SEARCH & SEIZURE AND CONFESSIONS UPDATE

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I. FOURTH AMENDMENT – SEARCH & SEIZURE

A. Preliminary Questions – Expectation of Privacy / Is There a Search?

1. GPS

a) In United States v. Jones, __ U.S. __, 132 S.Ct. 945 (Jan. 23, 2012), the Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. In an opinion written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, the Court held that "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area," it is a Fourth Amendment search. Id. at 6 n.4, 7. Because the Court held that a "classic trespassory search" had taken place in this case, id. at 12, it did not analyze whether a search had occurred under the reasonable-expectation-of-privacy test of Katz v. United States, 389 U.S. 347 (1967). The Court thus found no need to address the government's argument that Jones lacked a reasonable expectation of privacy in the exterior of his vehicle and its location on public roads. Id. at 5. The Court explained that before Katz, "our Fourth Amendment jurisprudence was tied to common-law trespass," id. at 4, and the reasonable-expectation-of-privacy test the Court adopted in Katz "has been added to, not substituted for, the common-law trespassory test." Id. at 8. The Court did not consider whether warrantless installation and use of the GPS device could be justified by reasonable suspicion, holding that the argument was "forfeited." Id. at 12.

Justice Sotomayor wrote a separate concurring opinion characterizing the "trespassory test" as an "irreducible constitutional minimum." She argued as well, however, that, even in the absence of a physical intrusion, the government's use of invasive "nontrespassory surveillance techniques" may violate a "reasonable societal expectation

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of privacy." Slip op. 1-6 (Sotomayor, J., concurring). She believed that, "[u]nder that rubric, * * * at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" Id. at 3 (quoting Justice Alito's concurring opinion).

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, concurred in the judgment. He criticized the majority for resurrecting a trespass-based Fourth Amendment standard rather than applying the existing reasonable-expectation-of-privacy test. Slip op. 1-10 (Alito, J., concurring in the judgment). Nevertheless, under that test, Justice Alito concluded, "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Id. at 13.

b) The Ninth Circuit has ruled that, where officers placed a GPS device on a vehicle and tracked it, in good faith reliance on pre-Jones binding precedent, the fruits of that tracking activity should not be suppressed. United States v. Pineda-Moreno, 688 F.3d 1087 (9th Cir. 2013) (citing Davis v. United States, 131 S.Ct. 2419, 2423-24 (2011) ("searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule").

c) Law enforcement's actions of engaging in public, short-term GPS monitoring of employer's van that defendant was driving, after attaching GPS device to vehicle, did not violate the defendant's reasonable expectation of privacy. Analyzing Jones, the Court of Appeals held that the defendant failed to show he had a reasonable expectation of privacy, noting that he "provided no evidence he had permission to drive the van or otherwise had any interest in it when the device was attached to the vehicle in a public parking lot," and he did not have a reasonable expectation of privacy in his personal movements from one place to another, particularly where the monitoring is "short-term" and a driver "has borrowed another's vehicle without any knowledge of whether it is being tracked by a GPS device." The court noted that it would wait to decide other issues in appropriate cases, such as whether some tracking may need to be justified by reasonable suspicion, or whether GPS tracking that aggregates large amounts of data for a much longer period of time, or on a purely arbitrary basis, may violate a person's reasonable expectation of privacy. State v. Estrella, 230 Ariz. 401, 286 P.3d 150 (App. 2012) (Div. 2) (defendant also waived separate "trespass" argument by failing to raise it in trial court and did not argue that fundamental error occurred; court also noted that expectation of privacy issue in this case concerned placement of GPS device on car and monitoring its movements, not privacy regarding contents of the van).

2. **Dog Sniff On Curtilage – Is There A "Search?"**

In Florida v. Jardines, _ U.S. _, 2013 WL 1196577 (Mar. 26, 2013), the Supreme Court held that a "search" occurred when an officer took his drug-sniffing dog (Franky) to the defendant's porch, which was on his curtilage, and the dog alerted to the presence of

marijuana. Officers obtained a search warrant and discovered marijuana in the residence. Writing for the majority, Justice Scalia (joined by Justices Thomas, Ginsburg, Sotomayor and Kagan), held that, under general trespass principles discussed in Jones, the officer's entry with his drug-sniffing dog intruded on the defendant's curtilage and the entry was not "explicitly or implicitly invited." Although officers may approach a house and walk on the curtilage to speak to the occupants (i.e. a "knock and talk"), just as a salesman or Girl Scout could, in this case, the officer did not go the residence to speak to the occupants, but instead took his drug-sniffing dog up to the front door, where the dog alerted. The scope of a permissible knock-and-talk does not extend to this activity, because there is no customary invitation to enter the curtilage with a drug dog to conduct a search. Because it found a search occurred based on trespass principles, the majority declined to address whether the defendant had a reasonable expectation of privacy that was also invaded.

