



When Police are Interrogating a Suspect and the Suspect Requests Counsel, How Long of a Break in Time is There Required to be Before Police Commence a New Interrogation – U.S. Supreme Court Answers This Question in *Maryland v. Shatzer*

Facts Taken From the Opinion: In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown, Maryland Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son. At that time, Shatzer was incarcerated at the Maryland Correctional Institution-Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Detective Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion—he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Detective Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.

Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, then eight years old, who described the incident in more detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Detective Hoover explained that he wanted to ask Shatzer about the alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Detective Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Detective Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and



concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, “‘I didn’t force him. I didn’t force him.’ ” After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State’s Attorney charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981). The trial court held a suppression hearing and later denied Shatzer’s motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer’s 2006 statements to the detectives. Based on the proffered testimony of the victim and the “admission of the defendant as to the act of masturbation,” the trial court found Shatzer guilty of sexual child abuse of his son.

Over the dissent of two judges, the Court of Appeals of Maryland reversed and remanded. The court held that “the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*,” and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer’s release back into the general prison population between interrogations did not constitute a break in custody. The case was

appealed to the United States Supreme Court who granted certiorari.

Decision by United States Supreme Court: *Edwards* created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary. *Edwards*’ fundamental purpose was to “[p]reserv[e] the integrity of an accused’s choice to communicate with police only through counsel,” by “prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights.” It is easy to believe that a suspect’s later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and companions, “thrust into” and isolated in an “unfamiliar,” “police-dominated atmosphere,” *Miranda v. Arizona*, citation omitted. But, where a suspect has been released from custody and returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. The Court held that because the *Edwards* presumption has been established by opinion of the court, it is appropriate for the Court to specify the period of release from custody that would terminate its application. The Court concluded that the appropriate period is 14 days, which provides ample time for the suspect to get reacclimated to his normal life, to consult with his friends and counsel, and to shake off any residual coercive effects of his prior custody. The Court held that because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts



at interrogation, *Edwards* does not mandate suppression of his 2006 statements.

The Court further held that Shatzer's release back into the general prison population constituted a break in *Miranda* custody. Lawful imprisonment imposed upon conviction does not create the coercive pressures produced by investigative custody that justify *Edwards*. When previously incarcerated suspects are released back into the general prison population, they return to their accustomed surroundings and daily routine – they regain the degree of control they had over their lives before the attempted interrogation. Their continued detention is relatively disconnected from their prior unwillingness to cooperate in an investigation. The Court held that the "inherently compelling pressures" of custodial interrogation ended when Shatzer returned to his normal life.

The judgment of the Court of Appeals of Maryland was reversed and the case remanded.

Note from City Attorney: This case was a unanimous decision by the United States Supreme Court. This case establishes a bright line rule of 14 days as the time necessary for a break in custody since the Court reasoned that 14 days is "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel," after being in custody. Since Shatzer was released back into the general prison population and was lawfully imprisoned upon conviction, he returned to his accustomed surroundings and daily routine. Such would not be the case, in my opinion, if the person has not been convicted and is confined to jail. For instance, say you arrest a person and read them their *Miranda*

rights, the person invokes the right to counsel and you stop questioning them, they are then placed in the county or city jail, it is my opinion that this case does not allow you to reinterrogate them in 14 days because it is not a break in custody as they are in the county jail, failing to make bond, and not being returned to their normal surroundings.

Case: This case was decided by the United States Supreme Court on February 24, 2010. The case cite is *Maryland v. Shatzer*, 569 U.S. ____ (2010).

Jeff Harper
City Attorney



United States Supreme Court Holds a Suspect's Silence, After Being Advised of His Right to Counsel Under *Miranda*, Does Not Invoke His Right to Remain Silent

Facts Taken From the Opinion: On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified. Van Chester Thompkins, who was a suspect, fled. About one year later he was found in Ohio and arrested there.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation



was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the *Miranda* rule.

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Detective Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four *Miranda* warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form.

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was “[l]argely” silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as “yeah,” “no,” or “I don’t know.” And on occasion he communicated by nodding his head. Thompkins also said that he “didn’t want a peppermint” that was offered to him by the police and that the chair he was “sitting in was hard.”

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, “Do you believe in God?” Thompkins made eye contact with Helgert and said “Yes,” as his eyes “well[ed] up with tears.” Helgert

asked, “Do you pray to God?” Thompkins said “Yes.” Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes” and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once. The trial court denied the motion. A jury trial was held and Thompkins was found guilty on all counts. He was sentenced to life in prison without parole. On appeal, the Michigan Court of Appeals rejected Thompkins *Miranda* claims. The Federal District Court denied his subsequent habeas request, reasoning that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation and, that it was not unreasonable, for purposes of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) for the state court of appeals to determine that he had waived his right to remain silent. The Sixth U.S. Circuit Court of Appeals reversed, holding that the state court was unreasonable in finding implied waiver of Thompkins' right to remain silent and rejecting his ineffective-assistance-of-counsel claim. The case was appealed to the United States Supreme Court, which granted certiorari.

Decision by U.S. Supreme Court on *Miranda* Claim: The United States Supreme Court, in a 5 – 4 decision, held that Thompkins' silence during the interrogation



did not invoke his right to remain silent. A suspect's *Miranda* right to counsel must be invoked "unambiguously." *Davis v. United States*, 512 U. S. 452, 459 (1994). If an accused makes a statement concerning the right to counsel that is "ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights.

The Court held that Thompkins waived his right to remain silent when he knowingly and voluntarily made a statement to police. A waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception, and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, citation omitted. Such a waiver may be "implied" through a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *North Carolina v. Butler*, citation omitted. If the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused uncoerced statement establishes an implied waiver. The record here shows that Thompkins waived his right to remain silent. First, the lack of any contention that he did not understand his rights indicates that he knew what he gave up when he spoke. Second, his answer to the question about God is a "course of conduct indicating waiver" of that right. Had he wanted to remain silent, he could have said nothing in response or unambiguously invoked his *Miranda* rights, ending the interrogation. That he made a statement nearly three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Third,

the Court held there is no evidence that his statement was coerced. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats. The fact that Helgert's question referred to Thompkins' religious beliefs also did not render Thompkins' statement involuntary. The Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' In these circumstances, Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.

Thompkins next argued that, even if his answer to Detective Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they obtained a waiver first. However, the Court held that a rule requiring a waiver at the outset would be inconsistent with *Butler's* holding that courts can infer a waiver "from the actions and words of the person interrogated." Any waiver, express or implied, may be contradicted by an invocation at any time, terminating further interrogation. When the suspect knows that *Miranda* rights can be invoked at any time, he or she can reassess his or her immediate and long-term interests as the interrogation



progresses. After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights. Thus, the police were not required to obtain a waiver of Thompkins' *Miranda* rights before interrogating him.

Note From City Attorney: Thompkins also made an argument of ineffective assistance of counsel and the U.S. Supreme Court also ruled against Thompkins on this issue. Having ruled against Thompkins on both of these issues, the U.S. Supreme Court reversed and remanded the decision of the Sixth U.S. Circuit Court of Appeals.

Comment from John Threet, Prosecuting Attorney for the Fourth Judicial District: This opinion has a good overview of what is required for a waiver of *Miranda* rights. It has to be (1) a free and deliberate choice rather than by intimidation, coercion, or deception and (2) made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon the rights. The Court held that a suspect must invoke his *Miranda* rights "unambiguously" so police don't have to guess at what the suspect wants. Also, police aren't required to stop questioning nor ask clarifying questions if the suspect is ambiguous. A waiver can be implied if the "defendant's silence, coupled with an understanding of his rights and a course of conduct indicates waiver." You can infer waiver "from the actions and words of the person interrogated." The Court said the *Miranda* rule and its requirements are met if the suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.

Case: This case was decided by the United States Supreme Court on June 1, 2010. The case cite is *Berghuis v. Thompkins*, 560 U.S. ____ (2010).

Jeff Harper
City Attorney



Arkansas Supreme Court Suppresses Confession of Juvenile in a Second Degree Murder Case

Facts Taken From the Opinion: On the morning of August 7, 2006, police officers of the Camden Police Department responded to a 911 call from T.C.'s residence, which he shared with his mother, Melody Jones, and his eleven-year-old sister, Kaylee. T.C. at the time was twelve years old. Upon their arrival, the police officers found Kaylee dead on her bed with her hands bound together in the front of her body with what was later determined to be a dog leash and her feet bound together with a cloth measuring tape. The police officers learned that Kaylee had been found with two plastic shopping bags over her head, which her mother had removed when she discovered Kaylee on her bed. The cause of Kaylee's death was later determined to be suffocation.

The police officers concluded that they were dealing with a potential homicide and quickly cleared and secured the residence. While police investigators processed the house for evidence, T.C. and his mother waited outside in a relative's vehicle. Some time after noon, the police officers asked the relative to drive T.C. and his mother to the Camden Police Station where it was cooler



and where they would not have to witness the removal of Kaylee's body from the residence. The relative then drove T.C. and his mother to the police station where they waited in the station's break room with family.

Having discovered no evidence of forced entry into the home, the police officers returned to the police station to interview T.C. and his mother. Melody Jones was interviewed first at approximately 4:30 that afternoon, while T.C. waited in the break room with his family. Jones's interview lasted approximately one hour and was videotaped in its entirety in the station's interview room. Following Jones's interview, police officers interviewed T.C. with his mother's permission in the interview room. T.C.'s interview began at approximately 5:30 p.m. Forty-five minutes into the interview, he was advised of his *Miranda* rights, and he signed a waiver-of-rights form. The interview continued until 6:45 p.m., when T.C. told the police officers that he was hungry. At that point, he was taken from the interview room to a detective's office, and the officers went to pick up some food for him. The portion of T.C.'s interview that occurred from 5:30 p.m. to 6:45 p.m. was videotaped by the police department.

What happened during the ensuing time period was testified to at the suppression hearing and trial by the police officers and deputy prosecuting attorney. While T.C. was eating his dinner in the detective's office, Deputy Prosecuting Attorney Gregg Parish talked with him for five to ten minutes about school, video games, and the things his sister liked.

