UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

CJI Legal Briefs

Volume 21, Issue 3 **Spring 2017**

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

Edited by Don Kidd

Contents

FOLLOW US ONLINE:

CIVIL RIGHTS: Informants; Duty to Protect

Nelson v. City of Madison Heights
CA6, No. 15-2441, 1/9/17

Shelly Hilliard, age 19, was a prostitute staying at a Madison Heights, Michigan Motel 6 while Officer Chad Wolowiec was conducting a narcotics investigation. Wolowiec saw a bag of marijuana through Hilliard's open window. Wolowiec and Officer David Koehler initiated a "knock and talk." Hilliard consented to the officers entering her room. Hilliard asked whether she could "work off" the possession charge. Hilliard called her drug dealer, Qasin Raqib, and ordered drugs. Wolowiec planned to have officers intercept Raqib before he arrived. Hilliard signed a confidential informant form, which provided that the "*Department will use all reasonable means to protect your identity; however, this cannot be guaranteed.*" Wolowiec asked Hilliard whether she was afraid that Raqib would hurt her. She responded "No." Wolowiec nonetheless removed her from the hotel.

Koehler made a traffic stop and conducted a canine search of Raqib's car. Wolowiec later told Raqib's passenger, Marquite Clark, that he had ordered the drugs. Wolowiec testified that he did not think this would reveal Hilliard as the informant. After the arrests, Wolowiec told Hilliard that Raqib and Clark believed she had set them up. Clark later testified that Wolowiec told her that Hilliard set up Raqib and that she relayed the information to Raqib. Raqib stated

that Clark told him that Hilliard informed on him. Days later, Raqib and an accomplice, James Matthews, murdered Hilliard. Hilliard's mother filed suit under 42 U.S.C. 1983.

The Sixth Circuit affirmed denial of summary judgment of qualified immunity, stating (in part) as follows:

"We must view the evidence in the light most favorable to Nelson. Doing so requires the conclusion that Officer Wolowiec acted with deliberate indifference when he disclosed Hilliard's identity. The evidence shows that neither he nor Hilliard knew much about Raqib other than he was a drug dealer. The evidence also reflects that Officer Wolowiec believed that Raqib could be dangerous because he removed Hilliard from the room in case Raqib showed up. The evidence shows no necessity for Officer Wolowiec to disclose Hilliard's identity during the thirty-minute window between the traffic stop and the disclosure of Hilliard's identity to Clark. Thus, a reasonable jury could find that Officer Wolowiec acted with deliberate indifference when he told Raqib's companion that Hilliard set up Raqib. Accordingly, the district court properly denied Officer Wolowiec's summary judgment motion because a reasonable jury could find that, under the state created danger theory of liability, he engaged in affirmative acts that increased Hilliard's risk of exposure to private acts of violence, which deprived Hilliard of her clearly established Due Process right to personal security and bodily integrity."

CIVIL RIGHTS: Shooting of Dogs During Execution of a Search Warrant

Brown v. Battle Creek Police Department
CA6, No.16-1575, 12/19/16

The Battle Creek Police Department obtained a warrant to search a residence, based on evidence from a trash pull and from a confidential informant. The Emergency Response Team was involved due to the subject's (Vincent Jones) criminal history, gang affiliations, possession of firearms, and possible possession of cocaine and heroin. Vincent Jones and Mark Brown were detained outside the residence.

Officer Klein testified that, approaching the door, he could see dogs barking aggressively and "jumping." The dogs, owned by Brown, were pit bulls, weighing about 97 pounds and 53 pounds. Klein testified that he "did not feel the officers could safely clear the basement with those dogs down there." The officers shot and killed the dogs. Brown sued under 42 U.S.C. 1983, alleging unconstitutional seizure of the dogs, unreasonable forced entry, and that the city was liable under *Monell* because the Department failed to provide training to address the known risk of constitutional violations arising from dog shootings.

The court dismissed, finding no genuine issue of material fact on the Fourth Amendment claims or that an inadequate training policy caused the alleged constitutional violations. The Sixth Circuit affirmed, agreeing that the officers acted

reasonably and that there was no history of "needless killing of animals in the course of searches in Battle Creek."

CIVIL RIGHTS:
Shooting of Erratic Acting Individual

Hughes v. Kisela
CA9, No. 14-15059, 11/28/16

After receiving a report of a person hacking at a tree with a knife, police officers responded to the scene and upon their arrival saw Amy Hughes carrying a large kitchen knife. Hughes began walking toward another woman and did not comply with the officers' demands to drop the knife. Unable to approach the two women because of a chain-link fence, Corporal Andrew Kisela shot Hughes four times.

The Court of Appeals for the Ninth Circuit held that material questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means were plainly in dispute. Kisela, therefore, was not entitled to summary judgment with respect to the reasonableness of his actions.

The panel further held that Kisela was not entitled to qualified immunity. The panel determined that the facts, viewed in Hughes' favor, presented the police shooting a woman who was committing no crime and holding a kitchen knife. While the woman with the knife may have been acting erratically, was approaching a third party, and did not immediately comply with orders to drop the knife, a rational jury—accepting the facts in the light most favorable to plaintiff —could find that she had a constitutional right to walk down her driveway holding a knife without being shot.

CIVIL LIABILITY: Qualified Immunity; Clearly Established Law

White v Pauley, USSC, No. 16-67, 1/9/17

Two women called 911 to report Daniel Pauley as a "drunk driver" on a highway near Santa Fe, then followed Daniel with their bright lights on. Daniel, feeling threatened, pulled over at an off-ramp to confront them. After a nonviolent encounter, Daniel drove to a secluded house where he lived with his brother, Samuel. Officer Kevin Truesdale interviewed the women at the off-ramp and obtained Daniel's license plate number. The dispatcher identified the brothers' address.

Truesdale was joined by Officers Ray White and Michael Mariscal. The three agreed there was insufficient probable cause for arrest, but decided to speak with Daniel. White remained behind in case Daniel returned. Truesdale and Mariscal drove separately, less than a half mile, to the address, without flashing lights. They approached the house in a covert manner, found Daniel's pickup truck, and spotted two men moving inside the residence. They radioed White, who left the off-ramp to join them.

At approximately 11 p.m., the brothers became aware of their presence and

yelled, "Who are you?" and "What do you want?" Mariscal and Truesdale laughed and responded: "Hey, (expletive), we got you surrounded. Come out or we're coming in." Truesdale shouted: "Open the door, State Police, open the door." Mariscal yelled: "Open the door, open the door." The brothers heard, "We're coming in" and did not hear the officers identify themselves. They armed themselves and yelled, "We have guns."

Truesdale positioned himself behind the house and shouted "'Open the door, come outside.'" White, walking toward the house, heard "We have guns," drew his gun and took cover behind a stone wall. Mariscal took cover behind a truck. Daniel fired two shotgun blasts from the back door while screaming loudly. Seconds later, Samuel opened a window and pointed a handgun in White's direction. Mariscal fired at Samuel but missed. "Four to five seconds" later, White shot and killed Samuel.

In a suit under 42 U.S.C. 1983, the district court denied the officers summary judgment on the defense of qualified immunity. The Tenth Circuit affirmed. The Supreme Court granted certirorari and vacated the judgment, finding as follows:

"Officer White did not violate clearly established law on the record described by the Court of Appeals panel. The Court declined to consider whether a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force because neither lower court addressed that argument. The Court expressed no opinion on whether Truesdale and Mariscal are entitled to qualified immunity.

"The Court stated as to Officers Mariscal and Truesdale, the appellate court held that accepting as true plaintiffs' version of the facts, a reasonable person in the officers' position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White. The panel majority analyzed Officer White's claim separately from the other officers because Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to 'Come out'' or 'We're coming in.' Despite the fact that Officer White arrived late on the scene and heard only 'We have guns' before taking cover behind a stone wall, the majority held that a jury could have concluded that White's use of deadly force was not reasonable. The majority also decided that this rule—that a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm—was clearly established at the time of Samuel's death. The Court of Appeals' ruling relied on general statements from this Court's case law that (1) 'the reasonableness of an officer's use of force depends, in part, on whether the officer was in danger at the precise moment that he used force' and (2) 'if the suspect threatens the officer with a weapon, deadly force may be used if necessary to

prevent escape, and if, where feasible, some warning has been given.' (citing, *Tennessee v. Garner*, 471 U. S. 1 (1985) , and *Graham v. Connor*, 490 U. S. 386 (1989). The court concluded that a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.

"Judge Moritz dissented, contending that the 'majority impermissibly second-guesses' Officer White's quick choice to use deadly force. Judge Moritz explained that the majority also erred by defining the clearly established law at too high a level of generality, in contravention of this Court's precedent. In the dissent, Judge Hartz noted that he was unaware of any clearly established law that suggests that an officer who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall.

"The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham, Garner,* and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers, *United States v. Lanier,* 520 U. S. 259, 271 (1997) , but in the light of pre-existing law the unlawfulness must be apparent, *Anderson v. Creighton,* 483 U.S. 635 (1987). For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case. *Brosseau v. Haugen*, 543 U. S. 194,199 (2004).

"This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that White's conduct—such as his failure to shout a warning—constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that this case presents a unique set of facts and circumstances in light of White's late arrival on the scene. This alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

"On the record described by the Court of Appeals, Officer White did not violate clearly established law. The Court notes, however, that respondents contend Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes

before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force. This Court expresses no position on this potential alternative ground for affirmance, as it appears that neither the District Court nor the Court of Appeals panel addressed it. The Court also expresses no opinion on the question whether this ground was properly preserved or whether—in light of this Court's holding today—Officers Truesdale and Mariscal are entitled to qualified immunity.

"For the foregoing reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is vacated; and the case is remanded for further proceedings consistent with this opinion."