Justice Kagan, joined by Justices Ginsburg and Sotomayor, concurred in the majority opinion's resolution of the case based on trespass theory, but would also find that the defendant's expectation of privacy was invaded. Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, dissented. The dissenting judges would find that a search did not occur under trespass, noting that the officer and dog approached the front door via the driveway and a paved path, which any visitor would customarily use; the dog was on a traditional six-foot leash that is standard; and the entry and alert occurred only after a minute or two. They also noted that: the fact that a drug dog can smell odors emanating from a home more easily than a human did not alter the analysis of whether a search occurred; dogs are not "devices" and have been used for many years, including when the Fourth Amendment was adopted; and the purpose of the officer's visit was irrelevant. They also noted that other visitors walk up to a front door without speaking to the occupants – such as mailmen and people leaving flyers – so it did not matter that the officers did not try to contact the occupants. The dissent also found that the defendant had no reasonable expectation of privacy that was invaded here.

3. **Other Curtilage Cases**:

In State v. Guillen, 223 Ariz. 314, 223 P.3d 658 (2010), officers suspected a garage was storing marijuana, so they conducted a dog sniff of the seams of a garage. The dog alerted to the presence of marijuana and the officers asked for and obtained consent to search from the defendant's wife. Officers later obtained a search warrant after the dog alerted on a freezer, and they discovered marijuana in the home. The Court of Appeals, Division Two, ruled that the dog sniff of the seams of the garage was unlawful without reasonable suspicion. On review, the Arizona Supreme Court did not resolve this issue, and assumed, without deciding, that the dog sniff was unlawful, but held that the evidence was not tainted by that illegality.

Officers may cross the curtilage to speak to the occupants. No justification is necessary to conduct a knock-and-talk because this is not an improper search and officers may make observations from such a lawful position. *See* State v. Olm, 223 Ariz. 429, 433, 224 P.3d 245, 249 (App. 2010) (Div. 2) ("Residents generally do not have a legitimate expectation of privacy in a path across their driveway to and including their front porch and front door, because that area is implicitly open to the public, thereby necessarily negat[ing] any reasonable expectancy of privacy in regard to observations made there") (citations omitted). "[N]o Fourth Amendment violation occurs when an officer, without a warrant, crosses the curtilage to knock on the front door to ask questions of the resident." Id, quoting United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir. 2001). "Nor are the occupant's Fourth Amendment rights violated when the officer observes contraband in plain sight from a lawful vantage point." Id. (citing cases).

However, in Olm, the court ruled that the officers could not walk on the unenclosed front yard (which it deemed curtilage) to view the VIN of a vehicle parked on that yard. The "concrete walkway clearly delineated the path guests were expected to take from the street or sidewalk to Olm's front door," 223 Ariz. at 434, and "it is undisputed that the officer could not see the Mustang's VIN plate from the street, the sidewalk, the concrete walkway leading to the front door, or from the area by the front door" and "in order to see the VIN plate, the officer had to enter the yard." Id. at 433-34.

4. **Search – DNA Testing As Condition of Release**

In Mario W. v. Kaipio, 230 Ariz. 122, 281 P.3d 476 (2012), seven juveniles argued that taking DNA swabs while they were on release was unlawful, challenging the constitutionality of A.R.S. § 8-238. Because a buccal swab (for DNA purposes) constitutes a "search," just like a blood draw, the question was whether such a search was "reasonable." The Court of Appeals, Division One, had held that the statute was constitutional and that there was no unreasonable search, although one judge dissented on the ground that the State failed to justify DNA extraction from the samples under the Fourth Amendment. On June 27, 2012, the Arizona Supreme Court ruled that: 1) the taking of the buccal swabs, the first intrusion on the juveniles' expectation of privacy, did not violate the Fourth Amendment, noting that it was similar to taking a fingerprint; and 2) the extraction of the DNA profile from the sample, however, constituted a second intrusion and violated the Fourth Amendment. The court found that the State demonstrated that the taking of the sample before pre-trial release and before a judicial finding of probable cause was justified by a legitimate government interest, namely that if the person absconds, the State loses an opportunity to gather that DNA information in order to locate the absconding juvenile or identify that person as the one who absconded. However, although taking the swab is no more intrusive than taking a fingerprint, the act of extracting a DNA profile from that buccal sample constitutes a second, additional intrusion and must be justified. The court rejected the State's argument that, once having obtained the sample,

the Fourth Amendment provides no greater bar to processing it for a DNA profile than in analyzing a fingerprint. It found that analyzing a fingerprint provided no greater intrusion, whereas here, the DNA must be extracted and a profile created before law enforcement can use it. This search creates a greater privacy interest. Because the State may obtain the DNA profiles after conviction, there needs to be an important interest to justify testing the samples before the juvenile's adjudication. Here, the State failed to show why the DNA samples needed to be extracted before adjudication or any failure to appear. *But see* Maryland v. King, *infra*.

In Maryland v. King, __ U.S. __, 133 S.Ct. 1958 (June 3, 2013), the Supreme Court ruled that: 1) a search using a buccal swab to obtain the defendant's DNA sample after his arrest for a serious offense under a Maryland statute was reasonable under Fourth Amendment; and 2) the analysis of the defendant's DNA did not render the DNA identification impermissible under the Fourth Amendment.