After Parish left, Officer Scott Wells spoke with T.C. about their shared interest in video games and science fiction. Officer Evin Zeek joined T.C. and Wells sometime later. After listening to T.C.'s and Wells's conversation for awhile, Zeek turned the conversation to what had happened to Kaylee the night before. According to the police officers, T.C. soon became frustrated when they began to point out inconsistencies in his version of what had happened the previous night. At some point later in the conversation, T.C. asked, "If I tell the truth, what's gonna happen? Do you think I can get probation?" After the police officers told T.C. that they did not know what would happen to him, he proceeded to tell them that he had placed plastic bags over his sister's face and bound her hands and feet. During part of the time that T.C. was in the detective's office, Melody Jones was being interviewed in the interview room.

Because the interview in the detective's office was not recorded, the police officers then took T.C. back to the interview room to record his confession. The videotaped interview that followed began at approximately 10:20 p.m. with Officer Zeek again advising T.C. of his *Miranda* rights. After T.C. stated that he understood his rights, Officer Zeek moved on to the waiver-of-rights form and the following colloquy occurred:

OFFICER ZEEK: At the bottom is what we call a Waiver of Rights Okay, and I will read it to you quickly. It says no promises or threats have been used against me to induce me to waive rights listed above. With full knowledge of my rights, I hereby voluntarily, knowingly, and intelligently waive them and agree to



answer questions. Do you understand the Waiver?

T.C.: No, what is a waiver?

OFFICER ZEEK: It simply says that what you are saying, you are doing of your own free will.

T.C.: Okay.

OFFICER ZEEK: Okay. We haven't made any promises. We haven't threatened you in any way. You are doing this because you want to do this. Okay. And again, it is by your own free will that you do this, that you make this statement.

T.C.: Yes.

OFFICER ZEEK: Do you understand that?

T.C.: Yes.

T.C. then signed the waiver-of-rights form and gave his confession.

On August 15, 2006, the State filed a petition for delinquency charging T.C. with first-degree murder for the death of his sister and moved to designate him as an extended juvenile-jurisdiction-offender under Arkansas Code Annotated Section 9-27-503. Following a fitness-to-proceed evaluation in accordance with section 9-27-502, the circuit judge found that T.C. was fit to proceed and that at the time he engaged in the conduct charged he had the capacity to possess the necessary mental state required for the offense charged, to conform his conduct to the requirements of the law, and to appreciate the criminality of his conduct.

On February 13, 2007, T.C. moved to suppress his statement and alleged that it had been elicited in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution; that he had not knowingly, intelligently, and voluntarily consented to giving a statement or waiving counsel due to his youth and immaturity; that his mother was not an appropriate person to consent to his questioning because she was also a suspect; and that his statement was coerced by threats from the deputy prosecuting attorney to charge him as an adult and was thus involuntary and false.

On August 27, 2007, the State filed an amended petition for delinquency, reducing the charge against T.C. to second-degree murder. Following pretrial hearings on August 31, 2007, and October 29, 2007, the circuit judge entered an order denying T.C.'s motions to suppress his statement and his motion to reject his waiver of rights. Specifically, the circuit judge found that the State had met its burden in proving that T.C.'s waiver of rights was freely, voluntarily, and intelligently made; that under the totality of the circumstances T.C.'s statement should not be suppressed; that T.C. understood the consequences of the waiver and that it was not the result of any coercion, force, or inducement; that T.C.'s confession was not unreliable and was given of his own free will; and that the police had not violated Rules 2.2 and 2.3 of the Arkansas Rules of Criminal Procedure or Arkansas Code Annotated section 9-27-317(h).

Following a bench trial, the circuit judge found T.C. to be delinquent on the charge of the second-degree murder. He was committed to the Division of Youth Services with the condition that if he was released



prior to his eighteenth birthday, he would be placed on probation until his eighteenth birthday.

T.C. appealed his delinquency order and disposition to the Court of Appeals, and the Court of Appeals affirmed. T.C. then appealed to the Arkansas Supreme Court.

Argument and Decision of Arkansas Supreme Court: On the motion to suppress his confession, T.C. made several arguments in support of his assertion that the circuit judge erred by denying his motion to suppress his confession: (1) that the *Miranda* warnings were not given until forty-five minutes into his first interview, and this failure tainted his later confession; (2) that the waiver of his *Miranda* rights was not voluntary, knowing, and intelligent; (3) that the consent of Jones to T.C.'s interview was invalid because of the suspect, her interest was adverse to T.C.'s; (4) that the confession was the result of police coercion; (5) that the confession was the result of violation of Arkansas Rules of Criminal Procedure 2.2 and 2.3; and (6) that the confession was not reliable.

The Arkansas Supreme Court focused initially on whether T.C.'s waiver of *Miranda* rights was voluntary, knowing, and intelligent. That determination involves the consideration of two components, both of which must be satisfied. *See Otis v. State*, 364 Ark. 151 (2005). The first component involves the voluntariness of the waiver and concerns whether the waiver was the product of free and deliberate choice rather than intimidation, coercion, or deception. The second component involves whether the defendant made the waiver knowingly and intelligently and concerns whether the waiver was made with "a full awareness of

both the nature of the right being abandoned and the consequences of the decision to abandon it." In making these decisions, this court reviews the totality of the circumstances surrounding the waiver, including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. *Jordan v. State*, 356 Ark. 248 (2004).

Using the totality-of-the-circumstances analysis, the Arkansas Supreme Court concluded that T.C.'s waiver was not knowingly and intelligently made. While a defendant's youth is a factor to be considered in determining whether a juvenile knowingly and intelligently waived his or her *Miranda* rights, it is generally not enough, standing alone, to prove that he or she is incapable of knowingly and intelligently waiving *Miranda* rights. For example, in *Otis v. State*, 364 Ark. 151 (2005), this court held that a fourteen-year-old with a functional age of nine to twelve years old had knowingly and intelligently waived his rights where officers had carefully explained what the words on the waiver form meant, where Otis had asked no questions, and where he had indicated that he understood the form. The court also noted that Otis's mother was present when he signed the form.

Similarly, in *Sandford v. State*, 331 Ark. 334 (1999), this court held that a sixteen-year-old with an Intelligence Quotient of 67 had knowingly waived his *Miranda* rights under the totality of the circumstances. Testimony

regarding those circumstances showed that he understood the statements on the waiver form, that he had not asked any questions about the form, and that his father had been present during the execution of the waiver forms. Likewise, in *Oliver v. State*, 322 Ark. 8 (1995), the court held that a fifteen-year-old with the mental age equivalent of a twelve-year-old had knowingly and intelligently waived his rights where testimony from the suppression hearing showed that the arresting officers had explained the waiver-of-rights form to Oliver and that he appeared to understand it.

The court noted that a common thread running through these cases is that the defendants had their rights carefully explained to them and either asked no questions or otherwise did not express confusion about the meaning of the waiver-of-rights form. In contrast, T.C. was given no explanation of the waiver-of-rights form the first time he signed it and instead was merely asked to read it for himself. The second time he was asked to sign the form, he said that he did not understand what “waiver” meant. Instead of explaining what waiver meant, the police gave T.C. the definition of voluntariness, saying: “what you are saying, you are doing of your own free will . . . [w]e haven’t made any promises. We haven’t threatened you in any way. You are doing this because you want to do this. And again, it is by your own free will that you do this, that you make this statement.”

The Court held this definition of what “waiver” means was patently wrong. As a result, the Court concluded, based on T.C.’s question and the police officer’s explanation, that T.C. did not understand the meaning of waiver. Waiver, of course, is

routinely defined as the “intentional relinquishment or abandonment of a known right or privilege.” See *Pratt v. State*, 359 Ark. 16 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387 (1977)). In laymen’s terms, it is “giving up” something, in this case the right to be silent and the right to counsel. The court held that the police officer’s explanation imparted to T.C. did not make clear that he was giving up his rights to remain silent and to the assistance of counsel. It necessarily follows then that T.C.’s waiver was not made with “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” E.g., *Otis v. State*, 364 Ark. at 161. That, the court held was the crucial test. Therefore the court held that the circuit judge’s finding that T.C. knowingly and intelligently waived his rights was clearly against the preponderance of the evidence.

Case: This case was decided by the Supreme Court of Arkansas on May 14, 2010. The case cite is *T.C. v. State*, 2010 Ark. 240.

Jeff Harper
City Attorney

Comment by John Threet, Prosecuting Attorney for the Fourth Judicial District:

The court stated in the case of T.C., that the first time he was given the rights form, he didn't have it explained at all and was merely asked to read it and sign it. The second time, he asked what "waiver" meant and the police basically explained what "voluntary" meant.

While I don't ever remember a case like that with any of our departments, I thought it



was a good reminder to make sure that you have simple and clear explanations for each part of the *Miranda* form so that the court can't hold that the officer going over the *Miranda* form didn't give a clear and complete explanation to the suspect.



Arkansas Supreme Court Overrules Court of Appeals Decision in Cockrell

You may remember the Court of Appeals case regarding Colton Cockrell that I reviewed with many of you during the Springdale officer refresher course, or from the article I wrote in the January 2010 *C.A.L.L.* The Supreme Court has now overruled the Court of Appeals decision suppressing the evidence. The facts of the case are as follows:

On January 25, 2008 at approximately 6:12 pm Officer Ryan Baker of the Sherwood Police Department was patrolling an area where twelve armed robberies had occurred in the past two weeks. While patrolling the two to three mile stretch, Officer Baker noticed a lone white truck backed into a parking spot near the loading dock of Kohl's department store. Kohl's was open at the time but Officer Baker was unable to see the driver due to the darkness.

Officer Baker pulled his patrol car directly in front of the truck, turned on his bright headlights, his spotlight and his take-down lights and called for assistance. Officer Baker then approached the truck with his flashlight in one hand and his gun in the other. As Officer Baker approached, he observed the driver reach down and saw

what he believed to be a small club, (later found to be a landscaping tool), on the front seat floorboard and a baseball bat behind the seat of the truck. Another officer arrived and Officer Baker walked over to the driver's side and asked the driver to step out. While standing outside of the drivers side of the vehicle Officer Baker observed a straw with a band-aid wrapped around it and a razorblade in plain view. The straw and razorblade had cocaine residue on them and the driver, Cockrell, was placed under arrest. Upon searching the vehicle the Officers located a small plastic bag containing cocaine. Cockrell also had fifteen hydrocodone pills in his pocket.

