C.A.L.L.

City Attorney Law Letter

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July 1, 2012

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Taken from the Declaration of Independence - July 4, 1776

SPD Officers: Effective July 1, 2012, Springdale Has a New Door to Door Solicitation Ordinance—Page 1

The City Fireworks Ordinance: A Refresher—Page 2

Can an Officer Enter a Residence to Arrest a Suspect – One of the Most Complicated Legal Issues Officers Will Face—Page 3

Eighth Circuit Decides Burden of Proof in §1983 Case—Page 18

United States Court of Appeals for the Eighth Circuit Holds Reasonable Suspicion Existed to Stop Suspect and Probable Cause Existed to Make Warrantless Arrest—Page 21

Court finds NO Exigent Circumstances in Entry of Hotel Room—Page 22

Officer Exceeded Terry's Limited Scope in Drug Case—Page 27

No Miranda Violation in Recorded Statements Taken at Suspect's Home—Page 32

No Ammunition Equals No Conviction on Simultaneous Possession of Drugs and Firearms—Page 34

Curbside Trash Pull Found Constitutional by Eighth Circuit—Page 35

When Can a Person be Charged With a Traffic Offense that Occurs on Private Property? - Page 36

Information from Security Guard at Club Found Reliable Basis for Investigative Stop of Vehicle—Page 39

Arkansas Court of Appeals Upholds Trial Court's Summary Judgment in Favor of Police Officers in a Civil Lawsuit—Page 40

Court of Appeals Resolves Constructive Possession and Crime Lab Report Issues in Favor of State—Page 43

Qualified Immunity Upheld for Officer in Drug Case—Page 45

Celebrating 15 years of publication!

Happy Birthday C.A.L.L.!

The first C.A.L.L. was published July 1, 1997.

SPD Officers: Effective July 1, 2012, Springdale Has a New Door to Door Solicitation Ordinance

On April 24, 2012, the Springdale City Council passed Ordinance No. 4585, which amends Sec. 82-1 of the Code of Ordinances of the City of Springdale relating to door to door solicitation at private residences.

Under Springdale's previous ordinance, which ends on June 30, 2012, Springdale residents who did not want to be bothered by door to door peddlers and solicitors who were peddling merchandise or personal property had to register with the City of Springdale on a "No Knock List." The "No Knock List" was then provided to peddlers and solicitors, as defined under the ordinance, who went door to door, but were not to knock on the door of any resident who was registered on the "No Knock List."

The new ordinance effective July 1, 2012, amends the old ordinance and still requires peddlers or solicitors, as defined under the ordinance, to obtain a permit from the City Clerk. Both the principal (the person or legal entity whose goods, merchandise, personal property or services are being peddled or solicited) and the peddler or solicitor is required to obtain a permit. Therefore, if you receive any complaint and the peddler or solicitor does not have a permit, he/she is in violation of this ordinance.

Further, any resident that does not want a peddler or solicitor to knock on their door must post a sign at the entry of their residence which bears the words, "No Soliciting, No Peddling," "No Peddlers," No Solicitors," "No Trespassing," or other words of similar import. The City of Springdale will provide free to any resident of the city a decal or sticker. If a resident wants to obtain a sign, they must pay for the cost of the sign to the City Clerk. If a peddler or solicitor knocks on the door of anyone who has a sign posted, they are in violation of the ordinance.

Officers need to familiarize themselves with the prohibitions under the ordinance set out in sub-paragraph "e". Officers also need to know who is considered a peddler or solicitor under the ordinance and be aware that the following are exempt from the provisions of the ordinance: (1) officers or employees of the city, county, state or federal government, or any subdivision thereof when on official business; and (2) charitable activities on behalf of a charitable organization, or activities related to a religious purpose or political purpose. All of these terms are defined in the ordinance.

In my opinion, the biggest challenge under this ordinance is going to be determining if a person is soliciting for a charitable organization. In the past, we have had peddlers or solicitors that claimed to be working for a non-profit organization, when in fact the organization was not considered a charitable organization as defined in the Springdale city ordinance, which requires the non-profit organization to hold a tax exempt certificate from the Internal Revenue Service pursuant to Sec. 501, et. seq., and any amendments thereto.

Remember again, this goes into effect July 1, 2012. A copy of the ordinance was sent to all SPD personnel on June 27, 2012. If you should have any questions, please contact the City Attorney's Office.

Jeff Harper
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. In addition, the Police Department inevitably receives a substantial number of calls regarding fireworks issues in the city from the end of June through the first part of July of any year. To assist in answering these questions and responding to these calls, a review of the City's fireworks ordinance is helpful. This review will also ensure that the ordinance is 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 a 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.

Public Display of Fireworks

Section (b)(2) of the ordinance sets forth the requirements for obtaining a permit for a public display of fireworks. The city may issue permits for a public display of fireworks if certain requirements are met. Once a permit is issued, any such public display shall be conducted by a competent operator approved by the fire chief and shall be located and discharged in such a manner as to not be hazardous to any property or dangerous to any person. In addition, **a person or entity may discharge fireworks pursuant to a permit for the public display of fireworks only between the hours of 8:00 a.m. and 11:00 p.m. from July 1st through July 4th of any year**. There are three situations when the city may issue a permit to allow a public display of fireworks on a day not falling between July 1st and July 4th of any year. *First*, the city can issue a permit for a public display of fireworks at a professional sporting event in a P-1 zone between the hours of 6:00 p.m. and 11:00 p.m. from April 1st through September 30th of any year, provided that the property adjacent to the P-1 zone is commercial or agricultural. *Second*, the city can issue a permit for a public display of fireworks for the purpose of allowing small test firing to determine the feasibility of a discharge site for future public display, provided no salute shells are discharged and provided that any such test firings shall occur between the hours of 6:00 p.m. and 10:00 p.m. between April 1st and June 30th of any year. *Third*, the city can issue a permit to allow the Rodeo of the Ozarks to shoot fireworks on regularly scheduled nights of the Rodeo of the Ozarks. This ordinance was passed by Springdale City Council in 2012 because the Rodeo of the Ozarks now has their first performance starting on Wednesday and ending on a Saturday, which does not always fall between July 1st – 4th date. For instance, the Rodeo of the Ozarks will be held July 4th through July 7th this year. Under the new ordinance, the Rodeo of the Ozarks can obtain a permit to shoot fireworks during the Rodeo of the Ozarks, but the fireworks still must not be discharged after 11:00 p.m.

Jonathan D. Nelson
Deputy City Attorney

Can an Officer Enter a Residence to Arrest a Suspect – One of the Most Complicated Legal Issues Officers Will Face

Arrest out of the home without a warrant? The United States Supreme Court has noted that, "with few exceptions, the

question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27 (2001). The United States Supreme Court wrote in *Payton v. New York*, 445 U.S. 573 (1980), the following: "The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

The language from the *Payton* decision was cited by the Arkansas Supreme Court when they decided the case of *Holmes v. State*, 374 Ark. 530 (2002). After quoting language from *Payton*, the Arkansas Supreme Court noted that they have held repeatedly that warrantless searches in private homes are presumptively unreasonable. *McFerrin v. State*, 344 Ark. 671 (2001); *Norris v. State*, 338 Ark. 397 (1999); *Williams v. State*, 327 Ark. 213 (1997). The court further held that the burden is on the state to prove that the warrantless activity was reasonable. *Warford v. State*, 330 Ark. 8 (1997).

The bottom line is that an arrest out of a home without a warrant is presumed to be unreasonable unless there is consent to enter the home, or there are exigent circumstances. Both of these exceptions to the requirement of not being able to enter a residence without a warrant are discussed below.

Consent: Rule 11.1 of the Arkansas Rules of Criminal Procedure is the authority to search and seize pursuant to consent and is set out in its entirety below.

> **Rule 11.1. Authority to search and seize pursuant to consent.**
>
> (a) An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.
>
> (b) The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.
>
> (c) A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent. For purposes of this subsection, a "dwelling" means a building or other structure where any person lives or which is customarily used for overnight accommodation of persons. Each unit of a structure divided into separately occupied units is itself a dwelling.

As to who can give consent to search a dwelling, Rule 11.2 provides the consent justifying a search and seizure can only be given, in the case of (c) search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.

Consent to search a dwelling is one legal issue where the Arkansas Supreme Court, citing the Arkansas Constitution, has been more restrictive than United States Supreme Court. Prior to the Arkansas Supreme Court case of *State v. Brown*, 356 Ark. 460 (2004),

the State only had to prove that the consent by a person allowed to give consent to search a dwelling was voluntarily given by an authorized person.

In the *Brown* case, three agents of the Fifth Judicial District Drug Task Force approached the residence of Jaye Brown and Michael C. Williams in Russellville, Arkansas. They did so because of information received from two anonymous sources that Brown and Williams were involved in drug activity and that a small child inside the trailer had become ill due to drug manufacturing. Upon reaching the door to the trailer home, they smelled a strong and familiar chemical odor. One of the agents knocked on the door and Jaye Brown answered. The agent told her that the three agents had information that someone was possibly growing marijuana there and there was illegal drug use at the residence and that they wanted to investigate. Brown asked that the agents wait a minute. She closed the door, but then returned a short while later. One of the agents presented her with a consent to search form to sign which read, "I give permission to the Fifth Judicial District Drug Task Force to search my vehicle/residence (circle one) for contraband or illegal terms." Brown and one of the officers signed the consent form. Jaye Brown did not circle vehicle or residence. A search of the residence by the agents ensued. Evidence of precursors used to manufacture methamphetamine were found in the residence. Brown and Williams were arrested, and one of the agents subsequently sought and received a search warrant to search the residence and seize any evidence or contraband found. The search warrant was executed, and evidence of methamphetamine manufacture and usage, as well as marijuana growth and possession was seized. Brown and Williams were later charged with manufacture of methamphetamine and marijuana and possession of methamphetamine with intent to deliver.

The Arkansas Supreme Court, in deciding the *Brown* case, noted that Article 2, Section 15 of the Arkansas Constitution reads in relevant part: "The right of the people of this state to be secured in persons, houses, papers or effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." The Arkansas Supreme Court held that the failure of the drug task force agents in this case to advise Jaye Brown that she had the right to refuse to consent to the search violated her right and the right of Michael Williams against warrantless intrusions into the home, as guaranteed by Article 2, Section 15 of the Arkansas Constitution. The court therefore affirmed the suppression of all evidence seized in the case that flowed from the unconstitutional search. The court also opined, "While we do not hold that the Arkansas Constitution requires execution of a written consent form which contains a statement that the homeowner has the right to refuse consent, this undoubtedly would be the better practice for law enforcement to follow."

After the *Brown* decision, Rule 11.1 was modified to contain the language that consent to search the dwelling shall not be valid unless the person giving the consent was advised of the right to refuse consent.

A case the Arkansas Supreme Court decided a little over a year after *Brown* makes it clear that failure to notify the person giving consent to search a dwelling of their right to refuse consent is fatal to the search. In *Carson v. State*, 363 Ark. 158 (2005), an officer of the Greenwood Police Department and the Twelfth and Twenty-first Judicial

Drug Task Force received a phone call from a store in Fort Smith that David Carson had purchased strong iodine tincture, an item used in the manufacture of methamphetamine. In response to the phone call, the officer traveled alone to Carson's residence on Johnson Street in Fort Smith about eleven o'clock in the morning. The officer was dressed in a pair of jeans and t-shirt, and was driving an unmarked Dodge pickup truck. Although the officer was carrying a weapon, it was not visible.

The officer went to the door and knocked. When Carson came to the door, the officer pulled out his badge, identified himself as a police investigator, and asked Carson if he could step inside to speak with him. Carson replied that he was a little busy, but he would step outside to speak with the officer. The officer thought it was odd that Carson was too busy to let him in, but would come outside to speak. The officer also noticed that Carson was sweating, had trouble making eye contact, and was shaking. The officer immediately started to point out evidence that he had heard and observed, such as the iodine purchase; the officer also mentioned the strong chemical odor in the air, and the fact Carson's hands looked like they were stained. As the officer pointed out to Carson, "everything [he] could see that [he] thought would relate to the manufacture of methamphetamine," Carson broke down and began to cry, telling the officer that he was correct, and that he did have a lab inside, and that he would show the officer where everything was. According to the officer's testimony, Carson invited him inside the home without the officer asking. In response to Carson's revelation about the lab, the officer followed him inside the house, where the officer saw in plain view items used to manufacture methamphetamine. At that time, Carson was placed into custody. Later that day, Carson gave a statement to police in which he again confessed that he was manufacturing methamphetamine.

Carson entered a conditional plea of guilty to a lesser charge of conspiracy to manufacture methamphetamine, a Class A felony and appealed the case to the Arkansas Supreme Court. Carson argued on appeal that the trial court erred in denying his motion to suppress the evidence seized as a result of the search of his home.

The Arkansas Supreme Court pointed out that in the case of *State v. Brown* (citation omitted), they declared a bright line rule: "When an officer does not inform a suspect of his or her right to refuse consent, any subsequent search – even one based on the suspect's apparent consent – is invalid." The court held in this case, the officer conceded at the suppression hearing that he never advised Carson of his right to refuse to consent to the search. Therefore, the court held that the search of the house was invalid, and the trial court erred in denying Carson's motion to suppress. Therefore, Carson's conviction was reversed and the case was remanded back to the Sebastian County Circuit Court.

It is clear that if you want consent to perform a search in a dwelling, whether it is a search for a person or personal property, you cannot enter the dwelling unless you have valid consent, which includes the warning that the person giving consent has a right to refuse consent as provided under Rule 11.1.

What is a search? Another issue that has come up in regard to consent to search a dwelling is whether or not a search is involved at all. Rule 10.1 of the Arkansas Rules of Criminal Procedure explains that a "search" is: "any intrusion other than arrest, by an officer under color of authority, upon an individual's person, property, or privacy,

for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or *sufficient consent* would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state."

In *Burroughs v. State*, 96 Ark. App. 289 (2006), one of the issues was whether or not the entry was pursuant to a search. In this case, a lieutenant with the Hot Springs Police testified at the suppression hearing that on September 9, 2004, he was assisting Arkadelphia police officers who had a warrant for a burglary suspect. He said they went to a residence in Hot Springs, which was the residence of Jason Wayne Burroughs (appellant), and knocked on the door. The lieutenant related that a female answered the door, and he explained that he had a warrant for the arrest of some individuals, and asked her for identification. The lieutenant said she informed him her name was Alice Ashmore and he again asked her for identification. He testified that she then said, "come in, I'll get it out of my purse." He said that he went in, along with a detective from the Hot Springs Police Department; that the female went to her purse, got her identification, and gave it to him; that he ran it through ACIC and NCIC; and it showed there was an outstanding warrant for her through another agency. He stated that he asked her if there was anyone else in the house, and she said there was not.

