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CIVIL LIABILITY:
Accidental Shooting of an Arrestee; Qualified Immunity

Torres v. City of Madera, CA9, No. 09-16573, 8/22/11

While handcuffed in the back seat of a patrol car, Everardo Torres ("Everardo") was mortally wounded when Madera City Police Officer Marcy Noriega ("Officer Noriega") shot him in the chest with her Glock semiautomatic pistol, believing it at the time to be her Taser M26 stun gun. Everardo's family filed this survival action under 42 U.S.C. § 1983, asserting excessive force in violation of the Fourth Amendment. They now appeal from an adverse grant of summary by the district court. The Court of Appeals for the Ninth Circuit reversed the district court and remanded the case for trial.

This is the second time this case has been before the Court of Appeals for the Ninth Circuit. The first case, *Torres v. City of Madena*, 524 F.3d 1053 (9th Cir. 2008) was set forth in *CJI Legal Briefs*, Volume 13, Issue 3, Fall 2008 at page 6. The district court initially granted Officer Noriega's motion for summary judgment, determining Everardo was not "seized" by Officer Noriega's unintended use of her Glock and therefore no Fourth Amendment violation occurred. The Court of Appeals for the Ninth Circuit reversed and remanded the case to the district court to determine if Officer Marcy Noriega's conduct was reasonable under *Graham v. Conner*, 490 U.S.. 386 (1989), finding, in part, as follows:

"While responding to a complaint of loud music on October 27, 2002, Madera City Police officers arrested Everardo and Erica Mejia ("Mejia"), handcuffed them, and placed them in the back of a patrol car. After thirty to forty-five minutes (during which time Everardo had fallen asleep), Mejia was removed from the car and replaced by another arrestee. Everardo awoke and began yelling and kicking the car door from inside, though the parties dispute whether he was yelling, "Get me out of the car," or simply that his handcuffs were too tight.

"Officer Noriega, one of several police officers on site that evening, was standing a few feet directly behind the patrol car when she first heard Everardo yelling. She recalls telling her fellow officers that whoever was closest should tase Everardo because he could injure himself if he kicked through the glass window. As it turned out, Officer Noriega herself was closest, so she approached the car. Upon reaching the rear driver's side door, she opened it with her left hand. She then reached down with her right hand to her right side, unsnapped her holster, removed the Glock, aimed the weapon's laser at Everardo's center mass, put her left hand under the gun, and pulled the trigger, all without looking at the weapon in her hand. She had turned off the safety to her Taser earlier that evening, enabling her to use it more quickly. The parties agree that Officer Noriega had intended to reach for her Taser, which she kept in a thigh holster immediately below her holstered Glock on her dominant right side, and that she had intended to use her Taser in dart-tase rather than touch-tase mode. Everardo died later that evening from the gunshot wound.

"This was not the first time Officer Noriega had mistakenly drawn the wrong weapon, though never before with such dire consequences. The Police Department first issued Officer Noriega a Taser, and certified her to use it, sometime in the winter of 2001, less than one year before Everardo's shooting. Her certification training consisted of a single three-hour class, during which she fired the weapon only once. She was given a right-side holster for her Taser and instructed to wear it just below her Glock. There was no discussion during this training session of a recent incident in which a Sacramento officer had mistaken his handgun for his Taser.

"Nonetheless, Officer Noriega soon came to experience firsthand the risk of confusing the two weapons, both all black and of similar size and weight. The first incident occurred about a month and a half after she was first issued the Taser when she was at a jail putting her weapons back in their holsters. She mistakenly put her Glock into the Taser holster, realizing her error when the weapon did not 'sit right' in the wrong holster. Concerned about the mistake, she notified her sergeant, Sergeant Lawson, who instructed her to practice putting each weapon in its proper holster and to practice drawing them.

"Just one week later, Officer Noriega again confused her weapons, this time during a field call. Seeking to touch-tase a kicking and fighting suspect who refused to get into the back seat of a patrol car, Officer Noriega instead pulled out her Glock. Only when she tried unsuccessfully to remove the cartridge, which would have been present on her Taser but was not a feature on her Glock, did she realize she was holding the wrong weapon and it was pointing at her partner's head,

the Glock's laser was pointing at his head. Frightened by this second incident of weapon confusion and by how narrowly she had averted a potentially fatal mistake, she again informed Sergeant Lawson, explaining that she 'had pulled out my gun thinking it was my Taser.' Again, Sergeant Lawson instructed her 'to keep practicing like he's been doing and that he's having everybody do.'

"For the next nine months, leading up to the day of Everardo's tragic shooting, Officer Noriega followed her sergeant's instructions, practicing drawing her two weapons daily, both before work and during downtime throughout each shift. Officer Noriega described her daily self-training as follows: 'I would have both my gun and my taser in their holsters. And I would draw my taser, and then I would draw my gun. And in my mind thinking taser, taser, taser, gun, gun, taser. Just practicing that way so I would draw, draw, draw.' In the five or so times she used her Taser in the field, never again did she confuse her two weapons, until the night of Everardo's shooting. On all previous occasions, however, she had only touch-tased the subjects, which required her first to remove the Taser's safety cartridge. Never before had she dart-tased anyone, as she had intended to do to Everardo.

"An officer will be denied qualified immunity in a § 1983 action only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in that situation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001)

"The question that confronts us now is whether Officer Noriega's conduct in mistakenly applying deadly force to Everardo was objectively unreasonable under the totality of the circumstances.

"If Officer Noriega knew or should have known that the weapon she held was a Glock rather than a Taser, and thus had been aware that she was about to discharge deadly force on an unarmed, non-fleeing arrestee who did not pose a significant threat of death or serious physical injury to others, then her application of that force was unreasonable. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). That she intended to apply lesser force is of no consequence to our inquiry, for objective reasonableness must be determined without regard to the officer's underlying intent or motivation. *Graham*, 490 U.S. at 397. Just as an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

"To guide the determination of whether Officer Noriega should have known she was holding the wrong weapon, we identified five factors for consideration in *Torres I*: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that she was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

"Officer Noriega's daily practice drawing the two weapons was conducted pursuant to Sergeant Lawson's instructions, and, as the Torres Family argues, the definition of 'training' does not necessarily require supervision and can include the skill, knowledge, or experience acquired by instruction, discipline, or drill. *Merriam Webster's Collegiate Dictionary* 1326 (11th ed. 2004). Accordingly, a reasonable jury could conclude from the totality of this evidence that Officer Noriega had trained for nine months specifically to prevent incidents of weapon confusion like this from happening, that she did not act in accordance with what she had practiced on the evening of Everardo's shooting, and that had she done so, Everardo's death could have been avoided.

"There is no dispute that Everardo had committed no serious offense, though acting out, posed no immediate threat to Officer Noriega's safety or that of anyone else, and, far from 'attempting to evade arrest by flight,' was sitting handcuffed in the back seat of a patrol car. The amount of force ultimately applied was a lethal shot from a semiautomatic handgun. Thus, if a jury were to find Officer Noriega's mistaken belief that she was holding her Taser rather than her Glock unreasonable, her use of force in this situation was excessive and violated Everardo's Fourth Amendment rights.

"In *Jensen* and *Wilkins*, we held that, had the defendant officers realized that the targets they were about to shoot were fellow police officers rather than armed civilians, they could not have reasonably believed the use of deadly force was lawful. *Jensen*, 145 F.3d at 1087; see *Wilkins*, 350 F.3d at 955. Likewise here, had Officer Noriega realized that she was pointing a Glock at Everardo's chest, she could not have been reasonably mistaken as to the legality of her actions. *Jensen* and *Wilkins* adequately put Officer Noriega on notice that an unreasonable mistake in the use of deadly force against an unarmed, non-dangerous suspect violates the Fourth Amendment.

"While a jury might ultimately find Officer Noriega's mistake of weapon to have been reasonable, it was inappropriate for the district court to reach this conclusion in the face of material disputes of fact. At this stage of the proceeding, Officer Noriega has not shown an entitlement to qualified immunity, and summary judgment was therefore improperly granted."

Editor's Note: In *Henry v. Purnell*, CA4, No. 08-7433, 7/14/11, Officer Robert Purnell shot Frederick Henry, an unarmed man wanted for misdemeanor failure to pay child support, when he started running away. In the ensuing § 1983 action, the parties stipulated that Purnell had intended to use his Taser rather than his pistol and the district court granted him summary judgment. However, because *Tennessee v. Garner* prohibits shooting suspects who pose no significant threat of death or serious physical threat, and because Purnell's use of force could be viewed by a jury as objectively unreasonable, the Court of Appeals reversed and remanded the case for trial.

CIVIL LIABILITY:

Search of Body Cavity; X-Ray

Spencer v. Roche, CA1, No. 11-1146, 10/18/11

Police arrested Shane M. Spencer for driving without a license. A confidential informant, who had provided reliable information in the past, told police that Spencer had inserted a package of crack cocaine into his anal cavity just prior to the arrest. Over Spencer's objection, officers attempted a visual inspection, but he refused to cooperate. The police then obtained a search warrant and took plaintiff to the hospital, where a physician conducted a digital search, followed by an x-ray. The only type of x-ray that covers the entire anal cavity also captures images of other organs. No drugs were found. The district court rejected plaintiff's suit under 42 U.S.C. 1983. The First Circuit Court of Appeals affirmed the district court, finding that the x-ray was reasonable under the Fourth Amendment and stating, in part, as follows:

"In determining the reasonableness of an intrusion into a suspect's bodily integrity, a court must consider the strength of the suspicion driving the search, the potential harm to the suspect's health and dignity posed by the search, and the prosecution's need for the evidence sought. In certain circumstances, the court also may consider the availability of a less invasive means of conducting the search. See *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 45-46 (1st Cir. 2009). Applying this balancing test, we have upheld digital searches of a vagina and rectum when supported by probable cause and appropriately carried out by medical professionals. See *Rodriques v. Furtado*, 950 F.2d 805, 811 (1st Cir. 1991). Conversely, we have ruled that compelling a prisoner to undergo abdominal surgery to recover suspected contraband offended the Fourth Amendment (at least in the absence of strong probable cause). *Sanchez*, 590 F.3d at 47-48. We have not yet considered the circumstances under which the police may be justified in compelling a suspect to submit to an x-ray search of a part of his body.

"In general, compelled x-rays have been viewed favorably by courts, given an appropriately supported level of suspicion. For example, courts have approved x-ray searches performed at border crossings when customs officials had reasonable suspicion that drugs were being smuggled internally. See, e.g., *United States v. Oyekan*, 786 F.2d 832, 837-38 (8th Cir. 1986); *United States v. Mejia*, 720 F.2d 1378, 1381-82 (5th Cir. 1983). Similarly, the Second Circuit has upheld an x-ray search of a criminal defendant who had set off a metal detector on his way to hear the jury's verdict. See *United States v. Johnson*, 24 F. App'x 70, 72-73 (2d Cir. 2001). And this court has described an x-ray as a 'much simpler, less invasive procedure' than surgery. *Sanchez*, 590 F.3d at 45.

"We hold today that the x-ray search of the appellant's anal cavity passed muster under the Fourth Amendment. Although the x-ray was an encroachment on the appellant's privacy interests, this encroachment was plainly outweighed by other factors. First, a diagnostic x-ray is a routine medical procedure that is brisk, painless, and generally regarded as safe. Second, there is no evidence that the x-ray was carried out in a dangerous or otherwise inappropriate manner; to the contrary, the imaging was performed by trained professionals in a

hospital setting. Third, the evidence sought in the x-ray search was indispensable to corroborate the officers' suspicion that the appellant had violated Massachusetts drug laws. Fourth, the warrant itself (never challenged by the appellant) confirms the existence of probable cause to believe that the appellant had stashed drugs in his rectum. Fifth, and finally, the record reflects no less intrusive way in which the police could have verified their suspicions. Under these considerations, the compelled x-ray search of the appellant's anal cavity was reasonable. Consequently, it comported with the Fourth Amendment."

CIVIL LIABILITY: **Traffic Accident; Police Cruiser**

Edlredge v. Town of Falmouth,
CA1, No. 11-1151, 11/22/11

James R. Eldredge, a pedestrian, was stopped by police who were responding to a 911 call. While he was standing near the cruiser, it was struck from behind by a second cruiser. Eldredge, injured in the collision, filed suit under 42 U.S.C. 1983. The district court dismissed, citing qualified immunity. The First Circuit affirmed, rejecting an argument that the collision constituted a seizure. The facts could reasonably support the officers' suspicion that plaintiff was the subject of the 911 call and that the stop was reasonable.

CIVIL LIABILITY: **Use of Force; Taser**

Mattos v. Agarano, CA9,
No. 08-15567, 10/17/11

Brooks v. City of Seattle, CA9,
No. 08-35526, 10/17/11

In *Mattos v. Agarano* and *Brooks v. City of Seattle,* plaintiffs, both women who were tased during an encounter with officers, filed suits under 42 U.S.C. 1983 seeking damages for the alleged violation of their Fourth Amendment rights. At issue was whether the use of a taser to subdue a suspect resulted in the excessive use of force and whether the officers were entitled to qualified immunity. The background on each incident is as follows:

Brooks

On the morning of November 23, 2004, Malaika Brooks was driving her 11-year-old son to school in Seattle, Washington. Brooks was 33 years old and seven months pregnant at the time. The street on which Brooks was driving had a 35-mile-per-hour posted speed limit until the school zone began, at which point the speed limit became 20 miles per hour. When Brooks entered the school zone, she was driving 32 miles per hour. Once in the school zone, a Seattle police officer parked on the street measured Brooks's speed with a radar gun, found that she was driving faster than 20 miles per hour, and motioned for her to pull over.

Once Brooks pulled over, Seattle Police Office Juan Ornelas approached her car. Ornelas asked Brooks how fast she was driving and then asked her for her driver's license. Brooks gave Ornelas her license and then told her son to get out of the car and walk to school, which was across the street from where Ornelas had

pulled her car over. Ornelas left, returning five minutes later to give Brooks her driver's license back and inform her that he was going to cite her for a speeding violation. Brooks insisted that she had not been speeding and that she would not sign the citation. At this, Ornelas left again.

Soon after, Officer Donald Jones approached Brooks in her car and asked her if she was going to sign the speeding citation. Brooks again refused to sign the citation but said that she would accept it without signing it. Jones told Brooks that signing the citation would not constitute an admission of guilt; her signature would simply confirm that she received the citation. Brooks told Jones that he was lying, the two exchanged heated words, and Jones said that if Brooks did not sign the citation he would call his sergeant and she would go to jail.