CIVIL LIABILITY: Use of Force; Perspective of a Reasonable Officer on the Scene

Malone v. Hinman, CA8, No. 15-365, 2/17

At approximately 2:00 a.m. on the morning of July 16, 2011, Jacobi Malone, then 18 years old, was walking back to his car parked in the Rivermarket area of downtown Little Rock, Arkansas. Malone approached a crowd of 40 or 50 people near his parked car. In the crowd, Malone saw a former schoolmate in the midst of an escalating disturbance. Malone's former schoolmate pulled out a pistol and pointed it at the crowd. Malone tried to "defuse the situation." He approached the young man with the "intention" to "push the gun down towards the ground," but, unfortunately, the gun discharged. When the gun discharged the first time, Malone's hand was on the young man's arm. The gun then discharged "one or two more times" before Malone "snatched" the gun from the young man. Hearing the gunshots, the crowd scattered. Malone started running, too, with the pistol now in his hand.

Meanwhile, Officer Hinman patrolled downtown Little Rock on his bicycle when he "heard what sounded like a disturbance and saw a large group of approximately forty to fifty people in the parking lot and on the sidewalk in front of the parking lot in the 200 block of East Markham." As Officer Hinman approached the crowd on his bike, he "heard one gunshot fired." Officer Hinman observed that once the first shot was fired, the crowd dispersed in all directions. He subsequently observed Malone fleeing on foot while holding the gun.

Officer Hinman says that he yelled "stop" to Malone but that Malone continued to run. Malone, however, did not hear anyone yell at him to "stop." Malone was experiencing "an adrenaline rush," and he did not "hear anything." Officer Hinman "knew that Malone was running toward where Officer Steve Montgomery and several other individuals were located. Officer Hinman drew his weapon and fired multiple rounds at Malone, striking

Malone in the arm, back, leg, and neck. The bullet that hit Malone in the neck paralyzed him from the chest down. When Officer Hinman fired his gun, Malone was two to three feet from Officer Montgomery.

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

"The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others. See *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985). We judge the reasonableness of an officer's use of force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham*, 490 U.S. at 396, 109 S. Ct. 1865.

"If a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *Garner*, 471 U.S. at 11. But where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Before employing deadly force, an officer should give 'some warning' when it is 'feasible' to do so.

"Viewing the facts in the light most favorable to Malone, he did not pose a threat of serious physical harm to Officer Hinman because he was running away from Officer Hinman. But we conclude that, looking at the circumstances from the perspective of a reasonable officer and taking the disputed facts in Malone's favor, Malone posed a threat of serious physical harm to others. Officer Hinman knew that approximately three gunshots had just been fired in a crowd of 40 to 50 people. He then saw Malone running away with a gun toward Officer Montgomery and others as the crowd dispersed. Officer Hinman instructed Malone to stop, but Malone did not stop because he did not hear Officer Hinman. Malone continued to run toward Officer Montgomery. The record shows that Malone was two to three feet from Officer Montgomery at the time that Officer Hinman fired his gun. The entire event occurred within three to ten seconds.

"Like the district court, we recognize the tragic nature of these events: Taking Malone's version as the truth, his good deed in defusing a dangerous argument, coupled with two split-second decisions, resulted in a promising young man's paralysis. Nonetheless, applying the required review standard, we hold that Officer Hinman's use of deadly force was objectively reasonable. Therefore, the district court did not err in granting Officer Hinman's motion for summary judgment based on qualified immunity on Malone's excessive-force claim."

DRIVING WHILE INTOXICATED:
Probable Cause;
Failure to Submit to a Chemical Test

Lockhart v. State
ASC, CR-14-990, 2017 Ark. 13, 1/26/17

Edward Lockhart was convicted of driving while intoxicated, his sixth conviction for this offense, and failure to submit to a chemical test. He now asserts a number of arguments in this appeal.

In the early morning in November 2013, Officer Troy White observed a car driving ten miles under the speed limit on Highway 5 in Bryant. Officer White testified that, after following the car for some time, he saw the car weaving and crossing the centerline a number of times. Officer White then turned on his patrol car's blue lights and pulled the car over.

Edward Lockhart was the car's driver. Officer White approached the car and smelled a strong odor of alcohol. Lockhart asked if he could step out of the car, and Officer White agreed. After Lockhart exited his car, Officer White saw "a little stagger to his walk." At one point, Lockhart asked where he was stopped. Officer White answered that he was in Bryant. Lockhart said he lived just up the road in Bryant, but Officer White later determined that Lockhart actually lived on 24th Street in Little Rock, at least a twenty-five-minute drive away.

Officer White also performed three field-sobriety tests. The first test, the horizontal gaze nystagmus, yielded no conclusion. The second test, the one-leg stand, Lockhart barely completed, and this test, too, yielded no conclusion. Lockhart indicated that he could not complete this test due to a military-related injury. The final test, the field breathalyzer, yielded no conclusion because Lockhart refused to submit. Based on all the foregoing, Officer White arrested Lockhart and took him to the station.

At the station, Officer White again attempted to have Lockhart complete a breathalyzer test. Before attempting this, Officer White read Lockhart a statement-of-rights form regarding the driving-while-intoxicated laws. Officer White asked Lockhart if he understood these rights and whether he would consent to the test. Lockhart said that he did not understand and would not take the test. Lockhart also asked to speak with his attorney. Officer White refused, telling Lockhart that he had no right to an attorney before taking the machine-breathalyzer test. Lockhart ultimately refused to take this test as well.

Lockhart's first argument on appeal is that substantial evidence does not support either conviction. First, he asserts that no evidence was ever admitted to show that his motor skills were impaired. Second, he argus that his failure to submit should have been dismissed because the police officer never informed him that he had no right to counsel when deciding to take the machine-breathalyzer test.

Upon appeal, the Court found, in part, as follows:

"In reviewing a challenge to the sufficiency of the evidence, this court determines whether the verdict is supported by substantial evidence, direct or circumstantial. We have recognized that refusal to submit to a chemical test can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt, and that such evidence possesses independent relevance bearing on the issue of intoxication. *Medlock v. State*, 332 Ark. 106, 109, 964 S.W.2d 196, 198 (1998). In addition, the observations of police officers regarding the smell of alcohol constitutes competent evidence on the issue of intoxication. See *Johnson v. State*, 337 Ark. 196, 202, 987 S.W.2d 694, 698 (1999). Further, opinion testimony regarding intoxication is admissible. *Mace v. State*, 328 Ark. 536, 540, 944 S.W.2d 830, 833 (1997).

"Viewing the evidence in the light most favorable to the State, we hold that the evidence was sufficient to support the jury's verdict. Lockhart here manifestly failed to submit to testing twice. This reveals a consciousness of guilt on his part and is independently relevant to prove he was intoxicated. In addition, Officer White testified that after he pulled Lockhart over, Lockhart emitted a strong odor of alcohol and had a stagger to his walk. Lockhart also appeared to be confused about his location and where he actually lived. We therefore affirm Lockhart's conviction for driving while intoxicated because the officer's observations, coupled with Lockhart's refusal to submit to testing and apparent confusion, amount to substantial evidence.

"Lockhart also challenges the sufficiency of the evidence regarding his refusal to submit to a chemical test under Ark. Code Ann. § 5-65-205(a) (Supp. 2013). He points out that he asked for an attorney at the police station when Officer White read him his statement of rights form regarding the driving-while-intoxicated laws. He maintains, in addition, that Officer White should have told him that he, Lockhart, had no right to an attorney at this stage. For support, he directs us to precedent that states 'An accused does not have the right to contact an attorney before taking, or refusing to take, the test.' *Wright v. State*, 288 Ark. 209, 212, 703 S.W.2d 850, 852 (1986). Lockhart maintains that this non-right should be explained to a person before the test is administered. However, this explanation happened in this case. Officer White told Lockhart that 'you do not have the right to an attorney before this test.' We therefore affirm the conviction for refusal to submit.

"Lockhart next challenges the traffic stop. He argues that Officer White never obtained probable cause to pull him over before he activated his blue lights. In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Sims v. State*, 356 Ark. 507, 512, 157 S.W.3d 530, 533 (2004). Probable cause is defined as facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable

caution to believe that an offense has been committed by the person suspected.

"Officer White testified that he observed Lockhart's vehicle weaving and crossing the center line a number of times. A video-recording of the moments leading up to and including the stop was also introduced and portrayed the events from Officer White's point of view. While we agree with Lockhart that the video introduced at trial does not clearly show Lockhart's vehicle crossing the centerline, this fact does not destroy probable cause. Officer White testified that he followed White for two and a half miles before activating his blue lights. But the video records only 45 seconds before the blue lights are activated. Officer White's testimony, combined with the video account, established probable cause that Lockhart had violated Ark. Code Ann. § 27-51-301(a) (Supp. 2013), which provides that 'a vehicle shall not be driven upon the left half of the roadway.' The stop was therefore legal, and we affirm the court's denial of the motion to suppress."

EMPLOYMENT LAW: Protected Speech

McGeral v. McCarthy
CA7, No. 16-2365, 3/6/17

Joseph S. McGeral began working as an Orland Park police officer in 2005. Conflict between McGreal and the department arose in 2009, which culminated in McGreal's firing in 2010. McGreal alleges that he was fired because of his exercise of protected speech at a village board meeting on November 2, 2009, concerning a proposal to lay off as many as seven full-time police officers. McGreal, the elected secretary of the local police union, allegedly presented three alternative solutions; he claims the defendants retaliated by accusing, interrogating, and ultimately firing him under the pretext of unsubstantiated violations of department policy. The defendants deny knowing that McGreal even attended the board meeting and claim that McGreal was legitimately fired because of misconduct, including an improper traffic stop; two unauthorized, unnecessary, dangerous high-speed chases; McGreal's behavior at and after an awards banquet; reckless driving while off-duty; and violation of a no-contact order during the ensuing investigation. The defendants allege that McGreal lied during questioning about each of those incidents. An arbitrator and a state court sustained McGreal's termination. McGreal filed suit under 42 U.S.C. 1983.