At trial Cockrell moved to suppress all the evidence claiming the stop was in violation of the Arkansas Rules of Criminal Procedure, specifically Rule 2.2 and Rule 3.1. The Rules state as follows:

Rule 2.2. Authority to request cooperation.

(a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

(b) In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a



request was made by a law enforcement officer.

Rule 3.1. Stopping and detention of person: time limit.

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

The trial court denied the motion and Cockrell was convicted of possession of a controlled substance, possession of drug paraphernalia, and carrying a weapon. Cockrell appealed to the Arkansas Court of Appeals. The Court of Appeals agreed with Cockrell holding that the officer violated both Rule 2.2 and Rule 3.1 of the rules of criminal procedure and suppressed the drugs, weapons, and paraphernalia. The State then appealed the Court of Appeals decision to the Arkansas Supreme Court.

The Arkansas Supreme Court reviewed Rule 3.1 investigatory stops stating, "our case law has established that whether an investigatory stop is justified depends on whether, under the totality of the circumstances, the police have a specific, particularized, and articulable reason indicating that a person may be involved in criminal activity." The Court then referred to Arkansas Code Annotated §16-81-203, which codified factors to be considered in whether the officer has grounds to reasonable suspect a person is subject to detention under Rule 3.1. The factors include but are not limited to the following:

16-81-203. Grounds to reasonably suspect.

The following are among the factors to be considered in determining if the officer has grounds to reasonably suspect:

- (1) The demeanor of the suspect;
- (2) The gait and manner of the suspect;
- (3) Any knowledge the officer may have of the suspect's background or character;
- (4) Whether the suspect is carrying anything, and what he or she is carrying;
- (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;
- (6) The time of the day or night the suspect is observed;



(7) Any overheard conversation of the suspect;

(8) The particular streets and areas involved;

(9) Any information received from third persons, whether they are known or unknown;

(10) Whether the suspect is consorting with others whose conduct is reasonably suspect;

(11) The suspect's proximity to known criminal conduct;

(12) The incidence of crime in the immediate neighborhood;

(13) The suspect's apparent effort to conceal an article; and

(14) The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

The Court then analogized the facts of the present case with *Thompson v State*, 303 Ark. 407, (1990), and *Adams v. State*, 26 Ark. App. 15, (1988). In *Thompson*, an officer noticed a vehicle at approximately 1:30 a.m. The vehicle was parked legally with its lights on and the motor running. The officer passed the vehicle again ten minutes later and the vehicle was still there, so the officer parked behind the vehicle to investigate. The occupant, Thompson, was eventually arrested for DWI. The Court in *Thompson* ruled that the officer's approach to investigate was a police-citizen encounter under 2.2 and was thus not a seizure under the 4th Amendment. In *Adams*, an officer

noticed a vehicle with no lights on that was parked near a high school at 6:30 p.m. The officer saw that the vehicle was occupied but it was not running even though it was cold outside. Additionally, there had been several burglaries in the area. The officer pulled in, turned on his spotlight, approached the driver's side and tapped on the window asking for identification. The driver rolled down his window and the officer smelled marijuana. The officer called for backup and while running the occupants licenses he observed the passenger apparently stuffing something down his pants. The officer asked the passenger, Adams, to step out of the vehicle and the officer frisked him finding a large plastic bag containing several smaller bags of marijuana, two roach clips and scales. Adams was convicted of possession with intent to deliver and possession of drug paraphernalia. Adams appealed his conviction to the Court of Appeals and the Court of Appeals upheld the conviction stating that the initial investigation was justified pursuant to Rule 2.2 and once the window was rolled down and the officer smelled marijuana he had reasonable suspicion to believe the occupants were committing, had committed or were about to commit a crime which authorized their detention under Rule 3.1.

The Court then turned to the present case stating that, "similar to the initial investigations in *Thompson* and *Adams*, Officer Baker's initial approach to investigate appellant's vehicle was lawful pursuant to Rule 2.2. And upon seeing appellant's movement in reaching down when the officer shined his lights on him, combined with the other factors present, namely (1) the vehicle was backed into a parking spot in a dark area of the parking

lot, (2) in the evening, and (3) in an area that recently had a high incidence of armed robberies, in which the police suspected that a possible get-away car was being used, Officer Baker had a reasonable suspicion that justified detaining appellant pursuant to Rule 3.1." The court then reversed the Court of Appeals and affirmed the circuit courts denial of the motion to suppress.

Case: This case was decided by the Arkansas Supreme Court on May 27, 2010. The case cite is 2010 Ark. 258.

Amber Roe
Deputy City Attorney



Temporary Cardboard Buyer's Tags: New Regulations Beginning July 1, 2010

During the 2009 legislative session, the Arkansas General Assembly passed Act 484 of 2009. While this law was passed in 2009, it was not slated to go into effect until July 1, 2010. This Act makes numerous changes to the "temporary cardboard buyer's tag" regulations, found at Ark. Code Ann. §27-14-1705.

One of the biggest changes caused by this Act is that the Act places the responsibility for obtaining such a tag on the buyer, not the dealer. Furthermore, this Act provides that the temporary tag must be obtained by the buyer within five (5) days of purchase, or the buyer can be ticketed and fined up to \$250 for 1st offense, up to \$500 for 2nd offense, and up to \$1,000 for 3rd and subsequent offenses.

This Act provides that not all dealers will be dispensing these temporary preprinted paper buyer's tags, and that these tags are also available from a vendor or the Office of Motor Vehicle. If a dealer issues a temporary tag, it is to be noted on the bill of sale that a temporary tag was issued to the buyer.

These temporary tags will also be required to contain more information than in the past. In addition, the expiration date will be covered by a sticker for added security.

This Act also changes where these temporary tags are to be displayed on the vehicle. Previously, these tags were to be placed at the location provided for the permanent license plate. Effective July 1, 2010, these tags are to be displayed on the inside of the rear window of the vehicle. If the vehicle does not have a rear window, the tag may then be displayed at the location provided for the permanent license plate.

This Act also eliminates a dealer's ability to charge a buyer for a temporary cardboard tag. Now, this fee will be paid to the State by the buyer at the time the vehicle is registered.

This Act also creates a new statute, Ark. Code Ann. §27-14-1708, creating a "temporary tag database", that will be accessible by law enforcement. All issuers of these temporary tags are to provide the required documentation to the Office of Motor Vehicle on the date of sale so this information can be entered into the database.

These are the primary changes being made to the temporary cardboard buyer's tags. Should you encounter any questions, please

feel free to contact the City Attorney's Office at any time.

Ernest Cate
Senior Deputy City Attorney



The City Fireworks Ordinance: A Refresher

Every year about this time, people start asking questions regarding the city's fireworks ordinance. Most of these People will rely on what advice is given to them by the Police Department. To assist in answering these questions, a review of the City's fireworks ordinance is helpful. This review will also ensure that the ordinance will be properly enforced. The primary City ordinance on fireworks is found at Section 46-56 of the Code of Ordinances for the City of Springdale.

Selling Fireworks - Section 46-56(a)

Prior to 2003, the selling of fireworks within the city limits was strictly prohibited by ordinance. However, in 2003, the Springdale City Council amended the fireworks ordinance to allow the selling of fireworks within the city limits. Now, in order to sell fireworks in the City, a permit to sell fireworks must be obtained from the City Clerk. Before a location can obtain a permit to sell fireworks, certain requirements must be met. Then, once a permit has been issued, the ordinance places several restrictions on the selling of fireworks within the city limits. Specifically:

-No fireworks shall be sold or stored within a permanent structure of the city.

-No fireworks stand shall be located except in a C-2, C-5, or A-1 zone, provided the A-1 property has frontage on a federal or state highway.

-Fireworks may only be sold between June 28th and July 5th.

-All locations where fireworks are sold must comply with all fire codes, and must be inspected by the fire marshal prior to the sale of fireworks.

-No person selling fireworks within the city shall be allowed to sell any fireworks which travels on a stick, as these are prohibited to be discharged within the city.

-No fireworks stand shall be located within 250 feet of a fuel dispensing facility.

-All fireworks stands must have at least 50 foot setback from the street/highway.

-No person under the age of 16 shall be allowed to purchase fireworks in the city.

-All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

Prohibited Fireworks – Section 46-56 (b)

It is a violation of the City's fireworks ordinance for anyone to discharge (or sell) bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is not prohibited.

Permitted Locations/Times – Section 46-56
(c)

Section (c) of the ordinance sets forth when legal fireworks may be discharged within the city limits. The ordinance provides that **legal fireworks may be discharged on private property between the hours of 8:00 a.m. and 10:00 p.m. beginning on July 1st and ending on July 4th.** Therefore, anyone discharging fireworks after 10:00 p.m. on the night of the 4th would be in violation of the City's fireworks ordinance.

To be in compliance with the ordinance, the owner of the private property where the fireworks are being discharged must consent to this activity. Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fireworks must be supervised by a person of at least 21 years of age.

The City also has an ordinance which prohibits fireworks in a city park, unless the person has obtained written approval from the park director.

I hope this review proves helpful. Have a safe and happy 4th of July.

Ernest Cate
Senior Deputy City Attorney



**Arkansas Supreme Court Rules
Pre-textual Stop was Legal in
Benton County Case**

Facts Taken From the Opinion: Benton County Sheriff's Deputy Cory Coggin had

been conducting a six-month drug-trafficking investigation, which involved a possible drug house that he had under surveillance. On November 3, 2008, Benton County Sheriff's Deputy Eric Lyle and his canine were stationed near that house. Two different sources advised Deputy Coggin that there was going to be some type of drug activity coming from that house that night. Around ten o'clock that evening, Deputy Coggin told Deputy Lyle on the radio that two vehicles left the house and asked him to follow a white Honda until he had probable cause to stop it.

Deputy Lyle quickly followed the white Honda, and as he approached the car to read the license plate, the driver slammed on his brakes, started to turn, turned on the turn signal, and turned into a corner gas station's parking lot. The car's signal came about 10 to 20 feet before the car turned. Deputy Lyle initiated a pre-textual traffic stop based on the improper signaling before the turn. Deputy Lyle testified that after he told the driver the reason he stopped the car, the driver appeared to be extremely nervous.