On cross-examination, the lieutenant explained that there were a total of five or six officers who approached the house, that all were armed, and only he was in uniform. He explained that when he first entered the residence, he watched Ashmore go and get her identification. He said he did not see any contraband in the room, but that he was not looking. He acknowledged that no one ever told Ashmore that she had the right to refuse entry to the officers. He said that he believed the other officers entered the rooms off the living room, that noises were heard, and that one of the officers observed what he thought were the makings of a meth lab. The lieutenant said that the officers reported hearing noise and could not see into the rooms, so he assumed the doors off the living room were closed. On redirect, the lieutenant stated he did not enter the house to search and that he did not ask for consent to search. On re-cross, he stated he entered the house because Ashmore invited him in as she was getting her identification and that the purpose of asking for her identification was to find out if she was who she said she was and whether she was related to the individuals for whom they were looking. The lieutenant acknowledged that they were looking for evidence of her identity, but stated that he did not consider going into the house as looking for evidence.

The Hot Springs detective testified that he looked toward the kitchen and saw what he believed to be bottled acid iodine salt crystals, and a gas generator (hydrogen peroxide). He also stated that there was a strong odor in the room. He stated that he recognized the odor from his experience working with narcotics. He testified that he and another detective heard some sounds in the back bedroom; that they asked if anyone else was in the house; that the female, Ms. Ashmore, said no; and that for officer's safety, they checked both the bedroom and the bathroom. He stated that they found a Mrs. Cotten in the bathtub; that she also had outstanding warrants for her arrest; that there was an active meth lab in the back corner of the bedroom; that the house was secured; that the drug task force was notified; and that a search warrant was secured to search the premises.

The trial court, in a letter opinion, denied appellant's motion to suppress, specifically finding "that the officers' entry into the residence was by a spontaneous invitation and not in response to a request for consent, so that the provisions of *State v. Brown* do not apply." Appellant was then subsequently tried by the jury for the offense of manufacturing methamphetamine and found guilty. On appeal, he contended that the trial court erred in denying his motion to suppress the evidence that was seized from his house because "the officers that furnished the information leading to the issuance of the search warrant were in his home illegally."

The Arkansas Supreme Court, in deciding the case, noted the definition of search under Rule 10.1 of the Arkansas Rules of Criminal Procedure. (See previous page for definition of search.) The court then concluded that "the facts of this case fit more in the category of a "search" than in the straight service of arrest warrants, the only "sufficient consent" would have been consent preceded by advice of the right to refuse consent, as explained in *Brown*, and as stated in Arkansas Rules of Criminal Procedures 11.1, which was not done here." "A search by any other name is still a search, and this search of the dwelling should have been preceded by advising Ms. Ashmore that she did not have to give consent." Consequently, the court held the trial court erred in denying appellant's motion to suppress, and reversed and remanded the case.

In deciding this case, the majority looked at the reason why the officers were at this Hot Springs residence to start with (to search for persons they had warrants for). Based on the court's decision, if you are going to a dwelling with the purpose to search (by consent), do not enter the dwelling without first advising the person giving consent that they have the right to refuse.

It can sometimes be confusing, but in determining whether you need to get consent, determine why you are at the residence. If an informant calls you and asks you to come over so he can talk to you, and invites you in, you are not there to perform a search and therefore you do not have to tell them that they can refuse to let you in. Likewise, when someone calls the police to report a theft and invites you in, you do not have to tell them they can refuse to give you consent because you are there to investigate a crime and not to perform a search. If you look at the *Burroughs* case, the reason they were there was to search for someone they had a warrant for. Therefore, to search, they were required to follow Rule 11.1 and get consent, advising the person that they could refuse consent.

What about when one owner gives consent and the other owner refuses? Another issue on consent to search a residence is what you do when one co-occupant who is present at the residence gives you consent, but another co-occupant who is present tells you that you cannot search. This issue was addressed in the United States Supreme Court case, *Georgia v. Randolph*, 547 U.S. 103 (2006). This case involved a domestic dispute in Americus, Georgia. On the morning of July 6, 2001, Janet Randolph complained to the police that after a domestic dispute, her husband took their son away, and when officers reached the house, she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern and that

his wife might take the boy out of the country again. He denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were "items of drug evidence" in the house. The officer asked Scott Randolph for permission to search the house, which he unequivocally refused. The officer then turned to Janet Randolph for consent to search, which she readily gave. She led the officers upstairs to a bedroom that she identified as Scott's, where the officer noticed a section of a drinking straw with a powdery residue he suspected was cocaine. The officer left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When the officer returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs, and after getting a search warrant, they returned to the house and seized further evidence of drug use on the basis of which Scott Randolph was indicted for possession of cocaine. He moved to suppress the evidence, as product of a warrantless search of his house and authorized by his wife's consent over his expressed refusal. The court opined, "this case invites a straight forward application of the rule that a physically present inhabitant's expressed refusal of consent to a police search is dispositive as to him, regardless of the consent of the fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent." "The state does not argue that she gave any indication to the police of the need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting probable cause for a warrant issued later). Nor does the state claim that the entry and search should be upheld under exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained." Therefore, the United States Supreme Court affirmed the judgment of the Supreme Court of Georgia and held the search unconstitutional.

The *Randolph* case made it clear that when both co-occupants of the residence are present, and one gives consent while the other refuses, you cannot search. However, the Eighth U.S. Circuit Court of Appeals, after the *Randolph* case, decided a case involving a co-tenant (husband) who was arrested at his business and refused to give consent to the officers to search his home computer. Officers never dealt with him at his residence. The officers then went to the residence and asked the wife for consent to search the home computer. The wife said she did not know what to do and asked what would happen if she refused to allow the officers to take the home computer. One of the officers explained he would apply for a search warrant, and in the meantime, he would leave an armed, uniformed officer in the home to prevent the destruction of the home computer and other evidence. The officer did not tell the wife that her husband previously denied consent to search the home computer.

The case was subsequently appealed to the U.S. Eighth Circuit Court of Appeals. The court held that unlike *Randolph*, the officers in the present case were not confronted with a "social custom" dilemma, where two physically present co-tenants have

contemporaneous competing interests and one consents to a search while the other objects. Instead, when the officer asked for the wife's consent, the husband was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus the court held that the rationale for the narrow holding in *Randolph*, which repeatedly referenced the defendant's physical presence and immediate objection, is inapplicable to this case. The *Randolph* opinion repeatedly referred to an "expressed refusal of consent by a *physically present resident*." The *Randolph* majority candidly admitted, "We are drawing a fine line; if a potential defendant with self-interest in objecting is in fact *at the door and objects*, the co-tenant's permission does not suffice for reasonable search. The court noted that the co-tenant (the husband) in this case was not at the door and objecting and therefore the case does not fall within *Randolph's* "fine line." Thus the court concluded that the officers' failure to advise the wife of her husband's earlier objection to a search of the home computer did not convert an otherwise reasonable search into an unreasonable one. This case is *U.S. v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008), and was discussed in detail in the July 1, 2008 edition of *C.A.L.L.*

Exigent Circumstances: Rule 14.3 of the Arkansas Rules of Criminal Procedure, entitled emergency searches, provides:

> An officer who has reasonable cause to believe that premises or a vehicle contain:
>
> (a) individuals in imminent danger of death or serious bodily harm; or
>
> (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
>
> (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;
>
> may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

The United States Supreme Court has noted that the ultimate touchstone of the Fourth Amendment "is reasonableness." Therefore, although "searches and seizures inside a home without a warrant are presumptively unreasonable," that presumption can be overcome. For example, the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.

In *Michigan v. Fischer*, 558 U.S. ___, 130 S.Ct. 546 (2009), a police officer responded to a complaint of a disturbance in Brownstown, Michigan. One officer later testified that, as he and his partner approached the area, a couple directed them to a residence where a man was "going crazy." Upon their arrival, the officers found a household in considerable chaos; a pickup truck in the driveway with its front smashed, damaged fence post along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors into the house. Through a window, the officers could see respondent, Jeremy Fischer, inside the house screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fischer refused to answer. They saw that Fischer had a cut on his hand and they asked him whether he needed medical attention. He ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. An officer pushed the front door part way open and ventured into the house. Through the window of the opened door he saw Fischer pointing a long gun at him and the officer withdrew. Fischer was later charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony.

The case was eventually appealed to the United States Supreme Court. The Court noted that the case of *Brigham City v. Stuart*, 547 U.S. 398 (2006), identified the need to assist persons who are seriously injured or threatened with such injury as an exigent circumstance. Thus, law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." This "emergency aid exception" does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only "an objectively reasonable basis for believing," that a person within [the house] is in need of immediate aid.

Brigham City illustrates the application of this standard. There, police officers responded to a noise complaint in the early hours of the morning. As they approached the house, they could hear from within an altercation occurring, "some kind of fight." Following the tumult to the back of the house whence it came, the officers saw juveniles drinking beer in the backyard and a fight unfolding in the kitchen. They watched through the window as a juvenile broke free from the adults restraining him and punched another adult in the face, who recoiled to the sink, spitting blood. Under these circumstances, the Court found it "plainly reasonable" for the officers to enter the house and quail the violence, for they had "an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning."

The Court held in the *Fischer* case, that just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house – and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside.

The Court held that officers do not need ironclad proof of "a likely serious, life-threatening injury to invoke the emergency aid exception." The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fischer argued that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. The Court held this would have no bearing, of course, upon their need to assure that Fischer was not endangering someone else in the house.

The Court further opined that it does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties. It's suffice to invoke

the emergency aid exception that it was reasonable to believe that Fischer had hurt himself (albeit non-fatally) and needed treatment that in his rage he was unable to provide, or that Fischer was about to hurt, or had already hurt someone else.

In deciding a case under exigent circumstances, the Arkansas Supreme Court has held that to enter a residence or private dwelling without a warrant, two things must be present: probable cause and exigent circumstances. *Mitchell v. State,* 294 Ark. 264 (1988). Probable cause is determined by applying a totality of the circumstances test and exists when the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers, or others, and the hot pursuit of the suspect. *Butler v. State,* 309 Ark. 211 (1992).

In a Springdale case, *Norris v. State,* 338 Ark. 397 (1999), Norris (appellant) was arrested for DWI out of his residence. Appellant was allegedly seen driving erratically by another driver. The citizen followed appellant to his home and called police. Based on the citizen's information, the officer approached appellant's home, where he was admitted into the house by the appellant's visiting mother-in-law. When the officer asked for the appellant, the mother-in-law went to appellant's bedroom to retrieve him. The officer followed her. In the bedroom, the officer questioned appellant, administered field sobriety tests, and arrested appellant for the offense of DWI #1. The appellant asserted on appeal that the police had no authority to enter his home to make a warrantless arrest for a minor offense and no valid consent was given to allow police to enter appellant's home to make a warrantless arrest. The Arkansas Supreme Court agreed with the defendant and held that a DWI first offense did not create exigent circumstances such that a warrantless arrest can be made out of the home.

The State also contended that because the appellant's blood-alcohol content decreases with the passage of time, it is therefore equivalent to "destruction of evidence" and that determining the blood-alcohol content is, then, an "exigent circumstance" that justifies a warrantless entry into appellant's home. The Court held in this case, because they considered DWI #1 a minor offense, a warrantless arrest cannot be upheld simply because evidence of the offender's blood alcohol level might have dissipated while the police obtained a warrant.

The Court also looked at consent to enter the home. The Court noted that they have suggested that so long as a searching police officer reasonably believes that a person giving consent had authority to do so, the consent is valid, notwithstanding a later determination that the consentor had no such authority. *Grant v. State,* 267 Ark. 50 (1979). The Court then looked to the scope of the consent in this case and noted that the mother-in-law had asked the officer to step inside the house because the family dog was making a disturbance but that she never asked or verbally consented to the officer coming any farther into the house, and specifically, not down the hall and into appellant's bedroom. The Court noted that testimony was undisputed. Further, the officer's testimony made it clear that while his initial entry into the house was in response to the mother-in-law's initial

invitation to step inside, that entry was distinct and separate from his decision to follow her out of the living room, down the hall, and into appellant's bedroom. The officer never asserted that he perceived the initial invitation as anything more than entry inside the front door or that he relied on that invitation in any way as a basis for going into the interior of appellant's home. Therefore, the Court held that the officer did not have consent to go back into the bedroom and make the initial contact with the suspect.

Now that we have gone over the basics of consent and exigent circumstances, let's take some scenarios on making an arrest out of a residence without a warrant.

Scenario #1: Let's now take the *Norris* case described above, and change the facts slightly. Springdale Police receive a call of a drunk driver. The person making the call is following the vehicle and describing the vehicle driving all over the road, including driving northbound in the southbound lane at times. The driver, however, makes it home and the complaining witness waits on the officer, who arrives 5 minutes later. The officer knocks on the door. A lady answers the door and states that, after the officer asks, that her husband has just arrived home in the vehicle, which is now sitting in the driveway. The officer asks how long he has been home, and she said about five minutes. She then tells the officer that he is now in bed. The officer then asks consent to enter the residence to search for the suspect (her husband), and the officer tells the wife that she has the right to refuse consent to allow him in the home to search for her husband. The wife agrees to allow the officer to come in the house and search for her husband. She advises the officer to follow her and takes the officer to a bedroom where the officer makes contact with the suspect. After interviewing the suspect, the officer determines that he is intoxicated and has not been drinking since he came home. *Can an arrest be made?* It is my opinion that an arrest can be made because the officer has entered the house lawfully, under proper consent. In the *Norris* case the officer had consent to step in the door, but did not ask consent to go back in the bedroom and the court held he did not have consent to go back and search for the suspect. **Also, I recommend you get consent in writing before conducting a search of the dwelling if possible. By doing it this way, it takes away the argument that defendant was never advised of his right to refuse consent.**

Scenario #2: Let's take this same case and assume the wife refuses to let the officer in, but says she will bring the suspect to the front door to talk to him. The officer is never able to enter the house under consent. He then talks with the suspect, determines that he is intoxicated and asks if he will voluntarily go in and take a blood test, but the suspect refuses. The officer gets his ticket book, writes a ticket for DWI and hands it to the suspect. Again, this is proper because no arrest has been made out of the home. This is the approach that has been taken by Springdale police officers since the *Norris* case was decided. I do not ever remember a case in which the defendant was found not guilty on DWI charges when a ticket was written at the home. A few suspects have even voluntarily gone with the officer down to the station to take a test and have then been taken back to the home after the breath test was administered.

Scenario #3: Benton County Sheriff's Office calls the Springdale Police Department and advises that they have probable cause to arrest John Doe for violation of an order of protection, which occurred five hours before in Benton County. John Doe resides in Springdale. The

officer goes to the house and observes John Doe in the living room, but John Doe will not answer the door. *Can the officer enter the house?* The answer is no, as you do not have consent to enter, nor do you have exigent circumstances.

Scenario #4: Washington County Sheriff's Office calls Springdale Police Department and advises they have probable cause to arrest Jack Johnson for burglary. The officers go to Jack's house in Springdale and knock on the door. Jack Johnson's wife answers the door. An officer can see Jack inside the living room. Officers ask for consent, and tell Mrs. Johnson she can refuse to give them consent to come in and search for Jack. She refuses. *Can you enter anyway?* No, as there are no exigent circumstances and there is no consent.