B. Consensual Encounters, Stops & Detentions

1. Consensual Encounters vs. Stops

In State v. Childress, 222 Ariz. 334, 214 P.3d 422 (App. 2009) (Div. 1), the Court of Appeals agreed with the defendant that the trial court had erred by finding the encounter consensual, but ruled that the stop was lawful and reasonable. In this case, the officer had stopped a motorcycle for doing two wheelies. Before that, the officer had seen the motorcycle rider speaking to the defendant, who was in a pick-up truck, at a stop light. When the officer pulled the motorcycle over, the defendant drove his pick-up truck into the parking lot, stopping behind the motorcycle. The officer stated: "occupants in the black truck - move in front of me," which the officer said he requested so he could see where they were. Ultimately, when a back-up officer arrived, the original officer walked over to talk to the defendant because the officer thought the occupants were witnesses to the motorcycle driver's behavior. The defendant exhibited signs of intoxication and was ultimately arrested for DUI. The defendant filed a motion to suppress. The Court of Appeals found that the officer's command to move resulted in a seizure, not a consensual encounter as the trial court had found. However, the officer's actions were lawful. The court found that the officer was entitled to ask the truck to move for officer safety reasons while conducting the traffic stop of the motorcycle driver, and it would be unreasonable for the court to rule that the officer needed to keep the defendant's truck behind him. The court also found that the officer conduced a reasonable stop of the truck because the defendant was a potential witness to the motorcycle driver's offense. "Although [the officer's] order to Childress to move his truck was a stop, in balancing the government's interest in officer safety and Childress's interest in travelling freely, we conclude the stop was reasonable. Approaching Childress to ask why he was in the parking lot was also

reasonable, given the continued safety risk Childress and his passenger posed and their potential value as witnesses."

In State v. Canales, 222 Ariz. 493, 217 P.3d 836 (App. 2009) (Div. 2), an officer responded to investigate a suspicious car in an apartment complex parking lot. He parked his vehicle directly behind a parked car matching the description of the 911 report, and shined his patrol car's alley light on the vehicle. The officer approached on foot and saw the defendant, who was sitting in the driver's seat, place a beer in the back seat. The officer smelled the odor of alcohol coming from the vehicle and saw that the defendant had red, watery, bloodshot eyes. Subsequent DUI investigation at the scene resulted in the defendant's arrest for DUI. The trial court found that the defendant was stopped initially without reasonable suspicion and suppressed the evidence. The State appealed, arguing that the initial encounter was consensual. The Court of Appeals found that a stop had occurred. "[The officer's] actions [of parking behind the vehicle] had made it physically impossible for Canales to terminate the encounter by leaving in his vehicle, and by shining a light toward the interior of the car and directly approaching the driver's side door, [the officer] had conveyed to Canales that he was the subject of the inquiry. Under these circumstances a reasonable person would not have believed he was free to disregard the police and go about his business." (internal quotations omitted). The court also found that this particular 911 tip was not sufficient to justify the stop, discussing the anonymous tip doctrine.

An officer needs only reasonable suspicion – not probable cause – to believe that a traffic violation has occurred to justify a stop of that vehicle. State v. Starr, 222 Ariz. 65, 213 P.3d 214 (App. 2009) (Div. 1) (stop was lawful based on officer's reasonable suspicion to believe the defendant changed lanes without signaling; after discussing U.S. Supreme Court and Ninth Circuit authority, court stated: "We agree with this analysis and the conclusion that the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops.") (internal quotations omitted).

In State v. Ramsey, 223 Ariz. 480, 224 P.3d 977 (App. 2010) (Div. 1), the Court of Appeals ruled that the defendant was seized. Two officers patrolling a high crime area at 1 a.m. observed the defendant walking eastbound then change directions after making eye contact with the officers. The officers continued to follow him as he changed directions several more times in what the officers believed was an attempt to avoid them. After he walked into a housing project, the officers drove onto a grassy area to continue observing him. The defendant put his hands in his pockets and continued walking away from the officers. The officers, fearing he was attempting to grab a weapon, commanded him to stop. The defendant ignored the officer's instructions and continued walking away. The command was repeated and the defendant turned back or looked over his shoulder while he continued to walk away from the officers. As the officers grabbed the suspect, the

defendant "put his right hand on his head and, with his left hand, he placed a piece of clear plastic in his mouth."

First, the court determined that the defendant was "seized" by the officers when, in response to an officer's commands, he took his right hand out of his pocket and placed it on his head. It found the trial court erred by finding that the defendant was seized when the officers pulled up onto the grass behind the defendant, noting that this ruling was error under Hodari D. Next, the court determined that the officers had reasonable suspicion to stop. Considering "the totality of all relevant circumstances," including the time of day, that it was a high crime area (testimony showed there were burglaries, sexual assaults, children being abducted from housing projects, homicides, shootings, stabbings), the defendant's attempts to evade the officers, and his refusal to obey the officers' commands, there was reasonable suspicion to conduct an investigatory stop. On a State's appeal, the Court of Appeals reversed the suppression order.