A few minutes later, Sergeant Steven Daman arrived at the scene and he, too, asked Brooks if she would sign the citation. When Brooks said no, Daman told Ornelas and Jones to "book her." Ornelas told Brooks to get out of the car, telling her that she was "going to jail" and failing to reply when Brooks asked why. Brooks refused to get out of the car. At this point, Jones pulled out a taser and asked Brooks if she knew what it was. Brooks indicated that she did not know what the taser was and told the officers, "I have to go to the bathroom, I am pregnant, I'm less than 60 days from having my baby." Jones then asked how pregnant Brooks was. Brooks's car was still running at this point.

After learning that Brooks was pregnant, Jones continued to display the taser and talked to Ornelas about how to proceed. One of them asked "Well, where do you want to do it?" Brooks heard the other respond "Well, don't do it in her stomach; do it in her thigh."

During this interchange, Jones was standing next to Brooks's driver's side window, Ornelas was standing to Jones' left, and Daman was standing behind them both. After Jones and Ornelas discussed where to tase Brooks, Ornelas opened the driver's side door and twisted Brooks's arm up behind her back. Brooks stiffened her body and clutched the steering wheel to frustrate the officers' efforts to remove her from the car. While Ornelas held her arm, Jones cycled his taser, showing Brooks what it did. At some point after Ornelas grabbed Brooks's arm but before Jones applied the taser to Brooks, Ornelas was able to remove the keys from Brooks's car ignition; the keys dropped to the floor of the car.

Twenty-seven seconds after Jones cycled his taser, with Ornelas still holding her arm behind her back, Jones applied the taser to Brooks's left thigh in drive-stun mode. Brooks began to cry and started honking her car horn. Thirty-six seconds later, Jones applied the taser to Brooks's left arm. Six seconds later, Jones applied the taser to Brooks's neck as she continued to cry out and honk her car horn. After this third tase, Brooks fell over in her car and the officers dragged her out, laying her face down on the street and handcuffing her hands behind her back.

The officers took Brooks to the police precinct station where fire department paramedics examined her. The same day, Brooks was examined at the Harborview Medical Center by a doctor who confirmed her pregnancy and expressed some concern about Brooks's

rapid heartbeat. After this examination, Brooks was taken to the King County Jail.

On December 6, 2004, the City of Seattle filed a misdemeanor criminal complaint against Brooks, charging her with refusal to sign an acknowledgment of a traffic citation, in violation of Seattle Municipal Code 11.59.090, and resisting arrest, in violation of Seattle Municipal Code 12A.16.050. Brooks was tried by a jury beginning on May 4, 2005, and after a two-day trial the jury convicted her of failing to sign the speeding ticket. The jury could not reach a verdict on the resisting arrest charge, and it was dismissed.

Brooks gave birth to her daughter in January 2005. The district court was presented with evidence that Brooks's daughter was born healthy, and Brooks's counsel confirmed at oral argument before this court that her daughter remains healthy now. Brooks herself has not experienced any lasting injuries from the tasing, though she does carry several permanent burn scars from the incident.

Mattos

On August 23, 2006, Jayzel Mattos and her husband Troy had a domestic dispute. Around 11 p.m., Jayzel asked C.M., her 14-year-old daughter, to call the police, which C.M. did. Several minutes later, Maui Police Officers Darren Agarano, Halayudha MacKnight, and Stuart Kunioka arrived at the Mattoses' residence. As the officers approached the residence, they saw Troy sitting on the top of the stairs outside the front door with a couple of open beer bottles lying nearby. Troy is six feet three inches tall, approximately 200 pounds, and he smelled of alcohol when the officers arrived. Officer Ryan Aikala arrived by himself soon after. Kunioka approached Troy first and informed him about the 911 call. Troy told Kunioka that he and Jayzel had an argument, but he stated that nothing physical had occurred. As Kunioka continued to question Troy, Troy became agitated and rude. Kunioka asked Troy if he could speak to Jayzel to ensure that she was okay. When Troy went inside to get Jayzel, Agarano stepped inside the residence behind him. Troy returned with Jayzel and became angry when he saw Agarano inside his residence. Jayzel was initially behind Troy, but she ended up in front of him on her way to the front door to speak with the officers. Troy yelled at Agarano to get out of the residence because he had no right to be inside. Agarano asked Jayzel if he could speak to her outside.

Jayzel agreed to go outside, but before she could comply with Agarano's request, Aikala entered the residence and stood in the middle of the living room. When Aikala announced that Troy was under arrest, Jayzel was already standing in front of Troy. She did not immediately move out of the way. As Aikala moved in to arrest Troy, he pushed up against Jayzel's chest, at which point she "extended [her] arm to stop [her] breasts from being smashed against Aikala's body."

Aikala then asked Jayzel, "Are you touching an officer?" At the same time, Jayzel was speaking to Agarano, asking why Troy was being arrested, attempting to defuse the situation by saying that everyone should calm down and go outside, and expressing concern that the commotion not disturb her sleeping children who were in the residence.

Then, without warning, Aikala shot his taser at Jayzel in dart-mode. *Id.* Jayzel "felt an incredible burning and painful feeling locking all of [her] joints [and] muscles and [she] f[e] ll hard on the floor." Agarano and MacKnight handcuffed Troy. Troy and Jayzel were taken into custody; Troy was charged with harassment, in violation of Hawaii Revised Statutes § 711-1106, and resisting arrest, in violation of Hawaii Revised Statutes § 710-1026, and Jayzel was charged with harassment and obstructing government operations, in violation of Hawaii Revised Statutes § 710-1010. All charges were ultimately dropped.

The Ninth Circuit Court of Appeals reversed the district court's denial of qualified immunity, finding that, although plaintiffs in both cases have alleged constitutional violations because a reasonable fact finder could conclude that the officers' use of a taser was unconstitutionally excessive, the officers were entitled to qualified immunity on section 1983 claims because the law was not clearly established at the time of the incidents.

Upon review, the Court stated that Brooks's alleged offenses were minor. "She did not pose an immediate threat to the safety of the officers or others. She actively resisted arrest insofar as she refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. Brooks did not evade arrest by flight, and no other exigent circumstances existed at the time. She was seven months pregnant, which the officers knew, and they tased her three times within less than one minute, inflicting extreme pain on Brooks. A reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of force was unreasonable and therefore constitutionally excessive."

Considering the case of Mattos, the Court stated, in part, as follows:

"Officer Aikala used the intermediate force of a taser in dart-mode on Jayzel Mattos after he and the other officers arrived to ensure her safety. Her offense was minimal at most. She posed no threat to the officers. She minimally resisted Troy's arrest while attempting to protect her own body and to comply with Agarano's request that she speak to him outside, and she begged everyone not to wake her sleeping children. She bears minimal culpability for the escalation of the situation. The officers were faced with a *potentially* dangerous domestic dispute situation in which they reasonably felt that Troy could physically harm them if he chose to, but there was no indication that Troy intended to harm the officers or that he was armed. When Aikala encountered slight difficulty in arresting Troy because Jayzel was between the two men, Aikala tased her without warning. Considering the totality of these circumstances, we fail to see any reasonableness in the use of a taser in dart-mode against Jayzel.

"When all the material factual disputes are resolved in Jayzel's favor and the evidence is viewed in the light most favorable to her, we conclude that she has alleged a Fourth Amendment violation. That is, a reasonable fact finder could conclude that the officers' use of force against Jayzel, as alleged, was constitutionally excessive in violation of the Fourth Amendment."

The Court of Appeals concluded that Brooks and the Mattoses have alleged constitutional violations, but that not every reasonable officer at the time of the respective incidents would have known—beyond debate—that such conduct violates the Fourth Amendment.

DNA: **Possession of Firearm**

Evans v. State, CACR 10-1280, 2011 Ark. App. 485, 8/31/11

In *Evans v. State*, Cleveland Lamont Evans appealed his conviction of a felony in possession of a firearm contending the evidence was insufficient to justify his conviction. The contraband was discovered in a laundry room that was connected to the den where Evans was sitting during the pendency of the search. The guns were on an open shelf above the dryer. The investigator who recovered the guns testified that he could see Evans when he retrieved the guns. Additionally, Evans's mother testified that she had not seen the guns before and had not put anything on that shelf in over a year.

The DNA profile taken from the pistol matched that of Evans. A forensic chemist for the State Crime Lab testified that in order to leave a DNA profile, an object would have to be used more than just touching it—minimal contact would not leave skin cells behind. She testified that the profile linking Evans to the pistol was a one-in-a-million-probability link.

The Arkansas Court of Appeals concluded Evans's proximity to the firearm at the time of the search, the fact that the only other person who could have been in control of the weapon testified that she had never seen it before, and the compelling DNA evidence linking Evans (as more than a casual handler) to the pistol, when taken together, constitute more than sufficient evidence to sustain Evans's felon-in-possession conviction.

DRIVING UNDER THE INFLUENCE: **Prescription Drugs; Evidence to Convict**

Commonwealth of Pennsylvania v. Griffith, No. 58 MAP 210, 11/2/11

In this case, the issue before the Supreme Court of Pennsylvania was whether expert testimony is required to convict a defendant of driving under the influence of a drug or combination of drugs when the drugs in question are prescription medications.

Michelle Griffith was charged with DUI following an eyewitness' account of her driving in a reckless and dangerous manner. Griffith failed field sobriety tests administered by law enforcement. Diazepam, Nordiazepam, and "Soma 350" were detected in her blood which Griffith admitted to taking on the morning of the incident. At the trial, two individuals testified: the eyewitness and the arresting police officer. The trial court convicted Griffith who appealed the conviction arguing the evidence was not sufficient without testimony of an expert to establish the medications impaired her ability to drive safely. The superior court agreed that an expert was needed and vacated the conviction. The Commonwealth of Pennsylvania appealed.

The Pennsylvania Supreme Court reversed the superior court, finding the evidence was sufficient to establish Michelle Griffith was under the influence of drugs to a degree that impaired her ability to drive.

EVIDENCE: **DVDs of Drug Buy; Proper Foundation; Authentication**

Williams v. State, CACR 10-943,
2011 Ark. App. 521, 9/14/11

In *Williams v. State*, the issue before the Arkansas Court of Appeals was whether the trial court abused its discretion in admitting DVDs containing video recordings of Jimmy Lee Williams selling marijuana and cocaine to a confidential informant. The Ouachita County Drug Task Force, by way of the confidential informant, made four controlled buys of illegal drugs from Williams. On each occasion, the informant wore a hidden digital-video recorder, which recorded each transaction.

The State offered testimony from two witnesses with knowledge of the DVDs and transactions, as well as testimony describing the process used to create the DVDs. Officer Cameron Owens and the informant testified that they did not tamper with the camera or recordings, that they reviewed each DVD, and that the DVDs were fair and accurate depictions of what transpired during the drug buys. Moreover, Officer Owens identified the DVDs in court as the ones that he had specifically made from the recordings. He testified about the process of placing the recordings on the DVDs.

His testimony was sufficient to authenticate the DVDs and establish that they were accurate copies of the recordings of appellant's drug transactions. Further, Officer Owens testified that he reviewed the videos with the informant, and the informant testified that he reviewed the DVDs that were before the court. The trial court did not abuse its discretion in admitting the evidence.

FORFEITURE: **Vehicle as a Container**

Trotter v. State, CA11-382,
2011 Ark. App. 696, 11/16/11

In *Trotter v. State*, State's witness Scott Bradshaw of the Arkansas State Police testified that a confidential informant made two controlled buys of marijuana from Herman Trotter, the first a purchase of one half pound of marijuana on July 16, 2008, and the second a purchase of one pound of marijuana on August 19, 2008. Both purchases were made in an old house that stood next to Trotter's mobile home. The day after the second purchase, police executed a search warrant, and they found inside the old house approximately twenty-eight pounds of marijuana, along with guns and a digital scale. Between the old house and the mobile home, police found two vehicles, a 2000 GMC pick-up truck and a 1985 Chevrolet Caprice.

Bradshaw further testified that a search of the Caprice revealed a "strong odor of green marijuana in the trunk" with "residue" he believed to be marijuana. Bradshaw asked Trotter about the smell of marijuana in the trunk, and Trotter told him that "he may have stored it in there." On cross-examination, Bradshaw admitted that he did not know what batch of marijuana had been stored in the Caprice or when it had been stored.

The Arkansas Court of Appeals held that the circuit court's decision to order forfeiture of the Caprice was not clearly erroneous. The court's forfeiture order did not specify a particular statutory provision as its basis for ordering forfeiture. The forfeiture statute in part subjects to forfeiture any property that is used, or intended for use, as a container" for a controlled substance. Ark. Code Ann. § 5-64-

505(a)(3). Bradshaw testified that the trunk of the car smelled of raw marijuana, there was what he believed to be marijuana residue in the trunk, and Trotter told him that he may have stored marijuana in the trunk. Further, twenty-eight pounds of marijuana were found in the nearby house. Given this evidence, the circuit court did not clearly err in ordering forfeiture based on the use of the Caprice as a "container." See *Lewis v. State*, 309 Ark. 392, 831 S.W.2d 145 (1992) (considering whether the evidence was sufficient that a truck was used to contain or transport marijuana).

The Court of Appeals denied forfeiture of the 2000 GMC pick-up truck stating there was insufficient evidence that it was used to transport drugs.

INTERROGATION:
False Promise of Reward or Leniency

Fuson v. State, CR10-998,
2011 Ark. 374, 9/21/11

On May 20, 2008, David Wayne Fuson initiated an online conversation in a chat room with Patti Bonewell, a detective in the Crawford County Sheriff's Department, who is affiliated with the task force combating internet crimes against children. Fuson identified himself as a thirty-four-year-old male from Stilwell, Oklahoma. Bonewell, acting undercover, posed as a fourteen-year-old female named "Kaylee" from Van Buren, Arkansas.

As shown by a transcript of their online discussion dated June 6, 2008, "Kaylee" accepted Fuson's invitation to meet with him late that evening after he completed his shift at work. After receiving directions by phone, Fuson traveled from Stilwell to "Kaylee's" home in Van Buren.

When he arrived, Fuson parked his truck across the street from the residence, and he was arrested just before he reached the front porch of the house. Officers impounded Fuson's truck, where they found condoms and lubricating jelly inside a sack.

Following his arrest, Fuson executed a form waiving his rights under Miranda and gave a statement to Detective Ken Howard of the Crawford County Sheriff's Department. In this video-recorded interview, Fuson admitted that it was his intention that evening to engage in sexual intercourse with a fourteen-year-old female. Fuson also issued a written statement, which read, "I talk[ed] to her online and I know that she was underage and I was coming over to have sex with her."

Prior to trial, Fuson filed a timely motion to suppress his custodial statements. Fuson claimed that his oral and written statements were made involuntarily because, immediately following Fuson's waiver of rights, Detective Howard initiated the conversation by stating, "What we need to do is we just need to kind of get this cleared up tonight, so I need for you to tell me what's going on over here."