Scenario #5: Washington County Sheriff's Office calls Springdale Police Department and advises they have probable cause to arrest a suspect who lives in Springdale for a murder that just occurred about an 30 minutes before at a residence five miles outside of Springdale. The officers are advised that the suspect should be considered armed and dangerous, and that a handgun was used in the murder. The officers arrive at the residence in Springdale and observe the suspect inside. The officers knock on the door, but no one will come to the door. *May the officers go into the house without a warrant and make an arrest?* Unlike the previous example, this case does have exigent circumstances in that a grave offense has just been committed and there is probable cause to arrest the suspect on the offense, the suspect is believed to be armed and dangerous, and the suspect is known to be inside the residence. Therefore, it is my opinion that in this fact situation, unlike the example of the burglary case, officers can make entry into the house and arrest the suspect on Washington County's probable cause for murder.

What about entering the residence if you have an arrest warrant?

Based on case law by the Eighth U.S. Circuit Court of Appeals and the Arkansas Supreme Court, it is my opinion that a valid arrest warrant carries with it the authority to enter the residence of the person named in the warrant in order to execute the warrant so long as the police have a reason to believe that the suspect resides in the place to be entered and is currently present in the dwelling. This was the decision of the Eighth U.S. Circuit Court of Appeals in *United States v. Clayton*, 210 F.3d 841 (8th Cir. 2000). However, the Eighth Circuit did note in this case that it is not enough for the police to know that a suspect is a resident of a dwelling, they must also have a reason to believe that the suspect is present at the time of entry.

The Arkansas Supreme Court has also decided a similar case. A murder was committed in Jacksonville, Arkansas. Following the murder, Roberto Benavidez (appellant) left Arkansas, and officers investigating the murder obtained information that Benavidez was staying in Georgia. A warrant for his arrest was issued. On November 4, 1999, a sergeant of the Chamblee, Georgia Police Department received a copy of a warrant authorizing Benavidez's arrest for capital murder from the Jacksonville Police Department in Jacksonville, Arkansas. The Jacksonville police informed the Chamblee, Georgia police sergeant that Benavidez was staying at a residence in Chamblee and gave them the address. The Jacksonville police also informed the sergeant that Benavidez was driving a 1989 blue, two-door Grand Am with Arkansas plates. In addition, the Jacksonville police provided a picture of

Benavidez to the Chamblee police and told the officers that Benavidez might be armed.

A lieutenant with the Chamblee Police Department located Benavidez's car in the parking lot of the apartment complex located at the address given to them by Jacksonville police. Several Chamblee police officers then went to the apartment address given to them by Jacksonville police. An Asian female answered the door, and the officers told the woman that they had a warrant to arrest Benavidez. She pointed to the bedroom. The officers went to the bedroom and found two men sleeping on the floor of an unfurnished room. The officers turned on the light and woke up the two men in the room. Using the picture provided by the Jacksonville police, a Chamblee, Georgia police officer identified Benavidez as one of the persons in the room.

Benavidez was not wearing a shirt, and since it was cold outside, one of the police officers reached into an open closet to get a shirt for Benavidez. When the officer reached for the shirt, he saw an identification card and pulled it out. The officer looked at the identification card and gave it to another officer. The officer again reached for the shirt and when he grabbed it, he found a .380 caliber pistol. Benavidez was then placed under arrest.

Benavidez stated that at the time he was arrested, he had been living in the apartment for four days. He stated he was staying at the apartment with the permission of the Asian woman who lived there.

A Pulaski County jury convicted appellant (Benavidez) of capital murder and sentenced him to life imprisonment. His sole claim on appeal was that the trial court erred by denying his motion to suppress because the Georgia police officers who arrested him did so by making a "search warrantless" entry into a third party's home without having a reasonable belief that the home was Benavidez's residence.

In deciding this case, the Arkansas Supreme Court noted that in *Steagald v. United States*, 451 U.S. 204 (1981), the United States Supreme Court held that although an arrest warrant carries with it the authority to enter a suspect's residence to arrest him or her, it does not give the authority to enter the residence of a third party to search for the subject of the arrest warrant, absent consent or exigent circumstances. However, in *Payton v. New York*, 445 U.S. 573 (1980), the Court stated that for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

The court held that in the present case, there is no dispute that the arrest warrant for Benavidez was founded on probable cause. With the valid warrant, the Chamblee police officers had the authority to enter the apartment where Benavidez was living if the officers had reason to believe that Benavidez lived in the apartment and that Benavidez was present at the apartment at the time the warrant was executed. The court held that clearly the officers had reason to believe that Benavidez was present in the apartment at the time the warrant was executed. The Jacksonville police had informed Chamblee, Georgia police that Benavidez was staying at an apartment and gave the address to the apartment, and Chamblee police had been told that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates, and that vehicle was found in the parking lot of the apartments.

From the totality of the circumstances, it was reasonable for the Georgia police to believe prior to the execution of the arrest

warrant that Benavidez was both living in apartment E-11 and actually present inside the apartment. The Georgia police also had received information from the Jacksonville police that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates, and that the car was at the apartment complex of the address supplied. Subsequent to receiving this information, the Georgia police officers discovered the subject car parked at the subject apartment complex.

The court held that the officers reasonably believed that Benavidez was residing at the apartment and reasonably believed that Benavidez was present at the apartment at the time they went to execute the warrant. The officers entered the bedroom where Benavidez was sleeping and positively identified him. An officer reaching for a shirt inadvertently discovered the gun and identification card which was wrapped in the shirt. The gun and identification card were plain view. Therefore, the court held that the arrest was valid, as was the seizure of the evidence in plain view.

It is important for officers to remember in this type situation that if the arrest warrant is for a person who is at a third party's house, without consent from the person entitled to give consent to search the dwelling, officers have to get a search warrant for the third party's house even though they have probable cause to believe that the person whom they have an arrest for is inside. However, if it is the house of the person whom you have the warrant for and you have probable cause to believe he is inside; the arrest warrant carries with it the authority to enter the residence.

There is one last word of caution about using the arrest warrant for the authority to enter a suspect's home. If it is considered a pretextual arrest, then the Arkansas Supreme Court has held it is an unlawful search, and therefore, an unlawful arrest. Such was the case in *Henley v. State*, 95 Ark App. 108 (2006).

In the *Henley* case, an officer of the Faulkner County Sheriff's Office received a call from the investigator of the Van Buren County Sheriff's Office wanting to talk to Marc Henley about a burglary that occurred in Van Buren County. The Van Buren County investigator did not have a warrant, but the Faulkner County officer checked his warrant log and discovered that Henley had a misdemeanor warrant for failure to appear on a speeding ticket.

Later that night around 10:00 p.m., the two officers along with another Van Buren County officer drove to Henley's home, arriving at 10:18 p.m. The officers parked their vehicles in Henley's driveway behind several other vehicles. As the officers exited their car, armed with flashlights, they looked into the other cars parked in the drive. The officers then proceeded to the front door of Henley's home. As they approached the door, the officers looked into Henley's home through a bay window although the window had a blind covering it; a section of the blind was damaged allowing officers to see inside the home. The officers observed Henley and a female inside the home standing around a pool table.

Once the officers arrived at the front door, they began knocking and shouting for Henley to come to the door. As one officer continued knocking on the door, another went to look through a bay window where he observed Henley and the woman under the pool table. Meanwhile, a third officer walked around to the back of the residence.

Eventually Henley opened the front door and was placed under arrest on the misdemeanor warrant and was handcuffed.

He was then questioned by the investigator from Van Buren County about the burglary until the investigator was satisfied Henley was not involved in any Van Buren County burglary. However, when Henley opened the door to exit his home, a Faulkner County deputy smelled an overwhelming chemical odor that he associated with processing methamphetamine. When Henley was being questioned, the female came outside where she was subjected to a pat down search. The search revealed a quantity of an illegal substance (later identified as methamphetamine). She responded to the discovery of the secreted black zippered bag containing methamphetamine by saying, "you can't tell Marc I gave it to you. He told me to put it there. He would kill me if I told you that." At this point the officers asked Henley if he would consent to a search of his home. He refused their request. However, as Henley was being placed in the squad car he mentioned that he was on probation. His Faulkner County probation officer was then contacted and the probation officer and drug agent who was called arrived on the scene. Henley and the female were taken back to the home. As Henley and the female were being watched, officers conducted a search of a home. The search revealed the components of a methamphetamine laboratory. Finding the discovery, Henley was arrested and entered a conditional plea of guilty to the offenses of attempt to manufacture methamphetamine, possession of drug paraphernalia with intent to manufacture, and maintaining a drug premises. He appealed his case to the Arkansas Court of Appeals.

One argument that the state made on appeal was that the search was justified because it followed the arrest of Henley on a valid warrant (the failure to appear warrant from Faulkner County). Henley responded that the evidence seized from his home followed a pretextual arrest and must be suppressed as dictated by *State v. Sullivan*, 348 Ark. 674 (2002) and *Smith v. State*, 265 Ark. 104 (1979). In *Smith*, the Arkansas Supreme Court concluded that if the initial arrest is simply a pretext to search, the search cannot stand. In that case, the Arkansas Supreme Court reasoned that a pretextual arrest exists if the officer would not have gone to the defendant's home to arrest him otherwise.

As to this case, the court noted that the officer's initial intent in their contact with Henley was to interrogate him about a Van Buren County burglary. Having no warrant for that purpose, the Faulkner County officer found an old misdemeanor warrant for Henley. The officers proceeded to Henley's home where he was arrested on the outstanding misdemeanor warrant as a pretext to investigate the burglary. The court held that, "we find no fault with the officer's presence at Henley's home to question him about the crime they were investigating – with or without the pretext of the warrant – the officers were legally entitled to investigate the burglary crime by questioning Henley. However, the court held that the search following the arrest cannot be justified because the serving of the warrant was merely a pretext." There was no evidence that these type of warrants were routinely served in person after 10:00 p.m. Therefore, based on the reasoning obtained in *Smith* and *Sullivan*, the court agreed with Henley's assertion that the evidence seized from his home followed a pretextual arrest and must be suppressed.

Based on this case, it is my opinion that if officers had gone to this house at a normal hour when they serve misdemeanor warrants, such as 6:00 p.m., the decision on this particular part of the case would be different. It is my opinion that officers should follow the laws of criminal procedure for when a search warrant can be executed, 6:00 a.m. – 8:00 p.m., unless there are

exigent circumstances. Of course, if the Faulkner County officers had been called to a disturbance at 10:30 p.m. and the house was entered lawfully, then they determined they had a misdemeanor warrant, there would be no problem with an arrest on the misdemeanor warrant.

Note From City Attorney: This article is intended to provide a guideline for Springdale officers on the complicated issue of making an arrest out of the home. Case law helps to give officers what factors should be considered in deciding whether to make an entry without a warrant, or whether to make an entry when you have an arrest warrant but not a search warrant. Of course, it will always come down to the facts that you have at the time you make the decision. I hope this article helps Springdale officers who are making that decision. *C.A.L.L.* is intended to provide legal guidance for Springdale police officers. As always, I recommend officers from other jurisdictions consult their legal counsel concerning this issue.

I want to thank Sergeant Jeff Taylor who has repeatedly requested from our office an article in *C.A.L.L.* about this issue. I also want to thank John Threet, Fourth Judicial District Prosecutor, who contributed to this article.

Jeff Harper
City Attorney

Eighth Circuit Decides Burden of Proof in §1983 case

Facts: Sandra and Gordon Der, individually and on behalf of their minor son, G.D., sued Isanti County, Minnesota Deputy Sheriff Sean Connolly in his individual and official capacity under 42 U.S.C. § 1983 and relevant state law. The Ders sought damages for injuries allegedly suffered when Deputy Connolly entered their home without a warrant. A jury returned a verdict in favor of Deputy Connolly.

On the afternoon of April 22, 2008, R.D., Sandra's teenage son came home from school. Sandra began screaming and yelling at R.D. R.D., believing that his mother was drunk, left the home and went to a friend's house to call his father, Terry Darby, to come get him. R.D. told his father and stepmother, Heather Darby, what happened and told them that he was concerned about his little brother still in the home with his mother. Heather called 911 to ask police to do a welfare check on G.D., the five-year old brother. Deputy Connolly was dispatched to conduct the welfare check and had also spoken with Heather who had confirmed the information given by dispatch and also said that G.D. was sick and not getting proper care.

At 9:45 p.m. Deputy Connolly arrived at the Der residence and knocked for two to three minutes before a female voice yelled back. Deputy Connolly identified himself and said he needed to speak with her. Sandra opened the door and Deputy Connolly explained why he was there. Deputy Connolly noticed a strong odor of an alcoholic beverage on Sandra and that Sandra had bloodshot, watery eyes. Sandra said the deputy could not come in and she began shutting the door. Deputy Connolly stopped the door with his foot to prevent the door from closing yet he was still outside the entrance of the home. He again explained that he needed to speak with her about the welfare of her children to which Sandra responded, "F**k you, you are not f*****g coming in, go away." She attempted to shut the door again. At that time, Deputy Connolly placed one of his hands on her wrist and tried to pull her

outside the door to better control the environment and for his own safety.

Deputy Connolly let go of Sandra's wrist when two large, growling dogs appeared. Sandra at first refused to put the dogs away, but then secured them. Deputy Connolly again told Sandra that he was only there to check on the welfare of her son and he confirmed that the five-year-old son was sick. Sandra told the deputy that the child was upstairs and asked the deputy if he wanted to go upstairs to check on him to which Deputy Connolly replied "yes." Thus, according to Deputy Connolly, Sandra consented to enter the home. Sandra and Deputy Connolly walked upstairs and into the living room where G.D. was lying. Deputy Connolly was concerned because G.D. appeared sickly, lethargic and very pale. When the child's temperature was taken, it was 102.9 degrees. Sandra gave G.D. fever medication and Deputy Connolly continued his investigation.

Deputy Connolly asked for Sandra's identification to see if she had any warrants. He asked if Sandra had consumed any alcoholic beverages and Sandy stated she had one shot of hard liquor. Deputy Connolly gave Sandra a PBT that registered a blood-alcohol content of 0.20. To evaluate Sandra's awareness, Deputy Connolly asked Sandra if she knew where her oldest son, R.D., was. Sandra said he was downstairs but upon checking, she realized his absence.

Deputy Connolly informed Sandra that, based on his observations of her, her intoxication and the information he received from dispatch about the original called in complaint, he did not feel that she could properly care for G.D. and suggested that someone come take care of G.D. until she sobered. Sandra got upset at this and Deputy Connolly told her that family services was the next option. Sandra then went into a rage and yelled, "I have a gun, I knew you were a cop out there, if I was going to answer the door and you would have come in, I would have shot ya." Deputy Connolly considered this a threat and handcuffed Sandra for everyone's safety, but informed her that she was not under arrest. After a family member came to the home, Deputy Connolly removed Sandra's handcuffs and left the residence.

Argument and Discussion: The Ders argued that the district court erred in (1) failing to assign Deputy Connolly the burden of proof regarding Sandra's alleged consent and whether an emergency or exigent circumstance existed in the Ders' home at the time of his entry, (2) instructing the jury as to what constitutes "exigent circumstances" justifying a warrantless entry into the home, (3) failing to exclude the results of the PBT as unreliable and unduly prejudicial, and (4) failing to admit evidence of a subsequent event involving Deputy Connolly's entrance into another individual's home.