In State v. Sweeney, 224 Ariz. 107, 227 P.3d 868 (App. 2010) (Div. 1), the officer made a lawful traffic stop of the defendant. After handing the defendant a warning citation filled out 8 minutes after the initial stop, the officer wished him a safe trip. After the defendant turned to walk away, the officer asked whether he could speak with him again. The defendant walked back to the officer. The officer asked whether he had anything illegal in his vehicle, and the defendant said he did not. The officer asked for consent to search to vehicle and the defendant refused, saying "no, you can't cause I don't think its in [the] law, is it?" The officer said "No, it's not," and asked for consent to do a dog sniff, which the defendant refused. The defendant then turned around again and began to walk away, but the officer grabbed the defendant's arm, turned him around and told him he was being detained. He ordered the defendant to stand still and called another unit to watch the defendant. The officer then used a canine to sniff the vehicle. The dog alerted and the officer found cocaine in the trunk.

The trial court had upheld the stop and the further stop and search. The Court of Appeals disagreed. It did note that the duration of the initial traffic stop was reasonable and that the officer could ask the defendant about his travels and such during the stop. "An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the duration of the stop." The appellate court found that the situation was not "consensual" at the time of the post-stop encounter. The officer had physically grabbed the defendant and ordered him to stand there while he waited for another officer to arrive to watch the defendant so the original officer could conduct a dog sniff. Thus, after the lawful traffic stop had concluded (which included the questioning that was deemed proper during that stop), the officer needed reasonable suspicion to continue to detain the defendant. Here, they lacked that reasonable suspicion.

The Court of Appeals found that "[c]onsidered in the aggregate, [the following] factors did not give rise to objective reasonable suspicion of anything. At most, they gave rise to the 'inchoate and unparticularized suspicion or hunch' that the Supreme Court rejected as grounds for detention in Sokolow and Terry":

> Here, Officer Craft testified that the following factors indicated to him that Appellant may have been transporting illegal drugs: (1) it was implausible that Appellant would travel 4,000 miles round-trip to buy a Camaro without first determining that one was available for purchase; (2) Appellant was overly nervous and his nervousness did not subside during the entirety of the detention; (3) Appellant's answers to the officer's questions were vague, and he discussed the weather; (4) a strong smell of deodorizer emanated from Appellant's car; (5) Appellant's car was clean and devoid of personal effects; (6) there was an atlas on the passenger seat of the car; (7) the car was rented in New York and had a Massachusetts license plate; (8) Appellant was a Canadian citizen; and (9) Appellant was driving while sitting far back in his seat, in a rigid upright position.

Id. at 874 (internal footnotes omitted). "A reasonably prudent person's suspicions would not be raised after observing a foreign national driving a clean, deodorized rental car with an atlas on the passenger seat, who upon being stopped and questioned outside in the three-degree weather by the police, failed to articulate with specificity the places he had visited while staying in an unfamiliar city. A holding to the contrary would subject nearly everyone to a continued, intrusive detention following a routine traffic stop. Our review of the recording of the encounter reveals that Appellant was calm, friendly and cooperative during the entire stop. Whatever Officer Craft's subjective beliefs, we cannot agree that the totality of the circumstances gives rise to any objective suspicions that would not be raised regarding the most innocent travelers." The further detention of the defendant, after a valid traffic stop, was not justified by reasonable suspicion. It also noted that its review of the recording "confirms" that it was the defendant's "refusal to consent that triggered the sudden change in tone and tactics." (The officer had asked for permission to consent, which the defendant refused, and he also refused a canine sniff of the vehicle, at which point he was detained.) This stop was held to be unlawful and the case reversed. [Judge Brown in his concurrence expressed that he did not believe that factors from the prior stop could be imported to justify the second stop. "The State cites no authority, nor has my research revealed any, that supports such wholesale retroactive reliance on reasonable suspicion as a basis for a subsequent, unrelated detention."]

2. **Stops – Traffic Violation & Community Caretaking Function**

In State v. Fikes, 228 Ariz. 389, 267 P.3d 1181 (App. 2011) (Div. 2), a police officer saw that a brake light at the top rear of Fikes's vehicle was not working and stopped him

for violating A.R.S. § 28-939. The vehicle's two other brake lights were working. After stopping the vehicle, the officer discovered Fikes had been driving under the influence of alcohol. Fikes' motion to suppress for lack of reasonable suspicion was denied and he was convicted of DUI. He appealed. The Court of Appeals reiterated that reasonable suspicion was necessary to "stop and detain" for an actual or suspected violation of Title 28. Section 28-939—the statute Fikes was suspected of violating—provided: "If a vehicle is equipped with a stop lamp or other signal lamps, the lamp or lamps shall: 1. Be maintained at all times in good working condition. 2. Not project a glaring or dazzling light." However, § 28-927 required that "A person . . . shall not drive a vehicle on the highways unless it is equipped with ***a*** stop lamp that meets the requirements of § 28–939." (emphasis added). Reading these statutes in conjunction, the court concluded that the officer did not have reasonable suspicion to stop Fikes because Arizona law required that only one stop lamp be functioning. The State argued that this decision could discourage officers from stopping dangerous vehicles for public-safety or community caretaking reasons, but the court noted that no such justification had been offered by the officer here. (The court also noted that the State had not argued good faith applied, so it did not consider the applicability of that exception.)