Deputy Lyle ran his canine around the car approximately five minutes after he initiated the traffic stop. Deputy Lyle did not issue a traffic-violation citation, but, after the dog alerted on the car, he detained both Jose A. Mancía-Sandoval and Osires Guevara (appellees), the driver and a passenger, and searched the car. Deputy Lyle found approximately four ounces of methamphetamine. Both appellees were charged with possession of methamphetamine with intent to deliver. Appellees moved to suppress the evidence, alleging that it was seized in violation of their Fourth Amendment rights. The circuit court held a suppression hearing.



The State admitted that the stop was pre-textual, but argued that, because Deputy Lyle had probable cause that a traffic violation occurred, it was reasonable to stop the vehicle under Arkansas and federal constitutional law and that the officer's immediate use of his canine around the vehicle and a positive alert gave him probable cause to search it. Appellees argued that Deputy Lyle created the probable cause to stop the vehicle and that there was no additional probable cause to allow the canine sniff because mere nervousness during the traffic stop did not justify it.

In granting appellees' motion to suppress, the circuit court made the following findings on the record after the suppression hearing:

While it's clear under the United States Supreme Court decisions- decisions in [*Whren v. United States*, 517 U.S. 806 (1996)] and [*United States v. Robinson*, 414 U.S. 218 (1973)], and the [*State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002)] case by the Arkansas Supreme Court, that pre-textual stops in general are constitutional, in this case I'm persuaded that this traffic stop was unconstitutional. The officer testified he was told to find a reason to stop the defendant's car, which he did. The defendant's quick braking and utilization of the turn signal, while the defendants' car was turning into a gas station, became the basis of the traffic stop. The officer testified that he was going to find a reason to stop this car and use of the turn signal while turning was the basis for his stop. He had acknowledged that he had to accelerate rapidly to catch up to the

vehicle and thus there is a question as to whether the defendants braked suddenly. This detective defined a reason to stop the defendants' car was confirmed by the officer who gave it [sic]. Both officers admitted that this car was going to be found violating some traffic law and stopped. A traffic violation arrest is pretext for-pretext for narcotics search in general is valid, but I can find no authority that suggests officers may set out on a mission to find a traffic violation. I commend the officers for their honesty, their integrity, and credibility with this Court are intact [sic]. I'm persuaded, however, that the stop crosses constitutional boundaries and thus the motion to suppress is granted.

The State appealed the circuit court's order to suppress the evidence to the Arkansas Supreme Court.

Decision by Arkansas Supreme Court: The Arkansas Supreme Court noted that the issue presented here is whether or not the circuit court erred when it looked to the subjective intent of the law enforcement officers involved in the traffic stop and found that the stop violated appellees' constitutional rights based on that intent. The Court concluded "that this appeal does present an issue involving the interpretation of our criminal rules and will have widespread ramifications because it will provide guidance to our law enforcement officers and our courts as to the law in our state when faced with similar circumstances in the future." Therefore, the Court accepted the case as a proper state appeal.



The Court noted that they have previously recognized that a pre-textual traffic stop does not violate the federal constitution:

"We note at the outset that a pre-textual stop does not violate federal constitutional law. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the United States Supreme Court held that a consensual search for contraband that took place just after a valid traffic stop did not violate the United States Constitution. *See also Whren v. United States*, 517 U.S. 806 (1996) (holding that the constitutionality of a traffic stop does not depend on the actual, subjective motivations of the individual police officers involved)."

State v. Harmon, 353 Ark. 568, 574 (2003). Additionally, the Arkansas Supreme Court concluded in *Harmon* that previous decisions relating to traffic stops where the police officer had an ulterior motive for the stop were treated differently than cases involving pre-textual arrests. "[T]his court has never held a valid traffic stop to be unconstitutional because of a police officer's ulterior motives." *Id.* at 575.

The Arkansas Supreme Court noted that in the instant case, the circuit court found that "[t]he defendant's quick braking and utilization of the turn signal, while the defendants' car was turning into a gas station, became the basis of the traffic stop." While the court questioned whether the defendants braked suddenly based on the officer's testimony that he had to accelerate rapidly to catch up to their vehicle, it acknowledged that the improper use of the turn signal was part of the basis for the stop. The circuit court then expressed concern that both officers had admitted that these

appellants were going to be found violating some traffic law and have their vehicle stopped. Based on that testimony of the officers, the circuit court held, "I can find no authority that suggests officers may set out on a mission to find a traffic violation." Because the circuit court acknowledged that some probable cause existed for the stop, but found the stop unconstitutional based on the officers' ulterior motives, the Arkansas Supreme Court reversed the decision.

The Arkansas Supreme Court noted that a pre-textual stop is not impermissible under either the federal or Arkansas Constitution and, thus, does not invalidate an otherwise lawful stop of a vehicle. *See Harmon, supra*. The circuit court did not find that the reasons cited by the officers for the stop did not constitute probable cause, nor did it express that it believed the officer's testimony to be fabricated. To the contrary, the circuit court "commend[ed] the officers for their honesty, their integrity, and credibility." Therefore, the Court held that when the subjective intent of the officers is not considered, the stop was "otherwise lawful." For this reason, the Arkansas Supreme Court reversed the circuit court's order suppressing the evidence against the appellees and remanded the case to the Benton County Circuit Court.

Case: This case was decided by the Supreme Court of Arkansas on March 18, 2010 and was an appeal from the Benton County Circuit Court. The case cite is *State v. Mancina-Sandoval*, 2010 Ark. 134.

Jeff Harper
City Attorney



Trooper had Reasonable Cause Before Consent was Withdrawn; William Rockward v State of Arkansas

Arkansas State Trooper, Dale Donham, pulled over a vehicle for unsafe lane change in Saline County. The vehicle was rented and the driver, William Rockward, provided Trooper Donham the rental paperwork. The vehicle had been rented by another person but Trooper Donham confirmed that Rockward was authorized to use the vehicle. Rockward stated that he was headed to Cleveland, Ohio and Trooper Donham stated that he had no reason to disbelieve that statement but Trooper Donham requested and received consent to search the vehicle.

When Trooper Donham opened the trunk he observed a speaker box with no wires connected. The screws were lying all around and some screws were missing. The Trooper had on prior occasions found drugs in speaker boxes and knew from his experience that when screws are missing from appliances, drugs are often found inside those items. When Trooper Donham moved the speaker something shifted inside that he believed was inconsistent with the ordinary contents of a speaker box. Trooper Donham then went to his vehicle to retrieve a screwdriver to continue his search. Rockward asked about the progress of the search to which Trooper Donham replied "hang on a second, I'll be right back." Rockward then stepped out of his vehicle and approached Trooper Donham in a way Trooper Donham described as "charging." Trooper Donham drew his gun and ordered Rockward on the ground. Rockward complied with the order, and Trooper Donham placed Rockward under arrest at

which time Rockward stated, "Sir, it's over with. It's over with. You can't do anything else at this point." Rockward then struggled with Trooper Donham down an embankment where he landed in a ditch and then attempted to flee. Rockward was then chased and tackled by a military officer who happened upon the scene. Trooper Donham placed Rockward in handcuffs in the back of his patrol car and removed the remaining screws from the speaker box and found three bags of marijuana.

At trial Rockward moved to suppress the evidence arguing that it was obtained as the result of an illegal search. The trial court disagreed and denied the motion to suppress. Rockward was found guilty and sentenced to six years probation. Rockward then appealed to the Arkansas Court of Appeals. On appeal Rockward argued that the marijuana should be suppressed because he withdrew his consent to search when he told the Trooper that "it was over," which was prior to the speaker box being opened. The Court of Appeals disagreed stating that the Trooper had discovered the speaker box in the trunk and observed the missing screws and had already moved the box and determined something was inside. Therefore, the Court reasoned, Trooper Donham had reasonable cause to believe the speaker box contained contraband prior to Rockward's withdrawal of his consent to search.

Case: This case was decided by the Arkansas Court of Appeals on February 3, 2010 and was an appeal from the Saline County Circuit Court. The case cite is Rockward v. State, 2010 Ark. App. 110.

Amber Roe
Deputy City Attorney

Disorderly Conduct and the First Amendment; *Watkins v. State*

On November 26, 2008 Paragould police were called by Paragould Light, Water and Cable, ("PLWC"), for a civil standby for Crafton Tree service. The tree service was trimming trees along an electric line. Resident Connie Watkins came out of her house through an opening in a wire fence that separated her property from a field and approached Officer Johnson. Watkins told Officer Johnson that PLWC did not have the right to trim the trees. Officer Johnson later testified that Watkins was very angry and was going from person to person yelling. Officer Tinnin was also on scene and had received the paperwork showing that PLWC did have authority to trim the trees and he tried to calm Ms. Watkins down. Officer Tinnin later testified that Watkins was yelling and screaming and continued to enter the work-safety area after being told not to. Watkins was yelling that the tree trimmers were murderers for murdering her trees and she used the "F" word and called them bastards. Officer Tinnin repeatedly warned Watkins that she would be arrested if she did not follow his instructions and he was concerned that it could come to blows if Watkins did not leave the area. Jake Crafton, the operations manager for the Crafton Tree Service, was on scene and later testified that Watkins came out of her house as soon as the tree service pulled up and began yelling and cursing stating, " you fucking tree trimmers you're butchering my trees," and yelling right in his face. Crafton further testified that Watkins "charged" him and his workers and he felt intimidated by her actions and concerned for the well-being of

his employees. Ms. Watkins was arrested and charged with disorderly conduct.

At trial, the court found Watkins guilty of disorderly conduct and she was fined \$100. Watkins appealed her guilty verdict to the Arkansas Court of Appeals. On appeal, Watkins argued that her conviction is invalid based up on her First Amendment right to free speech. The disorderly conduct statute states as follows:

5-71-207. Disorderly Conduct.

(a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she:

- (1) Engages in fighting or in violent, threatening, or tumultuous behavior;
- (2) Makes unreasonable or excessive noise;
- (3) In a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response;
- (4) Disrupts or disturbs any lawful assembly or meeting of persons;
- (5) Obstructs vehicular or pedestrian traffic;
- (6) Congregates with two (2) or more other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement



officer or other person engaged in enforcing or executing the law;

(7) Creates a hazardous or physically offensive condition;

(8) In a public place, mars, defiles, desecrates, or otherwise damages a patriotic or religious symbol that is an object of respect by the public or a substantial segment of the public; or

(9) In a public place, exposes his or her private parts.

(b) Disorderly conduct is a Class C misdemeanor.