The Seventh Circuit affirmed dismissal, finding that McGreal offered no admissible evidence supporting his claims for relief. The Court found, in part, as follows:

"McGreal first argues that the defendants violated his First Amendment rights by firing him in retaliation for his speech at the November 2 board meeting. To prevail on this claim, McGreal must show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take retaliatory action.

"Had McGreal made the initial showing that the defendants were aware of his protected speech and that his speech was a motivating factor in his firing, the burden would have shifted to the defendants to provide a legitimate and non-retaliatory explanation for the firing. But because the defendants provided several alternative explanations for McGreal's firing—that he (1) lied under oath during several formal interrogations; (2) committed numerous acts of insubordination; and engaged in reckless conduct while on duty—the burden would have again shifted back to McGreal to show pretext and to survive summary judgment, McGreal must produce evidence upon which a finder of fact could infer that the defendants' proffered reasons are lies. Again, McGreal has failed to meet his burden; he has offered no admissible evidence to show that the defendants' non-retaliatory explanations are anything but true.

"The district court thus did not err in granting the defendants' motion for summary judgment as toMcGreal's First Amendment retaliation claim."

FIRST AMENDMENT:
Interest in Obtaining Cooperation in Investigation Outweighs Speech Rights

Gillis v. Miller
CA6, No. 16-1245 and 16-1249, 1/6/17

During an investigation into alleged misconduct at the Bay County jail, union president Matthew Gillis received complaints that the jail's staff felt intimidated by management's tactics. Gillis worked with Sergeant Fred Walraven to draft a memorandum informing staff of their rights. The memo stated "I am in no way advising you not to cooperate with management, just advising you of your rights. It is your responsibility to ask for the representation."

Sheriff John Miller summoned Gillis the day after Gillis posted the memorandum, asked who wrote it, and declared: "I can have you prosecuted for interfering with an ongoing investigation." The investigation into Walraven began in January with an anonymous note, suggesting that administrators review security camera footage from shifts when Walraven was the supervisor. The footage showed officers playing cards, damaging jail property, conducting outside business, not monitoring security cameras, and other violations of department policy. Walraven was placed on administrative leave. His employment was terminated in April.

An investigation into Gillis began in February. A former inmate alleged that Gillis engaged in a sexual relationship with her during her time in custody and under court supervision. Gillis ultimately admitted involvement and resigned. The district court rejected the officers' First Amendment retaliation claims on summary judgment.

The Sixth Circuit affirmed finding, in part, "Regardless of whether the memorandum was protected speech on matters of public concern, Fillis and Walraven's speech interests were outweighed by defendants'

interest in obtaining compliance from the correctional officers with their investigation."

EXPERT WITNESS TESTIMONY:
Sex Trafficking Rings

United States v. Geddes
CA8, No. 15-3731, 1/3/17

On January 6, 2014, Rahmad Lashad Geddes traveled from Eau Claire, Wisconsin to Duluth, Minnesota with a woman named Grace Schreiner. Schreiner was under the impression that they were traveling to St. Paul, rather than Duluth, to sell drugs as they had done in the past. After a brief sojourn in St. Paul, they drove to Superior, Wisconsin where they checked into a motel and had sex. Thereafter, the pair drove to Duluth, and Geddes picked up cocaine from a supplier.

Throughout the remainder of this trip, Geddes was actively involved in selling cocaine, and Schreiner witnessed Geddes meet another woman to exchange cocaine for two handguns. On January 7, they drove to Rochester, Minnesota to pick up Geddes's friend, Shannon Funk. On the return trip, Funk and Geddes proposed that Schreiner engage in prostitution upon arriving in Duluth. According to Schreiner's trial testimony, she felt she had to comply because she would not be able to return home if she refused.

They checked into another Duluth hotel, and Geddes began cutting the quantity of cocaine he purchased into distribution amounts. Geddes and Funk created an advertisement on a website called Backpage.com with pictures of Schreiner and a telephone number to call, and Funk gave Schreiner a cellular phone on which to receive calls. This process culminated in Schreiner completing two transactions as a prostitute. In the first, she was paid to perform oral sex on one man at the hotel. Although the recipient was told this act would cost $120, he only left $20 on the table in the room. As a result of this discrepancy, Geddes slapped Schreiner four times in the face. The second act consisted of an encounter where a man came to the hotel and paid $20 but then left shortly thereafter without any sexual activity occurring.

Throughout the trip, Geddes refused Schreiner's requests to return home. The two finally returned to Eau Claire on January 14, 2014. Once Geddes left, Schreiner told her pastor what had occurred, and he called the police. Geddes was indicted on three counts: (1) sex trafficking by force, fraud, or coercion in violation of 18 U.S.C. § 1591; (2) transportation to engage in prostitution in violation of 18 U.S.C. § 2421; and (3) being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). A superseding indictment was later returned that was the same as to Counts 1 and 2, but Count 3 was changed to charge Geddes as an armed career criminal in possession of a firearm.

One of the motions Rahmad Geddes filed on appeal was his contention that the district court erred in allowing the prosecution to present expert testimony from Ann Quinn, a special agent with

the Minnesota Bureau of Criminal Apprehension. Agent Quinn is a member of a human trafficking task force, and has done work in this area for roughly fourteen years. At trial, Agent Quinn testified from her training and experience on the operation of sex trafficking rings and the terms used therein.

On this point of appeal, the Eighth Circuit Court found, in part, as follows:

"In *United States v Evans*, CA8, 272 F.3d 1069, (8th Cir. 2001), we dealt with a nearly identical issue and held that the district court did not abuse its discretion in allowing expert testimony 'regarding the operation of a prostitution ring, including recruitment of prostitutes and the relationship between pimps and prostitutes, and regarding jargon used in such rings.' In this case, Agent Quinn testified on the same subject matter we allowed in *Evans*, and she possessed adequate credentials and sufficient factual data on which to base this testimony. As a result, the district court did not abuse its discretion in allowing her testimony."

JURY VERDICT:

Racial Stereotypes or Animus

Peña-Rodriguez v. Colorado
USSC, No. 15-606, 3/6/17

In this case, a Colorado jury convicted Peña-Rodriguez of harassment and unlawful sexual contact. Following the jury's discharge, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward Peña-Rodriguez and his alibi witness. Counsel, with court supervision, obtained affidavits from the two jurors describing H.C.'s biased statements.

The court acknowledged H.C.'s apparent bias but denied a motion for a new trial, stating that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations during an inquiry into the validity of the verdict. The Colorado Supreme Court affirmed, citing Supreme Court precedent rejecting constitutional challenges to the federal no-impeachment.

The United States Supreme Court reversed finding "where a juror makes a clear statement indicating that he relied on racial stereotypes or animus to convict a defendant, the Sixth Amendment requires that the no-impeachment rule give way."

The Court noted that it has previously indicated that the rule may have exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged" and that racial bias, unlike the behavior in previous cases, implicates unique historical, constitutional, and institutional concerns that, unaddressed, threaten systemic injury to the administration of justice. Before the no-impeachment bar can be set aside, there must be a threshold showing that a juror made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of deliberations and verdict. The statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.

MIRANDA:
Juvenile Charged as an Adult

Stover v. State
ASC, No. CR-16-704, 2017 Ark. 67, 3/2/17

On July 6, 2013, Griffin was arrested for robbing and assaulting a female in Fayetteville, Arkansas. At the time of his arrest, Griffin was sixteen years old and in the custody of the Arkansas Department of Human Services (DHS). Griffin was initially transported to the Washington County Juvenile Detention Center but was transferred to the Washington County Detention Center on July 9, 2013, after he was formally charged as an adult with robbery and aggravated assault.

Sergeant Rick Frisby and Detective Matt Ray with the Springdale Police Department interviewed Griffin on July 9, 2013, in connection with an assault of a female in Springdale on June 29, 2013. The officers read Griffin his Miranda rights, and Griffin signed a form indicating that he had waived his rights. During the interview, Griffin admitted entering the female's apartment in Springdale and rubbing her shoulders and legs and tickling her. While he did not rape her, Griffin admitted that before entering the apartment, he had planned to have sex with her. The day after his statement, on July 10, 2013, Griffin was charged as an adult with residential burglary, sexual assault in the second degree, and aggravated assault.

On April 1, 2016, Griffin filed a motion in both cases to suppress his July 9 statement to police, claiming that at the time of the interview, he was in DHS custody and unable to waive his right to counsel pursuant to Arkansas Code Annotated section 9-27-317(g). The State responded and asserted that section 9-27-317(g) was not applicable because Griffin had been charged as an adult.

The circuit court found that all statements made by Griffin to the Springdale Police Department on July 9, 2013, were inadmissible in any prosecution. The State timely appealed the circuit court's order.

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

"The issue presented in this appeal is whether the circuit court erred in its interpretation of Arkansas Code Annotated section 9-27-317(g). We have not previously addressed this particular subsection of the statute, and because this is an issue of first impression involving statutory interpretation that has widespread ramifications, jurisdiction of this appeal is properly in this court.

"Arkansas Code Annotated section 9-27-317 is titled, 'Waiver of right to counsel—Detention of juvenile—Questioning,' and subsection (g) of this statute states that no waiver of the right to counsel shall be accepted when a juvenile is in the custody of the Department of Human Services, including the Division of Youth Services of the Department of Human Services. Because Griffin was in the custody of DHS when he waived his Miranda rights and gave his statement to the Springdale

police, the circuit court found that section 9-27-317(g) barred the State from using Griffin's statement against him, despite the fact that he had been charged as an adult in circuit court for the offenses.

