

# C.A.L.L.

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### **“Mini-Motorcycles” and Mopeds: What are the Rules?**

This article was first published several years ago in *C.A.L.L.*, but because of recent inquiries the City Attorney's Office has had about the subject, it is being republished. The full article can be found beginning on page 7.

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## **2009 Acts of Interest to Law Enforcement**

Springdale Police Officers attended training regarding the Acts of the 2009 Arkansas General Assembly that affect law enforcement. A summary of the Acts is set out on our website ([www.springdalear.gov/cosa](http://www.springdalear.gov/cosa)) in this edition of *C.A.L.L.*

## **Eighth U.S. Circuit Court of Appeals Upholds District Court in Denial of a Motion to Suppress Statements and Physical Evidence in Fayetteville Case**

### **Facts Taken From the Opinion:**

Ryleigh's bar is located on Dickson Street in Fayetteville, Arkansas. There are several drinking establishments on Dickson Street, and the area is popular with college students. The bars close at 2:00 a.m., and from the time the bartenders make the last call to the early morning hours, the Fayetteville Police Department typically receives an increased number of calls regarding alcohol-related disturbances and fighting. The incident at issue here occurred just a few days before fall semester was scheduled to begin and at a time when patrons were starting to congregate in the street as the bars prepared to close.

Shortly after 1:00 a.m. on August 15, 2007, a dispatch went out that a man at Ryleigh's was trying to purchase methamphetamine, saying that he had a shotgun and that he was not going back to prison. Officer Anthony Murphy responded to the call and approached a man who matched the dispatch description. In light of the nature of the call, Murphy asked for permission to search, which the man granted. No drugs or weapons were found on his person, and the man identified himself as Jimmy Joe Watters.

Watters appeared intoxicated, but responded appropriately to the officer's questions and seemed to understand their conversation. Murphy initiated a background check and learned that Watters was a sex offender in delinquent status and that he had both drug

and weapons charges against him. Watters admitted that he had been arrested in the past, but denied making statements about buying methamphetamine, having a shotgun, or going back to prison. Murphy arrested Watters for public intoxication, handcuffing his hands behind his back.

Officer Matthew Wright approached as Watters was being placed under arrest. Wright had verified with a witness that Murphy was speaking to the person who had been talking about buying drugs and having a gun. The witness reported that Watters had been with a woman that night. Both officers were concerned that Watters had been with other people and that his friends might have access to the gun.

Without giving *Miranda* warnings, Officer Wright asked Watters if there was a gun somewhere on Dickson Street. In response, Watters asked if his girlfriend was going to be arrested. Wright said that he could make no promises and could work no deals, but that if Watters had something to tell him, Wright would try to work with him in any way possible. Watters asked Wright for a handshake, which was impossible because of the handcuffs, and then for a hug, which Wright gave him. Watters motioned towards his vehicle, saying, "there's a gun in the van." Murphy retrieved the keys from Watters's girlfriend and looked through the window into the van, where he saw the stock of a shotgun and a bandolier containing shells.

Even though he was not being questioned, Watters continued to talk about guns and drugs while he and Wright walked towards the van. Wright was unable to read Watters his *Miranda* rights until they arrived at the van. Watters acknowledged and then waived his rights. Despite his intoxication, Watters

appeared to understand the nature of the events, and he consented to a search of the van, which revealed a loaded shotgun, shells, marijuana, and drug paraphernalia.

Following the entry of his conditional guilty plea to being a felon in possession of a firearm, Watters was sentenced to ninety-eight months' imprisonment. Watters then appealed the District Court's decision to deny his motion to suppress his statement to the U.S. Eighth Circuit Court of Appeals.

**Decision by U.S. Eighth Circuit Court of Appeals:** Watters argued on appeal that his motion to suppress should have been granted because the officers failed to inform him of his *Miranda* rights before eliciting incriminating testimonial evidence. Watters contended that the public safety exception announced in *New York v. Quarles*, 467 U.S. 649 (1984), does not apply because there were no exigent circumstances to justify dispensing with the *Miranda* warnings.

In *Quarles*, the Supreme Court recognized "a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence." 467 U.S. at 655. The exception applies when officers ask "questions reasonably prompted by a concern for the public safety" and not "questions designed solely to elicit testimonial evidence from a suspect." Citation omitted.

The Court opined that the record revealed that the officers' questions were designed to locate a weapon that Watters might have hidden shortly before his arrest. Dickson Street is a bustling area that contains several places to stash a weapon. Patrons were leaving the area's drinking establishments at the time the officers were dispatched to Ryleigh's. The officers knew that Watters

had claimed to have a gun with him that night and that he had been charged with firearm-related offenses in the past. The officers testified that they wanted to find the gun because it could have been accessible to Watters's friends or to the public. Wright testified that, "I wasn't concerned about the legality of the situation. I wanted to find a gun. If there was a gun out there, we needed to find it."

The Court agreed with the district court that the officers' questions were prompted by a concern for public safety, and not solely to elicit testimonial evidence:

"In an area where bars are concentrated, people are inebriated, and volatile situations are routine, police officers cannot lightly discount a report that an intoxicated person is trying to buy methamphetamine, claiming to have a shotgun, and stating that he is not going back to prison. The mix of a person seeking a dangerous drug — one often associated with violence — with an extremely destructive weapon and a desperate attitude is a virtual recipe for violence. The police had no way of knowing, before they asked, whether Watters had a gun and if so, where it was and whether it might be located somewhere that it might fall into the hands of other people on Dickson Street."

D. Ct. Order of July 2, 2008, at 5.

Therefore, based on the public safety exception, the Eighth U.S. Circuit Court of Appeals upheld the District Court's order.

The Court next reviewed the District Court's determination that Watters' consent to search

his vehicle was voluntary. The Court noted that factors relevant to the voluntariness of a defendant's consent include whether the defendant was intoxicated, but intoxication alone does not render consent invalid. See *United States v. Perry*, 437 F.3d 782, 785 (8<sup>th</sup> Cir. 2006). "In each case, the question is one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had reasonable appreciation of the nature and significance of his actions." *United States v. Castellanos*, 518 F.3d 965, 969 (8<sup>th</sup> Cir. 2008) (quoting *United States v. Rambo*, 789 F.2d 1289, 1297 (8th Cir. 1986)).

The Court held that Watters's intoxication was undisputed, and does not invalidate his consent to search the van. The district court found that Watters was a man of mature years, whose criminal history would have familiarized him with the procedural safeguards available to him under the law. The incident occurred in a public place and lasted less than an hour. Watters was coherent and able to answer the officers' questions. Although Watters was under arrest, the officers did not threaten him, intimidate him, or make promises to him. Watters contends that Wright's statement that "he would try to work with [Watters] in any way possible" implied that Watters would get something in return for answering the officer's questions. Moments earlier, however, Wright had told Watters that he could not make any promises or work with Watters on any deals. The Court held there was no clear error in the district court's determination that Watters voluntarily consented to the search of his vehicle.

Therefore, the judgment of the district court was affirmed.

**Case:** This case was decided on July 13, 2009 and was an appeal from the United States District Court for the Western District of Arkansas, the Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas. The case cite is *U.S. v. Watters*, 08-3696 (8th Cir. 7-13-2009).

Jeff Harper  
City Attorney



### **Consent to Search Obtained at Beginning of Traffic Stop; U.S. v. Rivera**

On September 2, 2007 Arkansas State Trooper Victor Coleman, on duty with his certified drug dog, was parked on the shoulder of Interstate 40 in central Arkansas. At approximately 10:23 am Trooper Coleman stopped a truck that he had observed speeding and following too close. Trooper Coleman informed the driver, Omar Rivera, the reason for the stop and inquired as to where he was going. Approximately a minute and a half into the stop Trooper Coleman requested that Rivera step out of his truck. Trooper Coleman continued to question Rivera about his traveling plans. About four and a half minutes into the stop Trooper Coleman asked Rivera if he had any guns or anything illegal in his truck to which Rivera answered no. Trooper Coleman then requested permission to search the truck to which Rivera replied "yeah." Coleman confirmed that it was okay to search the truck and Rivera replied "you can look in it." Trooper Coleman then instructed Rivera to sit in the patrol car and continued questioning Rivera about his travel plans.

Approximately six minutes into the stop Trooper Coleman reported the stop and ran Rivera's information. While waiting for the results, Trooper Coleman continued to ask questions such as where Rivera had purchased the truck. Trooper Coleman again confirmed he had consent to search the truck and went on to provide Rivera with a consent form that was written in Spanish. Rivera then inquired whether he was receiving a warning to which Trooper Coleman replied that he had just given him a warning and went on to discuss how fast Rivera had been traveling.

At 10:37 am Trooper Coleman received the results from the records check and asked Rivera what he thought upon reading the consent to search form. Rivera asked "What you say, if me say no?" To which Trooper Coleman replied that he would just run his drug dog around the vehicle. At approximately 10:39, or sixteen minutes into the stop, Rivera replied that he was not giving consent. By this time Trooper Coleman's partner had arrived at the scene and Trooper Coleman had Rivera sit in his partner's vehicle while he walked his drug dog around the truck. The dog then alerted to narcotics within 40 seconds, and about seventeen minutes after Rivera was originally stopped.

Trooper Coleman and his partner searched the vehicle on the side of the road and didn't locate anything so they moved the truck to a nearby wrecker service to perform a more complete search. The troopers located 5,000 grams of cocaine under the truck's windshield.

Rivera was indicted on federal drug charges. At trial Rivera moved to suppress the cocaine arguing that the traffic stop was an unreasonable seizure. The district court

agreed with Rivera stating that Rivera was, "unlawfully detained without reasonable suspicion beyond the point when the initial traffic stop should have ended." The court concluded that but for the unjustifiably prolonged detention, Trooper Coleman would not have decided to conduct the dog sniff. The government appealed the District Court's decision to the United States Court of Appeals.

On appeal Rivera did not dispute that the initial stop was lawful based on probable cause that he was speeding and following too close. Additionally, the parties agreed that the dog's alert provided Trooper Coleman probable cause to search the truck and that a dog sniff of the exterior of the vehicle during a lawful stop is not a violation of the 4<sup>th</sup> Amendment. The issue for the Court was whether the stop was unlawful because it was "prolonged beyond the time reasonably required to complete the traffic stop and the extended seizure was a "but for" cause of discovering the cocaine".

The Court found that although Trooper Coleman asked some questions not directly related to the stop those questions did not create an unreasonable seizure. The Court stated that during the first four to six minutes of the stop, much of the conversation related to the basis for the stop. Trooper Coleman requested license and registration , explained the reason he stopped Rivera, inquired into Rivera's destination and purpose of his trip, his criminal history and details of an earlier ticket Rivera had received that same day. The Court ruled that those are permissible incidents of a routine traffic stop. The Court stated that, "to the extent this questioning took longer than usual, the extra time can largely be attributed to Rivera's confused answers and language difficulties, which

reasonably necessitated Coleman's repeated follow-up questions."

The Court then went on to state that while the questions regarding Rivera's occupation and whether Rivera had guns or anything illegal were off the topic of a traffic stop, they were brief inquiries and didn't measurably extend the seizure. "An officers inquiries into matters unrelated to the justification for the traffic stop... do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Arizona v Johnson*, 129 S. Ct 781, 788 (2009).

The Court stated that four and a half minutes into the stop Trooper Coleman requested and received oral consent to search the truck. The Court held that Trooper Coleman could reasonably rely on Rivera's consent and once consent is granted it necessarily extends the traffic stop while a search is done.

Finally, Rivera argued that the traffic stop should have ended when Trooper Coleman received the radio response on the license and registration check. The Court found this argument lacking, stating that the stop was not unreasonably prolonged because Rivera had already given oral consent before the record check came back. Rivera had given consent to search four and a half minutes into the stop, therefore it was reasonable for Trooper Coleman to rely on that consent. The Court went on to state that as soon as Rivera refused to sign the consent form, Trooper Coleman promptly walked his dog around the vehicle. The time from Rivera refusing to sign the consent to the time the dog alerted was less than two minutes and such a brief detention for a dog sniff at the end of a traffic stop has previously been held

reasonable. *United States v Alexander*, 448 F.3d. 1014, 1016-1017 (8<sup>th</sup> Cir. 2006).

**Case:** This case was decided by the United States Court of Appeals on July 6, 2009. The case cite is *U.S. v Rivera*, 570 F.3d 1009 (8<sup>th</sup> Cir. 2009).

**Note From Deputy City Attorney:** This case was decided under federal case law. Please see my note following the next case.

Amber Roe  
Deputy City Attorney



### **Drug Dog Available from Onset of Stop; United States v. Suitt**

Dallas County, Iowa Deputy Faiferlick pulled over Michael Suitt at 11:31 am for an expired vehicle license. Deputy Faiferlick had Suitt sit in the patrol car as he ran checks on Suitt's license and registration. Deputy Faiferlick used his vehicle computer to run the check. At 11:34 am Deputy Faiferlick told Suitt that he was going to issue Suitt a warning. While writing the warning the deputy asked Suitt routine questions about the basis of his trip. Suitt appeared nervous and was unable to name the city he was traveling to or the length of his stay. At 11:39 am Deputy Faiferlick ran a second registration check this time through dispatch. At 11:44 am the deputy gave Suitt a warning ticket and returned his license. As Suitt walked back to his vehicle Deputy Faiferlick inquired as to whether Suitt had half a minute to answer a few more questions. Suitt agreed and the deputy asked whether Suitt had anything illegal in his vehicle and if he could have permission to search. Suitt denied having anything illegal,

and denied consent stating that he was on a tight schedule. The deputy then proceeded to get his drug dog Hank out of the vehicle and Hank alerted at approximately 11:47 am. Deputy Faiferlick then located 32 bales of marijuana.