In their first argument, the Ders argued that the district court improperly shifted the burden of proving the affirmative defenses of consent and exigent circumstances to them instead of placing that burden on the deputy. The Eighth Circuit decided to follow the majority of the courts and place the burden of proof on the plaintiff in a § 1983 action alleging a Fourth Amendment violation. *Valance v. Wisel*, 110 F.3d 1269, 1279 (7th Cir. 1997). As the Seventh Circuit explained, "[e]ven if a presumption of unreasonableness arises from the fact of a warrantless search [or entry], that does not serve in a civil case to shift 'the burden of proof in the sense of the risk of nonpersuasion.'" *Id*. at 1279 (quoting Fed. R. Evid. 301). Instead, the presumption only serves to impose on the defendant "the burden of going forward with evidence to

meet or rebut the presumption." *Id.* In this case, the district court's jury instruction on the burden of proof was correct and clearly stated the law in that the Ders bore the burden of proving that Sandra did not knowingly and voluntarily consent to the deputy entering her home. Deputy Connolly then satisfied his burden of production by producing evidence of Sandra's consent and that an emergency existed in the home.

Next, the Ders allege that there has to be some life threatening emergency to justify an officer's warrantless entry into the home. The district court instructed the jury that the question was whether, given all the circumstances known to Connolly at the time that he entered, a reasonable officer in Connolly's position-without the benefit of hindsight-would have believed that such an emergency existed requiring his attention. The Supreme Court explained in *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) that the "emergency aid exception" "requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid." The Eighth Circuit held that the jury instruction was proper.

The Ders' third argument on appeal was that the district court erred in admitting the PBT result into evidence even though the court instructed the jury that the PBT result could only be considered in deciding whether Deputy Connolly acted reasonable after he administered the test. The Eighth Circuit determined that the district court did not admit the PBT test result as substantive evidence of Sandra's intoxication, but limited its' use and through the instructions to the jury, minimized the danger of unfair prejudice to the Plaintiff and was properly allowed. A PBT is admissible to establish probable cause. *United States v. Iron Cloud*, 171 F.3d 587, 590 (8th Cir. 1999). *See also Sherbrooke v. City of Pelican Rapids*, 577 F.3d 984, 987-88 (8th Cir. 2009) (holding, in § 1983 action for violation of Fourth Amendment rights, that police officer had probable cause under state law to effectuate arrest of plaintiff for driving under the influence when, *inter alia*, the plaintiff "registered .11 on the PBT").

Finally, the Ders sought to introduce evidence of a subsequent incident involving Deputy Connolly which included a disputed home entry. The Eighth Circuit held that the district court did not err in excluding the proffered testimony as it was purely character evidence that was impermissible as it would show the deputy's subjective intent which was immaterial. The test is an objective test, "not what was in the mind of the actual officer, but what a reasonable officer would have concluded under the circumstances."

In upholding the district court's ruling for Deputy Connolly, the Eighth Circuit stated that precedent holds that "issues of motive and intent are essentially irrelevant" in § 1983 cases involving claims of excessive force, unreasonable search, and unreasonable entry. *Morgan v. City of Marmaduke, Ark.*, 958 F.2d 207, 211 n.2 (8th Cir. 1992).

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on January 25, 2012. The case was from the United States District Court for the District of Minnesota. The case citation is *Der v. Connolly*, 666 F.3d 1120 (8th Cir. 2012).

Brooke Lockhart
Deputy City Attorney

United States Court of Appeals for the Eighth Circuit Holds Reasonable Suspicion Existed to Stop Suspect and Probable Cause Existed to Make Warrantless Arrest

Facts Taken From the Case: On the afternoon of October 27, 2009, officers were dispatched to a Kansas City, Missouri, apartment complex regarding a reported disturbance. The dispatcher informed officers that "Maurice Blackmon" was in violation of a protection order and was possibly under the influence of phencyclidine (PCP). The dispatcher also said that Blackmon was served with the protection order the previous week.

Bystanders at the apartment complex told officers that they observed a black male dressed in all black who was behaving erratically and appeared to be high on a controlled substance. As one officer was scanning the area, he observed a man who was later identified as "Melvin Blackmon" who matched the description given by the bystanders. Officers attempted to make verbal contact with Blackmon by calling out "Maurice," the name given by the dispatcher, and Blackmon turned toward the officers but stared off in the distance in a confused manner. Based on the officers' experience, Blackmon's conduct was consistent with PCP usage. The officers gave Blackmon around twenty commands to get on the ground, but he failed to do so and remained unresponsive. Blackmon began to reach into his pockets, and officers became concerned that he was grabbing for a weapon. Blackmon then raised his fists as if he was prepared to fight. An officer deployed his taser, shocking Blackmon three times without effect. After the third shock, Blackmon turned his back to officers, who then tackled and handcuffed him. Blackmon remained silent throughout the entire ordeal.

Officers observed More-brand cigarettes on the ground where Blackmon was tackled. On Blackmon's person, officers discovered a cough syrup bottle containing a brown liquid, additional cigarettes (including one wet cigarette), and $1,729.13 in currency. Based on the officers' experience, More-brand cigarettes are often dipped in PCP and smoked, and PCP is commonly packaged in cough syrup bottles.

Officers then contacted the individual who reported the disturbance. That person showed officers the protection order papers, which appeared to be in order. The protection order was for both Sherry Pulluaim and her son. Officers learned that Blackmon had entered and exited Pulluaim's apartment while her son was present. Blackmon was placed under arrest for violating the protection order, resisting arrest, and possessing PCP. Later at the police headquarters, a detention unit supervisor noticed that Blackmon resembled a person involved in a bank robbery earlier that day, and upon reviewing surveillance video of the robber it was determined that Blackmon had robbed the bank.

Blackmon filed a motion to suppress evidence officers obtained incident to arrest, arguing that his stop and arrest were not supported by reasonable suspicion or probable cause. The district court denied Blackmon's motion to suppress, and Blackmon pled guilty to bank robbery yet reserved the right to appeal the denial of his motion to suppress.

Applicable Law and Decision by the U.S. Court of Appeals For the Eighth Circuit: The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's denial of Blackmon's motion to suppress evidence.

The Court first addressed Blackmon's claim that officer's lacked reasonable suspicion to stop Blackmon. In setting forth the applicable law, the Court said that under *Terry v. Ohio*, 392 U.S. 1 (1968), "police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause." *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989). Additionally, the Court stated that "An officer's suspicion is reasonable if he knows particularized, objective facts that lead to a rational inference that a crime is being or has been committed." *U.S. v. Gannon*, 531 F.3d 657, 661 (8th Cir. 2008).

In applying the law to the facts of the case, the Court noted that officers were told by a dispatcher that "Maurice Blackmon" had violated a protection order and was thought to be under the influence of PCP. The Court pointed out that bystanders at the scene explained that a black male dressed in all black was acting erratically and appeared to be high, and that upon locating Blackmon the officers observed a person who matched the bystanders' description and who appeared confused and unresponsive in a manner consistent with PCP usage. The Court concluded that under these facts, officers had reasonable suspicion that criminal activity might be afoot.

The Court next addressed Blackmon's claim that officers lacked probable cause to support Blackmon's arrest. It said that when determining if probable cause exists to make a warrantless arrest, the Court "… looks to the totality of the circumstances to see whether a prudent person would believe the individual had committed or was committing a crime." *U.S. v. Segars*, 31 F.3d 655, 659 (8th Cir. 1994). The Court also stated that "a defendant's response to even an invalid arrest or *Terry* stop may constitute independent grounds for arrest." *U.S. v. Dawdy*, 46 F.3d 1427, 1431 (8th Cir. 1995). The Court noted that officers attempted to make verbal contact with Blackmon, yet despite about twenty commands to get on the ground, Blackmon remained unresponsive and raised his fists as if preparing to fight. The Court reasoned that at that point, a reasonable officer would have had probable cause to arrest Blackmon for resisting arrest under Missouri law. Therefore, the Court concluded, the subsequent search of Blackmon's person where officers found what was thought to be PCP, More-brand cigarettes, currency, and other evidence, did not violate the Fourth Amendment.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on December 1, 2011, and was an appeal from the United States District Court for the Western District of Missouri, Honorable Circuit Judge Beam. The case citation is *United States v. Blackmon* 662 F.3d 981 (8th Cir. 2011).

Taylor Samples
Deputy City Attorney

Court finds NO Exigent Circumstances in Entry of Hotel Room

Facts: On June 29, 2009, officers conducting surveillance at the Greyhound bus terminal in Omaha and arrested Juan Perez and Juan Amaya-Armenta carrying heroin in their shoes. Perez informed officers that he was traveling with a third male wearing a dark shirt with a white logo, who also had heroin in his shoes. Following the arrests, the officers tried to uncover additional evidence to locate this third man and identified and removed several bags

from under the bus. They then attempted to locate the owners of the retrieved bags by approaching the bus passengers, but nobody claimed ownership. A search of the abandoned bags uncovered an identification card belonging to Hector Cruz. The investigators spoke to the bus driver who reported that he was missing five passengers, two of whom the officers determined were the already-arrested men. The officers were then able to obtain the ticket information for the remaining three, identifying Luis Ibarra-Penuelas, Hector Cruz, and Carlos Ramirez.

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

Then, the goose chase began. Through combined efforts, after an officer contacted local cab companies to see if there was a recent pickup from the bus station, the officers went to a nearby Best Western hotel to determine if the men possibly went there. There, the officers learned that three individuals arrived at the Best Western in a cab but did not stay. After questioning employees of the Best Western, officers learned that one of those individuals matched the description of the traveling companion provided by Perez and another matched the photo of Cruz retrieved from the abandoned bag. Further investigation revealed that the men had then taken a cab to the Comfort Inn. At the Comfort Inn, video surveillance revealed that three individuals, one of whom matched the description given by Perez, and another that matched Cruz's identification card, exited a cab in front of the hotel but did not enter the hotel. Instead, they walked to a nearby McDonald's and officers noticed from the video that two of them walked "heavily-footed," or not normal. At the McDonald's, the officers learned from an employee that she had provided three individuals with a phone book and noted that the men were looking for a cab. The officers contacted various local cab companies again and were told three individuals were picked up from the McDonald's area and taken to the Econo Lodge.

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

Once at room 220, an officer attempted to swipe the key card to gain entry into the room but the card did not work. At that point, the officer blocked the peephole, knocked on the door, and announced "housekeeping." Cruz partially opened the door and when the officer announced his presence and flashed his badge, Cruz attempted to push the door shut. The officers used a ram, which they had brought along apparently anticipating a forced entry, to

force the door open. The officers found Ramirez, Ibarra-Penuelas, and Cruz inside. After conducting a cursory sweep and securing the three men, an investigator noticed two pairs of shoes on the side of the bed similar to those packed with heroin and worn by Perez and Amaya-Armenta. Ramirez and Ibarra-Penuelas denied that these shoes belonged to them, and Cruz claimed a pair of boots located elsewhere in the room as his. After the men denied ownership of the two pair of shoes by the bed, the investigators searched the shoes for contraband and found heroin in each. The entire course of events from the time officers approached Perez and Amaya-Armenta at the bus station, and the officers' arrival at the Econo Lodge was approximately two and a half hours.

At the district court, Ramirez argued that the search of the hotel room was illegal and conducted without a search warrant. The magistrate judge recommended, and the district court found, that the officers' entry was justified by an exigent circumstance: the officers' reasonable fear that the evidence would be imminently destroyed. The magistrate judge's analysis (also adopted by the district court) focused on the following facts known to the police prior to the entry: 1) one of the investigators reasonably believed the men were attempting to elude the officers after they witnessed the officers arrest the two men at the bus stop; 2) the men in room 220 had purchased one-way tickets to Newark, New Jersey, with cash, and were not from Omaha; and 3) after the officers announced their presence, Cruz attempted to shut the door to prevent the officers from entering the room. Once inside, because the men did not claim ownership of the shoes, the court determined they were abandoned and thus the men had no expectation of privacy in them. Accordingly, the court denied Ramirez's motion to suppress and Ramirez appealed. Ramirez had pled guilty to possession with intent to distribute heroin.

Argument: On appeal Ramirez argued that the district court erred in finding exigent circumstances justified the officers' warrantless entry into the hotel room. He claimed that any alleged "exigency," if it existed at all on these facts, existed only because the officers created it--that the warrantless, unconstitutional search occurred when the officer unsuccessfully swiped the room card and only then did the officers knock, ultimately resulting in them breaking down the door to enter. Ramirez argued that there were no facts supporting the officers' failure to obtain a warrant in this case.

"The *Fourth Amendment* protects individuals against unreasonable searches and seizures by the government." *United States v. Williams*, 521 F.3d 902, 905 (8th Cir. 2008). The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *U.S. Const. amend. IV.*

The text of the Amendment itself expressly imposes two requirements. "First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). "'[T]he ultimate touchstone of the *Fourth Amendment* is "reasonableness."'" *Id.* (quoting *Brigham City v. Stuart, 547 U.S. 398, 403 (2006))*. So, even though a warrant must generally be secured, a non-consensual, warrantless search can be justified by reasonable

exceptions, including exigent circumstances. *Williams,* 521 F.3d at 908. "The [exigent circumstances] exception justifies immediate police action without obtaining a warrant if lives are threatened, a suspect's escape is imminent, or evidence is about to be destroyed." *United States v. Ball,* 90 F.3d 260, 263 (8th Cir. 1996). The analysis of whether [the exigent circumstance] exception to the warrant requirement has been made out is an objective one 'focusing on what a reasonable, experienced police officer would believe.'" *Id.* at 1021 (quoting *In re Sealed Case 96-3167,* 153 F.3d 759 (D.C. Cir. 1998)). "[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin,* 466 U.S. 740, 749-50 (1984). When the exigency at issue is destruction of evidence, police officers must demonstrate a sufficient basis for an officer to believe that somebody in the residence (or hotel room, in this case) will imminently destroy evidence. *United States v. Clement,* 854 F.2d 1116, 1119 (8th Cir. 1988).

The government claims that at the moment the officers were outside of room 220, exigent circumstances justified this warrantless entry because the officers believed, even before they swiped the key card, that the risk of destruction of evidence was imminent. By the time the officers arrived at the hotel, they had gathered additional, minimal information about the three men traveling from place to place who ultimately checked into room 220: Ramirez, a man who fit the description of the companion offered by Perez, was traveling with two others on similar cross-country routes on tickets purchased in cash, and two of them were walking "heavily-footed," indicating they may also be carrying heroin in their shoes. Yet, the government failed to meet its heavy burden to connect this knowledge with the existence of exigent circumstances supporting the warrantless entry--that is, that the inhabitants of room 220 would imminently destroy evidence.