Fuson contended that Howard's statement constituted a false offer of reward or leniency because it conveyed the impression that, if he cooperated, he would be allowed to go home. Fuson maintained that his claim was bolstered by Howard's subsequent statement that "I appreciate you being cooperative tonight, it's going to look a lot better on you."

At the suppression hearing, Howard testified that he was familiar with the prohibition against making false promises of reward or leniency and that nothing he said during the interview was intended to be a false promise of leniency. The circuit court denied the motion to suppress by written order dated February 19, 2009.

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

"It is well settled that a statement induced by a false promise of reward or leniency is not a voluntary statement. *Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580. When a police officer makes a false promise that misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003). For the statement to be involuntary, the promise must have induced or influenced the confession. Because 'the object of the rule is not to exclude a confession of truth, but to avoid the possibility of a confession of guilt from one who is, in fact, innocent,' a person seeking to have a statement excluded on the basis that a false promise was made must show that the confession induced by the false promise was untrue. *Goodwin v. State*, 373 Ark. 53, 61, 281 S.W.3d 258, 266 (2008).

"In determining whether there has been a misleading promise of reward, we consider the totality of the circumstances. *Winston v. State*, 355 Ark. 11, 131 S.W.3d 333 (2003). The totality determination is subdivided into two main components: first, the statement of the officer and second, the vulnerability of the defendant. If during the first step, this court decides that the officer's statement is an unambiguous false promise of leniency, there is no need to proceed to the second step because the defendant's statement is clearly involuntary. *Clark v. State,* 374 Ark. 292, 287 S.W.3d 567 (2008). We also doS not move forward to the second step if we conclude that no false promise of reward or leniency was made. See *Wallace, supra*. If, however, the officer's statement is ambiguous, making it difficult for us to determine if it was truly a false promise of leniency, we must proceed to the second step of examining the vulnerability of the defendant. *Winston, supra.* Factors to be considered in determining vulnerability include: (1) the age, education, and intelligence of the accused; (2) how long it took to obtain the statement; (3) the defendant's experience, if any, with the criminal justice system; and (4) the delay between the *Miranda* warnings and the confession.

"In our view, Howard's statement about clearing up the matter that evening was not an unambiguous promise of leniency. This comment does not remotely suggest that David Wayne Fuson would be released from custody following the interview. Moreover, the notion that Fuson was falsely led to believe that his release was imminent is belied by his statement during the interview that 'I just want to go home. *I don't know if I can*, but I just want to go home.' Although Fuson contends that Howard's remark that his cooperation would be viewed favorably reinforced the alleged false promise, Howard made this comment *after* Fuson confessed. Therefore, this statement could not have influenced the confession. We also note that Fuson confirmed in his testimony at trial that he believed he was meeting a fourteen-year-

old child that night. He also acknowledged on both direct and cross-examination that he was being honest with Detective Howard when he confessed that his purpose was to have sexual intercourse with the young girl. For these reasons, we hold that the circuit court did not err in denying the motion to suppress Fuson's custodial statements."

MIRANDA: **Custodial Interrogation**

United States v. Perrin, CA8,
No. 10-1885, 10/28/11

After state investigators detected downloads of child pornography at the house where Walter Perrin lived, federal agents got a warrant to search the premises. At least six officers in tactical gear entered the house, while several Sioux Falls police officers secured the perimeter. The search began around 1:45 in the afternoon. Agent Scherer led the group executing the warrant. Perrin and his mother were in the living room; another resident was in a bedroom. A fourth resident, Terry Boll, was leaving the house for work but came back inside at the officers' request. The officers had all four people stay in the living room with an armed officer. This small room was crowded with four residents, two officers, two dogs, and lots of furniture.

After the premises were swept, Agent Scherer retrieved the warrant from his vehicle and gave it to Perrin's mother. Agent Scherer told the group four things: the officers were looking for child pornography; the residents were free to leave; if anyone remained, he or she had to stay in the living room; and he wanted to ask questions but no one had to answer. The residents indicated as a group that they understood. Agent Scherer then began to ask about computers, access to them, and internet use. When he asked if anyone used Limewire, a file-sharing software often associated with child pornography, Perrin and Boll said yes. Perrin avoided eye contact with Scherer, slumped in his chair, and started fidgeting.

Perrin was in his mid-twenties at the time. He had always lived with his mother. He was always in special education classes until he dropped out during his senior year of high school. His intellectual functioning is sub-average. Perrin had worked for many years at TC's Referee restaurant, first as a dishwasher and then a fry cook.

Agent Scherer asked Perrin if they could talk privately in Perrin's bedroom, a short distance away. Perrin said yes and they went. Five to ten minutes had passed since Agent Scherer started talking to the group. Detective Sean Kooistra went to the bedroom too; he searched the room while Agent Scherer questioned Perrin, and left before the questioning ended. After they entered the bedroom, Scherer closed the door but it remained cracked open. Agent Scherer did not repeat his earlier admonitions about Perrin being free to leave or not answer questions.

Agent Scherer questioned Perrin for about ten minutes. His side arm was visible, but he had removed his protective vest. He did not touch or threaten Perrin, make any promises, or raise his voice. The Agent did not perceive that Perrin had any trouble understanding or answering questions about internet use and child pornography. Though neither Perrin nor the officers testified at the suppression hearing about the specifics of the

questions and the answers, Agent Scherer's report was admitted without objection and it summarized Perrin's admissions.

At the end of the bedroom questioning, Agent Scherer and Perrin returned to the living room. There were conversations between Perrin and his mother, some of which included Agent Scherer. The search ended an hour and a half or so after it began. Agent Scherer did not arrest Perrin after the bedroom questioning or when the officers left the home.

The issue is whether Perrin was in custody when he confessed to Agent Scherer. If so, Perrin's statements must be suppressed because the Agent gave Perrin no *Miranda* warnings before the questioning. If not, then his statements come in and Perrin's conviction stands.

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

"The ultimate question in determining whether a person is in custody for purposes of *Miranda* is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Czichray,* 378 F.3d 822, 826 (8th Cir. 2004), cert. denied, 544 U.S. 1060 (2005). Agent Scherer did not arrest Perrin before questioning him. So the question comes down to the situation's restraints. *E.g., United States v. Lowen,* 647 F.3d 863,(8th Cir. 2011). We consider first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave the bedroom and the house. *J.D.B. v. North Carolina,* 131 S.Ct. 2394, 2402 (2011). We do not ask how Perrin perceived the situation; as the Supreme Court recently emphasized in *J.D.B.*, the point is how a reasonable person would have seen his options in the circumstances.

"Considering the totality of the circumstances, we hold that Perrin was not in custody when Agent Scherer questioned him in Perrin's bedroom. Most importantly, about ten minutes beforehand, Agent Scherer had told Perrin and the three other residents present that they could leave and did not have to answer questions if they stayed. We have long regarded these admonitions as weighty in the custody analysis. And we have never held that a person was in custody after receiving them. *Czichray,* 378 F.3d at 826. Perrin argues that Agent Scherer should have told him again, and individually, before starting the bedroom questioning. We disagree. The ten-minute distance between the two events undermines Perrin's argument. While we may someday confront a case where the distance between warning and questioning, in the totality of the circumstances, puts the efficacy of an officer's original no-custody statements in doubt, this is not that case.

"Beyond the clear ground rules that started Agent Scherer's questioning, other circumstances indicate that Perrin was not in custody in his bedroom. He volunteered to go there. The questioning lasted about ten minutes. The bedroom, like the house, was police dominated, as the District Court found. A reasonable person would have taken some comfort, however, in being in his own bedroom instead of an interrogation room at the police station. The bedroom door was almost closed; but a cracked bedroom door

presents a different obstacle than a closed storage-room door blocked by a police officer. Neither Officer Kooistra nor Agent Scherer prevented Perrin from exercising his right to leave—they did not physically restrain him, and nothing of record suggests that they positioned themselves or acted to inhibit Perrin's exit."

"Against all this, Perrin stresses two points: the overwhelming police presence and his sub-average intelligence. Neither point is disputed. But considering all the circumstances surrounding the interrogation, which we must do, the many officers present and Perrin's mental deficits do not establish custody. We have held that circumstances more dominated by police were not custodial. *E.g., Czichray*, 378 F.3d at 825, 830; *LeBrun*, 363 F.3d at 718, 724. Any warrant search is inherently police dominated; there is nothing untoward about that circumstance. Perrin's mental deficits argument fails on the facts. Agent Scherer testified that Perrin neither appeared to have any difficulty responding to the questions in the bedroom nor exhibited any unusual intellectual deficit. Because Perrin has not crossed the factual threshold, we need not consider this issue further on the law."

"Having considered the totality of the surrounding circumstances, we hold that Perrin was not in custody during the ten minutes of voluntary questioning in his bedroom. A reasonable person in his position would have felt at liberty not to answer Agent Scherer's questions or leave or both, just as Agent Scherer advised Perrin and his housemates they could do before he asked any questions. No *Miranda* warnings were required. We therefore affirm the judgment."

PRIVACY: **Medical Records**

Bowling v. Georgia, No. S11A1014, 10/17/11

On the evening of April 23, 2004, Larry Bowling, Melody Harrell, and several of Bowling's family members went to a bar in Buford, GA—the Hideaway—to celebrate Bowling's birthday. Bowling drank shots of liquor and began to disturb other customers. Around midnight, police responded to a call from the Hideaway. Personnel from the bar reported that Bowling had struck Harrell and needed to leave. Bowling was in the parking lot when police arrived. He refused to leave at first but ultimately departed in a van driven by Harrell.

At approximately 2:42 a.m. on April 24, 2004, Gwinnett County police officer Miles Shapiro responded to a reported traffic accident in the Bona Road area. Upon arriving, Shapiro observed a van that had crashed into the right front corner of a house at 615 Bona Road and saw Bowling standing over Harrell, who was lying in the driveway with a large amount of blood around her head. Shapiro asked Bowling what happened, and Bowling replied that he accidentally shot Harrell when a gun discharged from his ankle and Harrell, who was driving, lost control of the van. Shapiro asked where the weapon was, but Bowling stated that he did not know. Shapiro decided to take Bowling into custody. He handcuffed Bowling's right wrist through Bowling's belt and beltloop but left the left wrist free because Bowling was complaining of a shoulder injury, and he had Bowling lie on the ground. Shapiro again asked Bowling about the location of the gun. Bowling said that he thought it was in the van.

Officer Joseph Morales subsequently arrived at the scene followed by Sergeant Scott Killian. As Morales attempted to assess Harrell's condition, Bowling told him that it was an accident and she was shot. Morales asked Bowling where the gun was, and Bowling stated that it was under his leg. When Killian arrived, Bowling was yelling that he had shot her, it was an accident, and the police needed to help her. Killian asked Bowling, "What happened?" and "Where's the gun?" Bowling replied that the gun went off accidentally and that the gun was under his left leg, but when Killian clarified that he wanted to know where it was "right now," Bowling said he did not know. As Killian examined Bowling's pant leg, Bowling told Killian that the gun was under the seat under his left leg. Shapiro ultimately located a loaded .380 caliber handgun some six to eight feet from the van's passenger door under a window of the house.

Bowling and Harrell were transported to Gwinnett Medical Center, where Harrell died from a gunshot wound to her head shortly after midnight on April 25, 2004. At the hospital, Bowling asked Shapiro to come into the room where he was being treated. Bowling told the doctor that he was in the car with his girlfriend while she was driving and a gun accidentally went off. As part of his treatment, Bowling's blood and urine were drawn and analyzed. The lab results showed his blood alcohol content was .142; his urine drug screen was positive for cocaine, marijuana, opiates, and benzodiazepines.

Investigator Dave Henry introduced himself to Bowling at the hospital and asked Bowling his name and the victim's name, which Bowling provided. Without prompting, Bowling stated that the weapon was under his leg, he pulled it out, and when it was raised to head level, it accidentally went off. After checking on Harrell, Henry advised Bowling that he was under arrest and secured an arrest warrant. Officer Larry Stone relieved Shapiro at around 7:00 a.m.

As Stone stood outside the treatment room, Bowling said that "he loved her, it was an accident and that he would never hurt her." Bowling asked Stone to come into the room, where Bowling stated that he pulled the gun from under the passenger seat and when he had it up, it just discharged. While en route to jail, Bowling asked Stone whether he had ever had a gun "just go off."

Kelley Cross, who lived with Bowling in August 2008 when Bowling was out on bond, testified that Bowling told him that, on the date in question, he sent Harrell to Bona Road to buy cocaine, but the substance she purchased was not cocaine, so he had Harrell drive him back to Bona Road. According to Cross, Bowling said that when they found the seller, he brandished his gun and demanded his money or the drugs and "Harrell started freaking out so he turned the gun on her and told her to quit tripping and she knocked his arm back. And right when she knocked his arm back, that's when he shot her."

Viewed in the light most favorable to the verdict, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that Bowling was guilty of the crimes of which he was convicted.

On May 13, 2009, an investigator with the district attorney's office obtained and executed a search warrant authorizing a

search of Gwinnett Medical Center for records regarding the examination, treatment, and care of Bowling on April 24, 2004. Bowling contends that the search warrant was unconstitutional and the medical records should have been suppressed at trial.

The Georgia Supreme Court stated that the privacy protections afforded by the Fourth Amendment are not absolute. If Bowling had a reasonable expectation of privacy in his records, the search and seizure of the medical records pursuant to a valid warrant was still lawful.

PROBABLE CAUSE: **Physical Description, Timing, and Proximity**

United States v. McCauley,
CA7, No. 10-2382, 10/6/11

When police arrested Terrance A. McCauley on an assault charge, they found crack cocaine secreted in his pants leg. McCauley moved to suppress the drug evidence, but the district court denied the motion and, after accepting McCauley's conditional guilty plea, sentenced McCauley to the mandatory minimum five-year term. On appeal, McCauley argues that his arrest was not supported by probable cause. The case is as follows:

At about 7 p.m. on September 11, 2008, Willie Aikens drove her boyfriend, David Neeley, to an apartment in the High Ridge Trail area of Fitchburg, Wisconsin, to pay $40 to a man he knew as "Twin." Neeley entered the apartment and paid his debt, but Twin exacted a penalty for Neeley's delay in paying him: Twin began punching Neeley, and after another man grabbed Neeley and held him by the neck, Twin beat him with a baseball bat. Neeley ran out of the apartment about 20 minutes after he had entered, got into the car with Aikens, and told her "they jumped on me."

