had a history with drugs and had recently been arrested for possession of a controlled substance. Viewing the totality of the circumstances, we hold that these factors combined to provide reasonable suspicion to continue the detention after the original purpose of the stop was complete.

"Mr. Johnson argues in the alternative that, even if there was a sufficient basis for his continued detention, it exceeded the scope of Rule 3.1 because that rule provides that a suspect may be detained for fifteen minutes. In this case, Officer Jones detained Mr. Johnson for nineteen minutes from the time the canine was requested until the canine officer arrived, in addition to the thirteen minutes he conducted the traffic stop.

"We do not agree that the length of the detention violated Rule 3.1. According to the plain language of the rule, the alternative

time period allowed the officer to detain appellant for such time as is reasonable under the circumstances" and was not restricted to a specific number of minutes. *Yarbrough, supra.* In *Omar v. State*, 99 Ark. App. 436, 262 S.W.3d 195 (2007), we held that the canine arrived without undue delay and that a thirty seven minute detention was not unreasonable. Similarly, the circumstances of this case demonstrated that the canine officer gave prompt attention to Officer Jones's request and arrived without undue delay just nineteen minutes later. We hold that the duration of the detention was reasonable under the circumstances."

SEARCH AND SEIZURE:
Warrantless Arrest Inside a Home; Admissibility of Confession and Evidence Seized from Defendant

State of Wisconsin v. Felix
No. 2010AP000346-CR, 4/3/12

In the early morning on September 8, 2007, a violent fight erupted outside of a party in the City of Schofield, Marathon County, Wisconsin. Officers responded after the fight had broken up and people had fled the scene. They discovered Davids lying bleeding in the middle of the street from multiple stab wounds. Davids was taken to the hospital and later pronounced dead. After police interviewed witnesses, they located, arrested, and obtained evidence and a statement from Devlin Felix all during the morning hours of that same day.

Shortly after arriving at the scene, police interviewed several people who were still present and also located several other witnesses who had attended the party. The witnesses who live near the scene stated that during the fight they had heard someone shouting about a stabbing. At the police station, detectives interviewed several people who had attended the party. T.W., a minor at the time of the homicide, described the fight that broke out among approximately six people outside of the party. T.W. stated that she heard Felix say, "I'm going to prison. I stabbed someone. I think I killed him." T.W. had responded, "[N]o you didn't, no you didn't, I think you're lying." According to T.W., Felix then stated, "I'm not lying, I've got blood all over me." T.W. told police that she was "pretty positive" or about "98" percent sure that Felix stabbed someone. T.W. also said that Felix left in a green Chrysler. A detective also interviewed Kyle Leder who reported hearing Felix say the word "stab" and also "I'm not going to prison" shortly before he saw Felix leave in a green Chrysler.

Based on this information, police obtained a warrant to search the residence where the party had taken place for Felix, witnesses and any evidence of the crime. Police did not find Felix at that residence, but eventually learned from Felix's father that he was living at Felix's mother's apartment. Felix's father gave the police a description of the residence and told them that the rear entrance led to the Felixes' apartment. When the police went to that residence they saw a green Chrysler parked in the driveway, which matched the description witnesses had given of the car that Felix had driven from the scene. The police had also discovered that the car was registered to Felix's mother. When a detective knocked on the rear door of the residence, it popped open. The detective could immediately see someone, whom he recognized as Felix from a photo, sleeping in a recliner at the bottom of the stairs

leading to the door. The detective and another officer drew their weapons and ordered Felix to come out with his hands up. Felix complied and was searched and handcuffed outside of the residence.

When Felix was being patted down before he was handcuffed, an officer asked Felix if he had any sharp objects on him. Felix replied that he had a knife in his pocket. When the officer did not find a knife on Felix, Felix stated that he "had a knife on [him]," but "must have gotten rid of it."

When officers located the person who was renting the apartment and subletting to the Felixes, Dean Kudick (Kudick), an officer asked Kudick for permission to search the house, which Kudick granted. Police found a knife next to the recliner where Felix had been sleeping. Police seized the knife and the green Chrysler that was parked in the driveway.

Felix was taken to the police department and placed in an interview room. A detective read Felix his Miranda rights and Felix signed a form waiving those rights. Felix then provided a statement detailing his involvement in the fight and Davids' death. The detective transcribed his questions and Felix's responses throughout the interview, and Felix signed this written statement after he had an opportunity to review it.

Felix then agreed to submit to a buccal swab for DNA analysis. Felix was transported to the jail where the detective asked Felix to remove his clothes and place each item in an individual evidence bag. The detective stated that he decided to take Felix's clothes as evidence at the jail because during the interview he had noticed that Felix had some "red spots" on his shirt that he suspected might have been blood.

Devin Felix was convicted of second-degree intentional homicide. The court of appeals reversed, holding that statements and physical evidence obtained from the defendant outside of the home after Miranda warnings were given and waived following a warrantless in-home arrest made in violation of *Payton v. New York* were not sufficiently attenuated from the unlawful arrest as to be lawful.

Upon review, the Wisconsin Supreme Court reversed the decision of the court of appeals after adopting the Harris exception to the exclusionary rule for certain evidence obtained after a *Payton* violation, holding that, where police had probable cause to arrest before the unlawful entry, a warrantless arrest from defendant's home in violation of *Payton* required neither the suppression of statements outside of the home after Miranda rights were given and waived nor the suppression of physical evidence obtained from Felix outside of the home. The Court found, in part, as follows:

"In *New York v. Harris*, 495 U.S. 14 (1990), the United States Supreme Court clarified that where the Fourth Amendment violation is an unlawful arrest without a warrant, in violation of *Payton*, but with probable cause, evidence obtained from the defendant outside of the home is admissible because it is not the product of illegal governmental activity. In this case, police arrested Felix inside his home on probable cause but without an arrest warrant. The signed statement Felix provided was taken at the police station and he also provided a buccal swab for DNA comparison."

SUBSTANTIVE LAW:

Arkansas Code Annotated § 5-14-125(A)(6)

Paschal v. State

No. CR11-673, 2012 Ark. 127, 3/29/12

David W. Paschal, a high school teacher, had a months-long sexual relationship with eighteen year-old A.D., a student at Elkins High School, where Paschal taught. Paschal was convicted of four counts of second-degree sexual assault. Arkansas Code Annotated section 5-14-125(a)(6) (Supp. 2009), in effect at the time of the crimes charged, provided that a person commits sexual assault in the second degree if the person is a teacher in a public school in a grade kindergarten through twelve (K-12) and engages in sexual contact with another person who is a student enrolled in the public school and less than twenty-one (21) years of age. The record reveals that A.D. was an adult (age 18) when she engaged in a sexual relationship with Paschal, and the State does not dispute Paschal's contention that the sexual relationship was consensual.

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

"The fundamental right to privacy implicit in our law protects all private, consensual, noncommerical acts of sexual intimacy between adults. *Jegley v. Picado*, 349 Ark. at 600, 80 S.W.3d at 332 (2002). Section 5-14-125(a) (6) criminalizes consensual sexual contact between adults. As applied in this case, section 5-14-125(a)(6) criminalizes consensual sexual conduct between adults and, therefore, we conclude that the statute infringes on Paschal's fundamental right to privacy."