The Court of Appeals stated that based on the trial courts comments it appears Watkins was convicted under 5-71-207(a) (3) which prohibits only "fighting words." The Court then looked into Watkins First Amendment challenge. It is well settled that while the First Amendment protects many forms of speech it does not protect "fighting words," see *Johnson v. State*, 343 Ark 343, (2001). The test for "fighting words" was set forth by the United States Supreme Court in *Chaplinsky v. New Hampshire*, (315 U.S. 568, 571 (1942)), as "what men of common intelligence would understand would be words likely to cause an average addressee to fight." The Court then stated that the facts in this case were that Watkins remained irrational even after she was told she could be arrested, cursed the officers and tree-service employees, she aggressively ran from person to person confronting them and according to Mr. Crafton was intimidating him and he was concerned for the well being of his employees. The Court held that Watkins's language combined with her

actions were sufficient to uphold her conviction.

Case: This case was decided by the Arkansas Court of Appeals on January 27, 2010, and was an appeal from Greene County Circuit Court. The case cite is *Watkins v. State*, 2010 Ark. App. 85.

Amber Roe
Deputy City Attorney



Confession Upheld; Court Rules Waiver of Miranda Rights was Knowingly, Intelligently, and Voluntarily Made in Benton County Case

Monty Stidam was convicted in Benton County for rape and sexual assault in the second degree. The victim was his three-year-old nephew J.S.. Stidam was sentenced to forty years on the rape and twenty years on the sexual assault to be run consecutively. Stidam appealed the conviction arguing that the trial court improperly denied his motion to suppress his custodial statement.

The facts of the case are as follows: on December 3, 2007 Linus Shockley asked his half-brother Monty Stidam, who lived within fifty yards of him, to watch three-year-old J.S. Linus left J.S with Stidam and was only gone for five minutes when he came back. The t.v. was on in the living room but J.S. and Stidam weren't in there so Linus went back into Stidams room where he saw Stidam jump up, pull his pants up and run outside. Linus stated Stidam was



aroused and that J.S. as crying and told Linus that Stidam "humped him."

A warrant was issued for Stidam on December 20, 2007 and he was arrested in Missouri on January 2, 2008. Detective Jeremy Felton, a criminal investigator for the Benton County Sheriff's office, drove to Missouri on January 3, 2008 to interview Stidam. Detective Felton was not dressed in uniform or carrying his gun at the time of the interview. Stidam, who was wearing handcuffs during the interview, was read his Miranda rights. Stidam stated he understood each one and signed the Miranda warnings. Stidam admitted touching J.S. in a "not right way" but denied the allegations. Stidam later admitted he had stuck his finger and penis into J.S.'s anus and "humped" him once. The interview lasted a total of 45 minutes.

At trial Stidam testified that when Detective Felton interviewed him in the Barry County, Missouri jail he was in handcuffs and though he remembered Detective Felton reading him his Miranda rights he did not understand that he did not have to talk to Detective Felton. Stidam testified that he thought that when he was told he could have an attorney present that that meant when he went to court, not when he was being questioned. Stidam testified that he was truthful and told Detective Felton he didn't do anything but Detective Felton kept going on and on, "torturing" him so he finally told Detective Felton what he wanted to hear because Detective Felton kept telling him he knew he had done it.

Detective Felton testified that the Miranda rights form was turned toward him and away from Stidam so that he could fill in what answer Stidam gave him and although Stidam did not initial each right, Stidam did

sign the rights form. Detective Felton testified that Stidam seemed to understand his rights and that Stidam was eighteen at the time of the interview and he was unaware of Stidam's educational level at the time of the interview. Detective Felton stated that he lied to Stidam during the interview when he told Stidam that he had personally spoken with J.S. and J.S.'s father Linus. Detective Felton testified that he was insistent on getting the truth out of Stidam, and he had determined Stidam was lying at the beginning of the interview when Stidam denied anything had happened. Detective Felton further testified that all he wanted was the truth and he did not want Stidam to make anything up just to please him; however, he admitted he determined Stidam was lying at the beginning of the interview because his story did not match what Detective Felton wanted to hear. It was stipulated at trial that Stidam's IQ was 80. Stidam's motion to suppress the custodial statement was denied, he was found guilty and he appealed the ruling the Arkansas Court of Appeals.

The Arkansas Court of Appeals reviewed the circuit courts denial of the motion to suppress Stidam's confession. Because statements and confessions made in police custody are presumed involuntary it is the States burden to prove that the confession was voluntary and that the defendant knowingly and intelligently waived his Miranda rights. *Diemer v. State*, 340 Ark. 223, (2000). The Court determines whether a waiver of Miranda rights is voluntary, knowing and intelligent by looking to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. The court looks at the "totality of the circumstances surrounding the waiver including the age,

education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of detention; the repeated or prolonged nature of the questioning; the use of mental or physical punishment; and the statements made by the interrogating officers and the vulnerability of the defendant." *Jordan v. State*, 356 Ark. 248, 256-57, (2004).

Stidam argues that he was only eighteen years old and had only a ninth grade education, and that his IQ was 80, that Detective Felton read his Miranda rights quickly and never explained what each right meant. Stidam further argued that his statement was "the product of coercion, and deception as Officer Felton lied to him about talking to J.S and Linus Shockley, and that after being continually told that he needed to be honest, he finally said he had done something just so the interview would end."

The Court of Appeals stated that a low intelligence quotient by itself will not render a waiver of the Fifth Amendment privilege against self-incrimination involuntary, therefore Stidam age, education level and IQ does not warrant suppression of his statement. Further, the Court held that Stidam was not promised anything in return for making a statement and there is no evidence he was coerced. The interview was not unduly lengthy and while it is true the Detective Felton lied to Stidam about talking to J.S and Linus, "law-enforcement officers are permitted to use psychological tactics and coercive statements so long as such are not calculated to obtain an untrue statement and the defendants will is not totally overborne." The Court then held that Stidam knowingly and intelligently waived his Miranda rights and the statement was not involuntary or coerced. The conviction was upheld.

Case: This case was decided by the Arkansas Court of Appeals on March 31, 2010, and was an appeal from the Benton County Circuit Court. The case cite is 2010 Ark. App. 278.

Amber Roe
Deputy City Attorney



Suspect Must Have "Conscious Object" of Terrorizing Victim for Terroristic Threatening Charge

Facts: Matthew Turner [Turner] was convicted in a bench trial of first-degree terroristic threatening and sentenced to five years in prison. At trial, the State presented testimony of Tammy Chambers [Chambers], who had dated and lived with Turner. Chambers stated that Turner had children with his ex-wife; Ledyia Anderson [Anderson] and those were his only children. Chambers stated that she only talked to Anderson in reference to the children and nothing else usually. On May 3, 2008, Chambers was getting out of the shower when she overheard Turner on the telephone saying that "she was not going to keep his children from him." Chambers stated that when Turner hung up the phone, he was very mad and stated to Chambers that "the bitch was going to be dead in the ditch next week; he was going to hire a crack head;" and that he "would be nowhere around for anybody to blame him" and that "he should've had a bigger gun and did it right the first time." Chambers testified that Turner had previously shot Anderson in the head and that she was concerned and worried for Anderson so she called Anderson and told her to watch her back.

Chambers then called Anderson the next morning and told her the exact words that Turner used.

Anderson testified that Chambers called her in May 2008, and what Chambers told her scared her so much that she bought a gun and obtained an order of protection. Anderson explained that while going through the divorce with Turner, he shot her car with a gun; had hidden her car; pulled a gun on her; raped her; stuck a gun to her head and shot her and shot her stepfather.

Argument and Discussion: Turner argued at trial and on appeal that the State did not present sufficient evidence to prove that he uttered the threat with the express purpose of terrorizing his victim because at the time he made the threat, he had no reason to believe that it would be communicated to the victim. A person commits first-degree terroristic threatening if, "with the purpose of terrorizing another person, the person threatens to cause death or serious physical injury...to another person." Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 2006). A person acts "purposely" with respect to his conduct or a result of his conduct "when it is the person's conscious object to engage in conduct of that nature or to cause the result." Ark. Code Ann. § 5-2-202(1) (Repl. 2006).

Turner argued that the case of *Knight v. State*, 25 Ark. App. 353 (1988), applied and required that his conviction be overturned. The Arkansas Court of Appeals agreed. In *Knight*, the defendant was an inmate in the Pulaski County Jail; he was overheard by a deputy sheriff monitoring an intercom system stating to the other inmates in his cell

that they would read about some of the deputies in the obituaries and they would not have died of natural causes because he would be "out of this pen someday." The deputy who overheard those remarks testified that he considered this a death threat and felt terrorized. Knight was convicted of first-degree terroristic threatening but on appeal the conviction was reversed. The Court stated that the statute does **not** require that the threat be communicated by the accused directly to the person threatened. *Richards v. State*, 266 Ark. 733 (1979) (emphasis added.) Nor does the statute require that it be shown that the accused had the immediate ability to carry out the threats. *See Commonwealth v. Ashford*, 268 Pa. Super. 225 (1979). The Court still found that to be found guilty of threatening under Arkansas statutes, the defendant must intend to fill the victim with intense fright and that it must be the defendant's "conscious object" to cause fright. The Court reversed and dismissed Turner's conviction because it held that the evidence was not sufficient to establish that Turner made the statement with the conscious object of terrorizing Anderson or that the threat be communicated to Anderson.

Case citation: This case was decided by the Arkansas Court of Appeals on March 3, 2010, and was an appeal from the Lonoke County Circuit Court. The case citation is *Turner v. State*, 2010 Ark. App. 214.

Brooke Lockhart
Deputy City Attorney



The "Texting While Driving" Statutes Explained

In 2009, the Arkansas General Assembly passed several different new laws pertaining to cell phones and texting while driving. These new laws are codified at Ark. Code Ann. §27-51-1501, *et seq.* and at Ark. Code Ann. §27-51-1601, *et seq.*

Ark. Code Ann. §27-51-1501, *et seq.*

Ark. Code Ann. §27-51-1501, *et seq.*, is the "texting while driving" section of statutes. More specifically, Ark. Code Ann. §27-51-1504 provides that a driver of a motor vehicle shall not use a handheld wireless telephone for "wireless interactive communication" while operating a motor vehicle. The statute does provide for exceptions for emergencies and for emergency officials. "Wireless interactive communication" is defined in Ark. Code Ann. §27-51-1503 as "typing, text messaging, emailing, or accessing information on the Internet with a handheld wireless telephone".