In State v. Becerra, 231 Ariz. 200, 291 P.3d 994 (App. 2013) (Div. 2), the Court of Appeals, Division Two, affirmed the officer's stop of the defendant's vehicle, which was partly based on a non-functioning taillight. The defense relied on Fikes, *supra*, when arguing that the stop was unlawful. The Court of Appeals disagreed, noting that the officer testified he stopped the vehicle not only because of the broken taillight, but also because he was concerned that the inoperable taillight would result in a rear-end collision with another automobile. The appellate court noted that, pursuant to A.R.S. § 28-982, officers may stop a vehicle "any time there is reasonable cause to believe that a vehicle is unsafe." It concluded that the officer's stop of the vehicle was appropriate pursuant to this statute, which provided a separate basis for the officer to stop the vehicle under his community caretaker function.

In State v. Baggett, __ P.3d __, 2013 WL 3483772 (Ariz. App. July 11, 2013) (Div. 1), the Court of Appeals, Division One, affirmed the trial court's determination that the officers lawfully stopped the defendant based on a traffic violation. The defendant was riding a bicycle at night without a visible light, in violation of A.R.S. § 28-817(A). The appellate court rejected the defendant's argument that the statute only applies to bicycles on roadways (because he was biking on a sidewalk), and held that the statute applies to all bicycles being operated at night. (In a footnote, the court noted that the parties did not raise the issue of whether the defendant violated a city code that prohibited riding a bicycle on a sidewalk.)

In State v. Organ, 225 Ariz. 43, 234 P.3d 611 (App. 2010) (Div. 1), the stop of the defendant's vehicle was justified under the community caretaking function. The court stated:

> [T]he community caretaking function permits a warrantless intrusion on privacy interests when the intrusion is suitably circumscribed to serve the exigency which prompted it. The officer's conduct must be carefully limited to achieving the objective which justified the search – the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance or property is at risk and to provide that assistance or to protect that property. . . The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions? . . . As in other contexts, in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or "hunches," but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.

225 Ariz. at 47 (internal quotations, bracketing, and citations omitted). An officer saw the defendant's vehicle stopped on the shoulder of a highway with its emergency lights activated. The officer turned his vehicle around to do a welfare check and see if the driver needed any assistance. As he approached the vehicle, the officer noticed that the defendant began driving slowly on the shoulder and his emergency lights were not flashing. The officer activated his front emergency lights to alert the defendant that he was an officer. He then got answers that prompted him to be suspicious. Noting that it had recognized the community caretaking exception in In re Tiffany O., 217 Ariz. 370 (Ariz. App. 2007), the Court of Appeals here found "it was reasonable for [the officer] to believe Defendant was having some emergency or trouble, that Defendant may have needed assistance and that a welfare check was necessary." "Further, the officer's action in stopping the vehicle was suitably circumscribed to serve the exigency which prompted it . . . It was only after the officer noticed other suspicious behavior while performing the welfare check that his inquiry changed from ascertaining if Defendant needed assistance into a potential criminal investigation. Based on this record, we conclude that Officer Lamb's initial stop of Defendant was reasonable, that it was an appropriate exercise of his community caretaking function and that it did not violate the Fourth Amendment." 225 Ariz. at 47-48 (internal citations omitted).

3. **Continued Detention**

In State v. Kinney, 225 Ariz. 550, 241 P.3d 914 (App. 2010) (Div. 2), the Court of Appeals found that the defendant was unlawfully detained after the officers learned he was not the person wanted on an outstanding warrant and his statements were a fruit of that unlawful detention. However, their admission at trial was not prejudicial in light of the other evidence. Officers had received a tip that a person wanted on a felony warrant was at a particular address. When the officers arrived, they saw defendant Kinney and he somewhat matched the description of the wanted individual. Officers asked the defendant to show his hands, but the defendant reached towards the car. The officers took "control of him." A weapon was observed in the truck and the defendant was handcuffed and escorted to a patrol car. When asked, he responded that his name was Kinney and gave permission to check his wallet to confirm his identity. The officers later read him Miranda warnings at the station, which he waived, and he said he had a prior conviction for armed bank robbery and that he did not believe his civil rights had been restored.

The Court found that at that time the officers saw that the defendant seemed to match the physical description of the wanted person, they had reasonable suspicion to stop him. Once they determined that he was not the wanted individual, however, they no longer had reasonable suspicion to detain him in connection with the warrant. By continuing to detain and question the defendant, the officers exceeded the bounds of a Terry stop. The court rejected the State's argument that the questioning was part of a records check, distinguishing cases cited by the State concerning traffic stops. The officers also did not testify that they still had officer safety concerns once they determined that the defendant was not the person wanted on the warrant. The trial court properly suppressed the statements the defendant made at the scene as a product of an illegal detention.

The State argued that the statements at the station were properly admitted because there was no taint from the unlawful detention at that time. The court determined that the statements were obtained as a fruit of the unlawful detention, but that their admission was not prejudicial in light of the other evidence.