Suitt was indicted and filed a motion to suppress the evidence arguing that Deputy Faiferlick unreasonably extended the traffic stop, a violation of the Fourth Amendment. The Court ruled that unlike in *United States v. Peralez*, 26 F.3d 1115 (8<sup>th</sup> Cir. 2008), (see July 2008 CALL), Deputy Faiferlick did not extend the stop by asking drug interdiction questions. Deputy Faiferlick asked only routine traffic questions and therefore did not unreasonably prolong the stop. Suitt pled guilty and was sentenced to 60 months. Suitt then appealed to the Eighth Circuit Court of Appeals.

On appeal the Court stated that the issue in the case was whether the dog sniff that led to the discovery of the marijuana was a result of an unconstitutionally prolonged stop. The Court recognized that situations typically occur where a roadside detention is unreasonably delayed while an officer waits for the arrival of a drug dog. However, the Court pointed out that Deputy Faiferlick had his drug dog Hank with him from the onset of the traffic stop. The Court ruled the present case is unlike *Peralez* where that officer issued a warning and then with no basis to believe criminal activity was afoot proceeded to keep the driver detained for ten minutes while asking the suspects about the presence of guns, drugs and illegal activity. Here, Deputy Faiferlick's questions regarding Suitt's destination were permissible and Suitt's vague answers led Deputy Faiferlick to ask about who Suitt was visiting. The Court stated that Suitt's answers, taken as a whole, were evasive and

that gave Deputy Faiferlick reasonable suspicion to prolong the stop, "for additional questioning after the basis for the initial stop had been resolved." Therefore, the Court ruled that Deputy Faiferlick's questioning did not unreasonably prolong the traffic stop.

Suitt then argued that the dog sniff was illegal because Deputy Faiferlick refused to let Suitt leave after Suitt refused consent to search his vehicle. The court agreed that while refusing consent is not a basis to continue a stop, the dog sniff was neither a search nor a seizure and that since it was conducted merely three minutes after the traffic stop concluded it was no more than a *de minimis* extension of the stop. The Court upheld the conviction.

**Case:** This case was decided on June 25, 2009 in the 8<sup>th</sup> Circuit Court of Appeals. The case cite is *U.S. v. Suitt*, 569 F.3d 867 (8th Cir. 2009).

**Note From Deputy City Attorney:** This case was decided on federal law. Prior C.A.L.L. articles based on Arkansas court cases have focused on the need to request consent to search a vehicle before handing back a drivers license and registration. It is my opinion that Arkansas Courts may have suppressed the evidence in this case because the officer waited until after the traffic stop was over to request consent, thereby extending the traffic stop. Once an officer hands back the license and registration, traffic ticket, warning etc., the probable cause that allowed the officer to make the stop is gone. The stop can only be prolonged at that point if the officer has developed new probable cause or reasonable suspicion. REQUEST CONSENT TO SEARCH PRIOR TO HANDING BACK PAPERWORK. See *Sims v. State*, 356 Ark.

507 (2004), *Enriquez v. State*, 97Ark. App. 62 (2006).

Amber Roe  
Deputy City Attorney



## "Mini-Motorcycles" and Mopeds: What are the Rules?

Recently, a number of questions have arisen regarding "mini-motorcycles", "pocket bikes", and mopeds. These look like motorcycles, only they are much, much smaller. I have had several officers ask about the legality of these mini-motorcycles and mopeds, and which laws apply to their operation.

The laws of the State of Arkansas specifically define "motorized bicycle", "motor-driven cycle", and "motorcycle". Under Arkansas law, a moped or a "pocket bike" would be considered a "motorized bicycle", if it has an automatic transmission and a motor of not more than 50cc. It would be considered a "motor-driven cycle" if it has no more than 250cc. Obviously, over 250cc would be considered a "motorcycle". Thus, mopeds and "pocket bikes" would more than likely be considered a motorized bicycle because mopeds and "pocket bikes" usually have an automatic transmission of not more than 50cc (usually 47cc or 49cc).

Can mopeds/"pocket bikes" be legally operated on the streets and highways of our city?

Yes, there is no state statute or ordinance preventing these "pocket bikes" from being operated on the streets of the City of Springdale. The only exception is contained

in Ark. Code Ann. §27-20-111(b), which provides that it shall be unlawful for any person to operate a motorized bicycle upon interstate highways, limited access highways, or sidewalks. In other words, mopeds and "pocket bikes" would not be allowed on I-540.

Must the operator of a moped or "pocket bike" obey the rules of the road?

Yes. Arkansas Code Annotated §27-20-111(a) provides that the operators of motorized bicycles shall be subject to all state and local traffic laws, ordinances, and regulations. Furthermore, §27-20-111(b) specifically prohibits the operation of a motorized bicycle on sidewalks.

Must the operator of a moped or "pocket bike" have a drivers' license?

Yes, the operator must either have a drivers' license or a certificate to operate a motorized bicycle. Ark. Code Ann. §27-20-111(c) provides that it is unlawful to operate a motorized bicycle upon a public street or highway unless the person has a certificate to operate such a vehicle. However, if a person already has a motor-driven cycle license, a motorcycle license, or a Class A, Class B, Class C, or Class D drivers' license, then the person shall not be required to obtain a certificate. A certificate is required for any person over the age of 10 that does not otherwise have a license. The statute also provides that a certificate shall not be issued to a person under 10 years of age. Thus, the statute seems to prohibit the operation of motorized bicycle by a child under the age of 10. In other words, "pocket bike" riders must have a valid drivers' license, a motorcycle endorsement, or a certificate to operate a motorized bicycle.

Must the operator of a “pocket bike” wear safety equipment?

Yes. Ark. Code Ann. §27-20-104(b) provides that drivers and passengers of mopeds and “pocket bikes” who are under 21 are required to have the same safety equipment as drivers and passengers under 21 on motorcycles or motor driven cycles. This requirement went into effect in August of 2005. As such, riders of mopeds or “pocket bikes” are required to wear protective eyewear, and are required to wear a helmet if under 21 years of age.

Must the owner of a “pocket bike” register it with the State?

No. Ark. Code Ann. §27-20-105 only requires that motorcycles and motor-driven cycles be registered, not motorized bicycles. Thus, a moped or “pocket bike” does not need to be registered.

Must the operator of a “pocket bike” provide proof of liability insurance?

The provisions of the Motor Vehicle Safety Responsibility Act (Ark. Code Ann. §27-19-101, *et seq.*) apply only to those vehicles subject to registration under the motor vehicle laws of this state. As mentioned earlier, motorized bicycles are not required to be registered, so they would fall outside these provisions. This conclusion was set forth in a 1992 Attorney General’s Opinion (92-118). However, motor-driven cycles and motorcycles are required to have insurance. Thus, it would appear that mopeds and “pocket bikes” are not required to have liability insurance.

Having a good understanding of these basic rules and regulations will prevent confusion

when dealing with the operator of a moped or “pocket bike”.

Ernest Cate  
Senior Deputy City Attorney

**Note:** This article was first published several years ago in *C.A.L.L.* but because of recent inquiries we've had about the subject, it is being republished.



### **Probable Cause Existed for Traffic Stop Regardless of Officers Misstatement of Law**

Francisco Gerardo Rodriguez was traveling on Interstate 40 in Van Buren when he was pulled over by Arkansas State Police Officer Olen Craig for failing to dim his bright lights for two oncoming vehicles. Upon making contact with Rodriguez, Officer Craig requested and received consent to search the vehicle. The search yielded fourteen kilograms of cocaine as well as a meth pipe and a small amount of methamphetamine. Rodriguez was issued a warning ticket for failing to dim his lights and arrested for possession.

At trial Rodriguez moved to suppress the evidence and the State called Officer Craig to testify. Officer Craig was questioned about what distance a driver was required to dim their lights in the presence of oncoming vehicles and Officer Craig responded that he thought the statute required lights to be dimmed at 300 feet but that it was irrelevant because Rodriguez did not dim his lights until a third vehicle approached. Rodriguez's motion to suppress was denied and he was sentenced to concurrent terms of twenty-five years for possession of cocaine with intent

to deliver, ten years for possession of methamphetamine and ten years for possession of drug paraphernalia.

On appeal Rodriguez argued that the circuit court erred in denying the motion to suppress because Officer Craig stopped Rodriguez's vehicle based on a mistake of law. Rodriguez argued that Officer Craig misstated the distance requirement required in the fail to dim headlight statute.

Arkansas Code Annotated §27-36-211(1)(A) states as follows:

**Use of multiple-beam road lighting equipment.**

Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto during the times specified in § 27-36-204, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations:

(1)(A) Whenever a driver of a vehicle approaches an oncoming vehicle within five hundred feet (500'), the driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver.

The Court dismissed Rodriguez's argument reiterating that the court looks to whether there was probable cause to make a traffic stop. The Court stated, "the proper inquiry is whether there are facts and circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable

caution to believe an offense has been committed by the person suspected." The Court went on to state that because Rodriguez failed to dim his lights at all on two occasions Officer Craig's misstatement about the statutes distance requirement makes no legal difference. The stop was lawful because Officer Craig had probable cause to believe a traffic violation had occurred.

**Cite:** This case was decided by the Arkansas Court of Appeals on June 24, 2009. The case cite is *Rodriguez v. State*, 2009 Ark. App. 508 (2009).

Amber Roe  
Deputy City Attorney



## Arkansas Court of Appeals Upholds Vehicle Search

**Facts Taken From Opinion:** In the early morning hours of December 20, 2007, Greene County Sheriff Deputy Chad Couch [Deputy Couch] was driving on a county road and observed a car traveling west on the road. As Deputy Couch got closer to the car, the driver accelerated away and turned off the car's headlights. Deputy Couch continued driving and lost sight of the car. Deputy Couch then drove into a farm shop and discovered the car. Brice Brumble [Brumble] was the driver of the car, Mary Joann Cole [Cole] was the owner of the car and a passenger, along with another passenger.

Deputy Couch walked to the driver's side of the vehicle and asked Brumble for his identification, as well as asking for the passenger's identification. Deputy Couch

then asked Brumble to step out of the car. After asking some questions, Deputy Couch asked for consent to search the car and Brumble consented. Deputy Couch logged the consent by reporting it to the primary dispatch. During the search, Deputy Couch found rolls of copper wire and aluminum tubing in the trunk.

Prior to the search but after the stop, Officer Sidney Binkley [Officer Binkley] came to assist. Officer Binkley knew Cole from a previous encounter and knew Cole to be the owner of the vehicle. Although there was contradictory testimony at trial, Deputy Couch testified he did not know who the true owner of the vehicle was. Cole moved to suppress the evidence based on an invalid consent to search the vehicle, but the trial court denied the motion.

Cole pled guilty to theft of property and received four years' probation. She then brought an appeal alleging that Deputy Couch did not have valid consent to search the vehicle.

**Argument and Decision by Court:** In reviewing the denial of a motion to suppress, the court makes an independent determination based on the totality of the circumstances while giving due weight to the inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406 (2003). Under Arkansas Rule of Criminal Procedure 11.2(b), "The consent justifying a search and seizure can only be given, in the case of...[the] search of a car, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given[.]"

The Arkansas Court of Appeals interpreted Rule 11.2(b) in *Ferrell v. State*, 7 Ark. App. 36 (1982). In that case, the officer saw a car

parked along a highway; beer bottles were strewn about the car. The owner of the car was sitting as a passenger. When the driver exited the car, the officer saw marijuana butts and a roach clip on the floorboard. The driver then told the officer to look in the trunk. At that time, the owner/passenger of the vehicle ran away and did not return until after the search of the vehicle was complete. The court held the search was valid.

In this case, the court held the police officer may rely on the consent to search given by the driver of a vehicle, even in the presence of the owner of the vehicle, unless the owner asserts his or her right to refuse consent. *Emphasis added.* When the owner of a car allows another person to drive their car, they are giving that person temporary authority to consent to a search of the car. In other words, the consent given to a police officer by the driver is valid, absent an objection from the owner. In the present case, Cole did not object to Brumble giving consent, so the search was upheld.

**Case:** This case was decided by the Arkansas Court of Appeals on June 24, 2009, and was an appeal from the Greene County Circuit Court. The case citation is: *Cole v. State*, 2009 Ark. App. 514.

**Note from Deputy City Attorney:** The court also noted that they hoped police officers would make an effort to identify the owner of the vehicle before asking for consent to search the vehicle and to obtain consent from the owner if the owner was present.

Brooke Lockhart  
Deputy City Attorney

## 8<sup>th</sup> Circuit Upholds Protective Sweep in Home

**Facts Taken From Opinion:** On July 26, 2006, officers, including Investigator Michael Blegen [Blegen], Detective John Cooley [Cooley], and Officer Chad Obersteadt [Obersteadt], went to Cortez L. Williams [Williams] residence in Missouri to execute an arrest warrant for Williams, who had allegedly violated the terms of his parole. The officers had also received a tip that Williams was threatening to burn down houses of people who lived nearby. The officers also knew that Williams had been arrested previously for being a felon in possession of a firearm.