Aikens and Neeley spent several hours driving around, debating what to do in order not to draw attention to his dealings with Twin (Aikens later reported she believed the $40 was a drug debt). Eventually, however, Aikens brought Neeley to St. Mary's Hospital, where, at about 12:30 a.m., he was interviewed by Officer Matthew Wiza. Wiza observed a large bruise on top of Neeley's head, a bruised knee, and a cut lip. Though he did not know the precise address, Neeley gave Wiza directions to the apartment where he had been assaulted. Neeley described Twin as black male, six feet tall, medium build, with collar-length braided hair, clothed in a blue tank top and blue jeans, and wearing an electronic monitoring bracelet on his ankle. Neeley described the other man as black, between 5-feet and 5-feet-4-inches, with a medium build of around 125 pounds, and braided, collar-length hair.

Wiza contacted his sergeant, who advised him that the man he described as "Twin" might be an individual on electronic monitoring named Mica Johnson, and provided Wiza with an address for Johnson. Wiza, accompanied by two other officers, drove to Johnson's residence, arriving between 1:30 and 2:30 a.m. on September 12. The directions Neeley had provided proved accurate, matching the route police took once they had Johnson's address in hand. On his arrival, Wiza went to the front door, where he heard some sort of social gathering inside. He knocked on the door for a few minutes, until it was opened

by a man about 5-feet to 5-feet-4-inches tall, with a slender build and collar-length braided hair. That man turned out to be McCauley. Wiza believed McCauley to be the same person Neeley described as having restrained him while Twin hit him with the bat. Wiza told McCauley he wanted to talk to him, but McCauley shut the door and locked it. Wiza continued to knock on the door, until a man matching the description of Twin opened the door. The man asked what Wiza wanted. "I think you know why I'm here," Wiza replied. The man shut the door, locked it, and turned off the lights.

Wiza was, in the words of the magistrate judge, "undaunted—and irritatingly tenacious." He continued knocking on the door for five to ten more minutes. At this point, McCauley stepped outside of the apartment with a woman and began walking away. Wiza immediately handcuffed him and brought him toward the squad car. Prior to placing McCauley in the car, Wiza patted him down. Between the shin and thigh of McCauley's left leg, Wiza detected something that, he later testified, "felt to me like a plastic baggie of crack cocaine," something Wiza was familiar with from five previous instances in which he had encountered the substance during pat-downs. Wiza pulled lightly at the man's pant leg and the bag—later determined to contain crack cocaine and several pills of MDMA (ecstacy)—fell to the ground.

McCauley challenges the district court's denial of his suppression motion, arguing that because Wiza had only a "very basic description" of McCauley, the officer did not have probable cause to arrest him, and therefore the crack cocaine discovered during the search should have been suppressed.

The Court of Appeals for the Seventh Circuit stated that in this case, the police had specific information about two individuals who had participated in a specific crime, including the location where it occurred and a description of the perpetrators. That information pointed to McCauley. The police were justified in believing to a sufficient probability that the individual they arrested was, in fact, the individual they sought.

PRIVACY RIGHT:
Filming of a Female Deputy

Doe v. Luzerne County,
CA3, No. 10-3921, 9/13/11

In this case, "Jane Doe," a deputy serving a bench warrant, entered a garbage-filled residence. She and her partner discovered that they were covered with fleas and were directed to proceed to an Emergency Management Building. They were told to stay inside their cruiser until a superior officer arrived. About 20 minutes later, superior officers arrived and began to film Doe for a training video. Despite the heat and biting insects, Doe was told to remain in the car. Doe alleges that officers laughed at her and filmed her in a semi-nude state at the hospital, taunted her because of a tattoo, and showed the video to other officers. The district court dismissed her 42 U.S.C. 1983 suit. The Third Circuit affirmed in part, with respect to unreasonable search and seizure and failure to train claims, but reversed with respect to a Fourteenth Amendment privacy claim. Doe had a reasonable expectation of privacy in the decontamination area, particularly with respect to members of the opposite sex.

The Third Circuit Court of Appeals stated that a dispute of material fact exists as to which of Doe's body parts were exposed to the officers. Accordingly, dismissing Doe's Fourteenth Amendment claim was error at this stage, and the district court's decision to the privacy claim was reversed and remanded for further proceedings.

RACIAL PROFILING: **Stop Based on Violation of Seatbelt Law**

United States v. Flores-Olmos,
CA10, No. 11-5010, 9/14/11

Flores-Olmos was stopped by a Nowata County, Oklahoma, deputy sheriff after the deputy saw a passenger in Flores-Olmos's pickup hanging his upper body out of the passenger-side window in a fifty-five mile zone and apparently not wearing a seatbelt. Flores-Olmos was unable to produce a driver's license or any other identification. His passenger showed the deputy an identification card apparently issued in Mexico. The deputy then asked Flores-Olmos whether he was in the United States legally. He admitted he was not. Flores-Olmos was arrested and jailed for failure to have a valid drivers' license.

The local district attorney refused to prosecute the traffic offense; Flores-Olmos was turned over to the custody of the Department of Homeland Security and was removed to Mexico. At the suppression hearing, the deputy testified that he determined to stop the pickup because of the perceived seatbelt violation and that he could not determine the nationality of the pickup's occupants until he approached the stopped vehicle.

The district court ruled that the police officer had reasonable cause to pull Flores-Olmos over because he observed a passenger apparently not wearing a seat belt, contrary to Oklahoma law. The court ruled that, once having made a legal stop, the officer was allowed to request a driver's license and vehicle registration, run a computer check, and issue a citation.

The Court of Appeals for the Tenth Circuit affirmed the lower courts ruling. Focusing on Flores-Olmos's charge of racial profiling, the court noted the Supreme Court's admonition that subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis, *Whren v. United States*, 517 U.S. 806 (1996). Upon review, the Court found, in part, as follows:

"Racial profiling issues concerning the intentional discriminatory application of the law are the province of the Equal Protection Clause. In analyzing a charge of racial profiling in the context of a traffic stop, we have held a defendant must present evidence from which a jury could reasonably infer that the law enforcement officials involved were motivated by a discriminatory purpose and their actions had a discriminatory effect. To satisfy the discriminatory-effect element, one who claims selective enforcement must make a credible showing that a similarly-situated individual of another race could have been, but was not, stopped or arrested for the offense for which the defendant was stopped or arrested. And the discriminatory-purpose element requires a showing that discriminatory intent was a motivating factor in the decision to enforce the criminal law against the defendant. Discriminatory

intent can be shown by either direct or circumstantial evidence.

"There is no evidence even remotely approaching this standard here. The stop was not rendered unreasonable on the ground that, after the stop was made, the deputy noticed the Hispanic appearance of the pickup occupants. The stop was based on an observed apparent traffic violation, not on the appearance of Flores-Olmos and his passenger.

SEARCH AND SEIZURE:
Affidavit and Warrant; Description of Place to be Searched

Ritter v. State, CR11-296, 2011 Ark. 427, 10/13/11

On May 13, 2009, David C. Fritschie and Charles F. Paluso were shot and killed in the driveway of a residence located at 34009 Arkansas State Highway 28 West. When Scott County Sheriff Cody Carpenter responded to the scene, he interviewed a witness who told him that someone driving a red Isuzu Rodeo had previously left the scene. Then, Clifford Mac Ritter drove up in a red Isuzu Rodeo. Sheriff Carpenter stated that Ritter approached him, said that he had heard sirens, asked what had happened, and asked if law enforcement officers needed his help. Sheriff Carpenter testified that he detained Ritter, and that, although he had not told Ritter about the shootings, Ritter told him, "You're not pinning this shit on me."

Lieutenant Keith Vanravensway, an investigator for the Scott County Sheriff's Department, was among the law enforcement officers present at the crime scene. He left the scene and returned to the police department, and based on his observations, statements from members of the work crew, and information he received from other law enforcement officers, Lt. Vanravensway swore out an affidavit describing the premises to be searched:

> *on the premises known as "the Rideout residence" or "34009 Hwy 28 West," Waldron, Arkansas 72958, which is located from the Scott County Courthouse as follows: turn left (east) onto W. 1st St. from the courthouse and travel approximately .1 of a mile to the intersection of W. 1st St. and U.S. Hwy 71B (Main St.). Turn left (north) onto U.S. Hwy 71B (Main St.) and travel approximately 2.3 miles to the intersection of U.S. Hwy 71B and U.S. Hwy 71. Turn right (north) onto U.S. Hwy 71 and travel approximately .7 miles to the intersection of U.S. Hwy 71 and Arkansas State Hwy 28 West. Turn left (west) onto Arkansas State Hwy 28 West and travel approximately 17.2 miles to the said location, which is at 34009 Hwy 28 West at Coaldale, Arkansas in Scott County, Arkansas.*

Based on Lt. Vanravensway's affidavit, the district judge issued a search warrant for "the premises known as the 34009 Ar. State Hwy 28 W. or the Rideout residence." Shortly after the warrant was issued, it was executed at Ritter's residence and several items, including a Browning shotgun, were seized.

A review of the warrant and affidavit reveals that the address listed by Lt. Vanravensway—34009 Hwy. 28 West—was the location where the victims' bodies were

found rather than Ritter's address, which was 33601 Hwy. 28 West. Before trial, Ritter filed a motion to suppress evidence seized during the search of his home. In his motion, Ritter contended that he was subject to an unlawful arrest and that there was no probable cause upon which to support the search warrant. At the suppression hearing, Ritter stated that the search warrant listed an incorrect name and address and contended that the search warrant was invalid because it failed to describe with particularity the premises to be searched. Accordingly, he asserted that any evidence seized as a result of the search must be suppressed.

Lieutenant Vanravensway testified at the suppression hearing that he had sought a warrant for the Ritter residence. He also testified that he included facts in the affidavit regarding his familiarity with Ritter and information he had obtained from Arkansas State Police Special Agent Cory Mendenhal. According to Special Agent Mendenhal, Ritter's wife said that Ritter had left their residence with a gun and then returned with the gun approximately thirty minutes later. The affidavit also noted that Ms. Ritter told Special Agent Mendenhal that when her husband again left the residence, she took the gun inside and put it under a mattress. Lieutenant Vanravensway testified that he failed to write down Ritter's address while he was at the scene, so he phoned officers at the scene to obtain the address. He stated that one of the officers read him the name and address on the Rideout mailbox, so that was the name and address he used in the affidavit. Lieutenant Vanravensway testified that he used the Rideout name and address due to "confusion" and because he had a limited time to get a warrant issued before 8 p.m. The warrant was signed at 7:59 p.m., and Lt. Vanravensway notified officers that he had obtained the warrant.

The circuit court denied Ritter's motion to suppress and found that Lt. Vanravensway acted in good faith and that there was no mistake in the search.

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

"The Fourth Amendment to the United States Constitution provides in pertinent part that no search warrants shall issue except those 'particularly describing the place to be searched.' An application for a search warrant shall describe with particularity the places to be searched and the things to be seized. Ark. R. Crim. P. 13.1(b). And a warrant shall state, or describe with particularity the location and designation of the places to be searched. Ark. R. Crim. P. 13.2(b)(iii). The requirement of particularity of describing the location and place to be searched is to avoid the risk of the wrong property being searched or seized. *Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995). The test for determining the adequacy of the description of the place to be searched under a warrant is whether it enables the executing officer to locate and identify the premises with reasonable effort and whether there is any likelihood that another place might be mistakenly searched. *Costner v. State*, 318 Ark. 806, 887 S.W.2d 533 (1994). In determining whether a particular description is sufficient under this test, courts must use common sense and not subject the description to hypercritical review. *Beshears,* supra. Highly technical attacks on search warrants are not favored because the success of such attacks could discourage law enforcement

officers from utilizing search warrants. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

"A search warrant is not automatically rendered invalid if it contains an incorrect address of the property to be searched. In *United States v. Gitcho*, 601 F.2d 369 (8th Cir. 1979), the federal district court granted the defendant's motion to suppress because the only description of the location to be searched was an incorrect street address listed in the warrant; the government appealed. The United States Court of Appeals for the Eighth Circuit reversed stated the address stated in the warrant does not exist, making the mistaken search of the wrong premises unlikely. Of even greater importance is the fact that the agents executing the warrant personally knew which premises were intended to be searched, and those premises were under constant surveillance while the warrant was obtained. The premises which were intended to be searched were, in fact, those actually searched.

"In the present case, the warrant contained an incorrect address, thus increasing the likelihood of searching the wrong residence. But this likelihood was mitigated by the fact that the officers executing the warrant personally knew which premises were to be searched and the fact that the intended location was under surveillance while Lt. Vanravensway secured the warrant. In addition, the affidavit included facts indicating that it was the Ritter residence, not the Rideout residence, that was intended to be searched. After listing numerous facts about Ritter and referring to the Ritter residence, Lt. Vanravensway noted that Special Agent Mendenhal had learned from Ms. Ritter that Ritter had left their residence with a gun and returned approximately thirty minutes later, still carrying the gun. The affidavit also stated that Ms. Ritter told Special Agent Mendenhal that she had placed the gun under a mattress in the Ritter residence. Moreover, Chief Deputy Staggs testified that, while waiting to begin the search, he walked past Ms. Ritter and asked her how she was doing, and Ms. Ritter told him, 'The gun you're looking for is under the mattress. There's [a] pillow case with some shotgun shells under there as well.' Ms. Ritter's statement, made shortly before the warrant was executed at the Ritter residence, further mitigated the likelihood that the officers were at the wrong residence. Finally, the premises that were intended to be searched were, in fact, searched."

The Arkansas Supreme Court held that the circuit court did not err in denying Ritter's motion to suppress.

SEARCH AND SEIZURE:
Affidavits; Personal Observation by Law Enforcement Officer

Hampton v. State, CACR11-206, 2011 Ark. App. 559, 9/28/11

On March 7, 2008, two detectives executed a search warrant on 14th and Apple Street in Pine Bluff, Arkansas. The affidavit provided that the detectives—after being informed by an unidentified informant that a black male and a white female were selling crack cocaine out of a particular house—supervised two controlled buys of cocaine by this informant. The affidavit stated how on each occasion the informant was provided funds, how the informant was as he entered the home, and then how the informant delivered the substance to the

detectives. The substance was later shown to field test positive as cocaine.

Henry Hampton argues that, because speculation was required for one to conclude that cocaine or other contraband would be found at his home, the trial court erred in denying his suppression motion. The Arkansas Court of Appeals stated the link is established by the detective's personal observation, not hearsay recounted by the informant. Because the affidavit contained the detective's personal observation of controlled buys of cocaine, the fact that the affidavit did not establish the informant's reliability was not fatal. *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001) (holding that even though the reliability of the informant was not established, the affidavit was adequate based on the officers' personal observations). The Court concluded "there was adequate probable cause to issue the search warrant and that the resulting search was proper."

SEARCH AND SEIZURE:
Automobile; Dog Sniff

United States v. Ayala,
CA10, No. 10-5167, 9/27/11

In October 2009, the federal Drug Enforcement Administration (DEA) learned that Ruben Garcia-Hernandez, a suspected drug trafficker, would be participating in a drug transaction. DEA agents and officers from the Tulsa Police Department began surveilling him. They saw him enter an apartment in Tulsa and exit carrying a paper bag. He then drove to a gas station, where he pulled up next to a white Scion bearing Arkansas plates driven by Erlin Ayala.