4. **Stops vs. De Facto Arrest**

In State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239 (2012), the Arizona Supreme Court ruled that an investigative stop had ripened into a de facto arrest when the officers detained the suspect in handcuffs for 30 to 40 minutes while waiting for a detective to arrive to question the defendant. The appellate court found that the State did not demonstrate that the officers diligently pursued its investigation to justify a continued detention, and the use of handcuffs, which does not automatically convert a Terry stop into a de facto arrest, occurred throughout the entire encounter with the suspect, but the State

failed to show why they were necessary based on officer safety reasons or to prevent the suspect's flight. The totality of circumstances demonstrated that a de facto arrest occurred.

While investigating stolen vehicles, police officers saw several men drive into an apartment complex driveway, disappear, and then leave in a stolen truck. Some officers left the scene to follow the people who left in the truck, while another officer detained the defendant because he appeared to be acting as a lookout. The officer handcuffed the defendant because there was at least one person unaccounted for. He did not frisk him or ask him whether he had a weapon. The officer began questioning the defendant after advising him of his Miranda rights, and he was handcuffed at the police car for at least 15 minutes before a detective arrived. The detective was briefed for an additional 15 minutes before he began interviewing the defendant. The defendant confessed to the crime.

The defendant was charged with facilitating a theft of means of transportation and moved to suppress his statements, arguing that his detention became a de facto arrest. The trial court denied the motion and the defendant was convicted at trial. Although there was reasonable suspicion to stop the defendant (based on reliable information that the truck was stolen, the timing of the defendant' arrival, his actions, and the truck driver's shouting at the defendant), the stop became a de facto arrest. An investigative detention must last no longer than necessary to effect the purpose of the stop, and the record did not show why the officers kept the defendant handcuffed for 30-40 minutes while waiting for a detective to return and interview him. Although an officer may detain a suspect in handcuffs to allay safety concerns, the length of the detention must be brief and the officer's safety concerns must be articulated. In this case, the State failed to articulate why handcuffs were needed to preserve officer safety or prevent the suspect from fleeing, and the Court found that once the other officers returned to the scene, the threat had clearly ended. The State also failed to explain why it was necessary to wait for a detective to question the defendant. Although it may be reasonable for an officer initiating a stop to wait for another officer, the record must reflect the reason for doing so. The Supreme Court remanded the case to the trial court for further proceedings.

5. **Objective Reasonableness of Stop Controls, Not Officer's Belief**

In State v. Whitman, 232 Ariz. 60, 301 P.3d 226 (App. May 20, 2013), the Court of Appeals, Division One noted that "a traffic stop that is objectively lawful is not rendered illegal simply because an officer fails to appreciate or recite the legal ground that supports the action." The trial court found the traffic stop lawful based on a suspected violation of A.R.S. § 28-721(A), which prohibits driving in the middle of the road instead of on the right half of the roadway. The defendant argued that the officer did not actually stop him for violating this statute, but for two other violations – driving with a broken taillight and failing to stop at a stop sign. The Court of Appeals noted that the stop was objectively reasonable based on a violation of § 28-721(A) and that an officer's failure to recite or

appreciate the legal ground does not affect this conclusion. Whether a stop is lawful is an objective test. "Although an officer's express basis for a traffic stop may be relevant and probative in regard to certain factual questions, a court's constitutional analysis does not depend on the officer's actual or express reasons for the stop."

C. Probable Cause - Dog Sniffs & Drug Odor

In Florida v. Harris, __ U.S. __, 2013 WL 598440 (Feb. 19, 2013), the Supreme Court unanimously ruled that a drug dog's alert provided probable cause to search the defendant's vehicle. It also rejected the lower court's "inflexible" standard for determining probable cause in this context, which focused primarily on the dog's field-performance records.

The officer stopped the defendant's vehicle based on a traffic violation. After the defendant declined to consent to search, the officer ran his drug dog Aldo around the vehicle. The dog alerted to the presence of drugs, and the officer found methamphetamine ingredients, but no drugs that the dog was trained to detect. The defendant was arrested and released on bail, and during a subsequent stop, Aldo again alerted, but no drugs were found. At the suppression hearing, the officer testified about his and Aldo's extensive training in drug detection. Defense counsel did not contest that evidence, focusing instead on Aldo's certification and performance in the field, particularly during the two stops of the defendant's truck. The trial court denied the motion to suppress, but the Florida Supreme Court reversed, holding that a wide array of evidence was always necessary to establish probable cause, including field-performance records showing how many times the dog has falsely alerted. The Court noted that if an officer like this one failed to keep such records, he could never have probable cause under the Florida court's test.

The Court ruled that, because the training and testing records supported the dog's reliability in detecting drugs and the defendant failed to undermine that evidence, the officer had probable cause to search the truck. It discussed how probable caus requires only a "fair probability" on which "reasonable and prudent people act." The Court has consistently looked to the totality of circumstances and rejected bright line rules. The Court stated:

> In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the

> reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question — similar to every inquiry into probable cause — is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. *A sniff is up to snuff when it meets that test.*

(Slip Op. at 9) (Emphasis added).