A violation of this section of statutes is a primary offense.

Ark. Code Ann. §27-51-1601, *et seq.*

Ark. Code Ann. §27-51-1601, *et seq.* targets cell phone usage by those drivers under the age of 21. Specifically, Ark. Code Ann. §27-51-1603 provides that drivers under the age of 18 cannot engage in "wireless interactive communication" while driving, except in an emergency. "Wireless interactive communication" is defined in Ark. Code Ann. §27-51-1602 as "talking, typing, text messaging, emailing, or accessing information on the Internet with a

wireless telephone". In other words, drivers under the age of 18 cannot use a cell phone for *any* reason, including talking, except in an emergency.

Ark. Code Ann. §27-51-1604 provides the same restrictions on a driver who is 18 years of age, but under the age of 21, except the use of a hands free device is allowed. In other words, drivers between the ages of 18 and 21 can use "hands free" technology to communicate via a cell phone.

Ark. Code Ann. §27-51-1605 provides that "a driver of a motor vehicle is not to be stopped or detained solely to determine compliance with this section". As such, a violation of §27-51-1601, *et seq.* is a secondary offense, not a primary offense.

Also, Ark. Code Ann. §27-51-1607 provides that a warning is to be issued for the first offense, with no court appearance or penalty required. Also, a record of all warnings issued must be maintained by the police department. Any second and subsequent offense is punishable by a \$50 fine.

Overview of Statutes

- 1) Ark. Code Ann. §27-51-1501, *et seq.*, prohibits all drivers from texting while driving and is a primary offense.
- 2) Ark. Code Ann. §27-51-1601, *et seq.* prohibits drivers under the age of 18 from using a cell phone while driving (including talking), is a secondary offense, and the first offense is a warning.
- 3) Ark. Code Ann. §27-51-1601, *et seq.* provides that drivers between the ages of 18 and 21 may use a hands free cellular device

while driving, is a secondary offense, and the first offense is a warning.

Ernest Cate
Senior Deputy City Attorney



Handicapped Parking Violations: How Far Can You Go?

Lt. Church asked that an article be placed in *the C.A.L.L.* regarding handicapped parking spots, and the police department's enforcement of the statutes relating thereto. The section of statutes pertaining to handicapped parking spots is found at Ark. Code Ann. §27-15-301, *et seq.*

How must handicapped parking spots be marked?

The first step in enforcing the handicapped parking spot laws is to determine if the parking spot is actually a legally designated handicapped parking spot. The requirements for designating such parking spots are found at Ark. Code Ann. §27-15-315. Specifically, this statute provides that a sign must be present that displays the blue and white international symbol of handicapped access accompanied by one (1) or more phrases, such as "Disabled Parking"; "Van Accessible"; "Handicapped Parking"; "Reserved for Handicapped"; "Reserved Parking" with the blue and white international symbol of access; or "Permit Required — Towing Enforced".

In addition, Ark. Code Ann. §27-15-315(b)(2) provides that "[c]orresponding

pavement markings of the blue and white international symbol of access are preferred but not required for enforcement of this subchapter". In other words, there is no requirement that the actual parking surface be painted, marked, or otherwise designated as a handicapped spot before the police can enforce the statute.

Are there limits on the Police Department's authority in enforcing these statutes?

In enforcing the statutes on handicapped parking spots, where may the police go, and are there any limits on their authority?

First, Ark. Code Ann. §27-15-306 provides that:

- (a) Any law enforcement official in this state may enter upon any public parking space, public parking lot, or public parking facility in this state for the purpose of enforcing the provisions of this subchapter with respect to accessible parking for a person with a disability.
- (b) Any law enforcement officer in this state may enter upon the parking space, parking lot, or parking facility of any private agency in this state for the purpose of enforcing the provisions of this subchapter with respect to accessible parking for a person with a disability.

Ark. Code Ann. §27-15-302 defines a "private agency" as "any person, firm, association, organization, or entity, . . . whose customary and normal operations include the providing of parking spaces as a means of accommodating the general public or a select clientele or membership". Furthermore, "public agency" is defined as

"any department, office, or agency of the State of Arkansas or any city, county, school district, or other public agency of this state or of its political subdivisions".

The police may enforce the "parking in handicapped spot" statute in any of the areas listed in the statute.

What are the penalties associated with a "parking in a handicapped spot" violation?

Ark. Code Ann. §27-15-305(b) contains the penalties for a violation of the "parking in a handicapped spot" statute. Specifically, this statute provides that it is a violation for any vehicle found to be parked in an area designated for the exclusive use of any person with a disability, including the access aisle, if:

a) on which is not displayed a special license plate, a special certificate, or an official designation of another state;

or

b) if operated by a person who is not a person with a disability while not being used for the actual transporting of a person with a disability.

The statute gives law enforcement the authority to impound any vehicle found to be in violation of the statute. In addition, the owner of the vehicle shall upon conviction be subject to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for the first offense and not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000) for the second and subsequent offenses, plus applicable towing, impoundment, and related fees as well as

court costs. Also, upon a second or subsequent conviction, the court shall suspend the person's driver's license for up to six (6) months.

Thanks goes to Lt. Church for suggesting that this subject be addressed.

Ernest Cate
Senior Deputy City Attorney



Arkansas Court of Appeals Finds Constructive Possession of Firearm

Facts: Virgil Dennis Pogue was convicted of manufacturing methamphetamine, being a felon in possession of a firearm, and simultaneous possession of drugs and a firearm. His sentence was enhanced for manufacturing methamphetamine in the presence of children. Only the felon in possession of a firearm charge will be discussed here.

Argument and Discussion: The State need not prove actual possession of a firearm; constructive possession will suffice. Constructive possession may be implied when the contraband is in the joint control of the accused and another. However, joint occupancy, standing alone, is insufficient to establish possession or joint possession. The State must establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *See generally Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). This control and knowledge can be inferred from the circumstances, such as the proximity of the

contraband to the accused, the fact that it is in plain view and the ownership of the property where the contraband is found. *Young v. State*, 77 Ark. App. 245, 72 S.W.3d 895 (2002).

In this case, there was evidence that the house was less than 900 square feet; that Pogue lived there with his wife and children; that a black powder rifle missing a bolt was leaning against the wall near the door; and that Pogue answered the door when the police knocked and announced the search warrant. The missing bolt was not found. The Court determined there was enough evidence to show that Pogue was in constructive possession of a firearm. The missing bolt was not fatal to the charge of being a felon in possession of a firearm because, for that charge, the definition of "firearm" includes firearms that lack a component necessary to make them immediately operable. Ark. Code Ann. § 5-1-102(6)(B)(i) (Supp. 2009); *see also Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998).

The missing bolt was fatal to the State's case for simultaneous possession of drugs and a firearm because that offense also requires that the firearm be "readily accessible for use" which the Court interpreted to mean capable of immediate use.

Case citation: This case was decided by the Arkansas Court of Appeals on January 27, 2010, and was an appeal from the Sevier County Circuit Court. The case citation is *Pogue v. State*, 2010 Ark. App. 74.

Brooke Lockhart
Deputy City Attorney



Arkansas Court of Appeals- Another Determination of Constructive Possession

Facts: At approximately two o'clock in the morning of November 8, 2006, McGehee Police Officer Jason Williams [Officer Williams] observed a Chevrolet Caprice "going slow" on Highway 65. Officer Williams ran the tags and discovered they belonged on a Ford F150. Officer Williams stopped the vehicle. The vehicle was driven by Lee Mark Harris [Harris] with Danielle Mitchner [Mitchner] as a passenger- Mitchner had fallen asleep. Officer Williams made contact with Harris who appeared "impaired." Harris slumped in his seat and had "drool on the side of his chin, on the left side of his face all the way to the bottom of his chin, that was dried, a white looking substance." Harris's speech was "slow" and he had red watery eyes. Harris responded slowly to Officer Williams request for his driver's license and registration and Harris was unsteady on his feet and placed his hand on the car for balance when ordered to remove the fictitious tag. Harris denied having any open containers and denied drinking. When asked who his passenger was, Harris replied he didn't know who she was, that she was a "friend". Harris then gave Officer Williams consent to search the vehicle.

Upon searching the car, Officer Williams noticed a purse in between the front seats. In it, he saw "a brown paper sack with little white dryer sheets and a corner of a plastic bag." When he lifted the dryer sheets, he observed what he believed to be cocaine. Mitchner confirmed it was her purse but she was "shocked at the fact that there was anything found in the bag" and that she

didn't put anything in her purse. Harris was convicted by a jury of possession of cocaine with intent to deliver and was sentenced to eighty years in the Arkansas Department of Correction. He appealed.

Argument and Discussion: Again, it is not necessary for the State to prove literal physical possession of drugs in order to prove possession. *See also Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). Possession of drugs can be proved by constructive possession. *Id.* Although constructive possession can be implied when the drugs are in the joint control of the accused and another, joint occupancy of the vehicle, standing alone, is not sufficient to establish possession or joint possession. *Id.* There must be some other factor linking the accused to the drugs such as (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the vehicle, or exercises dominion or control over it; and (5) whether the accused acted suspicious before or during the arrest. *Id.*

Harris argues that: (1) the evidence was not in plain view; (2) the contraband was not found in his personal effects; (3) the contraband was found in an area close to where he was sitting, but he had left the vehicle [to take off the tag] at the time of the search; (4) although he was the owner of the vehicle, the contraband was found inside Mitchner's purse; and (5) he did not act suspiciously before or during the arrest.

However, the Court found that the drugs were found in between the seats, on the "hump", which made the contraband easily

accessible to Harris. Harris was driving the car and therefore had control and dominion over it. Harris also exhibited suspicious behavior in his evasive answers concerning the identity of his passenger. And finally, there was testimony from Officer Williams that Mitchner denied putting cocaine in her purse and that she seemed surprised that it was found there. While the statement was hearsay, under the Court's standard of review, it was still considered even though improperly admitted at trial. The Court found that Harris constructively possessed the cocaine and upheld the conviction.

Case citation: This case was decided by the Arkansas Court of Appeals on February 11, 2010, and was an appeal from the Desha County Circuit Court. The case citation is *Harris v. State*, 2010 Ark. App. 123.