"We agree with the State that the circuit court erred in granting the motion to suppress on this basis. In *Boyd v. State*, 313 Ark. 171, 853 S.W.2d 263 (1993), we interpreted section 9-27-317 and held that the statutory requirement of parental consent to a juvenile's waiver of the right to counsel applies only to proceedings in juvenile court. Because the juvenile in that case was charged as an adult in circuit court, we affirmed the circuit court's denial of the motion to suppress the defendant's confession, stating that when the prosecutor chooses to prosecute a juvenile in circuit court as an adult, the juvenile becomes subject to the procedures and penalties prescribed for adults.

"We reaffirmed this holding in *Ring v. State*, 320 Ark. 128, 894 S.W.2d 944 (1995), wherein the juvenile argued that he had not yet been charged as an adult at the time he gave his confession and that section 9-27-317 therefore applied to him and prevented the admissibility of his confession at a hearing on his motion to transfer his case to juvenile court. Relying on *Boyd*, we held that because the appellant in *Ring* was ultimately charged in circuit court and, upon this court's affirmance of the denial of his motion to transfer, will ultimately be tried there, the failure of the law enforcement officers to obtain the consent of appellant's parents to his waiver of right to counsel, as required by section 9-27-317, does not bar admission of appellant's confession.

"Subsequent to our decisions in *Boyd* and *Ring*, we have continued to hold that the provisions in section 9-27-317 apply only to juvenile-court proceedings. See, e.g., *Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (2004) (affirming denial of motion to suppress based on failure to comply with section 9-27-317(i) where juvenile was charged as an adult); *Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001) (holding that provisions in section 9-27-317 regarding juvenile's right to have a parent present during questioning are limited to juvenile proceedings); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), (stating that requirement of parental consent to juvenile's waiver of rights applies only to juvenile court proceedings); *Sims v. State*, 320 Ark. 528, 900 S.W.2d 508 (1995) (affirming circuit court's denial of motion to suppress even though parents did not consent to waiver of right to counsel where juvenile was ultimately charged and tried in circuit court), overruled on other grounds by *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

"We share the circuit court's concern with protecting a juvenile in Griffin's situation. As Griffin argues, our interpretation of the statute at issue provides incentive for a prosecutor to charge a juvenile in circuit court rather than in the juvenile division when a statement has been taken in violation of the statute. Thus, even though this statute was intended to provide greater protection for juveniles, our interpretation in *Boyd* and subsequent cases has had the opposite

effect. Nonetheless, while we agree that the result may seem egregious, we are bound by the principles of stare decisis to follow the interpretation of section 9-27-317 that we set out in the *Boyd* line of cases. We note that the legislature has had ample opportunity during this time to extend the rights contained in section 9-27-317 to adult proceedings, but it has chosen not to do so. *Ray*, supra. It is well settled that an interpretation of a statute by this court subsequently becomes a part of the statute itself. *Corn v. Farmers Ins. Co.*, 2013 Ark. 444, 430 S.W.3d 655. The legislature is presumed to be familiar with this court's interpretation of a statute, and if it disagrees with that interpretation, it can amend the statute. Without such an amendment, however, our interpretation remains the law. Accordingly, we must regrettably decline Griffin's invitation to overrule our prior cases."

Accordingly, the circuit court erred in granting Griffin's motion to suppress his statement to police, and the Arkansas Supreme Course reversed the decision.

SEARCH AND SEIZURE:
Abandoned Property

United States v. Juszczyk
CA10, No. 15-3323, 1/2/17

The property at issue in this case was a backpack owned by defendant Juszczyk, who was repairing his motorcycle in the backyard of Tina Giger. A concerned neighbor contacted police, who came to investigate. When they did, Juszczyk threw the backpack onto Giger's roof, where the backpack was later retrieved by police and searched. Methamphetamine, a firearm, and documents bearing Juszczyk's name were found inside.

The issue this case presented for the Tenth Circuit's review was whether Juszczyk lacked an objectively reasonable expectation of privacy after throwing his backpack onto the roof. The Court concluded that any expectation of privacy was not objectively reasonable; as a result, Juszczyk abandoned the backpack and the search was lawful.

SEARCH AND SEIZURE:
Affidavit; Informant Information

Haley v. State
ACA, No. CR-16-610,
2017 Ark. App. 18, 1/18/17

Dalvin D. Haley entered a conditional guilty plea in the Faulkner County Circuit Court to the charges of maintaining a drug premises within 1000 feet of a drug-free zone, possession with intent to deliver ecstasy, possession with intent to deliver Xanax, possession with intent to deliver marijuana, and possession of drug paraphernalia. On appeal, Haley argues that the circuit court erred in denying his motion to suppress evidence seized during the search of his apartment because the affidavit in support of the search warrant failed to establish a basis for the confidential informant's knowledge and reliability and it failed to provide a substantial basis for a finding of reasonable cause to believe that things subject to seizure would be found in his apartment.

On April 15, 2014, Agent Lucas Emberton of the Twentieth Judicial Drug Crime Task Force swore out an affidavit for a search warrant for the address of 300 South Donaghey, Fox Run Apartment B-2. The affidavit provided:

FACT #1: On April 8, 2014, Investigator Sergeant Loeschner, Investigator Todd Wesbecher, Investigator Kennedy and I met with confidential informant #168 at a predetermined location in Conway, Arkansas. The informant and informant's vehicle were searched for illegal contraband and none was found. The informant was given an amount of U.S. Currency which was photocopied and made a part of the case file to go to the address of 300 South Donaghey Apartment B-2 (Fox Run Apartments) in Conway, Arkansas and purchase marijuana from a black male known to the informant as "Dalvo." The informant left the predetermined location and was kept under visual surveillance and did not stop at any other location until arriving at 300 South Donaghey and the informant remained inside of the vehicle. A black male was witnessed walking out of 300 South Donaghey, Apartment B-2 and getting into the informant's vehicle. The male stayed inside the vehicle for a short period of time and was witnessed walking back to Apartment B-2. The informant was kept under visual surveillance and did not stop at any other location until arriving back at the predetermined location. The informant handed to me an amount of green vegetable matter and stated it was purchased from "Dalvo" while in the parking lot of Fox Run Apartments and was represented to be marijuana. The informant and informant's vehicle were searched and no illegal contraband was located. The green vegetable matter was transported to Conway PD and entered into evidence locker 022 for submission to the Arkansas State Crime Laboratory.

The affidavit further provided that a second controlled buy occurred on April 15, 2014, involving facts identical to those that had occurred on April 8, 2014. Finally, the affidavit provided a detailed description of Fox Run Apartment B-2 from which "Dalvo" exited and reentered, along with detailed directions to the apartment.

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

"A search warrant is flawed if there is no indicia of the reliability of the confidential informant. *Fouse*, 73 Ark. App. at 143, 43 S.W.3d at 164 (citing *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989)). There is no fixed formula for determining an informant's reliability. *Heaslet v. State*, 77 Ark. App. 333, 345, 74 S.W.3d 242, 249 (2002). Factors to be considered in making such a determination include whether the informant's statements are (1) incriminating, (2) based on personal observations of recent criminal activity, and (3) corroborated by other information. Facts showing that the informant has provided reliable information to law enforcement in the past may be considered in determining the informant's reliability in the present case. Failure to establish the veracity and bases of knowledge of the informant, however, is not a fatal defect if the affidavit viewed as

a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

"Haley argues on appeal that the circuit court erred in denying his motion to suppress because the affidavit included the hearsay testimony of the confidential informant that he purchased marijuana from 'Dalvo' on April 8 and 15, 2015, and the affidavit was devoid of any facts establishing a basis of the informant's knowledge and reliability. He further argues that this defect is fatal because the affidavit fails to provide a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in particular places.

"We agree that Agent Emberton's affidavit failed to provide facts relating to the reliability of the confidential informant. There are no facts in the affidavit explaining the informant's relationship with Haley, the informant's previous drug-buying experience with Haley, or how he (the informant) acquired the information that Haley was selling marijuana. Further, Agent Emberton did not provide specific details or general information about the informant's assistance in previous drug cases in order to establish his reliability. *Langford,* 332 Ark. at 61, 962 S.W.2d at 362 (where officer's affidavit did not provide information about the informants' knowledge of the defendant's criminal activity or specific details concerning the informants' assistance in previous drug cases, the officer's affidavit demonstrated the reliability of the informants by including general facts that they had provided information about other drug violators, which had been verified though the officer's personal knowledge and led to the subsequent arrest and prosecution of violators).

"However, this defect is not fatal because review of the affidavit as a whole provided a substantial basis for a finding of reasonable cause to believe that things subject to seizure would be found in apartment B-2. In *Ingle v. State,* 2010 Ark. App. 410, at 9, 379 S.W.3d 32, 39, we held that an affidavit in support of a search warrant that may have failed to establish the confidential informant's reliability or basis of knowledge was not a fatal defect where the affidavit recited facts of the affiant's monitoring of the confidential informant's controlled buy of methamphetamine.

"In the instant case, Agent Emberton's affidavit likewise stated that he monitored the confidential informant's controlled buys of marijuana from 'Dalvo.' Agent Emberton's affidavit included facts that on two separate occasions—April 8 and 15, 2014—he, along with two other law-enforcement officers, searched the informant and his vehicle for illegal contraband and none was found. The informant was given currency to purchase marijuana from a black male known as 'Dalvo' at apartment B-2. The informant, during both drug purchases, was under constant surveillance. Thus, on both occasions, the officers, including Agent Emberton, witnessed 'Dalvo' exit apartment B-2, enter the informant's vehicle for a short period of time, and

then leave the vehicle and return to apartment B-2. After both controlled buys, the informant delivered to the officers "green vegetable matter" purchased from 'Dalvo,' who represented it was marijuana. These events, witnessed by Agent Emberton and included in his affidavit, corroborated the information provided by the informant and supported the reliability of the informant. Therefore, we hold that the circuit court did not clearly err in finding that Agent Emberton's affidavit, as a whole, provided a substantial basis for a finding of reasonable cause to believe that things subject to seizure would be found in apartment B-2."