Blegen knocked on the front door and announced, "Police!" A child unlocked the door but did not open it. The child called for his "mom and dad." While this was happening, Cooley, who was in back of the house, observed Williams run to the back door and then turn to go back inside the house. After Williams was handcuffed on the living room floor, officers conducted a search. Upon entering a bedroom, Obersteadt saw a semi-automatic pistol on top of a high bookcase, partially concealed in a pile of clothing. Cooley took custody of the firearm.

Williams was indicted in federal court for being a felon in possession of a firearm. He was found guilty at a jury trial and sentenced to forty-six months' imprisonment. He appealed and argued that the firearm should be suppressed as evidence because officers violated his Fourth Amendment rights by conducting an improper protective sweep of his home.

**Argument and Decision by Court:** The parties agreed that there was no warrant for the search of Williams's home. Therefore, the firearm is admissible only if the search falls into an exception to the warrant requirement.

In *Maryland v. Buie*, the Supreme Court held that a properly limited warrantless protective sweep may be conducted "in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337 (1990). A protective sweep must be quick and limited to a cursory look at places where a person could be found. *Id.* At 335-36.

In coming to the conclusion that the protective sweep was justified by reasonable suspicion that dangerous accomplices may have been present, the court noted the following facts: (1) that the child who came to the door called out to "Mom and Dad", indicating that more than one adult was in the home, (2) that the officers had prior information that the defendant was threatening to burn neighbors homes, (3) that the officers knew that the defendant had previously been arrested for possessing a firearm after having been convicted of a felony, and (4) that the officers observed the defendant attempt to flee from them. The court also stated that Williams's attempt to flee could have been construed as an effort to warn others. *See United States v. Jones*, 193 F.3d 948, 950 (8<sup>th</sup> Cir. 1999). Also, the indication that there could be firearms present posed a danger to officer safety. *See United States v. Davis*, 471 F.3d 938, 945 (8<sup>th</sup> Cir. 2006).

The court also agreed with the district court in finding that the arrest and protective sweep were simultaneous. Although Williams was handcuffed before the search occurred, a valid protective sweep may be conducted within a reasonable period of time after the subject of the warrant has been arrested. *Davis*, 471 F.3d at 944. The court upheld the protective sweep of Williams's home.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on August 20, 2009, and was an appeal from the United States District Court for the Western District of Missouri. The case citation is: *U.S. v. Williams*, No. 08-2413 (8<sup>th</sup> Cir. Aug. 20, 2009).

Brooke Lockhart  
Deputy City Attorney



## **Arkansas Supreme Court Reverses Capital Murder and Kidnapping Conviction Finding That Statements Should Have Been Suppressed**

**Facts Taken From the Opinion:** On August 27, 2006, the car of seventeen-year-old Casey Crowder was found along the side of Highway 65 in Dumas, Arkansas. Casey's clothed body was later discovered, in Desha County along "forty-three canal" on September 2, 2006, with a black zip-tie around her neck. During the course of the investigation into her disappearance and death, Kenneth Ray Osburn became a person of interest.

On September 4, 2006, Osburn presented himself at the Southeast Arkansas Law Enforcement Center (SEALEC) and stated that he had heard that investigators wanted to speak with him and examine his truck. He was subsequently interviewed by Special Agent Rick Newton and Special Agent David Chastain of the Arkansas State Police at 2:55 p.m. (hereinafter, "the 09.04.06 2:55 interview"). The interview was not audio or video recorded, but was recorded via notes taken by Agent Chastain. During the interview, Osburn consented to searches of both his home and truck. In addition, after the agents noticed scratches on Osburn's arms, he permitted the agents to photograph his entire body.

At 11:15 p.m. that same day, Osburn was again interviewed, this time by Special Agent Newton and Agent Boyd Boshears of the Federal Bureau of Investigation, and the interview was audibly recorded (hereinafter, "the 09.04.06 11:15 interview"). The agents repeatedly attempted to obtain information or a confession from Osburn, to no avail. Osburn denied any involvement in Casey's disappearance and death and eventually stated that he wanted to get a lawyer. Despite this request, however, the interview continued. At the conclusion of the interview, Osburn was not arrested.

On September 28, 2006, however, an arrest warrant was issued for Osburn, and he was taken into custody. According to investigators, in an effort to avoid the media stationed at the SEALEC, Osburn was taken to a metal outbuilding located on the then-sheriff-elect's property near Dumas to be interviewed (hereinafter, "the 09.28.06 4:45 interview"). Again, Agents Newton and Boshears attempted to obtain a confession from Osburn, and, according to Agent Newton, used various tactics and

investigative techniques in an attempt to "change his demeanor." While the transcript and the recording of the interview reveal that at one point Osburn asked the agents to call his lawyer, the interview continued. Nonetheless, upon a subsequent request by Osburn for counsel, the 09.28.06 4:45 interview was terminated.

While Agent Newton was outside of the metal outbuilding making arrangements for Osburn's transportation, a conversation took place between Osburn and Agent Boshears, which was not recorded. During the suppression hearing, Agent Boshears testified that Osburn asked him if he could see his family. Boshears explained that such was not his decision to make and that he would ask. He then explained the process that would take place, including transport and booking, followed by arraignment. Boshears testified that Osburn again asked to see his family and that Boshears assured Osburn that he would ask. At that time, according to Boshears, Osburn stated that he was "in a mess." After suggesting prayer, Boshears testified that Osburn asked him to pray for him and that Boshears responded that he had and he would. At that time, Boshears testified, Osburn became emotional, his demeanor changed, and he requested to see his daughter. After a brief discussion regarding faith, Boshears asked Osburn, according to the circuit court's findings, if he wanted to "keep talking," to which Osburn replied that he wanted to "do the right thing and talk." Boshears then informed Agent Newton that Osburn "requested to continue our conversation."

Accordingly, the agents again interviewed Osburn (hereinafter, "the 09.28.06 7:25 interview"). While the 09.28.06 4:45 interview was audiotaped, the agents videotaped this interview. Osburn's *Miranda*

rights form was reviewed and, at that time, Osburn confessed to his involvement.

Osburn was then taken to the SEALEC. While there, he briefly visited with his mother, daughter, and son. Afterward, Osburn approached then-Sheriff-Elect Jim Snyder, Osburn's friend and former employer, who was standing at the door of the room in which Osburn had met with his family. Sheriff Snyder testified at the suppression hearing that Osburn denied that he "did that to that girl" and told him that he "was outside" himself "watching [himself] do it." Sheriff Snyder testified that he then went to get Agents Boshears and Newton and told them what Osburn had said, to which they responded "we better go back and talk to him." The three of them returned to the room, where Agent Boshears asked Osburn if he wanted to talk. Osburn indicated he did, and a rights form was completed. During the interview (hereinafter, "the 09.28.06 8:55 interview"), Osburn again confessed to his involvement.

Prior to trial, Osburn moved to suppress each of his statements, arguing that they were taken despite his requests for counsel and that he did not knowingly, voluntarily, and intelligently waive his rights. The State responded, and a hearing was held, at the conclusion of which the circuit court took the motion under advisement. The circuit court later entered its order, granting in part and denying in part Osburn's motion to suppress.

With respect to the 09.04.06 11:15 interview, the circuit court found that, during the latter part of it, "the process and procedure used by the agents became accusatory." It further found that Osburn "unequivocally invoked his 5th Amendment right to counsel" on page seventy-eight and

that "[h]e had the right to do so at this time." The circuit court then concluded that:

By the time the defendant invoked his right to counsel in this case, the investigators were sufficiently focused on him as a suspect that his right to counsel had attached. Once that right is invoked, questioning must cease. Any statement of the defendant on September 4-5, 2006, after the invocation of the right to counsel is suppressed.

With respect to the voluntariness of this statement, the circuit court found that those portions of this statement "prior to the invocation of the right to counsel, and which are otherwise admissible . . . , did not require the giving of *Miranda* rights prior to the statement, and that portion of the motion to suppress is denied."

The circuit court also addressed the 09.28.06 4:45 interview. Noting that this interview was preceded by the admonishment and completion "of a *Miranda* rights and a signed waiver," the circuit court found that the interview occurred after Osburn's arrest for Casey's murder, "so it was custodial without question." It then found that the statement should be suppressed, in that the State made no showing that Osburn had initiated the contact with police leading up to the statement. Specifically, the circuit court found that the officers who took the statement failed to even acknowledge Osburn's prior exercise of his Fifth Amendment right to counsel and proceeded as if it had not occurred.

As to the 09.28.06 7:25 interview, the circuit court reviewed the videotape of the interview and found that Osburn appeared calm and relaxed. It then found that Osburn

had initiated further contact with police after invoking his right to counsel:

The court finds that the defendant did in this particular statement evince a willingness or desire for generalized discussion about the investigation, when he said to Agent Boshears, "I am in a mess." The further conversation between the defendant and Boshears from that point led eventually to the defendant stating he wanted to talk further about the situation and "do the right thing."

It further found that the statement was knowingly, intelligently, and voluntarily made and denied Osburn's motion to suppress it.

Finally, with respect to the 09.28.06 8:55 interview, the circuit court found that Osburn initiated the conversation with then-Sheriff-Elect Snyder and that his statements were knowingly, intelligently, and voluntarily made. For these reasons, the circuit court denied Osburn's motion to suppress with respect to this statement.

Kenneth Ray Osburn was convicted of capital murder and kidnapping and was sentenced to life imprisonment without parole and appealed to the Arkansas Supreme Court.

**Decision by the Arkansas Supreme Court:** The Arkansas Supreme Court noted that the issues here are the two statements that the Circuit Court refused to suppress, the 09.28.06 7:25 interview and the 09.28.06 8:55 interview. Osburn challenged the Circuit Court's refusal to suppress the statements, claiming that his right to counsel was violated and that the statements were not voluntary, but coerced.

The Fifth Amendment right to counsel attaches during custodial interrogation. See *Edwards v. Arizona*, 451 U.S. 477 (1981). When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Instead, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. While the accused may initiate further contact with the police, the impetus must come from the accused, not the police. *Metcalf v. State*, citation omitted. Because it is undisputed that Osburn invoked his right to counsel at the conclusion of the 09.28.06 4:45 interview, the question initially presented is whether Osburn initiated further communication with the investigators.

In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), which was a plurality decision, four justices held that the respondent's question, "Well, what is going to happen to me now?," "'initiated' further conversation in the ordinary dictionary sense of that word." Justice Rehnquist, writing for the four, further observed that while a "bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue," the respondent's question "evinced a willingness and a desire for a generalized discussion about the investigation."

The Court then opined that here, the interaction between Osburn and Agent Boshears began with Osburn's inquiry as to

whether he could see his family before being taken to jail. Agent Boshears, after telling Osburn that that was not his decision, according to his own testimony, began to describe to Osburn what was about to happen and what Osburn could expect. Again, Osburn asked to see his family, and, again, Agent Boshears told him that he would ask.

It was at that point that Osburn simply made the statement that he was "in a mess," which the State claims constituted an initiation of contact with the police. However, the Arkansas Supreme Court held it was clear that such a statement could have a variety of meanings, as evidenced by Agent Boshears's testimony that he too had found himself "in a mess":

And I explained to [Osburn] that during times that I have, that I would call myself in a mess or tough times, I explained that I rely heavily on my faith and pray a great deal.

The Court held that here, Osburn's statement simply did not indicate any desire on his part to reengage in a discussion of "the investigation," as required by *Bradshaw*. Indeed, the conversation did not turn to the investigation, but instead, according to Agent Boshears's testimony, it turned to prayer, Osburn became emotional, and he again asked to see his daughter. The two began to speak about faith, to which, according to Boshears, Osburn stated that he did not feel worthy "to keep the faith" or his "relationship with Christ." Then, Agent Boshears, according to the circuit court's findings, "asked if [Osburn] wanted to keep talking." It was only at that time that Osburn stated that he wanted to do the right thing and talk, and the statement at issue resulted.

The Court held that after examining the totality of the circumstances, they could simply not say that Osburn initiated further contact as contemplated by *Bradshaw*. Absolutely no inquiry or statement made by Osburn evinced any willingness on his part to reengage or reinitiate a conversation relating to the investigation; to the contrary, his inquiries and statements indicated a desire to see his family and expressed his despair. Nor did Osburn's statement that he was "in a mess" initiate.

The Court held the only statement made by Osburn that indicated any willingness to discuss the investigation after his invocation of the right to counsel came *after* Agent Boshears asked him if "he wanted to keep talking." Here, counsel was not made available to Osburn, nor did he initiate; instead, the Court held that it appears from the totality of the circumstances that the 09.28.06 7:25 interview was the result of a violation of *Edwards*. Accordingly, the Court held that because Osburn did not initiate, his Fifth Amendment right to counsel was violated by the 09.28.06 7:25 interview, and the circuit court's finding to the contrary was clearly against the preponderance of the evidence.

The Arkansas Supreme Court then turned to Osburn's claim that the illegality of the 09.28.06 7:25 interview rendered the 09.28.06 8:55 interview "fruit of the poisonous tree."