Brooke Lockhart
Deputy City Attorney



Springdale's New Animal Ordinances

The Springdale City Council approved several changes to the animal ordinances. The animal ordinances are found in sections 14-1 through 14-66 of the Springdale Code. The changes that are set out and explained below **go into effect on May 14, 2010.**

The first changes are found in 14-1 which adds to and changes applicable definitions.

Cable run means a metal cable that is mounted aboveground at a designated height to two (2) stationary objects for the purpose of attaching a pulley

system that moves from one end of the cable to the other and to which a dog is tied or secured by means of a rope, chain, or cable attached to the dog's collar or harness

Free-roaming cat means a cat that is not kept inside of a house, business or other legal occupancy structure or kept in a fenced area enclosed with a top and containing a shelter. A cat that is allowed to go outside of such structure or fenced area is considered a free-roaming cat.

Habitual Animal Offender means any animal owner or harbinger, who within any twelve-month period, is charged with three violations, arising out of separate incidents of this title which pertains to animals from which conviction, guilty plea, no contest plea, deferred judgment, or plea bargain results. The controlling date is the date of each animal ordinance violation, not the date of the plea entered, or the conviction resulting therefrom.

Potentially Dangerous Animal means any dog or other animal that has shown a propensity, tendency, or disposition to attack without provocation and is able or likely to inflict injury to another person or animal.

Running at large (to run at large) means not confined on the premises of the owner within a fenced enclosure or animal shelter or under the control of a person, either by lead, cord, leash, rope or chain; provided, further, that an animal may be considered confined

if on a lead, rope or chain which is securely fastened or picketed in a manner which is sufficient to keep the animal on the premises. Cat owners and harborers may only be charged with running at large if the cat is a habitual nuisance on the property of another or if they have failed to follow the conditions set forth under 14-37.

Swivel means pivoting hardware that can be used in a trolley system to attach a cable run to a tether or a tether to a dog's collar or harness in order to minimize twisting and tangling of the tether

Tether means a rope, chain, or cable that is attached to a dog's collar or harness for purposes of restraining the dog

Trolley system means a method of restraining a dog which utilizes a cable run, swivel and tether attached to a dog's collar or harness.

Vicious dog or vicious animal means any dog or other animal that has bitten or attempted to bite any person, or caused serious injury to another domestic animal or livestock without provocation and is able or likely to inflict injury to another person.

Section 14-2 which sets forth the penalties that have changed. It is now important to note which number violation a running at large is because someone is given a higher fine for subsequent offenses within a three year period. It is therefore necessary that you write on the citation and in your report which number offense it is. Additionally you should set out in your report and on the

ticket whether the dog is neutered. With female dogs, unless the owner can provide you proof that the dog has been spayed, the citation should be for an unsterilized animal and the owner can provide proof later in court if the dog was, or is subsequently sterilized. While this change requires you to spend a few extra minutes getting additional information, the intent is to burden the owners financially who continually allow their animal (especially their unsterilized animal) to run at large. As you can see below the fines go to a good cause, allowing additional animals to get spayed and neutered, and if the owner gets their unsterilized dog sterilized before court they get the reduced sterilized dog fine. The change to section 14-2 now reads as follows:

(d) Penalty, Running at large. Conviction for running at large in violation of this section shall result in a fine as follows:

(1) **For a sterilized dog:**

a. The **first conviction within a three-year period** shall result in a minimum fifty dollar fine.

b. The **second conviction within a three-year period** shall result in a minimum seventy-five-dollar fine.

c. The **third and each subsequent conviction within a three-year period** shall result in a minimum one-hundred-dollar fine.

(2) **For an unsterilized dog:**

a. The **first conviction within a three-year period** shall result in a minimum one-hundred-fifty dollar fine, unless by time of sentencing for the violation, proof of sterilization of

the animal has been produced, in which case the fine structure applicable to sterilized dogs in subsection (d)(1) herein shall apply.

b. The **second and each subsequent conviction within a three-year period** shall result in a minimum two-hundred-fifty dollar fine, unless by time of sentencing for the violation, proof of sterilization of the animal has been produced, in which case the fine structure applicable to sterilized dogs in subsection (d)(1) herein shall apply.

c. The fine structure applicable to sterilized dogs in subsection (d)(1) herein shall also apply to unsterilized dogs too elderly or infirm to breed, as previously certified in writing as such at the time of the dog's rabies vaccination by a veterinarian licensed to practice within the state.

(3) *Deposit of funds.*

(a) The difference in the fine for unsterilized animals pursuant to section 14-2(d)(2) shall be deposited into a fund established for the city's low cost spay and neuter efforts.

(b) The animal shelter manager shall be responsible for establishing procedures and guidelines for the utilization of the abovementioned fund.

Sections 14-5 and 14-31 now require every dog and cat over six months of age to be microchipped. Animals that are microchipped can be scanned and taken home (with an accompanying citation), rather than taken to the shelter where they

may be eventually euthanized or take up shelter space causing another animal to have to be euthanized. If an owner is unable to provide proof that a dog or cat over six months is microchipped then they should be cited for no microchip. The microchip takes the place of city tags which are no longer required.

Sections 14-5 and 14-6 reflect the new state law that rabies vaccinations can be good for longer than 12 months. The proper way to handle whether a rabies vaccination is good is to have the owner provide proof and if they are unable to do so on scene then they should be charged and can bring proof to court.

Section 14-7 adds deer to the list of wild animals that people can not keep, maintain, sell or have in their possession or under their control within the city. (Random I know, but it was added because there was a person who put netting over their yard and kept wild deer).

Section 14-17 allows for home quarantine of an animal when any animal has bitten, scratched, or otherwise caused an abrasion, puncture, or break in a person's skin only with approval of the Animal Shelter supervisor Brett Harris. It is imperative that when an animal that has bitten or otherwise caused an abrasion, or puncture, or break in a person's skin (and where the owner does not have proof of rabies vaccination) it is quarantined within 24 hours either at a veterinarian's office (this is the preferred location so limited shelter space is not taken), at the animal shelter (at a cost of \$20 a day), or with approval by the animal services director, quarantined at home. This must be followed up on to ensure quarantine

is done and animal control should be notified of the location of quarantine.

Section 14-36 now forbids the tethering of dogs although trolley systems are allowed. The ordinance now reads:

Direct-point chaining or tethering of dogs to a stationary object is prohibited. Dogs may be restrained by means of a trolley system, or a tether attached to a pulley on a cable run, if the following conditions are met:

- (1) Only one (1) dog may be tethered to each cable run.
- (2) The tether must be attached to a properly fitting collar or harness worn by the dog, with enough room between the collar and the dog's throat through which two (2) fingers may fit. Choke collars and pinch collars are prohibited for purposes of tethering a dog to a cable run.
- (3) There must be a swivel on at least one (1) end of the tether to minimize tangling of the tether.
- (4) The tether and cable run must be of adequate size and strength to effectively restrain the dog. The size and weight of the tether must not be excessive, as determined by the animal services officer, considering the age, size and health of the dog.
- (5) The cable run must be at least ten (10) feet in length and mounted at least four (4) feet and no more than seven (7) feet above ground level.

(6) The length of the tether from the cable run to the dog's collar should allow access to the maximum available exercise area and should allow continuous access to water and shelter. The trolley system must be of appropriate configuration to confine the dog to the owner's property, to prevent the tether from extending over an object or an edge that could result in injury or strangulation of the dog, and to prevent the tether from becoming entangled with other objects or animals.

Additionally, trolley system, swivel and tether are defined under section 14-1 as set out above.

Section 14-37 allows free roaming cats, (defined in section 14-1 and set out above), conditioned on them being microchipped and sterilized. However if a cat becomes a habitual nuisance the cats owner or harbinger may be charged with running at large (see the definition section of 14-1 running at large). The cat's owner or harbinger is allowed one written warning if they are unable to provide proof that the cat is sterilized and microchipped. The ordinance now reads as follows:

Secs. 14-37. Free Roaming Cat conditions

(a) *Identification.* Cat owners shall identify their free-roaming cats by means of a microchip that registers the owner with a national computer recovery network.

(b) *Sterilization.* All free-roaming cats shall be sterilized unless the owner's veterinarian, licensed by the

state, certifies in writing that the animal is physically unable to reproduce or that the animal is medically compromised to the extent that it cannot be sterilized safely.

(c) *Chaining.* Direct-point chaining or tethering of cats to a stationary object is prohibited.

(d) *Warning notice to comply with free-roaming requirements.* Notwithstanding any other provision of this article:

(1) If the animal services division determines that the owner of a free-roaming cat is not in compliance with the microchipping and sterilization requirements of this section; and

(2) If a prior warning notice to comply with the microchipping and sterilization requirements has not been issued for that animal; then the owner shall be given a warning notice to comply with the microchipping and sterilization requirements within ten (10) days, with documented proof of such compliance or a letter to document the owner's intent to keep the animal indoors submitted to the animal services division within that ten (10) day period.

Section 14-38 provides that people that are habitual animal offenders, defined as having more than three violations (including three separate incidents not just three different charge in one incident), within one year, are precluded from owning or having animals on their property for one year. The date of each incident is the controlling date, not the date of the plea or conviction.

Finally, there is now a distinction between a **potentially dangerous animal** which is defined in section 14-1 and set out above as any dog or other animal that has shown a propensity, tendency, or disposition to attack without provocation and is able or likely to inflict injury to another person or animal, and a **vicious animal** which is now defined in 14-1 as any dog or other animal that has **bitten or attempted to bite** any person, or caused serious injury to another domestic animal or livestock without provocation and is able or likely to inflict injury to another person. An owner is allowed to keep an animal that has been found to be potentially dangerous if they meet the following conditions set out in section 14-39:

Sec. 14-39. Potentially Dangerous Animals.

It shall be unlawful for any person to keep within the city limits any potentially dangerous animal, except in compliance with the provisions of this section.

(1) *Permit required.* A potentially dangerous animal may be kept within the city limits only so long as the owner or custodian complies with the requirements and conditions in accordance with the potentially dangerous animal permit.

(a) The owner or custodian shall pay an annual permit fee of one hundred dollars (\$100.00) for possession of a potentially dangerous animal, in addition to all other required fees.