Alan Eberle, an investigator with the Nebraska State Patrol, testified at the suppression hearing that based on the hotel-hopping actions of these men after, Eberle supposed, the three observed the arrests at the bus station; he was concerned that they were trying to elude officers or were going to destroy evidence or personal items linking them to the case. Exigency, however, does not exist by mere supposition. Stating a belief that these men were about to destroy evidence after safely arriving at the Econo Lodge and checking into their room, seemingly without knowledge that they were being tracked by law enforcement, is speculative. And, as noted, Investigator Eberle's subjective belief is not determinative in the analysis. "[T]his court must look objectively at what a reasonable police officer would believe[,]" given the objective facts at the officer's disposal at the time of entry. *Williams,* 521 F.3d at 908.

The Supreme Court's very recent opinion in *King* is the starting point in the analysis. While instructive on the issue of exigency, however, *King* is not dispositive of the issues before the court in this case because in *King*, the Court <u>assumed</u> the existence of exigent circumstances so as to focus on the issue presented. (emphasis added). There, the Court focused solely on articulating under what circumstances police impermissibly create an exigency. *Id. at 1862-63*. In doing so, the Court reviewed whether the exigent circumstances exception applies when police, by knocking on a door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence--a most basic scenario of the "police-created exigency" doctrine. *Id.* at 1854. The Court held that any exigency that existed was not police-created and that the

warrantless entry and search was justified in the *King* case. *Id*. at 1863. *King*'s discussion of reasonable police conduct informs the analysis on the issue whether a genuine exigency, in fact, supported the warrantless entry in the instant case. Relevant here, the officers in *King* arrived at a door from which they smelled marijuana smoke and the officers banged on the door as loud as they could and announced their presence, saying "Police, police, police," or something to that effect. *Id.* at 1854. An officer testified that as soon as they started banging on the door, they could hear people inside moving and it sounded as though things were being moved, leading the officers to believe that drug-related evidence was about to be destroyed. *Id*. Accordingly, the officers announced that they were going to make entry and then kicked the door down, ultimately leading to the discovery of the evidence. *Id.*

The Court held that the officers' conduct in *King* was entirely consistent with the *Fourth Amendment* and in doing so, likewise discussed the privacy rights of occupants who have no obligation whatsoever to respond. *Id.* at 1862. No matter that the officers in *King* banged on the door and loudly announced their presence, the Court held that "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether [the person at the door is an officer or a private person], the occupant has no obligation to open the door or to speak." *Id*. The occupant, now alerted to the police presence, may even choose to open the door and speak but need not allow the officers to enter and may refuse to answer questions at any time. *Id*. But, cautioned the Court, if the occupants choose not to stand on their constitutional rights and "instead elect to attempt to destroy evidence," they "have only themselves to blame for the warrantless exigent-circumstances search that may ensue." *Id.*

In this case, one of the three facts relied upon by the district court in its analysis of the exigency supporting this warrantless entry was Cruz's attempt to shut the door once he became aware of the police presence outside room 220. This, however, occurred after the officers unsuccessfully attempted to unconstitutionally enter room 220 with the key card, which they admit compromised their position outside the hotel room that morning. As a result of that failure, the officers blocked the peephole, knocked on the door, and announced "housekeeping." Even if the Court were to ignore the failed unconstitutional entry that set the stage, so-to-speak, and prompted (according to the officers) this knock and announce, and the Court made no determination regarding whether any alleged exigency at that point was police-created, Cruz's attempt to shut the door in response to the knock does not support the exigency here.

Made plain in *King*, officers certainly have the option at all times to merely knock on a door and seek entry. Officers might even reasonably pound on a door and announce their presence without running afoul of the police-created exigency rule. *Id.* at 1861. However, when the police knock on a door but the occupants choose not to respond or speak, or maybe even choose to open the door and then close it, or when no one does anything incriminating, the officers must bear the consequences of the method of investigation they've chosen. At that point, if their method fails, "'the investigation will have reached a conspicuously low point,' and the occupants 'will have the kind of warning that even the most elaborate security system cannot provide.'" *Id.* (quoting *United States v. Chambers*, 395

F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting)).

Accordingly, crediting these officers with conducting a run-of-the-mill attempt to simply knock and gain entry, Cruz was under no obligation to allow the officers to enter the premises at that point and was likewise within his bounds in his attempt to close the door. That he did so, without more, does not bolster the claim that it was reasonable to conclude that the destruction of evidence was imminent. There is no evidence that these men knew the police were tracking them. Also, knowledge that drugs were in the room is not enough to suffice to conclude that destruction was imminent. The Court also stated that there was no evidence to support the supposition that all five men were to rendezvous at some point or that the two men were waiting for the other three men.

The Court found NO exigent circumstances in this case that would justify a warrantless entry into the hotel room. Ramirez's conviction was reversed because the evidence used to convict him was the fruit of a warrantless entry without exigent circumstances.

Note: There was a very strongly worded dissent from Chief Judge Riley stating that in viewing the totality of the circumstances, there was an exigency and that the officers' belief that the men might try to destroy or hide the heroin or other evidence upon reaching the privacy of the hotel room was objectively justified and that officers should not, in that instance, have to wait two to four hours for a search warrant. Chief Judge Riley noted that the officers did not violate or threaten to violate the *Fourth Amendment* before knocking on the door and that after the botched keycard entry, Cruz still answered the door showing that the botched entry had no effect on the events in the room.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on April 26, 2012. The case was from the United States District Court for the District of Nebraska. The case citation is *United States v. Ramirez*, 676 F.3d 755 (2012).

Brooke Lockhart
Deputy City Attorney

Officer Exceeded *Terry's* Limited Scope in Drug Case

Facts: Officers involved in the Commercial Interdiction Unit (CIU) of the Nebraska State Patrol met at the Omaha Bus Depot on February 8, 2012, to intercept people who may be transporting controlled substances or illegal items. Officers Scott and Rasgorshek followed one of the bus passengers while Officer Lutter followed and saw another passenger, Luis Alberto Aquino, talking on his cell phone and taking an interest in the other officers. A suspicious bag was found next to the bus and as passengers re-boarded the bus, officers asked them if the bag belonged to them. When Aquino passed the officers, he said the bag was not his and another passenger claimed the bag. Lutter then boarded the bus and walked past Aquino, then turned back and, showing Aquino his identification as law enforcement, kneeled on the seat on the opposite side of the bus about two rows in front of Aquino. Officer Scott accompanied Lutter. No other passengers on the bus were approached.

Lutter told Aquino no one was in trouble and no one was under arrest but asked if Aquino would talk to him. Aquino asked if

he had to get off the bus and Lutter told him he did not have to unless he wanted to. Aquino remained seated. Lutter asked Aquino about his travel itinerary to which he replied he was going from Merced, California, to Des Moines, Iowa, and gave the officer his bus ticket which was for one-way travel and had been paid for in cash. Lutter asked for identification and Aquino gave a California ID. Lutter returned the ticket and ID to Aquino. By this time, passengers had begun re-boarding for their destination; this interaction did not delay the bus's departure.

Lutter then informed Aquino he was watching for people at the bus station who may be transporting controlled substances or illegal items. Lutter specifically informed Aquino that he wanted to talk to him because he noticed his actions in the terminal while watching two of the officers speak to other passengers, and because Aquino appeared to be nervous while observing the officer/passenger encounters. Lutter then asked Aquino if he had any bags. Aquino said he did. Lutter asked Aquino to exit the bus and show him his bag. Aquino walked off the bus followed by Lutter. Scott also exited the bus with Lutter and Aquino.

After exiting the bus, the men walked to the driver's side of the bus where Aquino located his bag in the undercarriage luggage area. Lutter asked Aquino if he could search both the bag and Aquino's person. Aquino agreed to let the officer search his bag. Lutter then asked if he could conduct a pat-down search of Aquino's person. Aquino said he did not want the officer to touch him. Lutter then asked Aquino if he would unzip his coat and hold his clothing next to his body so that Lutter could tell if there was anything secured under his clothing. Aquino opened his jacket and pulled his clothing tight to his body. Lutter observed nothing unusual. Lutter then asked Aquino to do the same thing with his dark-colored, baggy jeans. Aquino complied by pulling the thigh area tight on both pant legs, but not the lower portion of the leg area. Lutter said Aquino appeared to be very nervous and fidgety at this point, and was unable to maintain eye contact with him. Lutter next asked Aquino to pull the lower portion of his pant legs tight around his ankles and calf area. Aquino made half-attempts to do so by using only one hand on each leg. At this point, Lutter noticed an unnatural bulge on the inside of Aquino's right calf. Lutter then asked Aquino to lift his pants up above the bulge. Aquino refused. Lutter then placed Aquino in handcuffs, testifying he did so as a precautionary safety measure. Without first conducting a pat down, Lutter immediately lifted Aquino's pant leg above the bulge and saw a duct-taped bundle strapped on Aquino's right leg. Based upon his training and experience, Lutter believed the now-revealed bundle contained a controlled substance. Aquino was then escorted into the rear office area of the bus terminal and advised of his *Miranda* rights. Aquino declined to waive his rights and asked for an attorney. At this point, the package was removed from Aquino's right leg and his body was further searched. Two other packages were found taped to Aquino, one on his left leg and one in his crotch area. All of the packages contained methamphetamine. The officers had Aquino transported to the Douglas County Corrections Center where he was booked for possession with intent to deliver methamphetamine. Lutter testified his conversation with Aquino lasted for ten to fifteen minutes. Scott testified the entire episode lasted for twenty to twenty-five minutes.

A federal grand jury returned a one-count indictment against Aquino charging him with possession with intent to distribute at least 50 grams but less than 500 grams of a

mixture or substance containing methamphetamine in violation of *21 U.S.C. §§ 841(a)(1)*& *841(b)(1).* After pleading not guilty, Aquino filed a motion to suppress the evidence found during his encounter with Investigator Lutter. The motion was granted by the magistrate judge and the government appealed contending that the encounter between Lutter and Aquino was consensual up until the moment the officer handcuffed the defendant.

Argument: The *Fourth Amendment* "is not triggered by a consensual encounter between an officer and a private citizen." *United States v. Villa-Gonzalez,* 623 F.3d 526, 531 (8th Cir. 2010). An encounter which is initially consensual, however, can become non-consensual and therefore "implicat[e] the *Fourth Amendment* when, considering the totality of the circumstances, the questioning is so intimidating, threatening, or coercive that a reasonable person would not have believed himself free to leave" or to end the encounter. *Id.* at 532 (citations and internal quotations omitted). The Court considers seven non-exclusive factors when examining the totality of the circumstances, which are: [O]fficers positioning themselves in a way to limit the person's freedom of movement, the presence of several officers, the display of weapons by officers, physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication the person is the focus of a particular investigation. *United States v. Griffith,* 533 F.3d 979, 983 (8th Cir. 2008) (internal citations omitted). "Determining which police-citizen contacts fall within the protections of the *Fourth Amendment* and which do not is fact intensive and turns on the unique facts of each case." Id. (citing *United States v. Hathcock,* 103 F.3d 715, 718 (8th Cir. 1997)). Ultimately, "[t]he government bears the burden of proving voluntary consent." *United States v. Quintero,* 648 F.3d 660, 667 (8th Cir. 2011).

The government argued that the dispositive issue in this case is whether Aquino's compliance with Lutter's request to pull the bottom portion of his pant leg tight against his body was a consensual act which gave rise to reasonable suspicion when Lutter noticed the concealed bulge, in turn justifying a subsequent investigatory detention. The Court disagreed. This case turns not on Aquino's last act before being handcuffed, but rather Lutter's first act after placing Aquino in handcuffs, which was to lift Aquino's pant leg to reveal the concealed bulge. Under the circumstances involved in this case, Lutter violated the *Fourth Amendment* when he searched underneath an article of Aquino's clothing without his consent and without probable cause to do so, instead of performing a pat down to confirm whether the concealed bulge was a weapon.

To begin the analysis, the Court starts with three noncontroversial and well-established principles of *Fourth Amendment* jurisprudence. First, the scope of an investigatory detention under *Terry v. Ohio,* 392 U.S. 1 (1968), is limited. See, e.g., *United States v. Fisher,* 364 F.3d 970, 973 (8th Cir. 2004) ("An investigative stop must be limited in scope and manner to satisfy the requirements of *Terry*."). While an officer may conduct a limited, warrantless search of a suspect "if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous," the scope of such a search "must be confined to a search reasonably designed to discover concealed weapons." *United States v. Roggeman,* 279 F.3d 573, 577 (8th Cir. 2002). "[T]he 'sole justification' for such a search is the protection of the officer and others[.]" *Id.* (quoting *Terry,* 392 U.S. at 29). Because of the limited scope of an investigatory detention under *Terry,* officers "must use the

least intrusive means that are reasonably necessary" to protect officer safety. *United States v. Correa*, 641 F.3d 961, 967 (8th Cir. 2011) (internal quotation marks and citations omitted).

Second, where an officer exceeds the permissible scope of *Terry*, the investigatory detention is transformed into an arrest. See *Peterson v. City of Plymouth, Minn.*, 945 F.2d 1416, 1419 (8th Cir. 1991). Third, a *Terry* stop that becomes an arrest must be supported by probable cause. *United States v. Smith*, 648 F.3d 654, 659 (8th Cir. 2011). In addition to these three general principles of *Fourth Amendment* law, a fourth established principle applies to the particular circumstances involved in this case in addressing whether an officer's mere observation of a concealed bulge under a person's article of clothing establishes probable cause to believe the person is trafficking drugs. In *United States v. Tovar-Valdivia*, 193 F.3d 1025 (8th Cir. 1999), the Court held an officer did not have probable cause to support an arrest not only after he observed a concealed bulge, but also touched the bulge without confirming the presence of a weapon or contraband. *Id*. at 1028. The Court said "[t]he bulges could have been bandages about his body, a money belt worn about his ribs, or any number of non-contraband items." *Id*.

In another case, *United States v. Jones*, 254 F.3d 692 (8th Cir. 2001), the Court concluded "Lutter's determination that Jones had a bulge under his clothing that was not part of his body did not give Lutter probable cause to arrest and search Jones." *Id.* at 697. Jones involved not only Lutter's initial observation of a concealed bulge, but also his act of touching the bulge with the suspect's consent. *Id.* at 694. Under the facts present in Jones, the Court concluded Lutter's consensual act of touching the bulge did "not supply any new facts supporting probable cause" to supplement Lutter's initial observation of the concealed bulge. *Id.* at 698. Jones analyzed the holdings in two other cases and concluded the two cases stood for the legal proposition that "the mere presence of a bulge under a person's clothing, which is not part of the person's anatomy, [does not] amount[] to evidence of drug possession." *Id*. None of the Court's prior cases have concluded the mere observation of a concealed bulge, standing alone, establishes probable cause to support an arrest. Instead, the Court has required the officer's initial observation of a concealed bulge to be buttressed by a *permissible* touching of the bulge, see *United States v. Favela*, 247 F.3d 838, 840 (8th Cir. 2001) which then may give rise to probable cause *if* touching the bulge makes the presence of contraband "immediately apparent." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Turning to the facts of this case, the parties dispute whether Aquino's act of pulling his pant leg tight was a consensual act. If the Court applies the legal principles discussed above to the facts of this case, the parties' factual dispute is irrelevant because of the operative facts which *are not* in dispute. First, the government does not dispute Aquino never consented to Lutter touching him. The government therefore does not claim, and the facts will not support a claim, that Lutter's act of searching under Aquino's pant leg to reveal the concealed bulge was done with Aquino's consent. Second, the government does not dispute Lutter never performed a pat down before searching under Aquino's clothing to reveal the concealed bulge.