On this issue, the Court held that Osburn's Fifth Amendment right was violated and as such, this Fifth Amendment violation "triggers the fruit of the poisonous tree doctrine requiring the suppression of the fruits of that constitutional violation." The Court held that under the facts of the case "we are simply unable to say that Osburn's

statement from the 09.28.06 8:55 interview did not come by exploitation of the illegality of the 09.28.06 7:25 interview. The Court opined that "We have held that when the original confession has been made under illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is shown. *See Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991). The Court held the contrary had not been shown. Accordingly, the Court held that the 09.28.06 8:55 interview was a fruit of the earlier 09.28.06 7:25 interview and should have been suppressed.

The Arkansas Supreme Court next took up Osburn's argument that the confession was coerced. On this issue, the Court found that many of the investigators' statements that Osburn alleges were threatening, and, therefore, coercive, were made during the 09.04.06 11:15 interview. The Court held that while some of the statements could indeed be described as threatening, the record reveals that they were made twenty-four days prior to the interview at issue. Therefore, the Court held that they could not say that there was an essential link between the coercive behavior of the police and the resulting confession of the accused. The 09.28.06 interviews took place twenty-four days after the alleged threats were made to Osburn, which the Court held was enough time to avoid any effects of the coercive statements.

The Court then held "the same cannot be said, however, with respect to the tactics used and statements made by Agents Newton and Boshears during the 09.28.06 4:45 interview, which concluded just before the 09.28.06 7:25 interview." The Court held that their review of the record revealed that during the 09.28.06 4:45 interview,

conducted at a metal outbuilding located on the then-sheriff-elect's property, the interrogating agents immediately began using Osburn's concern and love for his family to coerce him into making a confession. Immediately after having read Osburn his *Miranda* rights, but prior to his signing his *Miranda* rights form, the agents seized upon Osburn's concern for his daughter, ironically, after stating that they were not threatening him.

The Court held that the transcript and recording of the 09.28.06 4:45 interview adequately demonstrated an interview replete with evidence of coercion. The Court held they could not ignore the coercive statements in the interview itself, nor the statements by Agent Boshears during his conversation with Osburn following his invocation of the right to counsel and prior to the 09.28.06 7:25 interview, which continually suggested to Osburn that he might not be able to see his family or that his daughter might be arrested, unless he confessed. The Court held that Osburn's will was overborne by the coercive tactics used during the entirety of the interview process following his arrest. Accordingly, the Court held that the Circuit Court's finding that Osburn's statement resulting from the 09.28.06 7:25 interview was voluntarily made was clearly against the preponderance of the evidence and further held that because Osburn's 09.28.06 8:55 statement was quite clearly a fruit of the 09.28.06 7:25 interview, it too should have been suppressed.

The Court therefore reversed and remanded Osburn's convictions and sentence.

**Case:** This case was decided by the Arkansas Supreme Court on June 25, 2009, and was an appeal from the Ashley County

Circuit Court. The case cite is *Osburn v. State*, CR 08-1146 (Ark. 6-25-2009).

Jeff Harper  
City Attorney



### **8<sup>th</sup> Circuit Finds Roadside Questioning at Traffic Stop is Not a Violation of *Miranda***

**Facts Taken From Opinion:** On August 31, 2007, Sergeant Gerald Baggett [Sergeant Baggett] and Officer Frank Platt [Officer Platt] of the Omaha Police Department stopped a vehicle in which Romando Morse [Morse] was a passenger. The driver was arrested for driving on a suspended license, and Sergeant Baggett asked Morse to exit the vehicle so the officers could conduct a search of the vehicle. Morse exited the vehicle and Sergeant Baggett stated that he was going to conduct a pat-down search of Morse, and asked Morse if he had anything on his person that Sergeant Baggett should know about. Morse said that he had crack cocaine in his pocket. Morse was then placed under arrest and the drugs were recovered from Morse's pocket.

Morse filed a motion to suppress the statement and the evidence and argued that his statement was the product of an unwarned custodial interrogation that violated his *Miranda* rights. Morse's motion was granted at the district court level and the government appealed.

**Argument and Decision by Court:** On appeal, the government argued that *Miranda* warnings were not required for roadside questioning of a motorist detained pursuant

to a routine traffic stop. *Berkemer v. McCarty*, 468 U.S. 420 (1984). In *Berkemer*, the Supreme Court held that even though a motorist is seized during a traffic stop, *Miranda* warnings are not required where the motorist is not subjected to the functional equivalent of a formal arrest. *Id.* At 440-442. The court noted that in *United States v. Martin*, 411 F.3d 998 (8<sup>th</sup> Cir. 2005), *Miranda* warnings were not required when a police officer asked a motorist during a traffic stop virtually the same question asked of Morse: whether there was "anything in the vehicle that [the officer] should know about." *Id.* at 1000. Like the motorist in *Martin*, Morse was never "'informed that his detention would not be temporary,' and he was asked only a 'modest number of questions.'" *Id.* at 1003.

Therefore, Morse was not subjected to the functional equivalent of a formal arrest before Sergeant Baggett made his inquiry, and *Miranda* warnings were not required.

**Case:** This case was an appeal from the United States District Court for the District of Nebraska. The case citation is *U.S. v. Morse*, No. 08-2377 (8<sup>th</sup> Cir. June 26, 2009).

Brooke Lockhart  
Deputy City Attorney



## **Arkansas Court of Appeals Affirms Conviction Involving Search by Parole Officer With Fort Smith Police**

**Facts Taken From the Opinion:** Michael Allen Hatcher was on parole and as a condition of his release on parole, Hatcher

signed a document containing the following consent: "You must submit your person, place of residence, and motor vehicles to search and seizure at any time, day or night, with or without a search warrant, whenever requested to do so by any Department of Community Punishment Officer."

On February 24, 2007, Hatcher's parole officer, Craig Robie, was covering for Anthony Martin's parole officer. Officer Robie testified that he and several Fort Smith police officers had been looking for four hours trying to locate Martin. He said that, during their search for Martin, an officer came and told Officer Robie they had received information that Martin was at Hatcher's residence. Officer Robie testified that he and the other officers were conducting "a parole search" and that he was in control of contacting Hatcher. Officer Robie also testified that he was directing the officers. He said that he "asked them to travel with [him] to Mr. Hatcher's residence to see if [they could] make contact with Mr. Martin."

Officer Robie testified that, while looking through the window outside of Hatcher's home, he saw Martin standing by the kitchen table. He testified that he knocked on Hatcher's front door, that Hatcher opened the door, and that he entered the residence and asked everyone to put their hands up. He said that the Fort Smith officers were there for backup. Fort Smith police officers Bruce Fletcher, Brandon Bird, and Brett Rogers confirmed Officer Robie's testimony that Officer Robie knocked on the door and made the first contact with Hatcher. Officer Robie stated that he smelled a very strong chemical odor, like a meth lab, as soon as Hatcher opened the front door. During a search of Hatcher's home, officers discovered evidence later used against

Hatcher at trial. Hatcher was convicted by a jury of manufacturing methamphetamine and possession of drug paraphernalia, for which he was sentenced to terms of 24 years' and 10 years' imprisonment, to run concurrently. He filed a motion to suppress the evidence against him, which was denied by the Sebastian County Circuit Court, and he appealed his conviction to the Arkansas Court of Appeals. His sole point of appeal was that the Circuit Court erred in denying his motion to suppress.

#### **Decision by Arkansas Court of Appeals:**

The Court noted that as a general rule, "[a] warrantless entry into a private home is presumptively unreasonable." *Norris v. State*, 338 Ark. 397 (1999) (citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). The presumption may be overcome if the law-enforcement officer obtained consent to conduct a warrantless search. Ark. R. Crim. P. 11.1. The Supreme Court has held that a parolee's advance consent is valid because the parolee remains in the custody of the penal institution from which he is released, and the "special needs of the parole process call for intensive supervision of the parolee making the warrant requirement impractical." *McFerrin v. State*, 344 Ark. 671, 678-679 (2001) (quoting *Cherry v. State*, 302 Ark. 462, 467 (1990)).

On his appeal, Hatcher made two arguments in support of his contention that the circuit court erred in denying his motion to suppress. First, he contended that the officers' search did not comply with the terms of his consent because no one "requested" to search his home, and second, he contended that the search was not a valid "parole search" because his parole officer, Officer Robie, did not solicit the help of police to search Hatcher's home; rather, the

police sought out Officer Robie to help them.

The Court of Appeals noted that the Arkansas Supreme Court addressed and rejected the first argument in *McFerrin* because the parolee was required to grant any request to search and, therefore, the parolee's verbal consent at the time of the search was unnecessary. In *McFerrin*, police searched the parolee's sister's home, where the parolee was living, without requesting consent from either the parolee or his sister immediately before the search. The only consent obtained for the search in *McFerrin* was the consent signed by the parolee as a condition of his release — the language of the consent was identical to Hatcher's consent — and a verbal consent by the parolee's sister given prior to the parolee's release as a condition of his living in her home. Accordingly, the Court concluded that the consent signed by Hatcher as a condition of his release requiring him to submit to a search of his place of residence was sufficient to support Officer Robie's search.

The Court also rejected Hatcher's second argument. Officer Robie testified that he solicited the other officers' help in searching for Martin at Hatcher's home. He testified that he directed the other officers, that he knocked on Hatcher's door, and that he was the first one to enter Hatcher's home. A parole officer may enlist the aid of the police, and a police officer may act at the direction of the parole officer without overreaching the scope of the search. *Cherry*, 302 Ark. at 468.

Accordingly, the Arkansas Court of Appeals held the Circuit Court's denial of Hatcher's motion to suppress was not clearly against

the preponderance of the evidence and therefore affirmed his conviction.

**Case:** This case was an appeal from the Sebastian County Circuit Court and was decided by the Arkansas Court of Appeals on June 17, 2009. The case cite is *Hatcher v. State*, 2009 Ark. App. 481 (2009).

Jeff Harper  
City Attorney



## **Eighth U.S. Circuit Court of Appeals Upholds Search in Arkansas Case**

**Facts Taken From the Opinion:** Andrew Phillip Nichols lived with his girlfriend, M.L., and her seven-year-old daughter in a house that Nichols owned. On August 15, 2007, M.L. found an unlabeled computer disk in the house that contained several sexually explicit photographs of her daughter. M.L. immediately notified the local police department, and when officers arrived at the home, M.L. showed officers the disk's contents and handed the disk over to them for evidence. The officers then obtained a search warrant for Nichols's computer, and a subsequent search revealed computer files containing the same sexually explicit photographs as stored on the computer disk.

M.L. had lived in Nichols's home for three months prior to the discovery of the disk, but she was not named on the deed. She had a child with Nichols in July 2007. M.L. testified that she purchased groceries and paid utilities for the house, kept all her belongings in the house, received mail at the

house, slept every night at the house, was not restricted from any area of the house, and was not restricted from accessing the computer.

It was undisputed that the camera, computer, and disk Nichols used to photograph, download, and store the illegal photographs were all manufactured outside the state of Arkansas. Based on the evidence, a grand jury indicted Nichols for producing visual depictions of a minor engaged in sexually explicit conduct using materials that had been transported in interstate or foreign commerce.

Nichols filed a pretrial motion to suppress physical evidence found on the disk and computer. After an evidentiary hearing, a magistrate judge issued a Report and Recommendation that the district court deny Nichols's motion to suppress evidence. The district court adopted the recommendation. The district court also denied Nichols's motion to dismiss the Indictment for lack of federal jurisdiction. Thereafter, Nichols conditionally pleaded guilty, preserving his right to appeal the district court's denial of his motions to suppress evidence and dismiss the Indictment. The case was appealed to the United States Court of Appeals for the Eighth Circuit.

**Decision by Eighth Circuit:** Nichols argued that the district court erred in denying his motion to suppress evidence seized during the search of his home. He claims the search was not authorized by a warrant and the consent of his cohabitant girlfriend was invalid because she did not have a property interest in the residence.

The Eighth Circuit noted that the Fourth Amendment permits a valid warrantless search of a premises when officers obtain

the voluntary consent of an occupant who shares authority over the area in common. See *United States v. Matlock*, citation omitted. Common authority is a question of fact determined by the existence of "mutual use, joint access, and control." *United States v. Almeida-Perez*, citation omitted.

The Court held that Nichols's argument that M.L. had no authority to consent because she had no property interest in the residence was without merit and has been rejected by the Supreme Court. See *United States v. Matlock*, 415 U.S. 164 (1974). ("The authority which justifies the third party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes. . . ."). Here, though the third party, M.L., had no property interest, she was a co-occupant of Nichols's residence. She had unrestricted and joint access to the entire residence, including complete access to the computer and the computer disk that officers searched. She slept at the residence, kept her possessions there, paid for its upkeep, and freely occupied it as a possessor. Thus, the district court did not clearly err in finding that M.L. had common authority to consent in this case.

The Court noted that even had M.L. lacked common authority, her consent was still effective because police officers had reason to believe she had common authority. A search is justified without a warrant where officers reasonably rely on the consent of a third party who demonstrates apparent authority to authorize the search, even if the third party lacks common authority. See *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). Apparent authority is present when "the facts available to the officer at the moment . . . warrant a man of reasonable

caution in the belief that the consenting party had authority over the premises. The Court noted that M.L. telephoned officers and had them meet her at the house. She met the officers at the door, explained to them her relationship with Nichols, freely operated the computer to show officers the disk's contents, and appeared familiar with the home. These circumstances suggest that officers were justified in believing that M.L. was an occupant of the home capable of granting consent. For these reasons, the Eighth Circuit affirmed the district court's denial of Nichols's motion to suppress.