Tulsa Officer Corbin Collins was watching the gas station. He observed Ayala exit the Scion, walk over to the passenger side of Garcia-Hernandez's vehicle, and place something inside while Garcia-Hernandez stood between the two vehicles. Collins saw Ayala return to the passenger side of the Scion, but he could not see "exactly what he was doing." Afterwards, Ayala got in the Scion, picked up a passenger who had earlier gone inside the station, and drove north.

Tulsa Officer Anthony First followed the Scion in the light rain, and initiated a traffic stop when he observed the Scion make an unsafe lane change. He approached the car on the passenger side, where he noticed that the passenger-side window was partially down and that there was "a very strong, sweet odor coming from the car." Ayala was unable to produce a driver's license or proof of insurance, and gave different versions of who owned the Scion.

Officer First returned to his patrol car, accompanied by Ayala, and began a computer-records check. To obtain the Scion's vehicle identification number, First went back to the car, opened the driver's side door, and examined the Nader sticker in the door jamb. While there, he asked the Scion's passenger about the nature of his and Ayala's visit to Tulsa. The passenger said that they were visiting a friend, but he could not remember the friend's name. Back in the patrol car, Ayala told First that he was in Tulsa looking for work as a painter. Suspecting criminal activity, First summoned a canine unit for assistance.

A few minutes later, Officer Daryl Johnson arrived with his canine partner, Max, and

began a "free air search" around the Scion, starting at the front passenger-side headlight and moving counterclockwise around the vehicle. When he and Max arrived at the passenger-side door, "Max focused in on the lower edge or the lower seam of the door as well as the seat belt which was sticking outside of the [Scion]." Max did not alert, however, and they resumed circling the Scion. After several more loops around the car, Max "stood on his back two legs and stuck his nose up in the [driver's side] window to the window area and looked to be focusing on something," but then he became distracted by the traffic. The window had been fully open, and Max's nose had gone "across the line of the window." Max then proceeded clockwise, stopping 15 or 25 seconds later at the passenger-side door, where he "focus[ed] on the window and then again on the seat belt" and "alerted to the odor of narcotics."

A search of the Scion uncovered almost $1,400 in cash, two cell phones (in addition to two found on Ayala), two bottles of cologne, and a brown paper bag on the floor behind the driver's seat containing methamphetamine wrapped in cellophane. Ayala and his passenger were arrested and ultimately charged with possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine.

Ayala moved to suppress, alleging that Max "breached the interior of the vehicle during the sniff." The district court denied the motion. It said that there was no evidence that the officers rolled down a window, and even if they did, Max alerted to the passenger-side seat belt, which
was protruding through the closed door.

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

"The Fourth Amendment, applicable to the States through the Fourteenth Amendment, protects against unreasonable searches and seizures. But a canine sniff itself does not implicate Fourth Amendment rights because of the limited information it provides and its minimal intrusiveness. *United States v. Hunnicutt,* 135 F.3d 1345, 1350 (10th Cir. 1998). A positive alert by a certified drug dog generally provides probable cause for officers to search a vehicle. See *United States v. Parada,* 577 F.3d 1275, 1282 (10th Cir. 2009), cert. denied, 130 S. Ct. 3321 (2010). Officers may not, however, rely on a dog's alert if they open part of the vehicle so the dog can enter or if they encourage the dog to enter. See *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998); cf. *United States v. Stone,* 866 F.2d 359, 364 (10th Cir. 1989) (reliance on alert was proper when dog's entry into vehicle was instinctive)."

The Court concluded that the defendant had not met the burden of establishing a Fourth Amendment violation.

SEARCH AND SEIZURE:
Automobiles; Detention; Dog Sniff

Dickey v. Wyoming, No. S-11-0062, 2011, WY 136, 9/28/11

On September 20, 2009, Deputies Robert Proffitt and Trevor Budd of the Campbell County Sheriff's Department stopped a pickup truck driven by Dana Dickey after observing it cross the center line on three occasions. Deputy Proffitt made contact with Dickey, whom he knew from

prior contacts, while Deputy Budd spoke with the passenger. After gathering the appropriate documents from Dickey and her passenger, the deputies returned to their patrol car.

Deputy Proffitt then contacted dispatch to run a check on Dickey and her passenger. While awaiting a response from dispatch, the deputies discussed their prior drug-related encounters with Dickey and her family members. Shortly thereafter, dispatch reported that Dickey and her passenger had no outstanding warrants, although both had a history of contacts with law enforcement regarding controlled substances. At that point, knowing that the sheriff's department did not have a canine unit on duty, Deputy Proffitt called the Gillette Police Department and requested that Officer Greg Brothers bring his drug dog Eddy to the scene.

Deputy Proffitt then began writing a warning citation for Dickey's failure to maintain a single lane of travel. Before Deputy Proffitt issued the citation, Officer Brothers arrived with his drug dog and conducted an exterior sniff of the truck.

At thirteen and one-half minutes into the stop, the dog alerted to the presence of controlled substances. Officer Brothers searched the truck's interior and discovered a purse underneath the passenger seat containing a syringe loaded with methamphetamine and a copy of Dickey's birth certificate. When questioned, the passenger said that Dickey handed her the purse with directions to place it under the seat.

Dickey was taken into custody and charged with possession of a controlled substance, her third or subsequent such offense, in violation of Wyo. Stat. Ann. § 35-7- 1031(c)(i)(C) (LexisNexis 2011).2 Dickey entered a conditional plea to one count of possession of a controlled substance. Dickey reserved the right to appeal the district court's denial of her motion to suppress the methamphetamine found in her purse following a traffic stop, claiming the evidence should have been suppressed as the fruit of a constitutionally infirm detention under the Fourth Amendment.

Upon review, the Wyoming Supreme Court found that the district court did not err in denying Dickey's motion to suppress where (1) the detention lasted no longer than necessary to effectuate the purpose of the stop, (2) the use of a drug dog during Dickey's lawful detention did not violate any constitutionally protected right, and (3) law enforcement officers had probable cause to search the vehicle.

In part, the Court stated as follows:

"The Fourth Amendment protects individuals from unreasonable searches and seizures. A routine traffic stop constitutes a seizure within the meaning of the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief." *Damato v. State*, 2003 WY 13, ¶ 9, 64 P.3d 700, 704 (Wyo. 2003) (quoting *Delaware v. Prouse*, 440 U.S. 648 (1979)). The reasonableness of a traffic stop is determined by applying a two-part analysis: (1) whether the initial stop was justified; and (2) whether the officer's actions during the detention were reasonably related in scope to the circumstances that justified the interference in the first instance. *Terry v. Ohio*, 392 U.S. 1 (1968).

"With respect to the second prong of the analysis, this Court has stated: During a routine traffic stop, a law enforcement officer may request a driver's license, proof of insurance and vehicle registration, run a computer check, and issue a citation. Generally, the driver must be allowed to proceed on his way without further delay once the officer determines the driver has a valid driver's license and is entitled to operate the vehicle. In the absence of consent, an officer may expand the investigative detention beyond the purpose of the initial stop only if there exists an objectively reasonable and articulable suspicion that criminal activity has occurred or is occurring.

"We have never imposed an arbitrary time limit when determining the permissible length of a traffic stop. *Lindsay v. State*, 2005 WY 34, ¶ 19, 108 P.3d 852, 857 (Wyo. 2005). Instead, we examine whether law enforcement diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly and without undue delay in detaining a defendant. In this case, Dickey does not dispute the validity of the initial traffic stop. Rather, her complaint concerns the duration of the stop and the reasonableness of her detention. Dickey acknowledges that the Fourth Amendment does not prohibit a dog sniff of the exterior of a vehicle during a lawful traffic stop. See *Illinois v. Cabelles*, 543 U.S. 405 (2005). However, she contends the deputies impermissibly prolonged the stop beyond the time necessary to issue the warning citation in order to enable the drug-detection dog to conduct a free air sniff of the vehicle she was driving.

"Dickey's claim is based on the premise that a five-minute delay occurred between the time Deputy Proffitt completed the warning citation and the time the canine unit arrived at the scene. The only evidence Dickey can muster to support the alleged five-minute delay is Deputy Proffitt's preliminary hearing testimony. However, Deputy Proffitt's testimony regarding the timing of the canine unit's arrival and the completion of the warning citation is at best equivocal and is inconsistent with his affidavit of probable cause and the video of the traffic stop. In the affidavit, Deputy Proffitt noted that Officer Brothers and his dog Eddy arrived at the scene before he completed the warning. Furthermore, the video of the traffic stop, which is the best evidence of what actually transpired during the stop, amply demonstrates that Deputy Proffitt was still investigating and gathering information directly related to the traffic stop immediately before the canine unit arrived. Although the video does not visually confirm when the warning citation was completed, Deputy Proffitt can be heard speaking with dispatch about the vehicle's ownership approximately sixteen seconds before K-9 Eddy began barking, signifying his arrival at the scene. After examining the entire record, we are unable to conclude that Deputy Proffitt impermissibly stalled issuing the citation in order to allow for the arrival of the canine unit, as Dickey maintains.

"In addition, we find nothing in the record indicating that the duration of Dickey's detention was so prolonged as to be unjustified. The record reveals that Deputy Proffitt engaged in a conscientious and reasonable investigation related to the purpose of the initial stop. He contacted

dispatch, awaited information, and then contacted the canine unit. His encounter with Dickey was focused, and he promptly set out to complete the warning citation. The canine unit arrived at the scene before the citation had been issued, and the dog sniff did not prolong the stop to any extent. The entire encounter—from the initial stop to the dog's alert—lasted approximately thirteen and one-half minutes.

"Considering the length of the detention in conjunction with the investigative methods employed therein, we have no trouble concluding that Dickey's detention lasted no longer than necessary to effectuate the purpose of the stop, and that its duration was reasonable. The dog sniff occurred while Dickey was being lawfully detained and, as Dickey has acknowledged, the use of the drug dog during her lawful detention did not violate any constitutionally protected right. After the drug dog alerted to the presence of controlled substances, Officer Brothers and the deputies had probable cause to search the vehicle. Consequently, the district court did not err by denying Dickey's motion to suppress the methamphetamine evidence."

SEARCH AND SEIZURE:
Automobiles; Inventory Searches

United States v. Garreau,
CA8, No. 11-1008, 10/11/11

On January 9, 2009, FBI Special Agent James Van Iten received a tip from a confidential informant that Jason Todd Garreau was traveling from Eagle Butte, South Dakota, to Pierre, South Dakota, with a stolen firearm in his vehicle. Van Iten passed the tip, along with a description of the vehicle that Garreau was driving, to Officer John Wollman of the Pierre police department. Wollman also learned from police dispatch that Garreau's driver's license was suspended and that he was subject to arrest on an outstanding state warrant. Wollman relayed this information to other law enforcement officers in the area, including Trooper John Stahl of the South Dakota Highway Patrol.

Shortly thereafter, Stahl saw the vehicle Garreau was driving, determined that it was traveling in excess of the posted speed limit, and signaled him to stop. Stahl issued Garreau a warning citation for speeding and ran a computer check on Garreau's driver's license. The check confirmed that Garreau's license had been suspended. Stahl also confirmed by way of radio that Garreau was subject to arrest on an outstanding state warrant. Stahl arrested Garreau, searched his person, and placed him in the back of the patrol car.

Stahl asked Garreau whether there was anyone available to pick up the vehicle that Garreau had been driving. Garreau answered in the negative. According to Stahl, he then called for a tow truck to take the vehicle into protective custody, and performed an inventory search of the vehicle. He found the firearm in a plastic bag under a spare tire, which was in a compartment under the carpet on the floor of vehicle's trunk. Stahl inquired about the firearm's serial number over his radio, and confirmed that the gun was stolen.

A federal grand jury charged Garreau with possession of a stolen firearm, in violation of 18 U.S.C. § 922(j), and possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3). Garreau

moved to suppress the firearm, on the ground that Stahl searched the vehicle in violation of the Fourth Amendment.

Upon review, the Eighth Circuit Court of Appeals found Trooper Stahl's search of the vehicle was a valid inventory search under the Fourth Amendment, stating, in part, as follows:

"The inventory search exception to the Fourth Amendment's warrant requirement permits law enforcement to inventory the contents of a vehicle that is lawfully taken into custody, even without a warrant or probable cause to search. See *United States v. Taylor,* 636 F.3d 461, 464 (8th Cir. 2011). An inventory generally serves three purposes: "the protection of the vehicle owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

"We conclude that Stahl's search of the vehicle was a lawful inventory search. An inventory search is reasonable and constitutional if it is conducted according to standardized police procedures. *United States v. Hall,* 497 F.3d 846, 851 (8th Cir. 2007). At the hearing, the government entered into evidence a written policy maintained by the South Dakota Highway Patrol governing inventory searches. The policy provides that a trooper may not leave an arrestee's vehicle unattended and must have the vehicle towed to a place of safekeeping. The trooper also must 'inventory the contents of all vehicles' that are 'impounded or taken into protective custody.' The inventory 'should include all areas of the vehicle, trunk, glove compartment and luggage or other closed containers within the vehicle.' The policy calls for the trooper to make such inventory" on a certain form.

"Stahl's search of the vehicle that Garreau had been driving substantially complied with the policy. No one was available after Garreau's arrest to take custody of the vehicle, so Stahl was required under the policy to have the vehicle towed to a place of safekeeping. Because Stahl was required to have the vehicle towed, he also was required to conduct an inventory search of the vehicle. Stahl found the firearm while searching all areas of the trunk, as required under the policy. And he listed all non-contraband property that he found in the vehicle on the form required by the policy."

SEARCH AND SEIZURE:
Automobiles; Length of Detention

United States v. Macias,
CA5, No. 10-50614, 9/27/11

In this case, Robert Macias, Jr. was convicted for being a felon in possession of a firearm and subsequently appealed the district court's denial of his motion to suppress a firearm uncovered during a warrantless automobile search by a trooper. The court held that because the trooper unconstitutionally prolonged defendant's detention by asking irrelevant and unrelated questions without reasonable suspicion of criminal activity, the court reversed and vacated the judgment of conviction, remanding the case for entry of a judgment of acquittal. The Court, in a lengthy decision, noted that Macias ultimately gave his consent

to a search of his truck. The Court of Appeals for the Fifth Circuit noted that approximately seventeen minutes after he began the search of the truck, and forty-seven minutes after initiating the stop, Trooper Barragan found an unloaded firearm and ammunition in a closed bag belonging to Macias. Macias was arrested approximately one hour and thirty-nine minutes after Trooper Barragan initiated the stop.