In State v. Baggett, __ P.3d __, 2013 WL 3483772 (Ariz. App. July 11, 2013) (Div. 1), *infra*, the Arizona Court of Appeals reiterated that the odor of marijuana provides probable cause to search, in that case, a backpack. (The court declined to address the defendant's argument that marijuana odor no longer provides probable cause to search in light of Arizona's Medical Marijuana Act (AMMA). The State argued that this statute does not affect an officer's ability to investigate criminal activity and is simply a defense to a crime. The court found this issue waived because it was not raised below.)

D. Frisk for Weapons - Justification

In State v. Baggett, __ P.3d __, 2013 WL 3483772 (Ariz. App. July 11, 2013) (Div. 1), the Court of Appeals, Division One, affirmed the trial court's determination that the officers lawfully frisked the defendant. The defendant was stopped for a traffic violation, namely, riding a bicycle at night without a visible light. The officers performed a weapons pat-down, which included removing his backpack and placing it on the hood of the police car approximately 15 to 20 feet away. The officers smelled marijuana coming from the backpack and searched it, finding baggies of marijuana and a scale. The appellate court agreed with the trial court that the officers had "reasonable suspicion to perform a weapons patdown," noting that the traffic stop occurred at 2:39 a.m. in an area known for high crime activity. The defendant appeared nervous and was evasive in answering questions about how he acquired the backpack. The officers believed a weapon could be concealed within the backpack. "Based on this record, the trial court did not abuse its discretion in finding that the officers had reasonable grounds to perform a weapons pat-down, which included separating

E. Exigent Circumstances Entry Into Home

1. Permissible Entry - Destruction of Evidence

In Kentucky v. King, 131 S.Ct. 1849 (May 16, 2011), the Supreme Court considered whether police officers violate the Fourth Amendment by entering a residence with

probable cause but without a warrant, based on a reasonable belief that evidence inside the residence is being destroyed, if it was reasonably foreseeable to the officers that persons inside the residence might destroy evidence in response to the officers' prior lawful conduct of knocking on the door and announcing their presence. The Court held that "[w]here, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." The Court rejected rules adopted by several courts of appeals in cases involving "police-created exigency," including those that consider whether the police acted with a bad faith intent to bypass the warrant requirement; whether it was reasonably foreseeable that investigative tactics employed by the police would create the exigent circumstances; or whether the officers had probable cause and time to seek a warrant, but instead chose to knock on the door and attempt to speak to an occupant or obtain consent to search. The Court concluded that the officers in this case neither "violated the Fourth Amendment [nor] threatened to do so" by knocking loudly on an apartment door and shouting "this is the police." The Court noted, however, that "[t]here is a strong argument" that the exigent circumstances exception "should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted." Justice Alito wrote the majority opinion; Justice Ginsburg dissented.

2. Lack of Exigent Circumstances ("Knock & Talk" parameters also discussed)

The Court of Appeals recently applied Kentucky v. King in State v. Aguilar, 2011 Ariz. App. 213 (Div. 1; Dec. 22, 2011), and held that insufficient exigent circumstances existed to enter the defendant's motel room without a warrant. Two police officers were informed of suspicious drug activity in motel room 214, so the officers decided to do a "knock and talk." After the officers knocked on the motel door and identified themselves as police officers, "someone . . . peeked out of the curtains" and a person inside asked "Who is it?" Officer Cervantes told the occupants "We need you to open the door" or words to that effect. Then, one of the officers said either "You have three seconds" or "You have until the count of three."

Approximately 30 seconds later, defendant Aguilar opened the door. Once the door was open, Officer Cecil observed "a substance that looked to be a green, leafy substance that [he] identified as marijuana" on a table next to the bed as well as a "strong odor of marijuana." Aguilar was then placed under arrest and admitted that he had recently purchased methamphetamine. After obtaining a warrant to search the motel room, the officers found "a small microbaggie with methamphetamine" located behind the door, as well as other drugs, distribution materials, and drug paraphernalia. Aguilar moved to suppress all evidence obtained after initial entry into motel room, and the trial court denied that motion.

The Arizona Court of Appeals reversed. First, the state conceded in the trial court that the defendant did not consent to the opening of the motel door, so the court stated that the "warrantless entry was lawful only if both probable cause and exigent circumstances existed." Although the court found that probable cause existed because officers had a reasonable belief that criminal activity was taking place in the motel room, it found that exigent circumstances was lacking. The court discussed Kentucky v. King, which held that a warrantless entry based on exigent circumstances is reasonable when police officers "did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." Applying King, the court reasoned:

> Unlike the circumstances in King, in which the officers testified that, after they announced themselves, they could hear people moving things within the apartment, here, no testimony was presented that the officers heard any noise or made any other observations suggesting the imminent destruction of evidence. Instead, someone simply looked outside and observed police officers and defendant chose not to answer the door . . . [T]he occupant has no obligation to open the door or to speak. [citation omitted]. That none of the occupants opened the door when the police officers initially demanded that the door be opened, and one occupant peeked outside the motel window, did not give rise to an exigency justifying a warrantless entry. As a result, the officers' subsequent threat to forcibly enter the motel room was unreasonable under the Fourth Amendment and was therefore unlawful.