On Nichols's other argument concerning dismissing the Indictment because the photos did not affect interstate commerce, making 18 U.S.C. § 2251 unconstitutional as applied to his case, the Court noted that they have upheld the constitutionality of § 2251 and have held on a number of occasions that the use of equipment that has moved in interstate commerce provides a sufficient jurisdictional nexus to include the production of child pornography under the Commerce Clause. See, e.g., *United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. 2007).

The Court held that Nichols photographed a child, downloaded those photographs, and stored them using a camera, a computer, and a storage disk that were all manufactured outside of Arkansas. Thus, federal jurisdiction is appropriate under the Commerce Clause and the Eighth Circuit precedent. Accordingly, the district court did not err in denying Nichols's motion to dismiss the Indictment.

For these reasons, the Eighth Circuit Court of Appeals affirmed the judgment of the district court.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on July 29, 2009, and was an appeal from the United States District Court for the Western District of Arkansas, the Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas. The case cite is *U.S. v. Nichols*, 09-1165 (8th Cir. 7-29-2009).

Jeff Harper  
City Attorney



### **Eighth U.S. Circuit Court of Appeals Affirms District Court Denial of Motion for Summary Judgment Based Upon Qualified and Official Immunity Involving Officer's Use of a Taser**

**Facts Taken From the Opinion:** Sandra Brown and her husband, Richard Brown (hereinafter referred to individually by their first names), had plans to meet friends for dinner at a downtown Minneapolis, Minnesota restaurant on Friday, October 8, 2005. After returning home from work, the Browns each had a cocktail, which they finished drinking at the end of their driveway. Rather than returning the glasses to the house, they put them in the car and went to meet their friends.

The Browns arrived at the restaurant around 6:30 p.m. and had dinner. Throughout the evening, Sandra had two more alcoholic drinks — a cocktail and a glass of wine — as well as coffee and water. Richard had a couple glasses of wine. They left the restaurant around midnight, with Richard

driving and Sandra riding in the front passenger's seat.

Traveling west on Highway 394, the Browns noticed a squad car with flashing lights behind their car, which was being driven in the left lane. The Browns did not think that the squad car was attempting to stop them, so Richard moved to the right lane to allow the squad car to pass. When the squad car followed the Browns into the right lane, Richard slowed down and looked for a place to pull over. There was road construction on Highway 394 and the right shoulder was barricaded and inaccessible, so Richard moved into the left lane and pulled over onto what the Browns described as the "sane lane."

As Richard opened his door and began to step out of the car, an officer ordered him to get back into the car. Richard complied with the order, pulling his leg back into the car and closing the car door. He rolled down the window, whereupon three officers came to his side of the car. One officer asked Richard if he knew why he had been stopped, to which Richard replied that he did not. At that point, one of the officers opened the door, pulled Richard out of the car, threw him against the side of the vehicle, and handcuffed him. All the while, Sandra sat quietly in the passenger's seat.

As Golden Valley Police Officer Rob Zarrett was responding to a radio call in Golden Valley, he heard that a St. Louis Park police officer was attempting to pull over a car on Highway 394 and that the driver was not stopping. After clearing the Golden Valley call, Zarrett responded to the St. Louis Park call. Before arriving on the scene, he heard a radio update that the car had pulled over into the left lane and that the driver was getting out of the car and refusing to get back into

the car. As Zarrett arrived at the scene, two officers were escorting Richard to a squad car.

The officers' behavior and demeanor frightened Sandra. She thought that the officers were aggressive and that the traffic stop was different from any that she had previously witnessed. The officers did not ask for Richard's license, registration, or proof of insurance, and they did not tell him what illegality he had committed that provoked the stop. Shortly after Richard was handcuffed, Sandra called 911 on her cell phone. She explained what had happened to the operator and was transferred to a different operator.

During her conversation with the second operator, Sandra heard someone yell, "She is on 911. She is on 911." As the 911 operator tried to reassure Sandra, Zarrett, who was accompanied by two other officers, yanked open the passenger's side door and yelled, "Get off the phone." Sandra replied that she was very frightened and that she wanted to stay on the phone with the 911 operator. Zarrett again ordered Sandra to get off the phone, to which she repeated that she was frightened.

Without another word, Zarrett applied the prongs of his Taser to Sandra's upper right arm, grabbed her phone and some of her hair, and threw the phone out the driver's side door onto the shoulder. Sandra does not remember whether she or one of the officers unfastened her seatbelt, but in any event Zarrett grabbed her right arm and pulled her out of the car, bending her arm behind her back. At that point, a second officer took her left arm and bent it behind her back. Zarrett and the other officer then escorted Sandra to a police car. Sandra tried to walk on her tiptoes to alleviate the pain from the escort

hold. She described the escort as a mix between walking and being lifted. In response to Zarrett's command to stop resisting, Sandra replied that she was not trying to resist. Upon reaching the police car, Sandra was handcuffed and placed inside the car.

Sandra was taken to the Golden Valley police station. Richard, who had refused the portable breath test offered at the traffic stop, was taken to the St. Louis Park police station, where, after taking two breathalyzer tests, he was ticketed for speeding. Sandra was charged with obstruction of legal process and an open bottle violation. Following the booking procedures, the Browns took a taxi home.

The prosecution of the charges against Sandra was later suspended under an agreement that the charges would be dismissed after successful completion of certain conditions.

Sandra claimed that she suffered extreme pain when Zarrett administered the Taser shock. She felt a sharp pain where the Taser met her arm, with the pain radiating from her upper arm and causing her muscles to clench. Sandra sustained bruises on her wrists and arms and red welts or marks on her upper arm. On the Monday after her arrest, she visited her primary care physician, who prescribed antianxiety medication. Sandra had never before been diagnosed with depression or an anxiety disorder. After the incident, Sandra experienced problems with sleeping and difficulty in focusing. She visited a psychologist twice. She is now afraid of the police. When she sees them her heart rate increases, a rash sometimes breaks out, and she occasionally hyperventilates.

Zarrett had a different recollection of the incident. After arriving at the scene, he approached the driver's side door with another officer, who ordered Sandra to get off the phone. She refused. Zarrett noticed that there were two glasses at Sandra's feet, possibly containing alcohol. After the officers walked around to the passenger's side door, Zarrett ordered Sandra to get off the phone, only to be told that she would not do so. Zarrett also says that he repeatedly told Sandra to unfasten her seat belt. As Zarrett opened the passenger's side door, Sandra scooted away from the door and pulled her knees towards her chest. Zarrett thought Sandra looked disheveled and believed that she might be intoxicated.

According to Zarrett, Sandra watched as he unholstered his Taser and removed the air cartridge, and he told Sandra that he would use his Taser if she did not comply. When Sandra was not looking, Zarrett grabbed her phone, threw it on the driver's seat, and applied the Taser in drive stun mode to Sandra's upper right arm for an estimated two to three seconds. Sandra then unfastened her seat belt, whereupon Zarrett removed her from the car and arrested her. With the help of another officer, Zarrett escorted Sandra to his squad car. Sandra resisted the escort, despite repeated commands that she cooperate.

Sandra Brown filed suit against Officer Zarrett alleging he violated her Fourth Amendment right to be free from excessive force during the course of the traffic stop and her arrest. Zarrett filed a motion for summary judgment based on qualified and official immunity and the District Court for the District of Minnesota denied the motion. Zarrett then appealed to the Eighth U.S. Circuit Court of Appeals.

**Decision by Eighth Circuit:** The Court noted that qualified immunity shields government officials from liability in a § 1983 (42 U.S.C § 1983) action unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006). The Court noted that they view the facts in the light most favorable to the plaintiff, accepting as true the facts that the district court found were adequately supported, as well as the facts the district court likely assumed.

Qualified immunity involves the following two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); see also *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (holding that courts may exercise their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first).

The Court's initial inquiry is whether the facts alleged support Sandra's contention that Zarrett violated her Fourth Amendment right to be free from excessive force during the course of the traffic stop and her arrest. The Court noted that they analyze excessive force claims in the context of seizures under the Fourth Amendment, applying its reasonableness standard. *Henderson*, citation omitted. The Supreme Court's "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical

coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Henderson*, citation omitted (quoting *Littrell v. Franklin*, 388 F.3d 578, 583 (8th Cir. 2004) and *Greiner v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir. 1994)) (internal quotations omitted).

The Court held that given the circumstances surrounding the Taser and arrest, we are not convinced that Zarrett's use of force was objectively reasonable as a matter of law. Sandra's conduct did not amount to a severe or violent crime. Zarrett suspected that Sandra had committed an open bottle violation, a misdemeanor punishable by not more than ninety days' imprisonment or a fine of not more than \$1,000, or both under Minnesota law. Zarrett contended that the district court failed to consider the seriousness of the crimes of fleeing from an officer in a motor vehicle and driving while intoxicated. The Court held that whatever the officers' suspicions may have been with respect to Richard's possible intoxication, they had no reason to believe that Sandra had had anything to do with the manner in which Richard had responded to their flashing lights. Accordingly, the U.S. Eighth Circuit Court held the district court did not err in determining that the crime at issue was Sandra's potential violation of Minnesota's open bottle law.

The Court held Sandra posed at most a minimal safety threat to Zarrett and the other officers and was not actively resisting arrest or attempting to flee. In light of the fact that Zarrett testified that he had ample time in which to come around from the driver's side

of the car to the passenger's side, there is nothing to indicate that he was faced with the need to make any split-second decisions, nor can the circumstances fairly be described as constituting a "tense, uncertain, and rapidly evolving" situation. As for Zarrett's argument that the two glass tumblers at Sandra's feet could be used as weapons, his deposition testimony that "It's not something I would rule out. It's something easily accessible," is hardly the description of an officer in fear of being physically attacked. There was no indication that Sandra would use the tumblers to harm the officers. She did not reach for them, and she did not threaten the officers, verbally or physically. Zarrett's contention that he thought Sandra might kick him when she raised her knees to her chest while cowering in the car might be accepted by a jury, but a jury could just as well interpret that conduct as an instinctive self-protective reaction consistent with Sandra's fear. The Court held that nothing in the record indicates that Sandra was actively resisting arrest as she sat in the car or that she was attempting to evade arrest by flight. Her principal offense, it would appear, was to disobey the commands to terminate her call to the 911 operator. Whether Zarrett reasonably interpreted her refusal as a realistic threat to his personal safety or whether it constituted nothing more than an affront to his command authority is a matter for a jury to decide.

The Court's second inquiry in considering the denial of qualified immunity is in considering the denial of qualified immunity and whether the right violated was clearly established. The Court held on this point that at the time Zarrett employed his Taser and arrested Sandra, the law was sufficiently clear to inform a reasonable officer that it was unlawful to Taser a nonviolent,

suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator.

The Court held it was the province of the jury to assess the credibility of the evidence, and if the jury accepts Sandra's account, it could fairly conclude that to apply a Taser in the situation here presented would constitute the use of excessive force. Therefore, accepting Sandra's versions of the facts as true, the Court concluded that she has alleged a violation of her clearly established right to be free from excessive force. Therefore, the District Court decision to deny the motion for summary judgment was affirmed.

**Note From City Attorney:** In a footnote to this decision, the Court noted that the Taser is a relatively new implement of force, and case law related to the Taser is developing. Several other circuits have considered whether the deployment of a Taser during arrest constitutes excessive force in violation of the Fourth Amendment. The First Circuit in *Parker v. Gerrish*, upheld a jury verdict that the officer used excessive force in Tasering an arrestee who had insulted the officers but also had complied with their requests and did not resist arrest. In *Zivojinovich v. Barner*, the Eleventh Circuit held that use of a Taser to subdue a suspect who had repeatedly ignored police instructions and continued to act belligerently was reasonably proportionate to the need for force. In *Casey v. City of Fed. Heights*, the Tenth Circuit held that use of a Taser and related force against a nonviolent misdemeanant who did not flee or actively resist arrest was excessive.

The Springdale Police Department policy on Taser deployment provides in part that "the decision to use the Taser shall be made based upon the actions of the subject or threats facing the officer and the totality of the circumstances of the incident. The use of this device must be reasonable and necessary. The Taser may be used if verbal direction has failed to obtain the subject's compliance, and the subject has signaled the intention to actively resist the officer's efforts to effect an arrest or custody."

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on July 22, 2009 and was an appeal from the United States District Court for District of Minnesota. The case cite is *Brown v. City of Golden Valley*, 08-1640 (8<sup>th</sup> Cir. 7-22-2009).

Jeff Harper  
City Attorney



### **Eighth U.S. Circuit Court Upholds District Court's Denial of Qualified Immunity in Case Involving a Prisoner at the Garland County, Arkansas Jail**

**Facts Taken From the Opinion:** Around 8:45 a.m. on February 13, 2007, Arkansas State Police arrested Steven McFarland for driving while intoxicated from the influence of drugs, among other charges. The arresting officer's report states, "Mr. McFarland appeared to be intoxicated," "appeared to be sleepy, and at times he fell asleep."