SEARCH AND SEIZURE:
Automobile Search; Search for Passenger's Identification

United States v. Rodgers,
CA9, No. 10-30254, 9/7/11

On December 16, 2009, at approximately 3:30 a.m., Police Officer Ryan Moody was patrolling the area of South 84th Street and South Hosmer Street in Lakewood, Washington, a high crime location known for juvenile prostitution and vehicle theft. During the course of his duties, Moody ran a routine check on a black Pontiac Grand Am. The registration record indicated that the car was registered to an individual named Joshua Rodgers. Moody noticed, however, that "the colors didn't match." The registration listed the car as gold, but the car observed by Moody was black. Moody testified that he often encountered license plates that had been removed from one vehicle and placed on a stolen vehicle of the same make and model to conceal a car's stolen status. Thus, suspecting the car might be stolen, Moody stopped the vehicle and approached on foot.

Upon reaching the driver's side of the car, Moody immediately recognized Rodgers from two prior traffic stops. Rodgers was cooperative and explained that he had painted his vehicle but did not have money to update his registration. Rodgers provided Moody with a valid driver's license.

At some point during the stop, Moody looked into Rodgers' car and noticed a young female in the front passenger seat. The young woman "appeared to be Caucasian" and "seemed nervous, didn't want to make eye contact." Based on her appearance, Moody thought that the girl was twelve to fourteen years old. Recalling that Rodgers was 51 years old according to his license, Moody asked Rodgers about the young woman. Rodgers responded that she was simply a friend and that he was giving her a ride to a nearby apartment complex. This scenario obviously raised Moody's suspicion more, being that he's a 51-year-old male, and the way she appeared was a 12-to-14-year-old female. Given the time of day and the high-crime location, Moody's "first inclination was that she was probably an underage prostitute." Moody also had concerns that the young woman "could have been a runaway" or "a missing person." Suspecting that Rodgers might be "pimping out the female," Moody continued to investigate and asked the young woman for identification. The young woman responded that she "didn't have any" ID, but she provided her name, S.F., and indicated that she was 19 years old. S.F. stated that her birthday was January 7, 1990, which was consistent with her stated age of 19 years old. Based on her physical appearance, however, Moody believed that S.F. was lying about her age.

Moody testified that S.F.'s identity was still not clear to him, so "based on the fact that he felt she lied to him, provided a false statement

to him, he wanted to check to see if she had any ID that he could actually confirm her identity with." S.F. had previously indicated that she "didn't have any" and Moody did not see a purse or bag that could harbor S.F.'s identification. Moody testified, however, that he believed S.F. had identification because "if she's going to stick with a story about being 19 years old," based on his training and experience, Moody thought "most 19-year-olds have some form of identification." While S.F. was secured by another officer at the rear of the vehicle, Moody proceeded to search the passenger area of Rodgers' car.

Moody never found any identification. In the center console of the car, however, Moody located a black case containing three bags of a crystalline substance later identified as methamphetamine. The officers placed Rodgers under arrest. A search of Rodgers' person uncovered marijuana, twenty oxycodone pills, and 284 dollars in cash. A full search of Rodgers' car led to the discovery of a firearm, used methamphetamine pipes, and what appeared to be a ledger. Rodgers was taken to the Pierce County Jail, where he admitted to selling narcotics. S.F. was arrested and taken to a juvenile facility,

Upon review, the Court of Appeals for the Ninth Circuit found the search in this case to be unconstitutional. The Court noted that passenger and vehicle searches have played a prominent role in Fourth Amendment jurisprudence. Their finding, in part, is as follows:

"The Supreme Court has consistently held that probable cause is necessary to conduct a warrantless search of a vehicle. See *Carroll v. United States*, 267 U.S. 132, 160-62 (1925); *California v. Carney*, 471 U.S. 386, 390 (1985). In recent years, the Court has clarified that if there is probable cause to believe a vehicle contains evidence of criminal activity, the search may extend to any area where evidence might be found. See *Arizona v. Gant,* 129 S. Ct. 1710, 1721 (2009) (citing *United States v. Ross,* 456 U.S. 798, 820-21 (1982)). In addition, when an arrest is made, a warrantless search is permitted 'if the arrestee is within reaching distance of the passenger compartment or it is reasonable to believe the vehicle contains evidence of the offense of arrest.' But the Court has never sanctioned a vehicle search simply because there was probable cause to arrest a passenger or because a passenger could not provide identification. The Fourth Amendment requires more.

"Despite his detailed testimony, Moody did not identify any particular facts or observations that led him to believe S.F. had identification and that it was inside Rodgers' car. Nor can we find any such facts in the record. There is, for example, no indication that Moody saw S.F. trying to hide anything in the car, that S.F. was eyeing anything inside the car, that S.F. made any furtive movements, or that any papers or objects appearing to be identification were in plain view. Indeed, the only relevant fact Moody offered—that he never saw a purse or bag that might have contained S.F.'s identification—cuts against a finding of probable cause to search the car.

"Without any objective facts indicating that S.F.'s identification was in Rodgers' car, we cannot endorse the significant intrusion of the search. The Supreme Court has emphasized that probable cause 'demands' factual

'specificity' and 'must be judged according to an objective standard.' *Johnson,* 256 F.3d at 905 (quoting *Terry,* 392 U.S. at 21-22 n.18)). The search was unconstitutional. All the physical evidence seized and Rodgers' subsequent statements to police must be suppressed under the exclusionary rule."

SEARCH AND SEIZURE:
Automobile Search; Search Incident to Arrest; Passenger Compartment

Boykins v. State of Georgia,
No. S11G0643, 11/7/11

Officer Morales of the DeKalb County Police Department saw Reginald Boykins pull his vehicle up and talk to a woman walking in a high crime area. Boykins quickly drove off when Morales turned the patrol car around. Suspecting prostitution, Morales asked the woman if she knew the man in the car. She said no. Morales drove into the nearby apartment complex and saw the vehicle pull into a parking space. He pulled behind the vehicle, got out, and asked Boykins for his identification. Boykins said his identification was in his apartment, but he gave Morales his name and birth date.

After discovering Boykins had an outstanding probation arrest warrant, Morales asked Boykins to get out of the car, put him in handcuffs and placed him in the custody of a second officer. Morales then searched Boykins' vehicle, finding cocaine in the center console.

Boykins contends the search of his vehicle was not a proper search-incident-to-arrest under *Arizona v. Gant,* 526 U.S. 332 (1990).

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

"In *New York v. Belton*, 453 U. S. 454, 460 (101 SC 2860, 69 LE2d 768) (1981), the United States Supreme Court held that when police have made a lawful custodial arrest of the occupant of an automobile, they may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile and may also examine the contents of any containers found within the passenger compartment of that automobile.

"Recognizing that many courts interpreted *Belton* to allow a vehicle search incident to the arrest of a recent occupant even if there was no possibility the arrestee could gain access to the vehicle at the time of the search, the *Gant* Court substantially limited its *Belton* decision. The Court held that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. The Court explained its limitation by specifically noting that because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains.

"The only evidence offered by the State in this case to justify its search of the vehicle's center console was the testimony of Officer Morales, who testified that Boykins exited the vehicle while he was being questioned about his identification. Boykins was then arrested, handcuffed, and placed in the custody of the second officer, all prior to the instant

search. Without offering any evidence as to Boykin's physical location after his arrest and placement in the custody of the second officer, Morales stated he searched the wing span within Boykins' vehicle where he discovered the illegal drugs. Morales' testimony thus fails to establish Boykins location in relation to the vehicle at the time of the search or to provide the court any other information from which it could make a determination that the center console remained within Boykins' arm's reach as required by *Gant*.

"In short, the State failed to make any meaningful showing that this was the 'rare' case justifying a warrantless vehicle search because officers were unable to fully effectuate an arrest. Because the State failed to meet its burden of proving the search incident to arrest exception to the warrant requirement, the exception did not apply.

"Contrary to the State's argument in this case, the Supreme Court did not intend a more limited reading of *Gant* and such interpretation is not necessary to protect law enforcement safety and evidentiary interests. As stated by the Court in *Gant, Belton* and *Thornton v. United States*, 541 U. S. 615 (124 SC 2127, 158 LE2d 905) (2004),] permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long,* 463 U. S. 1032 (103 SC 3469, 77 LE2d 1201) (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.' *Id.*, at 1049 (103 SC 3469, 77 LE2d 1201) (citing *Terry v. Ohio*, 392 U. S. 1, 21 (88 SC 1868, 20 LE 2d 889) (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U. S. 798, 820-821 (102 SC 2157, 72 LE2d 572) (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. *Maryland v. Buie,* 494 U. S. 325, 334 (110 SC 1093, 108 LE2d 276) (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding). These exceptions to the warrant requirement ensure police may constitutionally search a vehicle when circumstances present 'genuine safety or evidentiary concerns during the arrest of a vehicle's recent occupant.' The State's evidence in this case simply failed to show such concerns were present."

Editor's Note: *New York v. Belton*, 455 U.S. 454 (1981) allowed law enforcement officers to search the passenger compartment of the vehicle incident to arrest. The United States Supreme Court in *Arizona v. Gant,* 556 U.S. 332 (2009) severely limited the so-called *Belton* rule. The decision in *Arizona v. Gant* can be reviewed in *CJI Legal Briefs,* Volume 14, Issue 2, Summer 2009 at page 20.

SEARCH AND SEIZURE:
Consent Search; Co-Occupant
United States v. Rogers
CA8, No. 11-1386, 11/23/11

Randall Puyear, a police officer in Knoxville, Iowa, received a tip regarding a man suspected of a series of thefts in the area staying with a woman named Tina Spriggs. Officer Puyear followed up on the tip by visiting Ms. Spriggs at her apartment. After arriving at the apartment, the officer asked Ms. Spriggs whether anyone else was present inside the apartment. Rogers was present and agreed to speak with the officer. Rogers and the police officer went outside to the officer's patrol car to talk. In the patrol car, Officer Puyear asked Rogers for some basic information such as his name, driver's license, date of birth, and whether he had ever been in trouble with the law.

At some point during the conversation, the officer confirmed Rogers had been staying overnight with Ms. Spriggs in her apartment. Officer Puyear told Rogers he was investigating a series of thefts in the area and asked Rogers if he could search the apartment. Rogers declined to give permission, indicating the apartment was Ms. Spriggs's. Officer Puyear returned to the apartment and asked Ms. Spriggs for permission to search the apartment. At the suppression hearing, Ms. Spriggs testified she told Officer Puyear "I'd rather they didn't" search the apartment. Officer Puyear testified that Ms. Spriggs said "[s]he didn't know if she wanted to do that, or not." The district court found Ms. Spriggs "wasn't sure whether she wanted to consent to the search or not."

While talking to Ms. Spriggs, Officer Puyear received a phone call from another officer who told him a Savage .270 caliber high power rifle with a scope had been reported stolen. Officer Puyear returned to where Rogers was waiting outside and asked if there were any weapons in the residence. Rogers said a friend had recently dropped off a rifle for him to use for hunting. Officer Puyear was suspicious of this claim because it was April and he was unaware of any hunting seasons in Iowa that allowed the use of rifles in April. The officer asked if he could see the rifle.

Rogers agreed to show the rifle to Officer Puyear and began walking toward the apartment. Rogers walked into the apartment, past Ms. Spriggs who was standing by the front door. Officer Puyear followed Rogers into the apartment. Neither Rogers nor Ms. Spriggs objected when Officer Puyear crossed the threshold following Rogers into the apartment. Rogers retrieved the rifle from the laundry room and handed it to Officer Puyear. The officer confirmed it was the same rifle that had been reported stolen by matching the serial number on the rifle scope to the serial number reported to the police.

Ms. Spriggs became upset when she discovered Rogers was keeping a loaded rifle in her apartment unbeknownst to her. She then signed a written consent form allowing Officer Puyear and other officers to search the rest of the apartment, whereupon other stolen items were discovered, including some ammunition.

Rogers was arrested later that day. An investigation into his background revealed he was a felon prohibited from possessing a firearm. The investigation also revealed

Rogers was a sex offender who had traveled from Alabama to Iowa without registering with the Iowa Sex Offender Registry or notifying Alabama authorities he had moved. A federal grand jury returned an indictment charging Rogers with one count of possessing a stolen firearm and ammunition in violation of 18 U.S.C. §§ 922(j) and 924(a)(2), one count of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and one count of failing to register as required by SORNA in violation of 18 U.S.C. § 2250.

Rogers filed a motion to suppress evidence regarding the firearm, arguing the warrantless entry into the apartment violated his Fourth Amendment rights. Rogers claims he lacked authority to consent to a search of the apartment and that Officer Puyear knew he lacked authority because he told the officer he would have to ask Ms. Spriggs for permission. Rogers therefore argues the district court erred when it determined Officer Puyear could have reasonably relied upon Rogers's apparent authority to consent and erred in finding he consented to the officer's entry into the residence.

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

"A basic premise of Rogers's argument appears to be that only Ms. Spriggs could grant permission to enter the residence. We disagree with such premise. Rogers understands he must have had a legitimate expectation of privacy in the apartment to have standing to challenge the warrantless entry. See *United States v. Brown,* 408 F.3d 1049, 1051 (8th Cir. 2005). The government does not dispute Rogers's standing to challenge the entry and, of course, neither does Rogers. The fact that Rogers was staying with Ms. Spriggs in the apartment establishes both his standing to challenge the entry and his authority to grant consent. See *United States v. Jones,* 193 F.3d 948, 950 (8th Cir. 1999) ('It is well established that an adult co-occupant of a residence may consent to a search.')

"Furthermore, to the extent Rogers claims Ms. Spriggs denied consent, the factual predicate for such a claim is lacking. At the suppression hearing, Ms. Spriggs's testimony differed from Officer Puyear's testimony on that point. The district court resolved the conflict by determining Ms. Spriggs gave an ambiguous response to the request to enter and search the apartment, finding she 'wasn't sure whether she wanted to consent to the search or not.' We find no clear error in the district court's fact finding. See *United States v. Granados*, 596 F.3d 970, 976 (8th Cir. 2010) ('The district court's determination regarding the credibility of the two witnesses is…virtually unreviewable on appeal.')

"Ultimately, however, it is immaterial whether Ms. Spriggs denied consent or equivocated. Even assuming Ms. Spriggs denied consent, her denial would not benefit Rogers. The Fourth Amendment protects individual rights, so Rogers may not bootstrap his alleged Fourth Amendment violation onto an alleged violation of Ms. Spriggs's constitutional rights. See, e.g., *United States v. Padilla,* 508 U.S. 77, 81 (1993) ('It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure.') See also *Georgia v. Randolph,* 547

U.S. 103, 106 (2006) ('A physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid *as to him*.') Thus, in the end, whether Officer Puyear's warrantless entry into the apartment was valid under the Fourth Amendment will rise or fall on whether he reasonably believed Rogers had authority to consent and consented, just as the district court concluded. See *United States v. Nichols*, 574 F.3d 633, 636 (8th Cir. 2009) ('A search is justified without a warrant where officers reasonably rely on the consent of a third party who demonstrates apparent authority to authorize the search, even if the third party lacks common authority.')