SEARCH AND SEIZURE:
Affidavit; Mistake of Fact
United States v. Featherly
CA7, No. 15-3854, 1/17/17

Jesse Featherly lived in a Wisconsin trailer park when law enforcement discovered that Featherly's Internet-service account was sharing child pornography. FBI agent Jon Hauser obtained a warrant to search Featherly's residence, stating that an agent was able to determine the IP address of this user's computer and to ascertain that an Internet-service provider, Charter, had assigned that unique IP address to Featherly's account. Based on the images found, Featherly was charged with receipt and possession of child pornography.

Featherly moved for a "Franks" hearing, seeking to quash the warrant and suppress evidence because Hauser had falsely stated in his affidavit that the IP address was traced to Featherly's computer; an IP address identifies only a modem, not a particular computer. The magistrate concluded that probable cause supported the warrant, but that even if Featherly's explanation were correct, Wilkins did not perpetrate any knowing or reckless falsehood. The judge agreed that any mistake was irrelevant because Charter's identification of the modem was sufficient to support an inference that pornography would be found on Featherly's computer.

The Seventh Circuit affirmed, rejecting an argument that the inaccuracy kept the judge from considering the possibility that someone else in the trailer park connected to Featherly's modem wirelessly, without his knowledge.

SEARCH AND SEIZURE:
Exigent Circumstances; Hot Pursuit; Nonviolent Misdemeanor Outside Home
State of Florida v. Markus
FSC, No. SC15-801, 1/31/17

Housemates Justin McCumbers, Brandon Junk, Eric Blair, and Christopher Markus invited three women to their garage/recreation room to socialize. At 12:20 a.m. Officers Prendergast and Edu were dispatched to a noise disturbance, which had dissipated before they arrived.

Prendergast testified that as he approached Markus, who was outside, he smelled marijuana. Prendergast identified himself and asked Markus to stop.

Markus dropped his cigarette, raised both hands and walked backward. Prendergast instructed Markus to stop. Prendergast claimed Markus turned and ran into the garage/recreation room. The officers followed. Prendergast later testified that Markus was on the couch and resisted the officers. Additional officers arrived; they pulled Markus down. Prendergast straddled Markus to apply handcuffs, turned Markus on his side, and was alerted that there was a pistol in Markus' waistband.

McCumbers, who was in the home, testified that he handed Markus a tobacco cigarette and lit it before Markus walked outside to talk to men who were standing along the road, and that, when approached by the officers, Markus raised his hands and walked backward at a slow pace until he reached the couch. The officers had their Tasers drawn and pushed Markus, so that he "spun around." Others testified that the officers were rough with the other occupants and that they searched the bedrooms. Markus was convicted of possession of a firearm by a convicted felon.

The Supreme Court of Florida reversed, stating "the totality of the circumstances must be considered in evaluating Fourth Amendment cases. The exigent circumstance exception of hot pursuit does not justify a warrantless home entry, search, and arrest when the underlying conduct for which there is probable cause is only a nonviolent misdemeanor and the evidence of the alleged misdemeanor is outside the home."

The Florida Supreme Court noted that Markus did not pose a danger to the public, to the police, or to anyone. "Specifically, Markus was observed by the officer to be smoking what was alleged to be a marijuana cigarette and threw the cigarette onto the ground. The officers could have simply secured the evidence without any problem. In this particular case, the officer had no need to enter the home, not only because the suspected offense was minor, but also because the evidence was at hand with no risk of imminent destruction. The officer was free to retrieve the cigarette from the public street as evidence without entering the residence; in fact, the officer later returned to the driveway area after the constitutional violation and scuffle to recover the alleged cigarette."

SEARCH AND SEIZURE:
GPS Tracking of Cell Phone; Exigent Situation

United States v. Gilliam
CA2, No. 15-387, 12/1/16

In this case, the principal issue on appeal is whether information from a Cell Phone Global Positioning System can be obtained in exigent circumstances and used without a warrant to locate a suspect.

Corporal Chris Heid of the Maryland State Police contacted Sprint Corporation ("Sprint"), a telecommunications company. He told Sprint that he was investigating a missing child who "is being prostituted," and requested GPS location information for Jabar Gilliam's cell phone. Heid said that he was making

the request because of an exigent situation involving immediate danger of death or serious bodily injury to a person. Sprint complied with Heid's request and began providing real-time GPS location information to the Maryland State Police, which passed the information on to the FBI and the New York City Police Department resulting in the arrest of Gillam.

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

"Exigent circumstances justified GPS tracking of Gilliam's cell phone. The evidence available to law enforcement at the time of the search for Gilliam's location was compelling. Based on Heid's discussions with Jasmin's foster mother, social worker, and biological mother, law enforcement officers had a substantial basis to believe that Gilliam was bringing Jasmin to New York City to require her to work there as a prostitute. That type of sexual exploitation of a minor has often been found to pose a significant risk of serious bodily injury. See, e.g., *United States v. Curtis*, 481 F.3d 836, 838-39 (D.C. Cir. 2007). As the Ninth Circuit has observed, prostitution of a child involves the risk of assault or physical abuse by the pimp's customers or by the pimp himself and a serious potential risk of contracting a sexually transmitted disease. *United States v. Carter*, 266 F.3d 1089, 1091 (9th Cir. 2001).

"Faced with exigent circumstances based on credible information that Gilliam was engaged in prostituting a missing child across state lines, Corporal Heid acted reasonably in obtaining Gilliam's cell phone location information without a warrant."

SEARCH AND SEIZURE: Knock and Announce; Parole; Exclusionary Rule

Lane v. State, ASC, No. CR-15-1022, 2017 Ark. 34, 2/16/17, 2/16/17

Adam Lane, a parolee, appeals the judgment of the Sebastian County Circuit Court denying his motion to suppress evidence that officers discovered in his hotel room. Lane argues on appeal that the circuit court erred in denying his motion because the officers entered without a warrant and without knocking and announcing their presence in compliance with the Fourth Amendment to the United States Constitution and article II, section 15 of the Arkansas Constitution. It is an issue of first impression in Arkansas whether the knock-and-announce rule applies to parolees, and if it does apply, whether the exclusionary rule is the appropriate remedy.

In January 2015, Lane, who was on parole from the Arkansas Department of Correction, was staying at a hotel in Fort Smith. Lane had appeared for his initial parole intake but had failed to report to his Arkansas Department of Community Corrections parole officer, Adam Nading, in January as instructed. Lane also had violated a condition of his release by staying at the hotel, which was not his primary residence, without prior approval.

Nading learned that Lane was staying at the hotel and went there with a Fort Smith Police Officer. The hotel manager used an electronic key device to open the locked door for the officers. The officers did not knock or announce their presence before entering the room. Lane, who had been asleep in bed with a female companion, was arrested by the officers. Next to the bed, officers observed several baggies containing methamphetamine. The officers discovered more methamphetamine and a handgun in the bed.

Lane was charged as a habitual criminal offender with simultaneous possession of drugs and a firearm, possession of methamphetamine with intent to deliver, and possession of drug paraphernalia. He filed a motion to suppress the evidence seized during his arrest on the basis that the officers entered his hotel room without a warrant and failed to knock and announce their presence. The circuit court denied the motion. The jury convicted Lane of the charges, and the circuit court sentenced Lane to seventy years' imprisonment.

Upon review, the Arkansas Supreme Court found the officers' warrantless entry into Lane's hotel room was lawful. The Court stated, in part, as follows:

"As part of his 'Conditions of Release' from the Arkansas Department of Correction, Lane consented to a warrantless search and seizure of his 'person, place of residence, and motor vehicles.' In *Cherry v. State*, 302 Ark. 462 (1990) we held that such consents-in-advance do not violate the Fourth Amendment because the special needs of the parole process call for intensive supervision of the parolee making the warrant requirement impractical and because parolees have a diminished expectation of privacy. However, parole officers may carry out searches only if reasonable grounds exist to investigate whether the parolee had violated the terms of his parole.

"Here, the entry into Lane's hotel room was lawful because reasonable grounds existed. Lane had violated a condition of his parole by failing to report to Nading in January. Furthermore, among the conditions of Lane's parole was that he not stay away from his designated residence without prior approval from his parole officer. Nading had not approved Lane's stay at the hotel. For these reasons, we find that the warrantless search conducted by the parole officer was valid.

"While parolees have fewer expectations of privacy than free citizens, their privacy rights are not wholly inconsequential. A parolee has a diminished expectation of privacy because his residence is subject to search on demand. But this diminished expectation does not justify unannounced entry at any time. Knock-and-announce principles protect even those with limited privacy interests, like parolees, and the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. We should not be cavalier in curtailing the knock and announce rule, which dates back to 1603.

"Three reasons weigh in favor of requiring knock and announce for parolees. First, the knock-and-announce requirement safeguards and protects the interests of officers themselves because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Second, the requirement guards the privacy and dignity that can be eliminated by a sudden entrance. *Richards v. Wisconsin*, 520 U.S. 385, 393, n.5 (1997). This protects not only the parolee, but also the parolee's family and acquaintances, who may be on the premises when the search occurs. Third, as the Supreme Court observed in *Wilson v. Arkansas*, 514 U.S. 927 (1995), individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by forcible entry. In the present case, the motel employee opened the door, but often, unannounced entry results in a door being kicked in and property being destroyed.

"Because the officers failed to knock and announce their presence before entering Lane's hotel room and because there was no reasonable basis for their failure to knock and announce, the officers' conduct violated Lane's protection from unreasonable searches and seizures under the Fourth Amendment.