Police took McFarland to the Garland County Adult Detention Center, where

Deputy John T. Dodge, a detention facility officer, booked him in the presence of Deputy John D. Henry. A drug recognition expert took a urine sample, which tested positive for marijuana, benzodiazepines, and opiates. McFarland told the expert he had taken Seroquel, Hydrocodone, Depakote, and Ambien. McFarland possessed a prescription, issued the previous day, for 90 tablets of Chlorzoxazone, a muscle-relaxer. Twenty-one pills were missing from the bottle.

The drug influence evaluation was completed at 11:47 a.m. It states that McFarland's coordination is "poor," his speech is "slurred," his face is "flushed," and his eyelids are "droopy." "Arrestee stated that he took an unknown amount of" the pharmaceutical drugs he had mentioned before. McFarland's pulse, blood pressure, and temperature were "down." A blood alcohol test showed McFarland had not been drinking.

Lieutenant Judy Ann McMurrian was the supervising detention facility officer on February 13. Notified of the missing pills and of McFarland's symptoms, she spoke with Sergeant Ronald Radley, another detention facility officer, about transporting McFarland to a hospital. Radley suggested consulting Tommy L. Harmon, a practical nurse at the facility, before taking any action. McMurrian agreed.

McFarland entered a holding cell at about 12:30 p.m. A videotape shows him moving only once in the next five hours. Nurse Harmon examined McFarland in the cell, concluding he did not require hospitalization. Harmon's affidavit states that McFarland snored loudly, "as if he was sleeping off alcohol." Deputy Henry — who was with Dodge during the booking — was

also present during the examination in the cell, but did not inform Harmon of McFarland's ingestion of drugs.

Officers placed another detainee in McFarland's cell at 5 p.m. A half-hour later, the detainee noticed that McFarland was not breathing; he notified officers. Sergeant Dan J. Ansley, trained in CPR, entered the cell at 5:35 p.m. The videotape shows Ansley standing over McFarland shaking him; Ansley claims he checked for and observed a weak pulse. No officer attempted to perform CPR on McFarland.

Paramedics arrived at 5:42 p.m., and transported McFarland to a hospital. He sustained severe brain injuries, stemming from airway blockage.

Jan McRaven, guardian of the person and estate of Steven McFarland, sued Garland County officials, on behalf of McFarland, alleging deliberate indifference to McFarland's medical need. The district court granted qualified immunity to several defendants, concluding they lacked subjective knowledge of McFarland's condition and, therefore, were not deliberately indifferent. The district court denied qualified immunity to Lieutenant McMurrian, Sergeant Radley, Deputy Dodge, Deputy Henry, Nurse Harmon, and Sergeant Ansley, concluding that disputed material facts exist about their subjective knowledge of McFarland's medical need.

The defendants who had qualified immunity denied then appealed their case to the Eighth U.S. Circuit Court of Appeals.

**Decision by Eighth Circuit:** The Eighth Circuit noted "every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ." 42 U.S.C. § 1983. "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quotations and citation omitted). "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* An official who is deliberately indifferent to a prisoner's medical needs is subject to suit under § 1983.

#### **Lieutenant McMurrin**

"Intentional delay in providing medical treatment shows deliberate disregard if a reasonable person would know that the inmate requires medical attention or the actions of the officers are so dangerous that a knowledge of the risk may be presumed." *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8<sup>th</sup> Cir. 2006). In *Gordon*, this court affirmed the denial of qualified immunity when an officer was aware of the inmate's medical issues, knew the inmate had complained of breathing trouble and chest pain, but waited for other officers to ask him to initiate medical treatment.

McMurrin initially wanted McFarland hospitalized, but changed her mind after receiving Nurse Harmon's recommendation that hospitalization was unnecessary. McRaven asserted that Harmon, a practical nurse, is unqualified as a matter of law to determine whether or not McFarland should

have been hospitalized, since Harmon was not supervised by a more senior medical professional. The Court held that they need not decide that issue and instead, the question is whether McMurrin and the other defendant-officers reasonably relied on Harmon's medical opinion, whether or not Harmon should have provided a medical opinion without supervision.

Here, McMurrin could not reasonably rely on Harmon's medical opinion, for three reasons. First, McMurrin was aware of the cocktail of potent drugs McFarland had consumed, and that circumstances strongly suggested McFarland did not consume the drugs in prescribed dosages. Second, McMurrin was aware that McFarland exhibited symptoms of extreme intoxication. The drug influence evaluation described a clearly impaired person, which should have alerted McMurrin to McFarland's medical need. Third, McMurrin knew, or reasonably should have known, that Harmon based his medical assessment on the faulty assumption that McFarland was under the influence of alcohol, not drugs. Given McMurrin's knowledge of the drugs McFarland consumed and his physical state — facts that should have triggered special concern — it was unreasonable to rely on a medical assessment grounded on incorrect information. In combination, these three facts preclude qualified immunity.

The Court also noted that the facts in this case differ from those in *Grayson v. Ross*, 454 F.3d 802 (8<sup>th</sup> Cir. 2006). There, the intake officer was aware that the detainee "was likely under the influence of methamphetamine," but "did not know the amount of the methamphetamine taken or the time it was taken." "Nor could he readily determine the degree of" the detainee's intoxication. Here, by contrast, the intake

officers knew the cocktail of drugs taken by McFarland, and the drug intoxication evaluation showed a severely intoxicated detainee.

The Court held that like the *Gordon* officer, McMurrian was aware of McFarland's medical issues, knew he appeared medically distressed, and declined to have him hospitalized. Therefore the Court held that the District Court did not err by denying McMurrian qualified immunity.

#### **Sergeant Radley**

McMurrian told Radley that McFarland should be hospitalized. Radley disagreed, instead seeking permission from McMurrian for Nurse Harmon to evaluate McFarland. Radley was aware of McFarland's ingestion of drugs, but did not inform Harmon of this fact. Later, Radley observed, via the video monitor, McFarland sleeping in his cell for several hours without moving.

To be liable for deliberate indifference, an "official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Radley knew of the large quantity of drugs consumed by McFarland and his symptoms of intoxication. Radley could not reasonably rely on Nurse Harmon's medical opinion without informing Harmon of McFarland's ingestion of drugs. The Court held that disputed issues of material fact exist over Radley's subjective knowledge of McFarland's medical need, and therefore the Court held that the District Court did not err by denying Radley qualified immunity.

#### **Deputy Dodge**

Dodge's affidavit states: "At no time did I suspect that Mr. McFarland needed any type of medical care." The Court held that according to the record, Dodge knew of the large quantity of drugs consumed by McFarland and his symptoms of intoxication, and could not reasonably rely on Harmon's evaluation. He knew "of and disregard[ed] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. The Court held Dodge's subjective knowledge of McFarland's medical need is a disputed issue of material fact. The district court did not err by denying him qualified immunity.

#### **Deputy Henry**

Henry was present during the booking, when McFarland's drug ingestion was discussed, and during Harmon's examination of McFarland in the cell. Henry could have, but did not, inform Harmon of the drugs consumed by McFarland during Harmon's medical examination. Before agreeing with Radley not to hospitalize McFarland, McMurrian discussed the nurse's evaluation with Henry. Under these circumstances, Henry could not reasonably rely on Harmon's evaluation. The Court held that disputed issues of material fact exist over Henry's subjective knowledge of McFarland's medical need, and therefore the district court did not err by denying him qualified immunity.

#### **Nurse Harmon**

Harmon's affidavit states that he took McFarland's "blood pressure and pulse on several occasions," and that "[n]one of these readings indicated a medical need to me." The videotape of the cell, which recorded

McFarland sleeping for five hours, does not show Harmon checking McFarland's blood pressure or pulse. This creates a disputed material fact about the care Harmon provided.

The Court also noted that more importantly, having (incorrectly) evaluated McFarland as being intoxicated from alcohol, Harmon did not consult the blood alcohol test results — available at the time — to determine whether McFarland required hospitalization for alcohol poisoning. Had he done so, Harmon would have realized that McFarland was not under the influence of alcohol, signaling that something else was wrong. The Court held that the District Court did not err by denying him qualified immunity.

### Sergeant Ansley

Ansley entered the cell after receiving notice that McFarland was not breathing. The videotape shows him standing over McFarland and shaking him for seven minutes before paramedics arrive. Despite being trained in CPR, Ansley made no attempt to resuscitate McFarland. (Lieutenant McMurrin was also present at this time, but was not trained in CPR.)

An officer trained in CPR, who fails to perform it on a prisoner manifestly in need of such assistance, is liable under § 1983 for deliberate indifference. *Tlamka v. Serrell*, 244 F.3d 628, 633 (8<sup>th</sup> Cir. 2001).

The Court held that here, Ansley was aware of McFarland's medical need and was capable of providing assistance. He failed to do so and therefore the district court did not err by denying him qualified immunity.

The defendants also sought dismissal of McRaven's claim under the Arkansas Civil

Rights Act, Ark. Code § 16-123-105. On this issue the Court held that the federal and state claims "derive from a common nucleus of operative fact," and therefore the District Court did not abuse its discretion by exercising supplemental jurisdiction.

The Eight U.S. Circuit Court of Appeals affirmed the judgment of the District Court.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on August 20, 2009. The case cite is *McRaven v. Sanders*, No. 08-3543 (8<sup>th</sup> Cir. 8-20-2009).

Jeff Harper  
City Attorney



### Acts of Interest to Law Enforcement

The 2009 Arkansas General Assembly passed numerous Acts of interest to law enforcement. Below is a summary of these Acts which was compiled by our office. Unless the particular Act specifically sets out an effective date, it will go into effect on Friday, July 31, 2009. If you want to view the full text of an Act, go to the General Assembly website at [www.arkleg.state.ar.us](http://www.arkleg.state.ar.us), click on "Acts" to the left and then you can search for the particular Act. After reviewing the Acts, if you should have any questions, please let me know.

**Act 194** amends Ark. Code Ann. §5-26-303, domestic battery first degree, to add if the person knowingly causes serious physical injury to a family or household member who is sixty (60) years of age or older or twelve (12) years of age or younger. This Act also amends Ark. Code Ann. §5-26-304,

domestic battery second degree, to add if the person knowingly causes physical injury to a family or household member who is sixty (60) years of age or older or twelve (12) years of age or younger.

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**Act 331** amends Ark. Code Ann. §5-53-134, the Violation of Order of Protection statute, to provide that Violation of Order of Protection is a Class D Felony if the offender has a prior conviction for Violation of Order of Protection within the last five (5) years, if another crime was committed in connection with the current Violation of Order of Protection, and if the order of protection was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate. This Act also adds a provision that a law enforcement officer may not arrest the petitioner for violating the terms of an order of protection, just the respondent. This Act went into effect on March 10, 2009. See also ACT 1447.

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**Act 333** amends Ark. Code Ann. §5-26-305, the Domestic Battery Third Degree statute, to provide that Domestic Battery Third Degree is a felony if the person has a prior conviction for Aggravated Assault on a family or household member within the last five (5) years.

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**Act 619** amends Ark. Code Ann. §23-66-206 to prohibit insurance companies from refusing to insure or to refuse to continue to insure an individual because of the individual's status as a victim of domestic abuse.

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**Act 1447** creates a new statute, to be codified at Ark. Code Ann. §9-15-217, to provide that a person charged with violating an order of protection may be required to wear an ankle monitor as a condition of their release pending trial, and if convicted may be required to wear an ankle monitor for between four months and a year. See also ACT 331.

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**Act 1456** creates a new statute, to be codified at Ark. Code Ann. §16-81-116, authorizing an arrest without a warrant and even if it does not take place in the officer's presence for the offense of Interference with Emergency Communication (1<sup>st</sup> and 2<sup>nd</sup> degree). There is a 4 hour time limit, unless injury is involved, in which the time limit is 12 hours.

**Traffic Laws**

***Seatbelt Law***

**Act 308** repeals Ark. Code Ann. §27-37-704 and 27-16-804, thereby making a seatbelt violation a primary offense. This Act went into effect on June 30, 2009 and is the subject of an article in the July 2009 C.A.L.L..

***Cell Phones/Texting***

**Act 181** creates a new section of statutes to be codified at Ark. Code Ann. §27-51-1501, *et seq.*, to prohibit the use of handheld wireless devices for texting while driving. There are exceptions for emergencies and for emergency officials. This offense is a primary offense, and a violation of this Act

is considered a violation. This Act goes into effect on October 1, 2009. See also ACT 197 and ACT 247, as they purport to be codified at Ark. Code Ann. §27-51-1501, *et seq.*, as well. See also ACT 394. See also ACT 807.

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**Act 197 and Act 247 (they are exactly the same)** create a new section of statutes to be codified at Ark. Code Ann. §27-51-1501, and is known as "the Fewer Distractions Mean Safer Driving Act". This Act provides that drivers under the age of 18 cannot use a wireless communication device while driving, except in an emergency. A driver who is 18, but under 21 can use a hands free device only, except in an emergency. This offense is a secondary offense and is NOT a primary offense. Also, a first offense is merely a warning, and a record of all warnings issued must be maintained. A second and subsequent offense is punishable by a \$50 fine. This Act goes into effect on October 1, 2009. See also ACT 181, as it also purports to be codified at Ark. Code Ann. §27-51-1501. See also ACT 394 and ACT 807.