"On those two relevant issues, we note during the course of Officer Puyear's investigation and encounter with Rogers, he learned Rogers had been staying overnight in the apartment with Ms. Spriggs. Thus, the officer could reasonably believe Rogers had the authority to consent to an entry into the apartment. As to whether Officer Puyear reasonably believed Rogers actually consented to the entry into the apartment, we note consent 'can be inferred from words, gestures, or other conduct.' *United States v. Pena-Ponce*, 588 F.3d 579, 584 (8th Cir. 2009) (quoting *United States v. Guerrero*, 374 F.3d 584, 588 (8th Cir. 2004)). 'The determination of whether a reasonable officer would believe that the defendant consented is a question of fact, subject to review for clear error.' *Guerrero*, 374 F.3d at 588. When Officer Puyear asked Rogers if he could see the rifle inside the apartment, Rogers agreed to show the rifle to the officer and did not object when the officer followed him into the apartment. Under these circumstances, the district court did not clearly err when it found a reasonable officer would believe that the defendant consented to the entry into the apartment."

SEARCH AND SEIZURE:
Plain View Doctrine; Marked Money

United States v. Paneto,
CA1, No. 10-2412, 11/22/11

In an undercover capacity in civilian clothes and in an unmarked vehicle, Detective Nicholas Ludovici of the Providence, Rhode Island, Police Department was cruising a high crime area in anticipation that someone would think him to be looking for a "fix" and offer to sell him drugs. Other officers, supporting Ludovici's mission, were lurking nearby. Detective Ludovici was approached by Deshawn Owens who got into Ludovici's vehicle. Ludovici told him that he was looking for a "straight 20" (street slang for a $20 bag of crack cocaine). Owens replied that he would take Ludovici to his "boy's house" and identified his "boy" as "D."

Once Ludovici had pulled to the curb on Laura Street, Owens asked him for the purchase money. Ludovici gave Owens a $20 bill that he had pre-marked with a small ink slash through the zero in the figure "20" appearing in the upper right corner. Owens exited the car, entered the building, left briefly to visit a nearby shop, reentered the house, and eventually returned to the car. Once inside, he handed Ludovici a clear plastic bag containing crack cocaine.

Ludovici started to drive Owens back toward their original meeting place. En route, he covertly signaled his support crew. The other officers joined him and took Owens into custody. Thereafter, three of them (including Ludovici) returned to Laura Street.

They walked to the front door of the multi-family dwelling at 103 Laura Street. When they entered the structure, they observed the landlord painting in the stairwell. Ludovici, displaying his badge, inquired whether anyone had recently gone in and out. The landlord pointed to the third-floor apartment.

The officers decided to conduct a "knock and talk," a maneuver in which officers who have not yet secured a warrant go to investigate a suspected crime and determine whether the suspect will cooperate. They knocked on the door of what proved to be the defendant's apartment. The defendant opened the portal, the officers identified themselves, and the defendant invited them in. The defendant was not alone; his girlfriend, two of his children, and a teenage family friend were also inside the residence. A menagerie of reptiles and other animals completed the ensemble.

The front door of the apartment opened into what appeared to be the living room. Dwight Paneto ushered the officers into a side room, where Ludovici noticed a $20 bill on a coffee table. He immediately believed this to be the marked bill that he had given Owens to fund the drug buy and said as much. He bent to pick it up, confirmed the presence of the mark, and seized it. He proceeded to arrest Paneto and then administer *Miranda* warnings. Paneto executed a consent to search and cocaine and weapons were found inside the apartment.

Paneto argued that both the consent to search and the fruits of the search itself were tainted by Ludovici's earlier manipulation of the $20 bill.

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

"A police officer, even though he does not have a search warrant, may seize an object in plain view as long as he has lawfully reached the vantage point from which he sees the object, has probable cause to support his seizure of that object, and has a right of access to the object itself. *United States v.Sanchez*, 612 F.3d 1, 4-5 (1st Cir. 2010). A challenge to a search of an object in plain view calls for a slightly different analytic rubric. When an officer seeks to manipulate an object in plain sight, the relevant inquiry becomes whether the 'plain view' doctrine would have sustained a seizure of the object itself. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

"In this case, the object in question—the $20 bill—was visible to the naked eye during a lawful entry into the premises. Thus, Ludovici's handling of the bill satisfies the first prong of the plain view test. His actions also satisfy the third prong of the test; the bill was out in the open, and his access to it was unrestricted. The decisive requirement, then, is the second prong: whether he had probable cause to manipulate the object. In general terms, probable cause exists when police have sufficient reason to believe that they have come across evidence of a crime. *Texas v. Brown,* 460 U.S. 730, 742 (1983); *United States v. Curzi,* 867 F.2d 36, 45 (1st Cir. 1989). In the 'plain view' context, this means that probable cause exists when the incriminating character of the object is immediately apparent to the police. *Sanchez*, 612 F.3d at 5. The officer need not be certain of the incriminating character of an object, but, rather, must have a belief based on a 'practical, nontechnical probability' that the object is evidence of a crime. *United States v. Giannetta,* 909 F.2d 571, 579 (1st Cir. 1990).

"The probable cause standard was satisfied here. Even if we assume, favorably to the defendant, that Ludovici's lifting of the bill to eye level constituted a search, he had probable cause to handle the bill. We explain briefly. Ludovici immediately identified the bill as his marked money before lifting it up. This was confirmed by another officer on the scene, a defense witness, and the defendant himself. In addition, Ludovici knew that Owens had gone into the apartment and returned with drugs; that Owens had identified his source by an initial—'D'—which corresponded to the defendant's first name; that the defendant, when opening the door, had referred to himself as 'D'; and that the clearly visible denomination of the bill matched the denomination of the 'bait' bill that he had given to Owens. Moreover, the $20 bill spied by Ludovici stood out; there is no evidence that any other currency was in sight. The fact that people usually keep bills of large denominations—such as a $20 bill—in wallets or purses, not simply lying around, adds to the reasonableness of Ludovici's belief. These facts, taken in the aggregate, gave rise to a reasonable degree of probability that the $20 bill, which Ludovici spied on the coffee table, was evidence of the crime to which Ludovici had just been privy. Its seizure was therefore lawful; the defendant's consent to the ensuing search was untainted; and the fruits of that search were not subject to suppression."

SEARCH AND SEIZURE:
Search Warrants; Knock and Announce

United States v. Garcia-Hernandez
CA1, No. 10-2146, 10/12/11

In February of 2009, a confidential informant furnished information to law enforcement officers in Manchester, New Hampshire, that led to the unmasking of a massive drug-trafficking operation. The enterprise had long tentacles, reaching out to a myriad of suppliers, couriers, wholesalers, and street-level dealers.

An intensive investigation ensued. In due course, task force agents apprehended Renaury Ramirez-Garcia (Ramirez) while he was endeavoring to purchase ten kilograms of cocaine from an undercover officer. Ramirez admitted that he and Juan Garcia-Hernandez were partners in what amounted to a franchise of the larger drug-trafficking ring. According to Ramirez, Garcia-Hernandez's principal responsibilities were the procurement of cocaine from sources higher up the chain of command and the transportation of the acquired contraband to New Hampshire. The sources of supply were located as far away as Mexico, Florida, and Texas. From that point forward, Ramirez oversaw the distribution of the drugs in the Northeast.

After Ramirez told the agents that the local franchise was expecting a fifty-kilogram cocaine delivery in mid-April, they enlisted Ramirez's paramour, Nicole Kalantzis, to assist in the probe. In the course of meetings and telephone calls with Kalantzis, Garcia-Hernandez indicated that he expected the delivery of cocaine to occur on April 12. He also stated that Kalantzis could get a portion of the shipment to sell to Ramirez's customers.

To that end, Garcia-Hernandez and his girlfriend gave Kalantzis specific instructions on how to manage distribution of the drugs in Ramirez's absence.

Armed with this intelligence, the agents obtained a warrant to search the residence of Garcia-Hernandez. They planned to execute the warrant on April 12. On that morning — Easter Sunday — the officers sent Kalantzis into the house to confirm that the shipment had arrived. When Kalantzis left the house with a suitcase containing 15 kilograms of cocaine, the agents executed the search warrant.

The manner in which the authorities executed the warrant is, for present purposes, of particular pertinence. One officer drove an armored vehicle onto the lawn and parked in front of a picture window. Another breached the front door with a battering ram. Others detonated noise-flash devices, causing windows in the residence to shatter. The main body of searchers, several carrying assault rifles, stormed into the residence.

All in all, 18 officers and a dog participated in the mission. Inside the home, they found eight adults (including the defendant) and three children. The search yielded drug paraphernalia, multiple cell phones, small quantities of cocaine and marijuana, and approximately $58,000 in cash.

Garcia-Hernandez's Cadillac was parked outside the residence. The police obtained an additional search warrant for it. That ancillary search recovered 30 kilograms of cocaine stowed in garbage bags in the vehicle's trunk. Garcia-Hernandez was arrested and eventually charged with distribution of, and conspiracy to distribute, in excess of five kilograms of cocaine. See 21 U.S.C. §§ 841(a)(1), 846. He moved to suppress the seized evidence on the ground that the search party had violated the knock-and-announce rule by failing to alert the occupants prior to forcing entry into the dwelling.

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

"The issue in this case hinges on whether the Supreme Court's decision in *Hudson v. Michigan*, 547 U.S. 586 (2006), establishes categorically that exclusion of seized evidence is not available as a remedy for violations of the knock and announce rule. Garcia-Hernandez contends the manner in which the officers executed the search warrant—his words, a "military assault—was so egregious as to demand exclusion of the fruits of the search.

"The argument for suppression is anchored in a perceived violation of the knock-and-announce rule. That rule 'requires law enforcement officers to knock and announce their presence and authority prior to effecting a non-consensual entry into a dwelling.'" *United States v. Pelletier*, 469 F.3d 194, 198 (1st Cir. 2006).

"The rule, however, is not absolute. It is well established that, in certain circumstances, officers executing a search warrant may be justified in declining to knock and announce their presence. For instance, a failure will not violate the rule when officers 'have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective

investigation of the crime by, for example, allowing the destruction of evidence.' *Richards v. Wisconsin*, 520 U.S. 385 (1997).

"The parties joust over whether the no-knock entry into the defendant's abode violated the rule. The defendant argues that officers had no reason to believe that he presented any danger, as was made manifest by the dispatch of the unarmed informant into the house. The government counters that a no-knock entry was justified by the exigencies of the situation. We need not sort out the parties' conflicting positions about whether the entry into the defendant's home transgressed the knock-and-announce rule. Assuming for the sake of argument that it did, suppression is not an available remedy.

"The key precedent is *Hudson*. There, the Supreme Court squarely addressed whether a violation of the knock-and-announce rule might justify the exclusion of evidence seized. Noting that exclusion of evidence has always been a last resort, not a first impulse the Court held the exclusionary rule inapplicable to knock-and-announce violations. To be sure, the circumstances of this case differ from *Hudson*, where officers knocked first, then waited three to five seconds before entering the defendant's home in an unremarkable manner. The defendant strives to persuade us that the *Hudson* analysis is different in this case because police officers should be discouraged from employing such aggressive and violent tactics when executing domestic search warrants.

"Although this issue is new to this court, we do not write on a pristine page. Two other courts of appeals have indicated that a no-knock entry, even when accompanied by significant force, cannot justify the exclusion of evidence seized. See *United States v. Ankeny*, 502 F.3d 829, 833, 835-38 (9th Cir. 2007) (holding that defendant could not suppress evidence seized in an aggressive search that caused him physical injury and property damage); see also *United States v. Watson*, 558 F.3d 702, 704-05 (7th Cir. 2009) (holding, by analogy to knock-and-announce cases, that use of excessive force to search a car could not justify exclusion). We join these other courts in concluding that the holding in Hudson is categorical and that the amount of force used in effecting a no knock entry does not alter that reality."

Editor's Note: The Arkansas Supreme Court has not addressed this issue but in a couple of occasions when discussing this issue indicated that the exclusion of seized evidence might be the proper remedy for failure to knock and announce.

SEARCH AND SEIZURE:
Stop and Frisk;
Pat Down Locating Hard Object

United States v. Richardson,
CA7, No. 11-1205, 9/2/11

LaPorte County Deputy Dallas Smythe stopped Jake Richardson for driving 80 miles per hour in a 55 miles-per hour zone. Because Richardson and his passenger were behaving oddly, Deputy Smythe had his canine partner, Marko, conduct a free-air search of the vehicle. Marko alerted on both sides of the vehicle, so Deputy Smythe asked Richardson for consent to search the car, which Richardson granted. Before searching the car, Deputy Smythe performed a protective pat-down of Richardson's person.

During the pat-down, Deputy Smythe felt a hard object in Richardson's left pants pocket. When he removed the object, he saw that it was a bundle of paper currency. Continuing the pat-down, Deputy Smythe felt a hard object in Richardson's right pants pocket, and Richardson immediately tried to pull away from the officer. When Deputy Smythe removed the object, he saw it was a packet containing an off-white, rocky substance.

After Deputy Smythe had looked at the object, he asked Richardson what it was, and Richardson responded, "You know what it is." Deputy Smythe also asked why Richardson's shirt smelled like marijuana, and Richardson responded that he had been with people who were smoking marijuana. Deputy Smythe arrested and handcuffed Richardson without further question.

While being handcuffed, Richardson said that he could get more cocaine and marijuana and that he "would do anything to make this go away." He said he could get significant amounts of cocaine, and as proof he reported his involvement in an aborted cocaine transaction in Merrillville, Indiana. Deputy Smythe asked Richardson if he wanted to speak with someone. Richardson said he did, so Deputy Smythe called Sergeant Timothy Shortt.

While waiting for Sergeant Shortt, Richardson sat in the back of a squad car, with Deputy Lowell Boswell standing outside. Richardson repeatedly asked Deputy Boswell to open the door and talk to him. When Deputy Boswell entered the car to escape the cold, Richardson told him that he could get a lot of cocaine from a mall in Merrillville where people were coming with a U-Haul truck.

After his arrival, Sergeant Shortt approached Richardson in the squad car and asked Richardson how he was doing. Richardson responded, "Are you the guy we're waiting on?" Sergeant Shortt confirmed that he was. Richardson then told him he could buy a large amount of cocaine from someone in Michigan City, Indiana, or from a cocaine-filled U-Haul truck in Merrillville.