The government contends Lutter's act of handcuffing Aquino after observing the concealed bulge only initiated an investigatory detention, not an arrest, and was done as a precautionary safety measure.

Even if the Court assumed that to be true, Lutter exceeded Terry's limited scope after placing Aquino in handcuffs. Instead of conducting a pat down to determine if the concealed bulge on Aquino's leg was a weapon which might threaten his safety, Lutter immediately performed a more intrusive search by lifting Aquino's pant leg to examine his leg underneath his clothing.

Searching under articles of clothing, whether it is a man's pant leg or a woman's blouse, is necessarily more intrusive than a pat down. Such a search is thus not the "least intrusive means" necessary to protect an officer's safety, and exceeds the permissible limits of a *Terry* investigatory detention. *Correa*, 641 F.3d at 967. An actual search of a person's body is not authorized under *Terry* until *after* a pat down confirms the presence of a weapon or contraband. See *Tovar-Valdivia*, 193 F.3d at 1028 n.1 ("[N]or does *Terry* authorize the police officer to handcuff and search an individual *after the initial pat-down* of the bulge did not confirm the existence of a weapon or contraband.") (emphasis added).

The reasonableness of an intrusion into rights protected by the *Fourth Amendment* "turns on the unique facts of each case[,]" *Griffith, 533 F.3d at 983*, and no valid reason is apparent on this record which justified Lutter 's act of immediately searching underneath Aquino's clothing instead of first conducting a pat down to determine whether the concealed bulge was a weapon. This was not a rapidly evolving situation where Aquino made a furtive gesture which may have given Lutter reason to believe his safety was threatened by a readily accessible weapon. In addition, Aquino was already in handcuffs at the time of Lutter's search. Thus, concern for officer safety did not justify by-passing a pat down under the circumstances involved in this case. As a result, Lutter transformed the investigatory *Terry* detention into an arrest when he lifted Aquino's pant leg. Under the well-established principles of law discussed above, Lutter thus needed probable cause to support Aquino's arrest and the subsequent non-consensual search of his person.

Probable cause was not present when Lutter lifted Aquino's pant leg. At that point in time, Lutter had only observed a concealed bulge under Aquino's clothing. The government does not challenge the district court's determination that Aquino's conduct, up until the moment Lutter observed the concealed bulge, did not support reasonable suspicion, let alone probable cause, and prior cases clearly establish an officer's observation of a concealed bulge, without more, does not suffice for probable cause. In *Jones* and *Favela*, an officer's initial observation of a concealed bulge was buttressed by his subsequent touching of the bulge *with the suspect's consent* which then confirmed the presence of contraband. In this case, however, Lutter did not have Aquino's consent to touch the bulge or to search underneath his clothing. Lutter's act of immediately searching Aquino's body underneath his clothing, rather than conducting a pat down, exceeded the permissible scope of *Terry*. As a result, Lutter's conduct in handcuffing Aquino and searching under his clothing must be analyzed as an arrest which required probable cause, rather than as an investigatory detention which required reasonable suspicion. Under the facts of this case, Lutter did not have probable cause before performing the non-consensual search of Aquino's person, and thus the district court did not err in suppressing the evidence discovered during the search.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on March 22, 2012. The case was from the United States District Court

for the District of Nebraska. The case citation is *United States v. Aquino*, 674 F.3d 918 (8th Cir. 2012).

Brooke Lockhart
Deputy City Attorney

No *Miranda* Violation in Recorded Statements Taken at Suspect's Home

Facts: After receiving a complaint from Ray Leon Huether's [Huether] girlfriend, C.T., alleging that her daughter had been sexually abused by Huether, the Minot Police Department executed a search of Huether's residence. At the time of the search, Huether had moved to Fargo, but still retained ownership of the Minot residence. In the search, police seized computer equipment and discs. An examination of the evidence revealed child pornography.

After the Minot search, police officers including Sergeant David Goodman [Goodman] of the Minot Police Department and officials from the Fargo Police Department and the North Dakota Bureau of Criminal Investigation ("NDBCI"), executed a search warrant at the Fargo residence Huether shared with his girlfriend. The officers arrived at the Fargo residence at 7:45 a.m. on August 8, 2008. Upon finding Huether in bed, Goodman informed Huether that the officers were there to look for pictures and video of CT's daughter, and that he was not under arrest or in custody. Huether signed the warrant, consenting to a search of the residence. Officer Goodman then asked Huether if he would answer some questions, and again told him he was not under arrest or in custody. According to Officer Goodman's written police report, he also told Huether that he was free to leave; although Huether later testified at his state court trial that he did not remember being told he was free to leave. About thirty minutes into the interview, one of the other officers entered the room, at which time Officer Goodman began recording the interview. Huether was not restrained during the interview; although he testified that Officer Goodman was blocking the bedroom door, the room's only exit.

The interview lasted about two hours, during which time Huether made incriminating statements about his sexual abuse of C.T.'s child, and in addition, about the child pornography discovered during the Minot search. About ninety minutes into the interview, Officer Goodman stated to Huether, "we've got two officers from the Minot Police Department, two from the Fargo Police Department, and two from [NDBCI]. One of the officers from the [NDBCI] is . . . is ou[r] computer forensic specialist. So he's here to assist with the computer part of it." Officer Goodman arrested Huether after the interview and the search concluded. Huether was not given *Miranda* warnings prior to, or at any point during, his interview with Officer Goodman.

Huether was charged and convicted by a jury and sentenced to 240 months' (20 years') imprisonment for receipt of materials involving the sexual exploitation of minors in violation of *18 U.S.C. § 2252(a)(2)* and *2252(b)(1)*, and 120 months' (10 years') imprisonment for possession of materials involving the sexual exploitation of minors in violation of *18 U.S.C. § 2252(a)(4)(B)* and *2252(b)(2)*, both sentences to run consecutive to each other and to his 30-year state court sentence. Before trial, Huether filed a motion to suppress statements made during a search of his Fargo, North Dakota residence.

Huether appealed the district court's denial of his motion to suppress and its judgment entered against him, arguing that the district court: (1) erred by entering convictions on both a greater offense and a lesser included offense contrary to the *Double Jeopardy Clause*, (2) committed plain error by admitting testimony contrary to the *Confrontation Clause*, (3) erred by allowing a police officer to give testimony that usurped the jury's function, and (4) erred by failing to suppress un-Mirandized statements. The Court affirmed in part, reversed in part, and remanded. [Note: Only the *Miranda* issue will be discussed in this article.]

Argument and Discussion: On appeal, Huether contends the district court erred in denying his motion to suppress the recorded statements made during the Fargo search. When reviewing the denial of a motion to suppress, we review "the district court's factual findings for clear error and its conclusions of law *de novo*." *United States v. Muhlenbruch*, 634 F.3d 987, 995 (8th Cir. 2011). The *Fifth Amendment* dictates that *Miranda* warnings be given when "interrogation is 'initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" Id. (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) (citation omitted). To determine whether a defendant was in custody for *Miranda* purposes, a court looks to the totality of the circumstances confronting the defendant at the time of the interview, and asks "whether a reasonable person in his position would consider his freedom of movement restricted to the degree associated with formal arrest." *United States v. Flores-Sandoval*, 474 F.3d 1142, 1146 (8th Cir. 2007) (quotation omitted). The inquiry is an objective one, without consideration of the participants' subjective views. *Id*. (quotation omitted). The following non-exclusive factors form the custody inquiry:

> (1) whether the suspect was informed that he was free to leave and that answering was voluntary;
> (2) whether the suspect possessed freedom of movement;
> (3) whether the suspect initiated contact or voluntarily acquiesced;
> (4) whether strong arm tactics or strategies were employed;
> (5) whether the atmosphere was police dominated; or,
> (6) whether the suspect was placed under arrest at the end of questioning.

Muhlenbruch, 634 F.3d at 996. "The first three . . . factors which, if present, mitigate against the existence of custody . . . the last three . . . are aggravating factors which, if present, aggravate the existence of custody." *United States v. Axsom*, 289 F.3d 496, 500-01 (8th Cir. 2002).

The record established that the first, third and sixth factors were present. Officer Goodman advised Huether, at least twice, that he was not under arrest or in custody. It is undisputed that when Officer Goodman and the other officers initiated contact with Huether, he did not ask to leave, refuse to answer, or request anything during the interview, despite being told that he was not under arrest or in custody. Officer Goodman did not decide to arrest Huether until after the interview.

The record shows Huether freely answering Goodman's questions regarding the allegations of child sexual abuse, and receipt and possession of child pornography. In fact, Huether became more responsive in answering Officer Goodman's questions as the interview progressed. He also cooperated with the officers in providing access to his laptop.

Huether claims Officer Goodman made a verbal showing of force--telling Huether about the officers participating in the search, including a computer forensic specialist. Huether claims that the interview then became custodial, in violation of his *Fifth Amendment* rights. However, when Huether signed the search warrant, which listed the officers' names, he became aware of the number of officers present then. Huether also has prior experience with law enforcement--he was arrested after being questioned by law enforcement in Montana. At a minimum, these factors showed that Huether is no stranger to being interviewed by law enforcement and that he voluntarily chose to be cooperative.

Further, the court's recent decision in *United States v. Perrin*, 659 F.3d 718 (8th Cir. 2011), indicates that more than what is in the record is required for a determination that Huether was in custody for *Miranda* purposes. A federal officer, one of at least six in tactical gear who entered the house with a search warrant for child pornography, interviewed Perrin in his bedroom. *Id.* at 720. Before taking Perrin to the bedroom, the officer told Perrin he was free to leave and that he did not have to answer any questions, to which Perrin indicated that he understood. *Id*. The officer nearly closed the bedroom door, leaving it slightly open, enabling another officer to enter the bedroom to conduct a search during the interview. *Id*. No officers restrained Perrin or positioned themselves so as to inhibit his exit. *Id.* at 721. Like Officer Goodman, the officer there did not raise his voice or threaten Perrin; and like Perrin, Huether had no trouble "understanding or answering questions about internet use and child pornography." *Id.* at 720. The circumstances were such that Perrin would have considered himself free not to answer the officer's questions and leave the premises, and therefore not in custody when he confessed to possessing child pornography. *Id.* at 721. Therefore, the district court's judgment was affirmed on this part. [Although part was reversed and remanded on other issues not discussed here.]

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on March 9, 2012. The case was from the United States District Court for the District of North Dakota. The case citation is *United States v. Huether*, 673 F.3d 789 (8th Cir. 2012).

Brooke Lockhart
Deputy City Attorney

No Ammunition Equals No Conviction on Simultaneous Possession of Drugs and Firearms

Facts: A Polk County jury convicted Vincent Byron Fett [Fett] of possession of marijuana with intent to deliver and simultaneous possession of drugs and firearms. He was sentenced to consecutive sentences of 36 months and 120 months, respectively, in the Arkansas Department of Correction. Polk County Deputy Ronnie Richardson [Richardson] and Eighteenth Judicial District Drug Task Force Investigator Jeff Fields [Fields] testified that Fett consented to the search of his residence. In addition to a quantity of marijuana, the police found a rifle and a pistol in the location where Fett said that they would be found. Both officers stated that the guns were not loaded and that they did not find any ammunition in the residence.

Citing *Rabb v. State, 72 Ark. App. 396, 39 S.W.3d 11(2001)*, Fett moved at trial for directed verdict on the simultaneous-possession-of-drugs-and-firearms charge,

arguing that because the guns were not loaded and no ammunition was recovered in the residence, the firearms were not "readily accessible for use as a firearm." The trial court denied the motion. Following the jury's verdict, Fett filed an appeal.

Argument: On appeal, Fett challenged only his conviction for simultaneous possession of drugs and firearms. He argued that there was insufficient evidence to sustain his conviction and that the trial court erred in its interpretation of *Arkansas Code Annotated section 5-74-106* (Supp. 2011). The State has conceded error, and the Court agreed. Fett argued that the instant case was controlled by *Rabb*. The State concurred, and the Court agreed. In *Rabb*, the Court reversed and dismissed a conviction for simultaneous possession of drugs and firearms where there was an unloaded weapon and no available ammunition. The Court reasoned that, without ammunition, a firearm is not "readily accessible for use as a firearm." *Id. 72* Ark. App. at 403. The facts are identical in the instant case and the case was reversed and the conviction dismissed.

Case Citation: This case was from the Arkansas Court of Appeals and was an appeal from the Polk County Circuit Court, Hon. J.W. Looney, Judge. The case citation is *Fett v. State*, 2012 Ark. App. 259.

Brooke Lockhart
Deputy City Attorney

Curbside Trash Pull Found Constitutional by Eighth Circuit

Facts: Kody R. Williams [Williams] pled guilty to possession of a firearm by a felon, conditioned on his right to appeal the denial of his motion to suppress. Detective Matthew Miller [Miller] of the Lee's Summit, Missouri Police Department alleged in an affidavit that he received a tip on October 27, 2008 that Williams was selling drugs at an identified address. The tip also stated that Williams had prior convictions for drug trafficking and other felonies, and that the house at the identified address might also be occupied by an individual named Sherry Mitchell. The affidavit stated nothing regarding the reliability of any information previously provided to law enforcement by the source.

The affidavit further stated that the water utilities account for the identified address showed an active account in the name of Sherry Mitchell. It also noted that Detective Miller had "retrieved three bags of trash that had been left at the curb for pick-up by a trash company at the identified address. Within that trash were two torn pieces of a plastic bag coated with cocaine residue, several pieces of mail addressed to Sherry Mitchell at that address, and a blank card of a type for use by individuals on probation or parole with the Missouri Department of Corrections. After discovering that Sherry Mitchell had no criminal history, Miller averred his belief that someone on probation or parole, such as Williams, likely also resided at the address. Finally, Detective Miller stated that Williams had given the identified address as his home address during at least six interactions with police. A search executed pursuant to the ensuing search warrant yielded the handgun and ammunition that served as the predicate for the charges and Williams's subsequent conditional guilty plea.

Argument: On appeal, Williams argued that the district court should have held an evidentiary hearing on his motion to suppress evidence in order to determine the precise location from which his trash was pulled. "We review a district court's decision whether to hold an evidentiary hearing for

an abuse of discretion." *United States v. Yielding*, 657 F.3d 688, 705 (8th Cir. 2011). The only evidence presented to the district court regarding the location of the trash was Detective Miller's statement in his affidavit that he "retrieved three bags of trash that had been *left at the curb for pick-up by a trash company*" (emphasis added). Nevertheless, in the brief in support of the motion to suppress, Williams's counsel contended that "the officers illegally retrieved three trash bags from the *driveway* of the residence" (emphasis added). To the extent Williams contends that the trash actually was not at the curb as stated in the affidavit, he is challenging the factual accuracy of the affidavit. The standard for obtaining an evidentiary hearing under these circumstances is the well-known *Franks* standard:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.