"Despite this violation, we hold that the evidence seized should not be suppressed. The Supreme Court has held that under the Fourth Amendment to the United States Constitution the exclusionary rule does not apply to knock-and-announce violations by police. We likewise hold that in cases of parolees, the exclusionary rule does not apply to knock-and-announce violations under the Arkansas Constitution. Despite this violation, we hold that the evidence seized should not be suppressed. First, a knock-and-announce violation is too 'attenuated' from the seizure of evidence to warrant exclusion. Second, under the exclusionary-rule balancing test, the deterrence benefits of suppression do not outweigh the substantial social costs. Thus, despite the knock-and-announce violation, the evidence seized from Lane should not have been suppressed under the Fourth Amendment or the Arkansas Constitution."

SEARCH AND SEIZURE:

Lack of Expectation of Privacy

United States v. Covarrubias
CA7, No. 16-3492

A patrolman stopped a car hauler on a New Mexico highway because a digit on its license plate was unreadable. The officer noticed that a car, secured on the trailer, lacked a license plate. He asked to see its paperwork. The bill of lading showed that the car was being shipped from California to "Juan Pablo" in Indianapolis. The officer checked the VIN, determined that it was not owned by the shipper or receiver, became suspicious of drug trafficking, and received the driver's permission to search the locked vehicle. The officer found 46 pounds of methamphetamine in a hidden compartment below the console.

The hauler conducted a controlled delivery to the Indianapolis address.

Covarrubias arrived, paid the driver, and drove the car away. Police arrested him. Covarrubias waived his *Miranda* rights and acknowledged that he paid the driver, that he knew that the car contained methamphetamine, and that he was being paid $2,000 to deliver the car to an associate. The district court conducted an evidentiary hearing and then denied Covarrubias's motion to suppress. The court concluded that he lacked standing to argue that this evidence should be suppressed because he did not have either a subjective or objective expectation of privacy in the vehicle. He had "no apparent ownership or possessory right in the vehicle, as either the shipper or receiver" and "no expectation of privacy in the Saturn Vue after it was turned over to the shipping company," which had a key to the car and permission to drive the car on and off the trailer. In concluding that Covarrubias had no expectation of privacy in the car, Judge Pratt relied on this court's holding in *United States v. Crowder*, 588 F.3d 929 (7th Cir. 2009)—a case involving "nearly identical" facts, according to the judge—that parties have no reasonable expectation of privacy for a car given to a shipping company. *Crowder*, 588 F.3d at 934–35. Even if Covarrubias had standing to object to the search, the court went on to say, it was reasonable for the officer to believe that the car hauler had apparent authority to consent to a search because he had keys to the vehicle and authorization (as reflected in the bill of lading) to drive the car on and off the trailer.

Upon review, the Seventh Circuit Court of Appeals stated: "The district court properly concluded that Covarrubias did not have a legitimate expectation of privacy in the car because he did not own the car, had never been inside it, and did not control the car's contents. See *Rakas v. Illinois*, 439 U.S. 128, 134, 143 & n.12 (1978). Moreover, this case, as the district court observed, mirrors Crowder in legally relevant ways: the car hauler received keys to a car being shipped cross-country and permission to drive the car on and off the trailer. Crowder, 588 F.3d at 934–35. Even though the car's doors were locked, Covarrubias lacked a reasonable expectation of privacy because the car hauler controlled and had access to the car. Further, Covarrubias is incorrect that different terms in the bill of lading distinguish Crowder. In both cases the car haulers' control over the cars, stemming from the bills of lading, empowered them 'to act in direct contravention' of the defendants' privacy interests."

SEARCH AND SEIZURE: Parole Violator

North Dakota v. White
NDSC, 2017 ND 51, 3/7/17

Jesse White appealed a criminal judgment entered after a jury found he was guilty of possession of certain prohibited materials. White was on supervised probation when his residence was searched. His probation conditions required him to submit to a search of his person, vehicle or residence as requested by his probation officer.

A probation officer searched White's residence after police officers received a tip from White's girlfriend. White's girlfriend told officers that she discovered images of clothed, young girls in provocative positions and that White was uploading pictures to a cell phone with no service. The probation officer and police officers went to White's residence where the probation officer informed White of the reason for searching his residence and that they were interested in images on any computers or phones.

After review of this matter, the North Dakota Supreme Court affirmed, concluding the probation search of White's cell phones did not violate his Fourth Amendment rights and sufficient evidence supported his conviction.

SEARCH AND SEIZURE:
Reasonable Expectation of Privacy

United States v. Russell
CA8, No. 16-1700, 2/1/17

A confidential informant (CI) told Officer Adam Lepinski that he had observed Rashad Arthur Russell possessing firearms multiple times. Officer Lepinski knew that Russell's criminal history prohibited him from possessing a firearm. The officer also knew the CI had provided reliable information in the past.

A few weeks later, the CI informed Officer Lepinski that Russell would be riding in a "darker colored sedan," carrying a "greenish-colored handgun" in the Camden area of North Minneapolis. Within thirty minutes, the CI provided the sedan's license plate number. Officer Lepinski notified other officers, who set out to find Russell.

In the Camden area, officers found Russell riding in the passenger seat of a dark-colored sedan with a license plate matching the number from the CI. Following the sedan, officers noticed it making unusual direction changes and rolling through a stop sign. A few blocks later, the sedan pulled over. Russell exited the passenger side.

Stopping Russell and patting him down, officers found a small bag of marijuana. Another officer approached the sedan, opening the door to ensure no one was armed. Smelling marijuana, he searched the sedan, finding a gun on the passenger side. The sedan was a rental car leased to Russell's girlfriend but driven by another woman. His name was not on any rental documents, and he did not possess the keys.

Russell moved to suppress the gun, alleging no probable cause to search the sedan. The district court denied the motion.

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

"'Fourth Amendment rights are personal rights that may not be asserted vicariously.' *United States v. Barragan*, 379 F.3d 524, 529 (8th Cir. 2004), citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). An individual asserting Fourth Amendment rights 'must demonstrate

that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable. The defendant moving to suppress bears the burden of proving he had a legitimate expectation of privacy that was violated by the challenged search.' *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). If a defendant fails to prove a sufficiently close connection to the relevant places or objects searched he has no standing to claim that they were searched or seized illegally. *Barragan*, 379 F.3d at 529-30, quoting *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994). Factors relevant to standing include:

> *ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.*

"Generally, a mere passenger does not have standing to challenge a vehicle search where he has neither a property nor a possessory interest in the automobile. *Anguiano*, 795 F.3d at 878, quoting *Rakas*, 439 U.S. at 148. Russell was not an owner or registered user of the sedan and did not have a property interest in it. See *United States v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010) (holding defendant lacked standing where he neither owned nor drove the vehicle and only was an occasional passenger therein); *United States v. Green*, 275 F.3d 694, 698-99 (8th Cir. 2001) (holding defendant lacked standing where he was a passenger in a car driven by another).

"Russell asserts a possessory interest because the sedan was rented by his girlfriend and allegedly operated at his request. A defendant must present at least some evidence of consent or permission from the lawful owner/renter of a vehicle to give rise to an objectively reasonable expectation of privacy. *Muhammad*, 58 F.3d at 355. Russell provides no evidence that his girlfriend permitted him to drive the sedan or otherwise exercise any possessory control over it. Because he did not establish a reasonable expectation of privacy in the sedan, he has no standing to challenge the search. See *United States v. Macklin*, 902 F.2d 1320, 1330 (8th Cir. 1990) (To have a legitimate expectation of privacy by way of a possessory interest, defendant must have possession of the vehicle and the keys.), citing *United States v. Rose*, 731 F.2d 1337, 1343 (8th Cir.), cert denied, 469 U.S. 931 (1984)."

SEARCH AND SEIZURE:

Search of Juvenile at Detention Facility

Mabry v. Lee County
CA5, No. 16-60231, 2/21/17

T.M., a twelve year old Tupelo, Mississippi, middle school student, was arrested after a fight on school property and taken to a juvenile detention center. Center intake procedures dictated that all juveniles processed into the Center were to be searched for contraband using a metal detecting wand and a pat down.

In addition, procedures required that juveniles charged with a violent, theft, or drug offense who were to be placed into the Center's general population be subjected to a visual strip and cavity search. All juveniles brought to the Center were processed for placement in the general population unless the Youth Court specifically informed the Center that the juvenile was to be held as a "non-detainee."

Pursuant to these policies, a female corrections officer searched T.M. when she arrived at the Center. The officer first used the metal detecting wand and patted T.M. down, finding no contraband. At that point, the officer had no reason to suspect T.M. was concealing any contraband in or on her person. Because T.M. was charged with a violent offense, however, Center policy required that the officer strip and cavity search T.M. In a private setting, T.M. was made to strip naked, bend over, spread her buttocks, display the anal cavity, and cough. At no point did the officer touch T.M. during the search. No contraband was found. Following the search, T.M. showered, dressed, moved to a holding cell for approximately twenty minutes, and then entered the general population. She was released from the Center later that evening.

All charges were eventually dropped. Nicole Mabry ("Mabry"), T.M.'s mother, brought suit against Lee County ("County") and others on T.M.'s behalf, alleging among other things that the strip and cavity search violated T.M.'s Fourth Amendment rights. The district court granted the County's motion for partial summary judgment on the Fourth Amendment issue. Mabry timely appealed.

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

"In *Florence v. Board of Chosen Freeholders*, 132 S.Ct. 1510, the Supreme Court held that a regulation impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests. The Court further stressed the deference owed to correctional officials in designing search policies intended to ensure security, noting that, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response courts should ordinarily defer to their expert judgment in such matters. While taking pains to describe and apply the long established reasonableness framework of Fourth Amendment precedent, the Court in Florence nonetheless set up a high hurdle for inmates challenging the constitutionality of searches.