Richardson also told Sergeant Shortt he was planning to buy some cocaine next Sunday, and he offered to buy it for the police. After Richardson volunteered this information, Sergeant Shortt asked Richardson where he had gotten the cocaine base found in his pocket. Richardson told him he had gotten it in South Bend, Indiana.

After speaking with Sergeant Shortt, Richardson was taken to LaPorte County Jail for booking. During an inventory search, officers found a small bag of cocaine base in Richardson's sock. From arrest to booking, Richardson received no *Miranda* warnings.

Richardson was charged with possession with intent to distribute more than five grams of cocaine base. Before trial, he moved to suppress the two packets of cocaine base, the bundle of currency, and his post-arrest statements. The district court granted Richardson's motion as to the statements—"You know what it is"; "Are you the guy we're waiting on?"; and "South Bend"—he had made in direct response to Deputy Smythe's and Sergeant Shortt's questions, but denied the motion as to everything else. A jury ultimately found Richardson guilty. He was sentenced to 236 months' imprisonment, based in part on his 24 prior convictions, his career offender status, and the fact that he had

interacted with the criminal justice system every year of his life from age 12 to age 43—his age at sentencing.

Richardson appealed his conviction, arguing that the district court should have suppressed the physical evidence. While there were several issues in this case, the Court of Appeals for the Seventh Circuit first discussed the pat down of Richardson, finding, in part, as follows:

"Richardson correctly focuses his arguments on whether Deputy Smythe lawfully inspected the cocaine base in Richardson's pocket during the protective pat-down. Richardson does not dispute that Deputy Smythe lawfully initiated a stop and pat-down of Richardson's person. See *Terry v. Ohio,* 392 U.S. 1 (1968). Rather, he claims Deputy Smythe's pat-down became an impermissible exploratory search when Deputy Smythe removed the cocaine base from Richardson's right pants pocket and inspected it. Richardson's argument misapplies *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Richardson focuses on *Dickerson*'s pronouncement that an officer cannot go beyond a protective pat-down to manipulate an object concealed in a pocket unless 'the incriminating character of the object is immediately apparent.' 508 U.S. at 379. But that restriction does not apply until the officer concludes that the object at issue is not a weapon. *Dickerson,* 508 U.S. at 378; see *United States v. Muhammad,* 604 F.3d 1022, 1026-27 (8th Cir. 2010) (seizure and inspection of object not unlawful under *Dickerson* because officer was uncertain whether object was a weapon).

"Deputy Smythe testified that, after the protective pat-down, he wasn't sure what the object was. It was just an unfamiliar lump, a hard lump. Based on this testimony, the district court found Deputy Smythe was unsure whether the hard object in Richardson's pocket was a weapon. That finding was not clearly erroneous. See *United States v. Swann,* 149 F.3d 271, 275 (4th Cir. 1998) (deferring to district court's finding that the officer had not determined whether the object was a weapon when testimony was 'entirely ambiguous' as to whether the officer 'suspected or did not suspect a weapon').

"Richardson could have—but did not—argue that Deputy Smythe could not have reasonably suspected the object in Richardson's pocket was a weapon. See *United States v. Brown,* 188 F.3d 860, 866 (7th Cir. 1999). The test for reasonable suspicion is an objective one. *United States v. Robinson*, 615 F.3d 804, 807-08 (7th Cir. 2010). But Richardson disputes only whether Deputy Smythe actually believed the object was a weapon—an issue irrelevant to reasonable suspicion, see *Brown,* 188 F.3d at 866—and does not dispute that a reasonable officer in Deputy Smythe's position would have been 'warranted in the belief that his safety or that of others was in danger.' *Terry,* 392 U.S. at 27.

"Even if Richardson had argued that Deputy Smythe could not have had reasonable suspicion, his argument likely would have failed. Courts, including ours, have concluded that an officer who encounters a small, hard object during a pat-down may have reasonable suspicion to believe the object is a weapon. See, e.g., *United States v. Holmes*, 385 F.3d 786, 790-91 (D.C. Cir. 2004) (officer could reasonably suspect small digital scale in jacket pocket was a weapon); *Brown,* 188 F.3d at 865-66 (officer could reasonably suspect hard object smaller than a ping-pong ball in

suspect's groin area was a weapon). In close cases, we have taken the same approach that a field officer likely takes during a protective pat-down: 'Better safe than sorry.' See *Brown*, 188 F.3d at 866.

"Richardson has not shown that the district court erred by admitting the physical evidence found on Richardson's person."

Accordingly, the Court of Appeals for the Seventh Circuit affirmed his conviction.

SEARCH AND SEIZURE:
Search Warrants; Preference for Warrants

State of New Mexico v. Trujillo,
No. 32,324, 10/27/11

In *State of New Mexico v. Trujillo,* the New Mexico Supreme Court stated that in *State v. Williamson*, 2009-NMSC-039, 148 N.M. 488, 212 P.3d 376, they had advised district court judges reviewing search warrants after the fact to defer to the judgment and reasonable inferences of the judge who issued the warrant "if the affidavit provides a substantial basis to support a finding of probable cause." In this case, the Court reviewed an order suppressing evidence obtained pursuant to a search warrant, and "once again" the Court emphasized that "a reviewing court should not substitute its judgment for that of the issuing court." Based on the affidavit of the warrant that belies this case, the issuing judge found probable cause and issued the warrant. After the search was conducted and evidence was collected, Defendant Jerry Trujillo moved to suppress the evidence collected. The motion was based on a lack of an express nexus between the criminal activity described in the affidavit and the actual address that was searched. While the narrative contained references to "an address" or "the residence" or "the Trujillo home," at no point did the affidavit explicitly state that the residence and the address weren't one and the same place. Defendant therefore claimed the search violated his constitutional rights. A second district judge (reviewing judge) granted Defendant's motion and suppressed all of the evidence obtained in the search, and the Court of Appeals affirmed. The Supreme Court granted certiorari and reversed the appellate court. "Here the Court sustained the search because some deference is due the decision of the issuing judge and because, in accordance with sound policy, close cases in this area are to be decided in favor of our pronounced preference for warrants."

SEARCH AND SEIZURE:
Stop and Frisk; Stop of Pedestrian; Warrant Check

United States v. Burleson,
CA10, No. 10-2060, 9/12/11

Carl Roy Burleson and two companions were stopped by Roswell, New Mexico, Police Officer Jeff Kuepfer because they were walking in the middle of the street and because they were carrying an unleashed dog, which aroused the officer's suspicions. After telling the three individuals that they were not permitted to walk in the street and satisfying himself that the dog was not stolen, the officer asked the individuals for their names and requested a warrants check on each of them. Police dispatch informed the officer that Burleson had an outstanding warrant, and during the ensuing arrest, the officer found two handguns and ammunition

on Burleson. In the district court, Burleson moved to suppress evidence of the handguns and ammunition as fruit of an unlawful seizure under the Fourth Amendment. The district court granted the motion, concluding that at the time the officer obtained Burleson's identity and requested the warrants check, the officer had already completed the purposes of the detention and thus he had no lawful basis to further detain him.

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

"The Fourth Amendment protects citizens from 'unreasonable searches and seizures' by government officials. *U.S. Const. amend. IV*. 'One type of seizure is an investigatory stop,' *United States v. Simpson*, 609 F.3d 1140, 1146 (10th Cir. 2010), in which 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest,' *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Under *Terry,* an investigatory stop must be reasonably related in scope to the circumstances which justified the interference in the first place.

"In order to satisfy this requirement, the ensuing detention 'must not exceed the reasonable duration required to complete the purpose of the stop.' *United States v. Rice*, 483 F.3d 1079, 1082 (10th Cir. 2007). Accordingly, in the context of an investigatory stop of a motorist, once an officer returns the driver's license and registration, the traffic stop has ended and questioning must cease; at that point, the driver must be free to leave. *United States v. Villa,* 589 F.3d 1334, 1339 (10th Cir. 2009). The detention cannot be continued beyond this point unless the driver consents to further questioning or the officer has reasonable suspicion to believe other criminal activity is afoot. *Rice*, 483 F.3d at 1083-84. Even a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment. See *United States v. Lopez,* 443 F.3d 1280, 1285 (10th Cir. 2006) ('The Supreme Court has also made clear that an individual may not be detained even momentarily without reasonable, objective grounds for doing so.(quoting *Florida v. Royer*, 460 U.S. 491, 498 (1983)).

"However, it is well-settled in the traffic-stop context that while an investigative detention is ongoing, a police officer may obtain an individual's name and check that name for outstanding warrants. A law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. In *United States v. Villagrana-Flores,* 467 F.3d 1268 (10th Cifr. 2006) this Court applied these principles to the context of an investigatory stop of a pedestrian. We first observed that it is well-established that an officer may ask a suspect to identify himself in the course of a *Terry* stop. This is because obtaining a detainee's identity serves important government interests such as informing the officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.

"An identity's utility in informing an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder, would be non-existent without the ability to use the identity to run a criminal background check. Accordingly, we held that Villagrana-Flores's Fourth Amendment

rights were neither violated when his identity was obtained during a valid Terry stop nor when his identity was shortly thereafter used to run a warrants check In sum, we concluded in *Villagrana-Flores* that the same rationale that underlies our conclusion as to the permissibility of warrants checks in the motorist context applies with equal force in the pedestrian context."

SEARCH OF SEIZURE:
Stop of Vehicle; 911 Call
City of Dickinson v. Hewson
No. 20110018, 9/5/11

In August 2010, Rodney Hewson called 911 sometime after midnight to report that his wife, Lola Hewson, had left their residence after he had tried to prevent her from leaving. Rodney Hewson told the dispatcher that Defendant had been drinking "big time," was intoxicated, and had nearly hit him with her vehicle as she backed up to leave. Rodney Hewson told the dispatcher that they had better catch her before she kills herself or someone else. On the way to Rodney Hewson's residence, a City police officer saw a red Oldsmobile as described by Rodney Hewson to the emergency dispatcher. The officer proceeded to follow the vehicle until he was close enough to read the license plate. The officer relayed the plate number to dispatch and received information that the vehicle was registered to a "Lola" with a different last name, but with the same address provided by dispatch. The officer then initiated a traffic stop.

Hewson was subsequently arrested and charged with driving under the influence of alcohol. Before trial, Hewson moved the district court to suppress the evidence from the traffic stop, arguing the stop violated her constitutional rights. After a hearing, the court granted Lola Hewson's motion to suppress, concluding the officer's stop was not justified under the circumstances.

Upon review, the North Dakota Supreme Court concluded that the officer did have a reasonable and articulable suspicion to stop Hewson's vehicle, and the Court reversed and remanded the case for further proceedings.

SECOND AMENDMENT: **Drug Users**
United States v. Dugan
No. 08-10579, 9/20/11

Kevin Dugan illegally grew and sold marijuana. He also smoked marijuana regularly. When police officers responded to a report of domestic violence at his home one afternoon, they discovered his marijuana operation and arrested Dugan. Because Dugan also had a business of dealing in firearms, a jury convicted him of, among other things, shipping and receiving firearms through interstate commerce while using a controlled substance. Dugan challenged this conviction stating that it violated his Second Amendment rights.

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

"We see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so. Habitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are

under the influence of controlled substances. Moreover, unlike people who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse. The restriction in the federal statute under which he was convicted is far less onerous than those affecting felons and the mentally ill. Because Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, we conclude that Congress may also prohibit illegal drug users from possessing firearms."

SECOND AMENDMENT: **Assault Weapons; Large Capacity Magazines**

Heller v. District of Columbia,
DCC, No. 10-7036, 10/4/11

In *Heller v. District of Columbia*, the plaintiffs challenged, both facially and as applied to them, the provisions of the District's gun laws, new and old, requiring the registration of firearms and prohibiting both the registration of "assault weapons" and the possession of magazines with a capacity of more than ten rounds of ammunition. Plaintiffs argued those provisions were not within the District's congressionally delegated legislative authority or, if they were, then they violated the Second Amendment.

The court held that the District had authority under D.C. law to promulgate the challenged gun laws, and the court upheld as constitutional the prohibitions of assault weapons and of large-capacity magazines and some of the registration requirements. The court remanded the other registration requirements to the district court for further proceedings because the record was insufficient to inform the court's resolution of the important constitutional issues presented.

SURVEILLANCE CAMERAS: **Videotape Evidence**

People v. Taylor, (Illinois Supreme Court),
No. 2011 Ill. 110067, 10/6/11

In this case, the principal issue is whether under the so called "silent witness" theory, a videotape recording, was properly admitted at defendant's trial.

The Illinois Supreme Court stated that historically, photographic evidence was admitted as demonstrative evidence. See Tracy Bateman Farrell, *Construction and Application of Silent Witness Theory*, 116 A.L.R.5th 373, 373 (2004). Such evidence had no significance apart from the ability to illustrate something testified to by a witness. Jordan S. Gruber, *Videotape Evidence*, in 44 Am. Jur. Trials 171, § 45, at 267 (1992). Most jurisdictions now allow photographs and videotapes to be introduced as substantive evidence so long as a proper foundation is laid. Such evidence is generally admitted under the "silent witness" theory. Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence,* in 16 Am. Jur. Proof of Facts 3d 493, § 4, at 507 (1992).

Under this theory, a witness need not testify to the accuracy of the image depicted in the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation. In such a case, the evidence is received as a so-called silent witness or as

a witness that speaks for itself. The silent witness theory was originally utilized in Illinois and elsewhere in connection with the admissibility of X rays. See *Stevens v. Illinois Central R.R. Co.*, 306 Ill. 370, 375 (1922). The majority of cases now involve automatic cameras or surveillance systems where videotapes, CDs or DVDs are made from the system and sought to be admitted.

In determining whether a proper foundation had been laid for the admission of the VHS tape: (1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process are factors to be considered in determining the admissibility of videotapes.

This list of factors is nonexclusive. Each case must be evaluated on its own and depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered. The dispositive issue in every case is the accuracy and reliability of the process that produced the recording.

USE OF FORCE: **Castle Doctrine**

Barnes v. State of Indiana,
No. 82505-1007-CR-343, 9/20/11

A jury found Richard Barnes guilty of battery on a police officer and resisting arrest. The Indiana Supreme Court affirmed Barnes's conviction. Subsequently, Barnes petitioned for rehearing, which the Indiana Supreme Court granted. At issue in the appeal was whether the trial court erred when it refused to instruct the jury that Barnes, a suspected spouse abuser, had the right to get physical with the police officers if he believed their attempt to enter his residence was legally unjustified.

The Court continued to affirm Barnes's conviction, holding that the "Castle Doctrine," which authorizes a person to use reasonable force against another person to prevent the unlawful entry of his dwelling, is not a defense to the crime of battery or other violent acts on a police officer.