United States v. Mims, 812 F.2d 1068, 1074 (8th Cir. 1987) (quoting *Franks v. Delaware*, 438 U.S. 154, 171(1978)). In this case, Williams proffered no affidavit or other evidence indicating that the trash was not at the curb. As a result, the district court did not abuse its discretion in denying an evidentiary hearing.

Williams also argued that the district court erred in denying the motion to suppress because the trash was pulled from a location in which Williams retained some expectation of privacy. The constitutionality of a trash pull depends upon "whether the garbage was readily accessible to the *Comeaux*, 955 F.2d 586,589 (8th Cir. 1992) (quoting *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991)). The only evidence in the record as to the location from which the trash was pulled is Detective Miller's statement in the affidavit that he "retrieved three bags of trash that had been *left at the curb for pick-up by a trash company*" (emphasis added). It is well settled that there is no reasonable expectation of privacy in trash left at the curb in an area accessible to the public for pick-up by a trash company. *See, e.g., United States v. Trice*, 864 F.2d 1421, 1423 (8th Cir. 1988) (citing *California v. Greenwood*, 486 U.S. 35, 40-41(1988)). The denial of Williams's motion to suppress was upheld.

Case Citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on February 28, 2012, and was an appeal from the Western District of Missouri. The case citation is: *United States v. Williams*, 669 F.3d 903 (8th Cir. 2012).

Brooke Lockhart
Deputy City Attorney

When Can a Person be Charged With a Traffic Offense that Occurs on Private Property?

Recently, we have had some inquiries from officers about when a person can be cited for various violations that occur on private property. This issue was last addressed in the July 1, 1999, edition of C.A.L.L. The list of violations addressed in this article

includes many that officers routinely encounter.

Question: Can an officer write a citation on private property for the following violations of law: (a) Reckless Driving; (b) Careless Driving; (c) No Seat Belt; (d) Improper Driving (Springdale city ordinance); (e) No Driver's License; (f) No Vehicle License; (g) Fictitious License; (h) No Insurance; (i) Suspended Driver's License; (j) DWI and DUI; and (k) violation of implied consent?

Answer: In taking each of the statutes individually, we find that some have restrictive language, such as: public thoroughfares, highway, public streets, within this State, and private property. Therefore, the definitions of certain terms must be determined prior to discussing the particular statutes.

Street or highway is defined in A.C.A. § 27-14-216 as the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

Public highways is defined in A.C.A. § 27-51-101 as any highway, county road, state road, public street, avenue, alley, park, parkway, driveway, or any other public road or public place in any county, city, village, or incorporated towns.

In many of the statutes, there is no restrictive language used to limit where the law may be enforced. Therefore, they are to be treated like the criminal statutes. The criminal statutes rarely use limiting language such as "in public place" or "premises of another" to restrict where the law may be enforced. Therefore, the law is enforced anywhere within the State unless some type of limiting language is used. Set forth below is an application of the above information to various violations.

A. Reckless Driving – A.C.A. § 27-50-308 contains no restrictive or limiting language. Therefore, this statute can be enforced anywhere within the State, including private property.

B. Careless and Prohibited Driving – A.C.A. § 27-51-104 does use the limiting language of "public thoroughfares or private property in the State of Arkansas." Thus, this statute can be enforced on private property.

C. No Seat Belt – A.C.A. § 27-37-702 contains the limiting language "on a street or highway in this State." Therefore, this statute cannot be enforced on private property.

D. Improper Driving (Springdale City Ordinance) – Springdale City Code Chapter 114, Section 114-17, contains the limiting language "within the City of Springdale." Thus, this ordinance can be enforced on private or public property so long as the violation occurs within the City of Springdale.

E. No Driver's License – Three different statutes will be looked at in dealing with driver's licenses.

(1) A.C.A. § 27-20-106 (license for a motorcycle, motor-driven cycle, or similarly classified motor vehicle) – this provision on motorcycle licenses contains the limiting language "upon the public streets and highways of this State." Therefore, this statute cannot be enforced on private property.

(2) A.C.A. § 27-16-602 (regular operator's license) – this provision uses the limiting language "upon a highway," and therefore this statute

cannot be enforced upon private property.

(3) A.C.A. § 27-23-107 (commercial driver's license) – this provision uses no limiting language and specifically states that "no person may drive a commercial motor vehicle unless the person holds a commercial driver license with the applicable endorsements valid for the vehicle being driven and is in immediate possession of their commercial driver license when driving a commercial motor vehicle." Thus, this statute can be enforced on private property.

F. <u>No Vehicle License</u> – A.C.A. § 27-14-304 uses the restrictive term "upon any highway," and this language prohibits the statute from being enforced on private property. However, the statute allows an officer to cite not only the operator of the vehicle, but the owner as well when the owner knowingly permits the vehicle to be operated in violation of the statute.

G. <u>Improper Use of Evidences of Registration (Fictitious License)</u> – A.C.A. § 27-14-306 states that no person shall "display upon a vehicle any registration certificate, registration plate, or permit not issued for the vehicle or not otherwise lawfully thereon under this chapter." Therefore, since no limiting language is used, this statute can be enforced on private property against those in violation of the statute.

H. <u>No Insurance</u> – A.C.A. § 27-22-103 uses the broad limiting language of "any person who operates a motor vehicle within this state." Therefore, this statute can be enforced on private property.

I. <u>Suspended Driver's License</u> – The suspended driver's license violation can be classified into two categories, licenses suspended for DWI, and licenses suspended for everything else.

(1) DWI Suspension – A.C.A. § 5-65-105 prevents any person whose license has been suspended or revoked for DWI from operating a motor vehicle "in this state." Therefore, this statute can be enforced on private property.

(2) Non-DWI Suspension – A.C.A. § 27-16-303 prevents any person, resident or non-resident, from driving any motor vehicle "*upon the highways of this state* while the license or privilege is cancelled, suspended, or revoked." Therefore, this statute cannot be enforced on private property.

J. <u>DWI, Commercial Motor Vehicle DWI, and Underage DUI</u> – A.C.A. § 5-65-103, A.C.A. § 5-65-303, and A.C.A. § 27-23-114 do not contain any limiting language. Therefore, these violations can be enforced on private property.

K. <u>Violation of Implied Consent</u> – A.C.A. § 5-65-202 (dealing with DWI implied consent), A.C.A. § 27-23-115 (dealing with Commercial Motor Vehicle DWI implied consent), and A.C.A. § 5-65-309 (dealing with Under DUI implied consent) all contain the limiting language "in this state" or "within this state." Therefore, a person stopped on private property can be prosecuted if they refuse to take the test.

Remember, if you have a question concerning whether or not you have the authority to enforce a statute on private property, then look up the statute and be mindful of any restrictive or limiting terms of language contained therein.

Taylor Samples
Deputy City Attorney

Information from Security Guard at Club Found Reliable Basis for Investigative Stop of Vehicle

Facts: In the early morning of September 26, 2009, Tony Robinson [Robinson] was expelled from a nightclub in Little Rock, Arkansas, for fighting in the club. The club's owner asked that Robinson be removed. Alicia Smith [Smith], an off-duty police officer, was providing security at the club and followed Robinson out of the club. Robinson left and then returned. Another security guard at the club told Smith that Robinson had a gun in his hand and that he was in a white car. Smith gave this information to Sergeant Dan Brown [Brown] another police officer working at the club.

Smith saw the white car leave the club and she and Brown stopped the vehicle a short way from the club. The officers directed Robinson and the passenger to exit the vehicle, conducted a pat-down search, and questioned them. Robinson denied having a weapon. Robinson was placed in the back of the patrol car and a warrant check revealed that he was a convicted felon and had several outstanding warrants. Smith then returned to the vehicle and noticed a handgun sticking out from under the driver's seat. Robinson was arrested on the outstanding warrants and for unlawful possession of a firearm as a convicted felon. An inventory search of the vehicle revealed a pistol under the driver's seat.

Robinson moved to suppress the gun and the motion was denied. The Court found Robinson guilty after a bench trial and sentenced him to 235 months' imprisonment. Robinson appealed stating that the motion to suppress should have been granted because the officers lacked reasonable suspicion to make a traffic stop on him and that the officers exceeded the permissible limits of an investigative stop by placing him in the patrol car.

Argument and Discussion: A law enforcement officer may conduct an investigative stop of a vehicle if the officer "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The court considers the totality of the circumstances when determining whether an officer has a particularized and objective basis to suspect wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Law enforcement officers may make inferences drawn from their experiences and specialized training along with other factors such as the time of day or night in supporting the reasonableness of an officer's decision to investigate. *Id.* and *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995).

Reasonable suspicion may be based in whole or in part on hearsay information. The Supreme Court long ago rejected the notion that reasonable suspicion "can only be based on the officer's personal observation, rather than on information supplied by another person." *Adams v. Williams*, 407 U.S. 143, 147 (1972). Police may rely on the tip of an informant, *id*. at 146-47, and the degree of corroboration required to establish reasonable suspicion depends on whether the informant's reliability has been established. *United States v. Nolen*, 536 F.3d 834, 840 (8th Cir. 2008). The information here was provided by a security guard, an "informant" who "is not just any eyewitness." *Gramenos v. Jewel Cos.*, 797 F.2d 432, 439 (7th Cir. 1986). Given the security guard's position and responsibility to his employer, the risk that he will pursue a private agenda or embarrass

an honest patron is smaller than when a previously unknown citizen provides a tip. *Id.* And especially in a situation like this one, where police officers work directly with private security guards to keep a location secure, the police have reasonable grounds to believe the guard.

Applying those standards here, the police had reasonable suspicion to detain Robinson. In Arkansas, a person commits the crime of "carrying a weapon" if he possesses a handgun with a purpose to employ the handgun against a person. Ark. Code Ann. § 5-73-120(a). The security guard informed Officer Smith that Robinson had returned to the club with a gun in his hand, just shortly after an altercation that led to his ejection from the club, and entered a white car. Smith corroborated one aspect of the information when she observed the car described by the security guard as it was leaving the club. In light of these facts, it was reasonable for the police to suspect that Robinson was carrying a firearm in the immediate vicinity of the club with a purpose to employ it against another. *See Nesdahl v. State*, 890 S.W.2d 596, 598 (Ark. 1995). This suspicion gave the officers grounds to detain Robinson for investigation.

Robinson also argued that evidence of the handgun should have been suppressed because the officers exceeded the permissible limits of an investigative stop by handcuffing him and placing him in the back of a squad car. While an investigative stop must be limited in scope and manner, there is "no 'litmus-paper test' or 'sentence or paragraph' rule to determine when, given the 'endless variations in facts and circumstances,' police-citizen encounters exceed the bounds of mere investigative stops." *United States v. Jones*, 759 F.2d 633, 636 (8th Cir. 1985) (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983) (plurality opinion)). It is well established, however, that police officers may handcuff a suspect and place him in a patrol car during an investigative stop in order to protect their personal safety and maintain the status quo. *See United States v. Smith*, 645 F.3d 998, 1002-03 (8th Cir. 2011). In this case, officers had specific information that Robinson possessed a firearm just minutes earlier, and they knew that Robinson was potentially intoxicated or hostile. It was reasonably necessary for police to secure the suspect to foreclose the possibility that Robinson would gain control of the firearm and threaten the officers' safety. The police, therefore, did not exceed the permissible bounds of an investigative stop in handcuffing him and placing him in the patrol car. The conviction was upheld.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on March 8, 2012. The case was an appeal from the United States District Court for the Eastern District of Arkansas. The case citation is *United States v. Robinson*, 670 F.3d 874 (8th Cir. 2012).

Brooke Lockhart
Deputy City Attorney

Arkansas Court of Appeals Upholds Trial Court's Summary Judgment in Favor of Police Officers in a Civil Lawsuit

Facts Taken From the Opinion: Jeremy Dewayne Summers (appellant) filed a civil lawsuit which springs from his arrest and subsequent prosecution in the Mississippi County Circuit Court on charges of rape and second-degree sexual assault. The jury found him not guilty on both charges. Following his acquittal, appellant filed a lawsuit against the Gosnell police officers

Charlie Byrd and Robert Leon Lewis; Chief of Police Fred L. Roberts, Jr.; Mayor Dick Reams; and the City of Gosnell, Arkansas (appellees).

The criminal case began on May 7, 2006, when Michelle Priddy called the Gosnell Police Department and reported that her daughter, B., had been raped the day before in the tree line between Knight's Trailer Park and Jackson Street. B. told her mother that the boy's name was "Chris." B. was fifteen years old but possessed the mental capacity of a seven- or eight-year-old child. Officer Charlie Byrd went to their home and briefly interviewed Ms. Priddy, who told him that she would take B. to have a sexual-assault kit performed and then come to the police station. Based on a description of the perpetrator provided to Officer Byrd by Ms. Priddy and B., Officer Byrd canvassed the area where the incident occurred. He spoke with a resident of Knight's Trailer Park and learned that Jeremy Summers had visited the resident's daughter the day before and had been wearing clothes similar to those worn by the alleged perpetrator.

Officer Robert Lewis interviewed B. and Ms. Priddy at the police station. B. told him that she had been riding her bike when a boy asked her to go riding with him. She said that she was riding and the boy was walking. She went with him to an area east of Knight's Trailer Park where there was a fence and shrubs, and the boy asked her to have sex with him. After she told him "no," he forced himself on her. He told her not to tell anyone. B. told Officer Lewis that she had seen the boy before but did not know his name. Officer Lewis gave B. a three-year-old Gosnell High School yearbook. She looked through the yearbook and picked out Jeremy Summers. The district judge issued a warrant for appellant's arrest. Unable to post bond until it was reduced, appellant remained incarcerated for six months. At trial in August 2007, the jury found him not guilty. He filed a civil lawsuit on April 28, 2009.

Appellant alleged in the lawsuit that the defendants deprived him of his Fourth Amendment right to be free from seizures of his person; deprived him of his Fifth and Fourteenth Amendment rights to due process of law, including the right to be free from arrest without probable cause; maliciously prosecuted him; committed the tort of outrage; defamed him; falsely imprisoned him for a crime he did not commit; violated his property rights because their actions made it difficult for him to find a job; and committed negligence by failing to protect him from erroneous charges filed without probable cause. The Mississippi County Circuit Court granted judgment for the appellees' motion for summary judgment and appellant filed this appeal.

Decision by Arkansas Court of Appeals: The Court of Appeals held that with regard to the City of Gosnell and the Mayor, Dick Reams, the complaint did not allege, nor does appellant's response to the motion for summary judgment present any evidence to show, that these parties did anything intentionally to damage appellant. While appellant claimed in his response that Mayor Reams "intentionally" failed to require the City of Gosnell to adopt rules and regulations regarding proper police procedures, he failed to explain specifically what procedures he had a duty, and failed, to adopt. Moreover, he presented no evidence in response to appellees' affidavits to prove these allegations.