"The Court concluded that, in the correctional context, the burden is on the plaintiff to prove with substantial evidence that the challenged search does not advance a legitimate penological interest. Although stressing the importance of deference to correctional officials, the Court suggested that substantial evidence could demonstrate that a correctional strip search policy is an exaggerated response to security concerns when, compared to the facts presented in Florence, the need for such

a policy is lower, the justification weaker, the intrusiveness higher, or an alternative, less invasive policy more feasible. Justice Kennedy's majority opinion clarified that this case does not require the Court to rule on the types of searches that would be reasonable in instance where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees. The accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue.

"Chief Justice Roberts stressed: it is important for me that the Court does not foreclose the possibility of an exception to the rule it announces. Justice Alito highlighted that the Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible. Despite this cautionary language, the Court in *Florence* nonetheless made clear that the evidentiary burden rests with the plaintiff when challenging a correctional search policy. Without substantial evidence to the contrary, courts should defer to the reasonableness determinations of correctional officials.

"One of our sister circuits has addressed precisely this question since *Florence* was decided. In *J.B. ex rel. Benjamin v. Fassnacht,* 801 F.3d 336 (3d Cir. 2015), a minor was strip and cavity searched pursuant to routine intake procedures at a juvenile detention center. The Third Circuit held that *Florence* controlled for two reasons. First, focusing on the logic underlying *Florence*, the court asserted that there is no easy way to distinguish between juvenile and adult detainees in terms of the security risks cited by the Supreme Court in *Florence*. And, the court explained, because juveniles and adults pose the same security risks, it follows that the same constitutional test for reasonableness should apply in assessing searches meant to mitigate those risks. Second, the court in J.B. homed in on certain language in the *Florence* opinion that seems to indicate a broad scope of the holding, including *Florence*'s expansive definition of jail to include other detention facilities. The court noted that this sweeping language comports with the federal definition of prison: Any Federal, State, or local facility that incarcerates or detains juveniles or adults. Thus, relying on its reading of *Florence*'s substantive logic and certain passages in the opinion's language, the Third Circuit concluded that *Florence* controls in cases involving strip and cavity searches of minors.

"In explaining its motivation for shifting the burden of marshalling substantial evidence onto plaintiffs who challenge a search's reasonableness, the Court in *Florence* stressed the deference owed to correctional officers. The reason for that deference is because courts do not have

sufficient expertise to mandate, under the Constitution specific restrictions and limitations. Maintaining safety and order in correctional facilities requires the expertise of correctional officials. Consequently, determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials. It is this expertise on the part of officials, and the lack thereof on the part of courts, that motivates the deferential test outlined in *Florence*.

"*Florence*'s argument as to institutional competence applies with equal force to juvenile detention centers as it does to adult correctional institutions. That is, we can discern no reason why designing and implementing measures to maintain safety and order in juvenile detention centers requires any less expertise than in adult correctional facilities, nor do we see why courts are more competent to achieve the task in the juvenile context. Importantly, the persuasiveness of this point is not undermined by the fact that the actual security concerns and privacy interests implicated in the juvenile detention center context may be different in important ways from those faced in adult correctional facilities. We read *Florence* to mean that, in the correctional context—whether juvenile or adult—courts, which are not experts, should still defer to officials who are. The logic underlying *Florence*'s deferential test thus compels the conclusion that the deference given to correctional officials in the adult context applies to correctional officials in the juvenile context as well.

Having concluded that the burden allocation of *Florence* applies, we now determine whether Mabry has put forward substantial evidence demonstrating that the search policy that the Center applied to T.M. was not reasonably related to legitimate penological interests. Making that determination requires us to ask whether Mabry has pointed to substantial evidence in the record to indicate that the officials have exaggerated their response. Mabry makes no real effort to present evidence that the Center's search policy is exaggerated, unnecessary, or irrational in any way. Accordingly, she effectively concedes that she cannot prevail under *Florence*'s test. Mabry failed to enter evidence into the record below making a substantial showing that the Center's search policy is an exaggerated or otherwise irrational response to the problem of Center security. Mabry's argument must therefore be rejected.

SEARCH AND SEIZURE:

Seizure of Conversations in a Police Van

United States v. Paxton
CA7, No. 14-2913, 2/17/17

Five defendants were arrested as they were preparing to execute a planned robbery of a fictitious narcotics "stash house." They had been recruited by an undercover agent, posing as a drug courier seeking to rob a Mexican drug cartel. Two of the defendants, Walker and Paxton, were arrested outside of a Chicago restaurant and placed into a police transport van that was clearly marked as a Chicago Police Department

vehicle. Task force officers then drove the van to a warehouse, where the other three defendants had convened with the undercover agent for a final pre-robbery meeting. The three were placed into the rear-most compartment of the van along with Walker and Paxton. None were given *Miranda* warnings before being placed into the van. During the drive to the field office, the defendants conversed quietly. Unbeknownst to them, two recording devices had been hidden in the rear compartment of the van to capture their conversation. Although one defendant remarked that the van was "probably bugged," the defendants continued to converse and make incriminating statements.

The district court suppressed the statements. The Court of Appeals for the Seventh Circuit reversed the district court finding there was no expectation of privacy in the van. The Court stated that the defendants lacked an objectively reasonable expectation of privacy when placed into the marked police van, the interception and recording of the conversations did not constitute a search for purposes of the Fourth Amendment or an unauthorized interception of electronic communications for purposes of Title III, which generally prohibits the interception, disclosure, and use of wire, oral, and electronic communications absent judicial authorization or the consent of one of the parties to such communication.

SEARCH AND SEIZURE:
Traffic Stop Not Pretextual Where There was a Traffic Violation

United States v. Fuehrer
CA8, No. 16-1248, 12/28/16

Mark Fuehrer pled guilty to one count of possession with intent to distribute a controlled substance and was sentenced to 188 months in prison. The court concluded that the traffic stop was not pretextual where the deputy's observation of the traffic violation based on his use of the radar gave him probable cause to stop defendant's vehicle, and his subjective intent to detain the vehicle for a dog-sniff search is irrelevant. Another deputy arrived on the scene within two minutes and completed the tasks related to the traffic stop, writing defendant a warning after the dog sniff was complete and the dog had alerted to the presence of narcotics.

The Court of Appeals noted there is no evidence that the dog sniff unlawfully prolonged the traffic stop beyond what was necessary to complete the stop, finding as follows:

"Fuehrer argues that he was unconstitutionally detained while officers executed the dog sniff. If a defendant is detained incident to a traffic stop, the officer does not need reasonable suspicion to continue the detention until the purpose of the traffic stop has been completed. *United States v. Ovando-Garzo*, 752 F.3d 1161, 1163 (8th Cir. 2014). An officer may complete routine

tasks during a traffic stop, which can include a computerized check of the vehicle's registration and the driver's license and criminal history, as well as the preparation of a citation or warning. (quoting *United States v. Quintero-Felix*, 714 F.3d 563, 567 (8th Cir. 2013)). However, once an officer finishes the tasks associated with a traffic stop, the purpose of the traffic stop is complete and further detention would be unreasonable unless something that occurred during the traffic stop generated then necessary reasonable suspicion to justify further detention.

"The Supreme Court has held that the use of a well-trained narcotics-detection dog during a lawful traffic stop, generally does not implicate legitimate privacy interests. *Illinois v. Caballes,* 543 U.S. 405, 409 (2005). A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Thus, as long as a traffic stop is not extended in order for officers to conduct a dog sniff, the dog sniff is lawful.

"In this case, Deputy Kearney arrived within two minutes of Deputy Williams initiating the traffic stop. Because Fuehrer did not have a license, Deputy Williams asked Fuehrer to sit in the patrol car while he completed paperwork. Deputy Kearney conducted the dog sniff while Fuehrer was in the patrol car. Deputy Williams completed the tasks related to the traffic stop and wrote Fuehrer a warning after the dog sniff was complete and the dog had alerted to the presence of narcotics. Thus, there is no evidence that the dog sniff unlawfully prolonged the traffic stop beyond what was necessary to complete the stop. Fuehrer's reliance on *Rodriguez v. United States,* 135 S. Ct. 1609 (2015), is misplaced. In *Rodriguez*, the officer had already issued the driver a warning before conducting the dog-sniff search. The Supreme Court held that the search was unlawful because it prolonged the traffic stop at issue in that case. The facts just set forth distinguish the instant case from *Rodriguez.*"

SEARCH AND SEIZURE:

Search Warrant; Staleness

United States v. Morgan
CA8, No. 16-1525, 12/1/16

On August 4, 2013, an officer discovered that a computer offered child pornography by peer-to-peer file sharing. That day, police identified the computer's IP address. Twenty-four days later, police determined that the IP address was assigned to Damien Morgan. Over seven weeks later, a state judge issued a search warrant for his home—75 days after the IP address was identified and 51 days after investigators associated the IP address with Morgan.

Morgan appealed the denial of his motion to suppress and his sentence. He argues that the information in the search warrant was stale, and thus the warrant lacked probable cause, because police did not apply for the warrant until 75 days after identifying his IP address and 51 days after associating it with him.

The Court of Appeals for the Eighth Circuit concluded, however that periods much longer than 75 or 51 days have not rendered information stale in computer-based child-pornography cases. Here, the affidavit established a fair probability of finding evidence on Morgan's computers.

SEARCH AND SEIZURE:
Warrantless Blood Draw

State of Idaho v. Chernobieff
ISC, Criminal Docket No. 44259, 12/30/16

On September 11, 2013, at around 11:00 p.m., Idaho State Police Corporal Matthew Sly responded to a request for assistance from another officer who had pulled Daniel Chernobieff over in a traffic stop. Upon arrival, Corporal Sly noticed the odor of an alcoholic beverage, that Chernobieff's eyes were "glassy and bloodshot," and that his speech was "slow and lethargic." Corporal Sly also noticed that Chernobieff was agitated and appeared to have difficulty answering questions.