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**Act 394** amends Ark. Code Ann. §27-16-804 to provide that the holders of a "learner's license"/"intermediate driver's license" may not operate a wireless communication device while driving, except in an emergency. This Act also provides that the holder of an intermediate driver's license shall not drive with more than 1 unrelated minor passenger in the vehicle unless a licensed driver who is 21 or older is in the front seat of the vehicle, and shall not drive, except under certain conditions, between 11:00 p.m. and 4:00 a.m. A

violation of this Act is a primary offense (which contradicts Act 197 and 247, which are secondary offenses). See also ACT 181, ACT 197, and ACT 247. See also ACT 807.

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**Act 807** amends Ark. Code Ann. §27-16-804 to place restrictions on youthful drivers. These restrictions are similar to those contained in Act 394. The Act should be consulted for the details. See also ACT 181, ACT 197, ACT 247, and ACT 394.

#### ***Temporary Cardboard Buyer's Tags***

**Act 186** amends Ark. Code Ann. §27-14-305 to clarify that it is unlawful for any person to reproduce, paint, or alter a temporary cardboard buyer's tax issued under Ark. Code Ann. §27-14-1705. See also ACT 484. See also Section 20 of ACT 756. See also ACT 780.

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**Act 484** amends Ark. Code Ann. §27-14-1705, the statute dealing with temporary cardboard buyer's tags. The Act provides that not all dealers will be dispensing these temporary preprinted paper buyer's tags, and places the responsibility for obtaining such a tag on the buyer, not the dealer. This Act provides that the temporary tag must be obtained within five (5) days of purchase, or the buyer can be ticketed/fined. This Act provides that these tags are to be displayed on the inside of the rear window of the vehicle. This Act also creates a new statute, to be codified at Ark. Code Ann. §27-14-1708, and creates a "temporary tag database", that will be accessible by law enforcement. The Act should be consulted for the details. This Act goes into effect until July 1, 2010. See also ACT 186. See

also Section 20 of ACT 756. See also ACT 780 (which it conflicts with).

pounds. This Act went into effect on March 19, 2009.

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**Act 756** (Section 20) amends Ark. Code Ann. 27-14-1705, the temporary cardboard buyer's tag statute, to provide that these tags may be used on demonstration vehicles for up to 72 hours or loaner vehicles up to 14 days, but shall not be placed on work or service vehicles owned by a dealer. The Act should be consulted for details. This Act contained an Emergency Clause and went into effect on April 1, 2009. See also ACT 186. See also ACT 484. See also ACT 780.

**Act 561** creates a new statute, codified at Ark. Code Ann. §5-77-204, to provide that it is unlawful for persons with certain criminal histories to purchase or possess emergency vehicle lights or sirens with purpose to install them on a vehicle that reasonably appears to be or mimics a law enforcement vehicle, to install them on such a vehicle, or to operate such a vehicle with a emergency vehicle light or siren installed. A violation of this statute is a Class A Misdemeanor.

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**Act 780** amends Ark. Code Ann. §27-14-1705 concerning temporary cardboard vehicle buyer's tags, to require information on the tag to be legible from 100 feet during daylight hours, and provides how these tags are to be fastened to a vehicle. See also ACT 186. See also ACT 484 (which it conflicts with). See also ACT 756.

**Act 636** creates a new section of statutes, codified at Ark. Code Ann. §27-20-301, *et seq.*, known as the "Electric Autocycle Act". This Act allows autocycles to be registered as motorcycles and operated on the public streets and highways under certain conditions.

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**Miscellaneous Traffic Law Changes**

**Act 318** amends Ark. Code Ann. §27-14-1801, the statute which sets for the penalty for violating the vehicle "in transit to dealer" provisions, by increasing the fine to \$500 for a first offense, \$1,000 for a second offense, and \$1,500 for a third and subsequent offense.

**Act 701** amends Ark. Code Ann. §27-21-106, regarding the operation of an all-terrain vehicle by a person with a serious walking handicap, to provide that the person may operate the all-terrain vehicle on "public streets and roads when traveling on the public street or road is the most reasonable route of access available to him or her from one (1) off-road trail to another off-road trail or from his or her private property to an off-road trail".

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**Act 493** amends Ark. Code Ann. §27-35-203 to increase the maximum weight allowed on the front or steering axle of a vehicle from 20,000 pounds to 24,000

**Act 747** amends Ark. Code Ann. §27-66-401 to provide that it is a Class C

Misdemeanor to obstruct any road "by felling any trees across or by placing an obstruction on the road". Previously, it was an unclassified misdemeanor with a maximum fine of \$50. The Act also provides for a \$100 fine for every day the obstruction remains. Previously, the fine was \$2 per day.

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**Act 786** creates new statutes, to be codified at Ark. Code Ann. §27-16-1110, 1111, and 1112, to limit the validity period for drivers' licenses and identification cards issued to applicants who are not citizens of the United States.

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**Act 826** amends Ark. Code Ann. §27-50-302 to include the offense of "observing a drag race as a spectator on a public highway" as a Class B Misdemeanor. This Act also amends Ark. Code Ann. §27-50-309, the racing on the highway statute, to create the offense of "observing a drag race as a spectator on a public highway", which is a Class B Misdemeanor, and further defines the terms "drag race", "public highway", and "race".

\*\*\*\*\*

**Act 945** amends Ark. Code Ann. §27-14-723 to provide that certain entities that transact or conduct business in the state, and have a place of business in the state, must register their vehicles in this state. There are certain exceptions. Failure to comply with this statute could result in a civil penalty against the business, and any person convicted of driving a vehicle which is not in compliance with this statute is guilty of a violation.

**Act 1206** amends Ark. Code Ann. §6-19-110, the statute directing school bus drivers to report motor vehicles that pass stopped school buses, to provide that such report shall be made either to the law enforcement agency or to the appropriate prosecuting authority. Previously, all such reports came to the appropriate prosecuting authority. This Act also directs the school district, together with law enforcement and prosecutors, to develop a school bus safety plan.

\*\*\*\*\*

**Act 1308** creates a new section of statutes, to be codified at Ark. Code Ann. §27-16-1201, *et seq.*, to provide for the issuance of voluntary alternative drivers' licenses and identification cards with additional security features for enhanced identification purposes.

**DWI/Alcohol Related Laws**

**Act 294** authorizes the on-premises consumption of alcohol from 10:00 a.m. to midnight on Sundays, authorizes a referendum election for off-premises sales of alcohol on Sundays, and creates a "restaurant beer and wine permit". This Act went into effect on March 3, 2009.

\*\*\*\*\*

**Act 352** amends Ark. Code Ann. §3-3-202, the statute dealing with knowingly providing alcohol to minors, to increase the penalty from a Class C to a Class A Misdemeanor.

**Act 359** amends Ark. Code Ann. §5-65-104 and §5-65-205 to provide that a person arrested for DWI/ACV (drugs) or a person who refuses to submit to a chemical test is

ineligible for an ignition interlock restricted driving permit.

\*\*\*\*\*

**Act 423** amends Ark. Code Ann. §5-65-208, the statute requiring a chemical test of the blood, breath, or urine of a driver involved in an accident where death has occurred or is likely to occur, to remove the requirement that the test only be given when probable cause exists to believe that the driver is guilty of a DWI. The Act provides that the test shall be given in all accidents where death has occurred or is likely, regardless of DWI implications.

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**Act 431** amends Ark. Code Ann. §5-65-202 to clarify that the implied consent law applies to all chemical tests, not just one test.

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**Act 650** amends Ark. Code Ann. §5-10-105, the Negligent Homicide statute, to increase the penalty from a Class C Felony to a Class B Felony for negligent homicide while intoxicated. This Act also amends Ark. Code Ann. §5-65-111 to provide that, under certain circumstances, a prior conviction for negligent homicide counts as a prior DWI offense.

\*\*\*\*\*

**Act 922** amends Ark. Code Ann. §5-65-104 regarding the issuance of interlock devices and restricted licenses for second and third offense DWIs.

\*\*\*\*\*

**Act 948** amends Ark. Code Ann. §3-3-202, the knowingly furnishing or selling alcohol to minors statute, to provide that it does not apply to the serving of beer in any religious ceremony or rite in any established church or religion.

\*\*\*\*\*

**Act 956** amends Ark. Code Ann. §3-3-203, the minor in possession of alcohol statute, to provide that if the offender is less than 18, the charge goes to Juvenile Court. The Act amends Ark. Code Ann. §5-65-402 to provide when a juvenile is arrested for MIP or for possessing a fraudulent/altered ID, the officer is to forward the license/ID to the juvenile intake officer. This Act repeals Ark. Code Ann. §9-27-352 and places those regulations in Ark. Code Ann. §9-27-309. This Act went into effect on April 6, 2009.

\*\*\*\*\*

**Act 976** creates a new statute, Ark. Code Ann. §3-3-219, that a person who exercises control over private property shall not knowingly allow a person under 21 who is not a family member of the person to consume alcohol on the private property. 1<sup>st</sup> offense is a Class C Misdemeanor, 2<sup>nd</sup> offense is a Class A Misdemeanor, and 3<sup>rd</sup> offense is a Class D Felony.

\*\*\*\*\*

**Act 1293** amends Ark. Code Ann. §5-65-104 & 5-65-120 dealing with DWI DL suspensions.

**Laws Pertaining to the Sale or Possession of Certain Items**

**Act 329** creates a new statute, Ark. Code Ann. §5-60-102, to prohibit "the sale, offer

of retail sale, gift, or distribution of any novelty lighter". A violation of this statute is punishable by a minimum fine of \$25 and a maximum fine of \$500.

\*\*\*\*\*

**Act 339** amends Ark. Code Ann. §5-73-108(b), which defines the criminal offense of criminal distribution of explosive material, to add other categories of persons to which explosive material may not be distributed. This Act also creates a new offense, codified at Ark. Code Ann. §5-73-108(d), called "unlawful receipt or possession of an explosive material", which is a Class C Felony.

\*\*\*\*\*

**Act 466** amends Ark. Code Ann. §5-60-116, the inhaling certain compounds statute, to include the possessing or selling of certain intoxicating compounds. Previously, the statute only applied to the breathing, inhaling, or drinking of these compounds. The Act also prohibits "alcohol vaporizing devices". "Alcohol vaporizing device" is defined in the Act and should be consulted for the details.

\*\*\*\*\*

**Act 573** creates a new statute, Ark. Code Ann. §5-63-205, to provide that tickets of admission to a live entertainment event, theatre, musical performance, or place of public entertainment or amusement of any kind shall not be offered for sale by any person over the internet until the tickets have first been offered for sale to the public via an event-authorized outlet or offering. Likewise, internet portals or websites shall not allow any person to offer for resale any such ticket until the tickets have first been

offered for sale to the public via an event-authorized outlet or offering. A violation of this Act is a violation. This Act does not apply to sporting or athletic events.

\*\*\*\*\*

**Act 640** amends Ark. Code Ann. §5-60-201 to clarify that the sale or distribution of human or synthetic urine used to defraud a drug or alcohol screen is a Class B Misdemeanor.

\*\*\*\*\*

**Act 673** amends Ark. Code Ann. §5-64-401 to clarify what is meant by a "second or subsequent" conviction for possession of a controlled substance.

\*\*\*\*\*

**Act 712** amends Ark. Code Ann. §5-64-1103, concerning the penalty classification of sales limits for ephedrine, to provide that a first or second offense is a Class A Misdemeanor, a third offense is a Class D Felony, and a fourth or subsequent offense is a Class C Felony.

\*\*\*\*\*

**Act 785** amends various Arkansas laws pertaining to the regulation of tobacco products. Section 6 of this Act amends Ark. Code Ann. §5-27-227, which is the statute dealing with providing minors with tobacco products and cigarette papers.

\*\*\*\*\*

**Act 792** creates a new statute, Ark. Code Ann. §5-7-204, to provide that before a law enforcement vehicle is sold, all light, decals, radios, sirens, etc., must be removed from

the vehicle, unless the vehicle is being sold to another law enforcement agency. A violation of this statute is punishable by up to a \$1,000 fine.

\*\*\*\*\*

**Act 1212** amends Ark. Code Ann. §20-27-1502, the "unlawful to perform body art on a person under eighteen (18) years of age" statute, to make it a Class D Felony to perform body art on any person under 18 years of age in any unlicensed facility. If it is in a licensed facility, it is a Class C Misdemeanor.

\*\*\*\*\*

**Act 1495** creates a new statute, Ark. Code Ann. §20-27-2101 & 2102, to make it unlawful to sell or offer for sale an imitation firearm. "Imitation firearm" is a defined term that should be consulted, and there are exceptions in the Act as well. A violation of this statute is punishable by a civil penalty of up to \$1,000. This Act goes into effect on January 1, 2010.