(2) *Conditions for keeping a potentially dangerous animal.* The requirements and conditions for keeping or maintaining a potentially

dangerous animal within the city limits shall include:

(a) *Confinement.* All potentially dangerous animals shall be securely confined:

(i) Indoors; or

(ii) In an enclosed and locked pen or physical structure upon the premises of the owner. The pen or physical structure must meet the minimum space requirements of 150 square feet and must have secure sides and a secure top attached to the sides. If no bottom is secured to the sides, the sides must be embedded into the ground no less than two (2) feet. The pen or physical structure must be capable of preventing the entry of the general public, including children, and must be capable of preventing the escape or release of the dog. Electronic containment devices shall not be used to confine dangerous dogs.

(b) *Spaying or Neutering Mandatory.* All animals that are deemed potentially dangerous must be spayed or neutered within fourteen (14) days of being designated as such.

(c) *Leash and muzzle.* The owner of a potentially dangerous animal shall not allow the animal to go outside of its kennel, pen or physical structure unless the animal is muzzled, restrained by a leash sufficient to control the animal, and under the physical control of an adult. The muzzle must not cause injury to the animal or interfere with its vision or respiration, but must prevent the

animal from biting any human or animal. A muzzle is not required if the animal is:

(i) In the owner's yard if the yard is enclosed by a fence that is capable of preventing uninvited entry by other animals or people; and

(ii) Is restrained by means of a leash held by an adult.

(d) *Signs.* The owner of a potentially dangerous animal shall provide public notice of the animal's presence on the premises by displaying a warning sign. The sign shall be placed in a prominent place on the owner's property, clearly visible from the public highway or thoroughfare. Similar signs shall be posted on the animal's kennel, pen or enclosed structure.

(e) *Photograph identification.* Within ten (10) days of the declaration of an animal as dangerous, the owner or custodian shall provide the animal services division manager with two (2) digital-quality color photographs of such animal, clearly showing the color and approximate size of the animal, or shall make the animal available for photographing by the animal services division.

(f) *Change of status.* The owner or custodian of a potentially dangerous animal shall notify the animal services division immediately if the animal is unconfined and on the loose, or has attacked a human or a domestic animal.

(g) *Change of ownership.* If the owner of a potentially dangerous animal sells, gives away, or otherwise transfers custody of the animal, the owner shall contact the animal services division within 24 hours. The owner shall, within five (5) calendar days, provide the animal services division with written documentation containing the name, address, and telephone number of the new owner or custodian. The previous owner shall also, before transferring ownership or custody of the dog, notify the new owner of the animal's designation as a potentially dangerous animal and, if the new owner resides within the city limits, of the requirements and conditions for keeping a potentially dangerous animal. This notice shall be in writing and a copy shall be provided to the animal services division. Upon being notified that a potentially dangerous animal has been removed to another jurisdiction, the animal services division is authorized, but not required, to notify the appropriate governmental department in the jurisdiction where the animal has been transferred that the animal has been declared potentially dangerous by the city.

(3) *Failure to comply.* It shall be unlawful for the owner or custodian of a dangerous animal to fail to comply with the requirements and conditions set forth in this section. Any animal found by a police officer or animal services to be kept in violation of this section shall be subject to seizure and impoundment. In addition, failure to comply shall result in the immediate revocation of the potentially

dangerous animal permit for such animal. In the event of permit revocation, the owner or custodian shall remove such animal from the city limits within twenty-four (24) hours of receipt of the notice of revocation, or the animal shall become the property of the Springdale Animal Shelter. Notice of such revocation shall be mailed to the address the owner keeps updated with the animal shelter upon registering the potentially dangerous animal.

Exemptions. Dogs that are used regularly for law enforcement purposes shall not be subject to this section or the vicious animal section.

Defense to determination of vicious or dangerous animal.

It is a defense to the determination of an animal as vicious or potentially dangerous and to the prosecution of the owner of an animal:

- (1) If the threat, injury, or damage was sustained by a person who at the time was committing a willful trespass or other tort upon the premises occupied by the owner of the animal;
- (2) If the person was teasing, tormenting, abusing or assaulting the animal or has, in the past, been observed or reported to have teased, tormented, abused or assaulted the animal;
- (3) If the person was committing or attempting to commit a crime;

(4) If the domestic animal killed was at the time teasing, tormenting, abusing or assaulting the animal;

(5) If the animal was protecting or defending a person within the immediate vicinity of the animal from an attack or assault;

(6) If the animal was injured and responding to pain; or

(7) If the animal was protecting its offspring, itself or its kennelmates

Please also keep in mind the new animal cruelty law that was discussed in the last edition of C.A.L.L. If you have any question regarding these ordinances or any other animal issues please don't hesitate to call me or come by my office.

Amber Roe
Deputy City Attorney



United States Supreme Court Upholds *Miranda* Warnings Given to Suspect in Florida Case

Facts Taken From the Opinion: On August 10, 2004, law enforcement officers in Tampa, Florida, seeking to apprehend respondent Kevin Dewayne Powell in connection with a robbery investigation, entered an apartment rented by Powell's girlfriend. After spotting Powell coming from a bedroom, the officers searched the room and discovered a loaded nine-millimeter handgun under the bed.

The officers arrested Powell and transported him to the Tampa Police headquarters. Once there, and before asking Powell any questions, the officers read Powell the standard Tampa Police Department Consent and Release Form 310. *Id.*, at 1063–1064. The form states:

“You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.”

Acknowledging that he had been informed of his rights, that he “underst[oo]d them,” and that he was “willing to talk” to the officers, Powell signed the form. He then admitted that he owned the handgun found in the apartment. Powell knew he was prohibited from possessing a gun because he had previously been convicted of a felony, but said he had nevertheless purchased and carried the firearm for his protection.

Powell was charged in state court with possession of a weapon by a prohibited possessor, in violation of Florida law. Contending that the *Miranda* warnings were deficient because they did not adequately convey his right to the presence of an attorney during questioning, he moved to suppress his inculpatory statements. The trial court denied the motion, concluding that the officers had properly notified Powell of his right to counsel. A jury convicted Powell of the gun-possession charge.

On appeal, the Florida Second District Court of Appeal held that the trial court should have suppressed Powell’s statements. The *Miranda* warnings, the appellate court concluded, did not “adequately inform [Powell] of his . . . right to have an attorney present throughout [the] interrogation.” Considering the issue to be “one of great public importance,” the court certified the following question to the Florida Supreme Court:

“Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A) the right to talk to a lawyer ‘before questioning’ and (B) the ‘right to use’ the right to consult a lawyer ‘at any time’ during questioning?”

The Florida Supreme Court found that the advice Powell received was misleading because it suggested that Powell could “only consult with an attorney before questioning” and did not convey Powell’s entitlement to counsel’s presence throughout the interrogation. Nor, in the court’s view, did the final catchall warning—“[y]ou have the right to use any of these rights at any time you want during this interview”—cure the defect the court perceived in the right-to-counsel advice: “The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning,” the court stated, for “a right that has never been expressed cannot be reiterated.”

The case was appealed to the United States Supreme Court, who granted certiorari.

Decision by United States Supreme Court: The United States Supreme Court

held that advice that a suspect has “the right to talk to a lawyer before answering any of [the law enforcement officers’] questions,” and that he can invoke this right “at any time . . . during th[e] interview,” satisfies *Miranda*. The Court held that while the warnings prescribed in *Miranda* are invariable, the Court has not dictated the words in which the essential information must be conveyed. In determining whether police warnings were satisfactory, reviewing courts are not required to examine [them] “as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*.’”

The Court held that the warnings Powell received satisfied this standard. By informing Powell that he had "the right to talk to a lawyer before answering any of [their] questions," the Tampa officers communicated that he could consult with a lawyer before answering any particular question. And the statement that Powell had "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview" confirmed that he could exercise his right to an attorney while the interrogation was underway. In combination, the two warnings reasonably conveyed the right to have an attorney present, not only at the outset of interrogation, but at all times. The Court noted that the standard warnings used by the Federal Bureau of Investigation are admirably informative, but the Court declined to declare their precise formulation necessary to meet *Miranda*'s requirements. The Court held that different words were used in the advice Powell received, but they communicated the same message. Therefore, the decision of the Florida Supreme Court was reversed and remanded.

Note from City Attorney: The United States Supreme Court in a 7 – 2 decision upheld the *Miranda* form used by the Tampa Police Department as meeting the warning required under the *Miranda* decision. I have reviewed the Springdale Police Department *Miranda* Warnings form, and warning number 3 states as follows:

"You have the right to talk to an attorney before I ask you any questions and to have him with you during any questioning."

It is clear, in my opinion, that the Springdale Police Department *Miranda* form clearly expresses the advice of the right of counsel to be present during questioning and, therefore, it is my belief that the argument made in this case would not be an issue in the *Miranda* Warnings form used by the Springdale Police Department.

Case: This case was decided by the United States Supreme Court on February 23, 2010. The case cite is *Florida v. Powell*, 559 U.S. ____ (2010).

Jeff Harper
City Attorney



Congratulations to the Winners at the 2010 Springdale Police Department Awards Ceremony

The City Attorney's Office congratulates all the winners of awards at the 2010 Springdale Police Department Awards ceremony held April 14, 2010. The winners were:

Distinguished Service Award –
Jason Renfrow and Steve Nail
Meritorious Service Award –
Byron Johncox and Tim Proctor

City Attorney's Office Justice Award –
Brian Bersi
Washington County Prosecutor's Award –
Michael Hendrix

Life Saving – Kyle Naish

Dispatcher Life Saving –
Kate Morriss and Stacy Elliot

Medal of Valor –
Michael Hendrix and Tim Hill

Helen Bowman Civilian Employee Award –
Angela Barrios

James H. Melekian Dispatcher Award –
Taylor Johnson

Field Training Officer Excellence Award –
Bryan Johnson

Craig Chastain Officer of the Year Award –
John Parnell

Chief's Coveted Shield of Excellence Award
– Arvest Bank and WACO Title



Congratulations to SPD Officers for Completing Legal Survival Skills for Rookies Class

From April 19 – 23, 2010, our office, in cooperation with SPD, conducted a one-week class entitled, "Legal Survival Skills for Rookies." Congratulations to all the officers who completed the class. Their pictures are set out following this article.



Pictured from left to right:
James Wyles, Steve Nail, Luis Manjarrez, and Phillip Group
(not pictured – Gomez Zackious)