Based upon these observations, Corporal Sly asked Chernobieff to perform standard field sobriety tests, but Chernobieff refused. Consequently, Corporal Sly placed Chernobieff under arrest for suspicion of driving under the influence ("DUI") and placed him in the patrol car. In the car, Corporal Sly played the audio version of the administrative license suspension form for Chernobieff and began the fifteen minute wait period required for a breath test. However, Chernobieff refused the breath test.

Corporal Sly then contacted the on-call prosecutor for assistance in obtaining a warrant for a blood sample. The prosecutor asked Corporal Sly to transport Chernobieff to the jail, where a conference call would be set up with the on-call magistrate to obtain a search warrant. The prosecutor then unsuccessfully attempted to contact the magistrate. Over approximately ten minutes, the prosecutor attempted to call the magistrate between three and five times and left one or two voicemail messages. Unable to reach the magistrate to obtain a warrant, the prosecutor directed Corporal Sly to perform a blood draw due to exigent circumstances. Corporal Sly contacted the phlebotomist to perform a blood draw, and the test results indicated Chernobieff's blood alcohol content was 0.226.

The question before the Idaho Supreme Court in this case was whether exigent circumstances existed to justify a warrantless blood draw. The Court found, in part, as follows:

"Defendant-appellant Daniel Chenobieff argued the blood draw violated his constitutional protection against unreasonable searches and seizures. His argument was based on *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), where the United States Supreme held that whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. Exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. However,

while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case it does not do so categorically. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

"The district court specifically pointed to the prosecutor's attempt to obtain a warrant through the on-call magistrate who could not be reached. The district court also made reference to the delay resulting from Chernobieff's refusal to perform field sobriety tests, but in doing so the court erred. Any delay caused by Chernobieff's exercise of his Constitutional rights may not be considered. The court concluded that the magistrate considered the totality of circumstances and that the magistrate's findings were supported by substantial evidence.
The Idaho Supreme Court concurred with the district court. "Even excluding the delay related to the field sobriety tests, there was substantial evidence to support the magistrate's findings. Therefore, we find that the district court did not err in affirming the denial of the motion to suppress the results of the blood draw."

SIXTH AMENDMENT RIGHT TO COUNSEL:

Jailhouse Informant

Commonwealth v. Caruso
MSJC, No. SJC-09656, 1/13/17

On January 20, 2000, Sandra Berfield, the victim, received a package containing a pipe bomb, which exploded when she opened it, blowing her body asunder and killing her instantly. A jury in the Superior Court found the defendant, Steven Caruso, guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity and cruelty.

Following his arrest, Caruso encountered Michael A. Dubis, another prisoner, in a holding cell. Dubis recognized Caruso's name and face from the newspaper and asked him questions about the victim's death. For approximately ninety minutes, Dubis talked to Caruso, intending to find out what had happened. Dubis sought to win Caruso's trust and asked questions to elicit information he could pass on to law enforcement.

Caruso made numerous incriminating statements to Dubis. Caruso told Dubis that he had learned about making bombs from a friend, that he had used batteries and a pipe, and that the package would only explode when it was opened due to a "basic separation device." Caruso also said that he got the bomb there, that he used the return address of the victim's sister on the package, and that he knew the bomb would kill anyone who opened it. In addition, Caruso described his

relationship with the victim, including incidents involving damage to the victim's vehicle and that the victim had a video recording of him "messing with" her vehicle. Caruso said that the victim would not go out with him and that he was mad at her and called the victim a "bitch."

Dubis relayed this information to a State trooper, Sergeant James Plath, to whom Dubis had previously provided information. Plath informed law enforcement officials involved in Caruso's case. Following a motion to suppress, which was denied, Dubis testified to Caruso's statements at trial.

Caruso argues that Dubis was a government agent who questioned Caruso in violation of his right to counsel—which had attached at his arraignment—in violation of the Sixth Amendment to the United States Constitution.

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

"The Sixth Amendment prohibits the Commonwealth from deliberately eliciting incriminating statements from an individual who has been charged with a crime, without the individual's counsel present. *Tevlin,* 433 Mass. at 320, quoting *United States v. Massiah,* 377 U.S. 201, 206 (1964). In addition to direct questioning, the government deliberately elicits statements by intentionally creating a situation likely to induce the charged individual to make incriminating statements in the absence of counsel. *United States v. Henry,* 447 U.S. 264, 274 (1980). There is no dispute that Dubis intentionally elicited incriminating statements from the defendant to pass on to law enforcement for his own advantage.

"The only question is whether Dubis was a government agent. The United States Supreme Court has not clearly defined the point at which agency arises. *Murphy,* 448 Mass. at 460. Yet, at a minimum, there must be some arrangement between the Commonwealth and the informant before the informant's actions can be attributed to the Commonwealth. See id. at 463-464, 467 (articulated agreement between informant and Commonwealth containing specific benefit creates agency relationship.) An inmate's unencouraged hope to curry favor by informing does not establish an agency relationship, even if the informant subsequently receives a benefit. Nor does the fact that an informant provided information in the past establish an agency relationship.

"No agency relationship exists in the absence of a prior arrangement between the Commonwealth and the informant. For example, no agency relationship forms when the Commonwealth does not promise a benefit to an informant, even where—as in this case—the informant has provided information to a particular police officer on multiple prior occasions. In the *Murphy* case, an informant was a government agent, because an assistant United States attorney offered to file a motion to reduce the informant's sentence 'if he gave 'substantial assistance' to the government.' *Murphy,* 448 Mass. at 465, 467-468. In the *Henry* case, the government paid an informant on a contingency fee basis for information,

encouraging the informant to elicit incriminating information from other inmates. *Henry*, 447 U.S. at 270-271, 274. Even though the government instructed the informant not to question the defendant in the *Henry* case, the Supreme Court concluded that keeping the informant near *Henry* in prison and utilizing the contingency fee arrangement for information, tended to show that the government intentionally created a situation likely to induce *Henry* to make incriminating statements. See *United States v. Brink*, 39 F.3d 419, 423-424 (3d Cir. 1994) (intentional placement of known informant in cell may constitute deliberate effort to elicit incriminating information).

"Dubis was not an agent of the Commonwealth. No evidence suggests that the Commonwealth put the defendant and Dubis in the same cell in order to elicit information from the defendant. Nor does the evidence show that any law enforcement official involved in the defendant's case knew that Dubis and the defendant would be placed in the same cell or that their encounter was the result of anything but happenstance. That Dubis had provided information to a particular officer on more than one occasion does not demonstrate that he was a government agent. *Harmon*, 410 Mass. at 429. Dubis is unlike the informant in the Harmon case, who had reached out to the officer after making first contact with the defendant. The defendant in the Harmon case confessed his guilt to the informant only after the officer told the informant to keep his ears open. We concluded that the informant in the Harmon case was not a government agent, and the evidence suggesting Dubis was a government agent is even weaker. Although Plath similarly told Dubis to 'keep his ears open,' all of Dubis's contact with law enforcement regarding the defendant's case took place after Dubis's sole conversation with the defendant.

"Dubis's conduct as an informant is also unlike the informants in *Murphy*, 448 Mass. at 457, and *Henry*, 447 U.S. at 271, because each of them had in place, before eliciting incriminating information, an articulated agreement with the government, pursuant to which the informants received specific benefits. The facts in this case do not even suggest that the Commonwealth planned for Dubis and the defendant to share a cell.

"The lower court judge properly denied the defendant's motion to suppress. The record does not show the Commonwealth engaged in any conduct in contravention of its affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."

SIXTH AMENDMENT RIGHT TO COUNSEL:

Jailhouse Informant

United States v. Bates
CA5, No. 15-31087, 3/10/17

This is a murder-for-hire case. Nemesis "Nemo" Bates owned Nemo's Carwash in New Orleans. In 2010, someone stole a significant amount of jewelry and $20,000 in cash from Bates. Bates reported the theft to the police and

told them that he suspected his friend Christopher "Tiger" Smith was the culprit. On November 21, 2010, someone shot Tiger at least twenty times, killing him. A federal grand jury indicted Bates on four counts: (1) solicitation to commit a crime of violence, in violation of 18 U.S.C. § 1958(a) and 18 U.S.C. § 373; (2) conspiracy to use interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a) and 18 U.S.C. § 2; (3) causing death through the use of a firearm, in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2; and (4) conspiracy to possess firearms, in violation of 18 U.S.C. § 924(o). At trial, both sides agreed that Walter Porter was the actual shooter. The government advanced the theory that Bates hired Porter, along with Aaron Smith, to murder Tiger in exchange for $20,000, as retaliation for Tiger's stealing his jewelry and money. The government presented twenty-one witnesses, including Anthony Comadore, Bates's former cellmate, who testified concerning Bates's alleged jailhouse confession. By contrast, Bates argued that Smith and Porter acted on their own accord as part of a conspiracy to extort money from Bates after the fact. The jury convicted Bates on all counts.

Pursuant to Federal Rule of Criminal Procedure 29, Bates moved for a judgment of acquittal on all counts. The district court denied his motion. Bates timely appealed, arguing that the district court (1) abused its discretion by allowing Comadore to testify and (2) erred by denying his motion for acquittal.

The Fifth Circuit Court of Appeals concluded that the district court did not abuse its discretion by allowing Bates' former cellmate to testify because Bates failed to point to any evidence showing that the government affirmatively enticed the cellmate to solicit any information from Bates.

The Court concluded that "the mere presence of some conflicting evidence in the record does not render a jury verdict improper," and the Court rejected Bates' challenges to the credibility of the witnesses where their criminal history, drug problems, trustworthiness and past relationships with Bates all came out at trial and were presumably considered by the jury. Therefore, the Court affirmed the district court's denial of Bates' motion for judgment of acquittal.