Therefore, what are left are the allegedly tortuous and unconstitutional intentional acts of Officers Byrd and Lewis. Appellant's complaint alleged claims of arrest and seizure without probable cause, which violated his constitutional rights; malicious

prosecution; and the tort of outrage. The circuit court and the parties concluded that these claims hinged on whether the officers had probable cause to arrest appellant. In the hearing on the motion for summary judgment, the circuit court opined: "If there was probable cause, everything else that happened is an extension of a legitimate arrest based on a legitimate charge." Absent proof that Officers Byrd and Lewis intentionally withheld or knowingly provided false information in obtaining the warrant, we agree with the circuit court that its review of the officers' conduct, and ours, ends at that point. Once the court issued the arrest warrant, the officers' responsibility for pursuing the case was complete. At that point, the strength and evaluation of the case against appellant lay in the hands of the prosecutor, the circuit court, and the jury.

The Court turned to the investigating officers' conduct. Officers Byrd and Lewis investigated this case after the victim's mother called the Gosnell Police Department. They interviewed the victim's mother, Ms. Priddy, and the victim. Acting upon a description of the alleged perpetrator provided by the victim, Officer Byrd interviewed a resident of Knight's Trailer Park and was informed that appellant had visited the resident's daughter the afternoon of the incident wearing clothes similar to those worn by the alleged perpetrator. Officer Lewis interviewed B., who independently identified appellant as the perpetrator from an old yearbook. According to Ms. Priddy's affidavit, which appellant provided no evidence to refute, neither officer mentioned appellant's name to B. or suggested that he was a suspect.

On this evidence, the prosecuting attorney submitted an affidavit for an arrest warrant. The district court determined that the evidence was sufficient and issued a warrant. In an affidavit attached to appellees' motion for summary judgment, the prosecuting attorney stated that he "felt that probable cause existed." He acknowledged that he was aware of the alleged victim's mental deficiencies when he made the determination to request the warrant and prosecute the case. He also stated that B. identified appellant as the alleged perpetrator in open court. Finally, he said that, during his investigation and trial, he saw nothing to suggest that any officers from the City of Gosnell did anything "intentionally or did anything that might be considered improper in their investigation of this case." Appellant presented argument, but no evidence, to refute this. The circuit court denied motions for directed verdict at the close of the State's case and at the close of all of the evidence, demonstrating the court's belief that the evidence was sufficient to be submitted to a jury.

The Arkansas Court of Appeals held that they could not say that probable cause did not exist to support the arrest warrant. And appellant failed to meet proof with proof to demonstrate the existence of a material issue of fact on his claims of malicious prosecution, the tort of outrage, or any other intentional act of the investigating officers. Therefore, the Court of Appeals affirmed the court's order dismissing the lawsuit.

Case: This case was decided by the Arkansas Court of Appeals on February 22, 2012, and was an appeal from the Mississippi County Circuit Court, Chickasawba District, Honorable Randy F. Philhours, Judge. The case cite is *Summers v. Byrd*, 2012 Ark. App. 171.

Jeff Harper
City Attorney

Court of Appeals Resolves Constructive Possession and Crime Lab Report Issues in Favor of State

Facts: On the night of July 17, 2008, Stuttgart, Arkansas police pulled over a truck driven by Cornelius Joseph McCastle [McCastle] to serve a warrant on a person they thought was in the truck. After stopping, the passenger got out and ran, and an officer followed him, McCastle was alone in the truck. After officers apprehended the passenger, they went back to the truck and no one was in it. McCastle emerged from around a nearby house and told officers the truck belonged to his mother. Captain Dennis Mannis [Mannis] told McCastle a tow truck was on its way because the truck was locked and they had to do an inventory of the vehicle. Mannis asked McCastle if he had a key and McCastle told him there was a key under the hood. Mannis then asked McCastle if there were weapons or drugs in the truck and McCastle replied that there were hydrocodone pills in the upper console case and there was a black pouch with cocaine above the driver's seat. Mannis retrieved the items and photographed them. Mannis's inventory list, which was admitted into evidence at trial, stated the seized items were a "clear bag with numerous hydrocodone pills" and a "clear bag with off white substance believed to be powdered cocaine." On the crime lab submission forms, also admitted into evidence, there were items described as a "Clear plastic bag containing white pill bars" and a "Clear plastic bag off white rock sub. Believed to be crack cocaine."

Over McCastle's objection, an Arkansas State Crime Laboratory (crime lab) report was admitted into evidence, stating that the items submitted by Mannis were 60 naproxen tablets, 1.6744 grams of cocaine nicotinamide, and .2 grams of marijuana. McCastle argued that the report was inadmissible because of the differences in what Mannis listed on his search inventory, what was listed on the crime-lab submission sheets, and what was tested as stated in the crime-lab report. Mannis, however, denied that the evidence had been tampered with and attributed the discrepancies to his having prepared the inventory at night, which caused him to overlook the marijuana. McCastle was convicted as a habitual offender of simple possession of cocaine and received a sentence of seventeen years in the Arkansas Department of Correction. [Note: McCastle had been charged with possession of hydrocodone with intent to deliver and possession of cocaine with intent deliver. The State nolle-prossed the hydrocodone count, and the jury convicted McCastle of the lesser offense of simple possession of cocaine.]

Argument and Discussion: On appeal, McCastle first argues that there was no evidence that he had actual possession of cocaine and that there were not enough factors to satisfy the legal requirements of constructive possession. Citing *Kilpatrick v. State, 322 Ark. 728, 912 S.W.2d 917 (1995)*, he conceded that the pouch containing the contraband was found "up over the driver's seat" but asserted that the other enumerated "linking factors" discussed in that case were not present. The *Kilpatrick* linking factors include: 1) whether the contraband is in plain view; 2) whether the contraband is found with the accused's personal effects; 3) whether the contraband 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 automobile, or exercises dominion and control over it; 5) whether the accused acted suspiciously before or during the arrest. McCastle asserts that the cocaine was not found in his

personal effects, that he did not own the vehicle, and that he did not act suspiciously prior or during the arrest. The Court disagreed.

The Court reiterated that it is not necessary for the State to prove literal physical possession of drugs in order to prove possession. *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 a 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. *Kilpatrick, supra.*

First, there is no requirement that all or even a majority of the linking factors be present to constitute constructive possession of the contraband. *Miller v. State, 68 Ark. App. 332, 6 S.W.3d 812 (1999).* Second, it is not necessary that a criminal defendant own the vehicle to be linked to the contraband found therein. All that is required is that the defendant exercises "dominion and control over it," and proof that the defendant is the driver of the vehicle is evidence that he exercised dominion and control over it. *McKenzie v. State, 362 Ark. 257, 208 S.W.3d 173 (2005)*. Finally, the location of the cocaine, which McCastle acknowledged was above the driver's seat, was in close proximity to where he was sitting in the vehicle, which indicated that he had dominion and control over the drugs. The Court held that there was sufficient proof that he constructively possessed the cocaine.

The Court then turned to McCastle's argument that the trial court erred in admitting the crime-lab report into evidence because the State failed to prove the authenticity of the evidence and the proper chain of custody. Mannis testified that he seized the suspected contraband from McCastle's vehicle. He photographed the items at the scene and placed the items in a bag in his police vehicle. The photographs were admitted into evidence. According to Mannis, he deposited the items in the Stuttgart Police Department evidence room. Mannis listed the items on a form captioned "Tri-County Drug Task Force Search Warrant/Consent Search Inventory List" as "clear bag with numerous hydrocodone pills" and "clear bag with off white substance believed to be powdered cocaine." Subsequently, on the Arkansas Crime Laboratory Evidence Submission Forms, he listed the items as "Clear plastic bag Containing white pill bars" and "Clear plastic bag Off white rock sub. believed to be crack cocaine." A document titled "State Crime Laboratory Report of Laboratory Analysis" stated that the test results revealed that the submitted items were 60 naproxen tablets, 1.6744 grams of cocaine nicotinamide, and .2 grams of marijuana.

At trial, Mannis was asked to open the envelope containing the material returned from the crime lab. He recognized a green, leafy substance as marijuana. Mannis was asked to reconcile the discrepancies between what the submission sheet listed and what the crime lab tested and returned. He stated that ordinarily his department did not send marijuana to the crime lab for analysis and could only suggest that he "must have missed it." Over McCastle's objection, the trial court admitted the crime lab report into evidence. Citing *Crisco v. State, 328 Ark. 388, 943 S.W.2d 582(1997),* which he urged the Court to find analogous, McCastle argued that the trial court erred in admitting the crime lab report into evidence because the "trustworthiness of the report is not reliable." He noted the discrepancies in the description of the suspected cocaine and the presence of marijuana in the report and the

returned material as proof of tampering with the evidence. McCastle asserted that admission of the report was an abuse of discretion. The Court disagreed.

The purpose of a chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Walker v. State, 367 Ark. 523, 241 S.W.3d 734 (2006).*

The State is not required to eliminate every possibility of tampering with the evidence; the trial court must be satisfied within a reasonable probability that there has been no tampering. *Id*. A decision to admit evidence despite minor discrepancies between the descriptions of the items submitted to the crime lab and the lab's report is not abuse of discretion. *Guydon, supra.*

The Court saw no significant difference in the various descriptions of the suspected cocaine. However, there was more than a minor discrepancy in the description of the material purportedly sent to the crime lab—the marijuana was not listed at all--and what was tested there and returned to the Stuttgart Police Department. Nonetheless, Mannis explained the discrepancy, and the trial court found his explanation credible. Although not absolute, the Court defers to the fact-finder on credibility determinations unless the testimony is inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Ockerman v. State, 2011 Ark. App. 376*. The Court was mindful that the contraband was photographed at the scene, and that those color pictures were introduced into evidence. The Court held it was not an abuse of discretion to admit the crime lab report.

Case citation: This case was decided by the Arkansas Court of Appeals on February 22, 2012. The case was from the Arkansas County Circuit Court, Northern District, Honorable Circuit Judge David G. Henry. The case citation is *McCastle v. State*, 2012 Ark. App. 162.

Brooke Lockhart
Deputy City Attorney

Qualified Immunity Upheld for Officer in Drug Case

Facts: The Owatonna, Minnesota police had been told by an informant that Mario Molina-Campos [Campos] was supplying drugs to him and other dealers and that he owed Campos some money. Members of a drug task force set up a meeting at which an undercover officer was to give Campos the money owed by the informant, and other officers would be present to make an arrest. The transaction was planned to take place at a gas station located in Dodge City, Minnesota near the intersection of county roads 34 and 25. Much of the encounter between the police and Campos was recorded by a video camera mounted in one of the task force cars and by a hidden microphone worn by the undercover agent.

After Campos arrived at the gas station, the undercover agent approached his car, placed the drug money in the backseat, and spoke to Campos through the rear window. As he was talking, Campos began to drive forward. Fearing Campos would escape, one of the other officers drove his unmarked car to block him from behind while Sergeant Welinski moved his vehicle in front of Campos. At the same time the undercover officer opened the driver's door and ordered Campos to get out of his car. Boxed in by the police, Campos first reversed, dragging along the undercover officer who fell to the ground bleeding, and then attempted to drive

around Welinski's vehicle, heading toward county road 34.

As Campos tried to escape, Sergeant Welinski got out of his vehicle and fired eight shots at Campos's car which began to make a slow u-turn away from county road 34 before coming to a stop. One of the officers ordered Campos to get out of his vehicle. As Campos complied, he collapsed on the ground. The police called an ambulance and administered CPR, but Campos stopped breathing before the ambulance arrived. The audio recording indicated that approximately 3 seconds had elapsed between Sergeant Welinski's first and final shots.

Molina Gomes [Gomes], as trustee for the Campos's next of kin, filed a *§ 1983* claim against Sergeant Welinski in his individual and official capacities, claiming that he had used excessive force in violation of Campos's *Fourth Amendment* rights. Welinski moved for summary judgment, and the district court concluded that he was entitled to qualified immunity because he had reasonably believed that Campos "posed a threat of serious harm" to others at the time he shot him. The court granted summary judgment to Welinski in both his individual and official capacities. Gomes appealed only the grant of qualified immunity to Welinski in his individual capacity.

Argument: Qualified immunity protects government officials from liability under *§1983* unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer,* 536 U.S. 730, 739(2002) (citation omitted). The test for whether an officer is entitled to qualified immunity depends on: (1) whether the facts alleged by the plaintiff make out a violation of a constitutional right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Pearson v. Callahan,* 555 U.S. 223, 232 (2009). A right is clearly established if a reasonable officer would understand that his conduct was unlawful. *Nance v. Sammis,* 586 F.3d 604, 609 (8th Cir. 2009). The court exercises their discretion in deciding which of the two requirements to address first. *Pearson,* 555 U.S. at 236.

Gomes claims Sergeant Welinski violated the *Fourth Amendment* rights of Campos by using excessive force in trying to arrest him. This claim is analyzed under the *Fourth Amendment's* objective reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 388-89(1989). The court examines "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005) (citation omitted). The analysis of whether the use of force was reasonable must allow "for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97. The issue of reasonableness "must be examined from the perspective of the facts known to the officer at the time of the incident." *Nelson v. Cnty. of Wright,* 162 F.3d 986, 990 (8th Cir. 1998). The use of deadly force is not unconstitutional if the officer had "probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or others." *Nance,* 586 F.3d at 610 (citation omitted).

The court concluded that Sergeant Welinski's use of deadly force did not violate Campos's constitutional rights. The reckless driving by Campos in his attempt to escape was a danger to the arresting police

officers and to any drivers on the roadway. When Campos sped backwards; he dragged the undercover officer along, knocking him to the ground. He then crashed into a police vehicle before driving around Welinski's vehicle towards county road 34. At the time Welinski fired his weapon he had probable cause to believe that Campos posed a threat of serious danger to the officers as well as to other motorists. See *Scott v. Harris*, 550 U.S. 372, 383-86 (2007); see also *Sykes v.United States*, 131 S. Ct. 2267, 2274 (2011) ("It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others."). Welinski made a split second decision to try to prevent Campos from harming the officers or others in the area. He fired for just 3 seconds and stopped shooting before using all his bullets. See *Sanders v. City of Minneapolis*, 474 F.3d 523, 526-27 (8th Cir. 2007). Welinski's use of force under these quickly evolving dangerous actions by Campos was "objectively reasonable under the circumstances as [Welinski] perceived them." See *Hernandez v. Jarman*, 340 F.3d 617, 623-24 (8th Cir. 2003).

The court also rejected the trustee's remaining arguments. Although he claims Campos's driving posed no danger to other motorists, the video recording showed numerous cars passing along county road 34 just before Campos moved in the direction of the roadway. See *Scott*, 550 U.S. at 380 (declining to adopt factual allegations "contradicted by the record" in ruling on a motion for summary judgment). Even if the officers failed to identify themselves before the shooting began, as Gomes claimed, he had not shown that Sergeant Welinski's use of force was unconstitutional given the fast evolving circumstances and the officer's reasonable belief that Campos posed a serious threat to others. See *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995). The Eighth Circuit upheld the granting of summary judgment to the officer on the basis of qualified immunity.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on April 30, 2012. The case was from the United States District Court for the District of Minnesota. The case citation is *Molina-Gomes v. Welinski*, 676 F.3d 1149 (2012).

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