### **Animal Related Laws**

**Act 33** amends Ark. Code Ann. §5-74-702 to provide for enhanced criminal penalties if the offense of Aggravated Cruelty to a Dog, Cat, or Horse is committed in the presence of a child. This Act also repeals Ark. Code Ann. §5-62-101, the cruelty to animals statute, and replaces it with Ark. Code Ann. §5-62-103, which sets forth the offense of Cruelty to Animals. This new Cruelty to Animals statute also provides for minimum fines and minimum jail terms for each offense, and makes a 4<sup>th</sup> or subsequent offense (within 5 years) a Class D Felony. This Act also creates the new offense of Aggravated Cruelty to a Dog, Cat, or Horse,

which is when a person knowingly tortures any dog, cat, or horse. This offense is codified at Ark. Code Ann. §5-62-104, and is a Class D Felony for the first offense and a Class C Felony for any subsequent offenses occurring within five (5) years. This Act also defines many of the terms used therein, and these terms are defined in Ark. Code Ann. §5-62-102. This Act also specifically exempts certain activities from the provisions of this Act, and these exemptions are contained in Ark. Code Ann. §5-62-105. This Act also provides new procedures regarding the disposition and management of animals seized by law enforcement pursuant to Ark. Code Ann. §5-62-101, *et seq.*, and the Act should be consulted for the details. This Act also amends Ark. Code Ann. §5-62-111, to give any person the authority to interfere to prevent the "imminent or ongoing" Cruelty to Animals or Aggravated Cruelty to a Dog, Cat, or Horse, and that it is a Class A Misdemeanor for any person to knowingly interfere or obstruct such person's intervention. This Act amends Ark. Code Ann. §5-62-113, to provide that only law enforcement officers have the authority to arrest for these offenses, and removes the arrest authority of societies incorporated for the prevention of cruelty to animals. This Act also amends Ark. Code Ann. §5-62-116 to increase the penalty from an unclassified misdemeanor to a Class A Misdemeanor. This Act also amends Ark. Code Ann. §5-62-120 to change the offense of "unlawful dog fighting" to "unlawful animal fighting", which would include cock fighting. This Act also creates a new section, Ark. Code Ann. §5-62-126, which provides that an intervening act of God will not subject someone to prosecution under this Act.

\*\*\*\*\*

**Act 530** amends Ark. Code Ann. §5-54-126(a), which is the "killing or injuring animals used by law enforcement or search and rescue dogs" statute, to make it a Class D Felony to purposely cause, or attempt to cause, physical contact that is of a nature likely to cause physical injury to any animal owned or used by law enforcement agency or any search and rescue dog. Previously, the statute required death or injury to the animal. This Act also creates a new offense, Ark. Code Ann. §5-54-126(b), which states that a "person who purposely interferes with or obstructs an animal owned by or used by a law enforcement agency or a search and rescue dog used by a law enforcement officer in the discharge or attempted discharge of his or her duties upon conviction is guilty of a Class A misdemeanor". This Act provides that these statutes also apply to dogs trained for the purpose of locating controlled substances, and those trained to assist in the apprehension of persons alleged to have violated the law.

\*\*\*\*\*

**Act 1401** amends Ark. Code Ann. §5-36-102, to add a presumption of theft if a person wins by bid cattle or livestock at an auction, and then does not pay for the cattle or livestock.

**Changes to Specific Crimes**

**Act 330** amends Ark. Code Ann. §5-16-101, the offense of Video Voyeurism, to provide that the violation is a Class A Misdemeanor if the person who created the video recording, film, or photo distributed or transmitted it to another person or posted it on the internet.

\*\*\*\*\*

**Act 332** amends Ark. Code Ann. §5-13-204, the Aggravated Assault statute, and Ark. Code Ann. §5-13-205, the Assault First Degree statute, to provide that it is a crime to impede or prevent the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person. It is Aggravated Assault to do so under circumstances manifesting extreme indifference to the value of human life. Otherwise, it is Assault First Degree.

\*\*\*\*\*

**Act 336** creates a new criminal offense, codified at Ark. Code Ann. §5-37-215, called Fraudulently Filing a Uniform Commercial Code Financing Statement. This offense is a Class A Misdemeanor for the first offense, and is a Class D Felony for subsequent offenses.

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**Act 342** amends Ark. Code Ann. §5-54-102, the obstructing governmental operations statute, to include falsely identifying oneself to an animal control or code enforcement officer.

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**Act 343** amends Ark. Code Ann. §5-54-104, the interference with a law enforcement officer statute, to include interfering with an animal control officer or a code enforcement officer.

**Act 344** amends Ark. Code Ann. §5-13-202, the Battery Second Degree statute, to make it applicable to animal control and code enforcement officers.

\*\*\*\*\*

**Act 390** creates a new criminal offense, known as "damaging wires and other fixtures of telephone, cable, and electric power companies", Ark. Code Ann. §5-38-206. This offense is a Class D Felony. This Act also amends Ark. Code Ann. §17-44-102, involving the data and information that must be obtained by a scrap metal recycler at the time of purchase of scrap metal. This Act requires the scrap metal recycler to file a daily electronic report of this information into a database that is accessible by law enforcement. This Act also amends Ark. Code Ann. §17-44-103, to add to the list of items that a scrap metal recycler may not purchase without written documentation that the seller is authorized to sell the item. This Act provides that a scrap metal recycler cannot make cash payment to someone known by him to have been convicted of theft, burglary, or vandalism involving scrap metal, and the scrap metal recycler is to request a list of those persons from law enforcement. This Act amends Ark. Code Ann. §17-44-106 to increase the penalty for not complying with these regulations from a Class B Misdemeanor to a Class A Misdemeanor.

\*\*\*\*\*

**Act 428** amends Ark. Code Ann. §5-70-103, to change the criminal offense from "patronizing a prostitute" to "sexual solicitation".

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**Act 478** amends the escape statutes, Ark. Code Ann. §5-54-110, (1<sup>st</sup> degree), Ark. Code Ann. §5-54-111 (2<sup>nd</sup> degree), and Ark. Code Ann. §5-54-112 (3<sup>rd</sup> degree) to increase the penalties under certain circumstances. This Act also amends Ark. Code Ann. §5-54-117, the "furnishing

implements for escape" statute, to include other actions within the scope of the statute.

\*\*\*\*\*

**Act 485** amends Ark. Code Ann. §5-37-203, the defrauding a secured creditor statute, to make the existing offense "defrauding a secured creditor in the 1<sup>st</sup> degree", and to create a new offense called "defrauding a secured creditor in the 2<sup>nd</sup> degree". A person commits the offense of defrauding a secured creditor in the 2<sup>nd</sup> degree if vehicle insurance proceeds over \$1,000 obtained from the settlement of a property damage claim are used in contravention of the security agreement that created the security interest in the vehicle. Defrauding a secured creditor in the 2<sup>nd</sup> degree is a Class A Misdemeanor. The Act also creates a new statute, Ark. Code Ann. §23-89-216, that requires insurance companies to inform their insureds of this offense.

\*\*\*\*\*

**Act 525** (Section 6) amends Ark. Code Ann. §12-12-1720 to create the offenses of failure to report adult maltreatment or long term care facility resident maltreatment in the first degree (Class B Misdemeanor) and failure to report in the second degree (Class C Misdemeanor). This Act also creates the offense of "false reporting of adult abuse", with a first offense being a Class A Misdemeanor, and subsequent offenses are a Class D Felony. This Act creates the offense of "unlawful disclosure of data or information" regarding adult abuse and maltreatment, which is a Class A Misdemeanor. This Act creates the offense of "failure to report a death" as a result of suspected adult maltreatment or long term care facility resident maltreatment, which is a Class C Misdemeanor.

**Act 630** amends Ark. Code Ann. §5-14-127, the Sexual Assault 4<sup>th</sup> Degree statute, to provide that this offense also includes engaging in sexual contact with another person who is not the actor's spouse, and the actor is employed with the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail, and the victim is in their custody. This aspect of Sexual Assault 4<sup>th</sup> Degree is a Class D Felony.

\*\*\*\*\*

**Act 734** is known as the "Clean Air on Campus Act of 2009", and is codified at Ark. Code Ann. §6-60-701, *et seq.* This Act makes it a violation to smoke on property that is owned or operated by a state-supported institution of higher education. A violation carries a minimum fine of \$100 and a maximum fine of \$500. This Act goes into effect on August 1, 2010.

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**Act 936** amends Ark. Code Ann. §5-4-702 to include homicide in the list of offenses for which an enhanced penalty is authorized if the offense is committed in the presence of a child.

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**Act 1210** amends Ark. Code Ann. §5-38-205, the "impairing the operation of a vital public facility" statute, to include "engaging in a fight or violent and tumultuous behavior; or other conduct that causes a substantial disruption, obstruction, or impediment to the operation of a vital facility". If the basis for the offense is this behavior, then Impairing the Operation of a Vital Public Facility is a Class A Misdemeanor. Otherwise, it is a Class C

Felony. This Act also adds a specific definition of "vital public facility", which includes a city jail.

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**Act 1295** amends Ark. Code Ann. §5-36-103, to provide penalties for theft occurring in an area declared to be under a state of emergency. If the value of the property is more than \$500, the theft is a Class B Felony, and if the value of the property is between \$100 and \$500, the theft is a Class C Felony.

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**Act 1298** amends Ark. Code Ann. §17-27-104, to make it a Class D Felony for a second or subsequent conviction of practicing counseling without a license.

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**Act 1304** amends Ark. Code Ann. §5-54-125, the fleeing statute, to provide that fleeing by means of any vehicle or conveyance carries a minimum of 2 days in jail and a minimum 6 months DL suspension.

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**Act 1395** amends Ark. Code Ann. §5-4-501 and 5-10-101 to include the offense of Aggravated Residential Burglary in the list of "serious felonies involving violence" in the habitual offender statute, and includes it as an underlying felony in the capital murder statute.

**Miscellaneous**

**Act 209** amends Ark. Code Ann. §5-4-201 to increase the maximum fine for a Class A

Misdemeanor from \$1,000 to \$2,500, a Class B Misdemeanor from \$500 to \$1,000, and a Class C Misdemeanor from \$100 to \$500. This Act also amends Ark. Code Ann. §16-17-129 to increase the jail fee from \$5 to \$20 (if pass an ordinance) and increases the county jail fee from \$5 to \$20 (if County passes an ordinance). This Act contained an Emergency Clause and goes into effect on July 1, 2009.

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**Act 464** creates a new section of statutes, codified at Ark. Code Ann. §18-16-501, *et seq.*, to provide a procedure for the eviction of tenants engaged in certain gambling, alcohol, and prostitution offenses.

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**Act 527** amends Ark. Code Ann. §14-51-301, to specify that if the effective time period of the "eligible for promotion" list is more than one (1) year, the time period shall be established and certified before promotional tests are administered, and that after the eligible list is certified, the time period cannot be extended.

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**Act 633** repeals the provisions of Ark. Code Ann. §5-4-203 as they are no longer needed due to Ark. Code Ann. §16-13-701, *et seq.*, repeals Ark. Code Ann. §16-17-117, as this procedure is contained in the Arkansas Rules of Criminal Procedure, and amends the implied consent statutes to make the violation a strict liability offense. This Act also raises the court costs on a DUI from \$100 to \$300. This Act also deletes Ark. Code Ann. §27-14-314, which assessed a penalty for tags that were expired more than sixty (60) days.

**Act 749** creates the Child Maltreatment Act which will be codified at Ark. Code Ann. §12-18-101, *et seq.*, and repeals the previous Child Maltreatment Act which was codified at Ark. Code Ann. §12-12-502. See also ACT 1409.

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**Act 759** creates a new statute, to be codified at Ark. Code Ann. 9-27-363, to allow a court to consider whether a juvenile's confession was voluntarily, knowingly, and intelligently made, and sets forth the factors the court may use in making that determination. This Act also amends Ark. Code Ann. §9-27-317, regarding a juvenile's waiver of counsel, to clarify that the term "parent" actually means "custodial parent".

\*\*\*\*\*

**Act 776** creates a new statute, to be codified at Ark. Code Ann. §5-64-510, to provide that a prosecuting attorney who has possession of a methamphetamine-contaminated motor vehicle shall destroy the vehicle or sell it for scrap metal.

\*\*\*\*\*

**Act 974** amends the various statutes pertaining to the collection of DNA samples, and amends Ark. Code Ann. §12-12-1006 to provide that a DNA sample is to be taken at the time of arrest for capital murder, 1<sup>st</sup> degree murder, kidnapping, 1<sup>st</sup> degree sexual assault, and 2<sup>nd</sup> degree sexual assault, and provides what is to be done with the DNA sample. The Act provides that it is a Class B Misdemeanor to refuse to give this DNA sample. This Act amends Ark. Code Ann. §12-12-1115 and 12-12-1116 to increase the penalty for these prohibited disclosures of DNA information from a Class A

Misdemeanor to a Class D Felony. This Act also establishes procedures for the collection, maintenance, dissemination of DNA sample submitted following an arrest or a criminal charge.

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**Act 1286** amends Ark. Code Ann. §12-12-315, regarding death notifications under certain circumstances, to provide that the prosecuting attorney must be notified, as well as either the county sheriff or the chief of police.

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**Act 1288** amends Ark. Code Ann. §14-15-302 regarding what is to be contained in a coroner's preliminary report, and adds who may pronounce death in a hospice situation.

**Act 1409** amends Ark. Code Ann. §12-18-402, concerning mandated reporters for child maltreatment. See also ACT 749.

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**Act 1444** amends §5-1-109 to provide that the statute of limitations for rape is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a DNA profile.

\*\*\*\*\*

**Act 1491** amends Ark. Code Ann. §5-73-103, concerning the possession of firearms by certain persons, to provide that a felony conviction does not include if the case was dismissed and expunged.

Jeff Harper, City Attorney

Ernest B. Cate, Senior Deputy City Attorney



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Springdale City Attorney's Office  
201 Spring Street  
Springdale, AR 72764  
479-750-8173