3. Possibility of Violence

In State v. Flores, 260 P.3d 309 (Ariz. App. 2011), Division One considered whether the officers' warrantless entry Flores's home without an arrest warrant was justified under the exigent circumstances exception. The defendant had been warned not to violate the city sign code, but did so again the next day by placing signs on his yard. Officers approached the defendant's residence to seek identification from the owner of the SUV that the officer had seen the day before. The defendant refused to give identification multiple times. One officer saw a weapon in the console of a vehicle parked in the driveway of the residence and asked the defendant if he had any weapons on his person. The defendant replied with profanities. When the officer showed him the weapon, Flores laughed derisively and said it was a toy gun. When asked whether there were weapons in the house, Flores said "I have a whole bunch of F-in weapons, don't you?" When Flores again refused to provide identification, the officers followed him back to towards the residence with the intent to arrest him for refusing to produce his identification. The officers were also concerned the defendant might retrieve one of the weapons he had referenced. He went inside his house, and the officers followed. The officers tried to arrest the defendant and he resisted and swung at the officers, and was booked for this resisting arrest offense. On appeal, the court found that officers properly entered the home based on exigent

circumstances because of the possibility of violence, and the officers acted appropriately by entering the defendant's home to prevent him from obtaining a weapon.

F. Protective Sweeps

In State v. Fisher, 226 Ariz. 563, 250 P.3d 1192 (2011), the Arizona Supreme Court discussed protective sweeps in light of Maryland v. Buie, 494 U.S. 325 (1990), in which a sweep was conducted incident to the arrest of the defendant inside his home. In Fisher, the Arizona Supreme Court noted that there are two types of protective sweeps: ones that occur incident to arrest, and sweeps of areas where persons posing a danger might be found. Fisher involved the latter, because the defendant was not yet arrested and was detained outside his home when the officers entered the home to conduct a sweep. They found drugs during the sweep. The Supreme Court assumed, but did not decide, that a protective sweep is not forbidden when a person is detained and questioned but not yet arrested outside the home. It found the sweep unjustified in this case, however. "The common thread among cases interpreting Buie is that officers must have specific articulable facts that someone who could pose a safety threat is inside a residence." "The more specific facts supporting a reasonable belief that an area contains a potentially dangerous individual, the more likely the protective sweep is valid." Here, the officer could not articulate facts indicating that another person was in the apartment. Fisher had left the apartment with three other individuals, and Fisher identified himself and matched the victim's detailed description of the assailant. Although there was an unaccounted-for weapon, nothing indicated there was anyone else in the apartment. "Officers cannot conduct protective sweeps based on mere speculation or the general risk inherent in all police work. Because the officers here did not articulate specific facts to establish a reasonable belief that someone might be in the apartment, the protective sweep was invalid." The court acknowledged the dangerous job that police officers have and the "high cost of suppressing evidence," but stated that "specific facts, and not mere conjecture, are required to justify a protective sweep of a residence based on concerns for officer safety."

The Arizona Supreme Court later distinguished Fisher in State v. Manuel, 2011 WL 6372855 (Dec. 21, 2011). In Fisher, the court recognized that there are two types of protective sweeps under Maryland v. Buie: ones that occur incident to arrest, and sweeps of areas where persons posing a danger might be found. Fisher involved the latter, because the defendant was not yet arrested and was detained outside his home when the officers entered the home to conduct a sweep. Manuel involved the former. According to the court:

> The police knew that Manuel had outstanding felony warrants and was possibly involved in a Phoenix murder. While they were completing the arrest in the hallway outside the room, D.J. came to the doorway, screaming

> hysterically. Officers placed her in handcuffs and removed her from the scene while other officers swept the room to determine if anyone else was inside who might pose a threat. The hotel room was immediately adjacent to the place where Manuel was arrested and D.J. was detained. [citation omitted].

Thus, the police could sweep the room even without reasonable suspicion that someone was inside. *Cf.* Fisher (invalidating sweep under second Buie exception because the sweep was not supported by reasonable suspicion that others were in an apartment).

Because the sweep was permitted under Buie, the court next considered whether the officers lawfully discovered the pistol (the subject of the motion to suppress) within the scope of the sweep. Officers are entitled to conduct a "quick and limited search of the premises" under Buie, "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." The officers discovered the pistol underneath a hotel bed, and the court agreed that looking under a hotel bed is within the scope of Buie "because a person could have been hiding there." When an officer lifted the mattress and box spring to see whether someone was underneath the bed, the officer heard a "clunking" sound and saw the gun, because the gun had slid down the box spring, through the mesh fabric on the bottom. The court concluded that the officer's discovery of the gun in plain view after lifting the bed was lawful under Buie.

G. Border Searches

In United States v. Cotterman, __ F.3d __, 2013 WL 856292 (9th Cir. Mar. 8, 2013) (en banc), the Ninth Circuit determined that the forensic search of the defendant's laptop by a computer expert, which the court found was a border search, nonetheless required reasonable suspicion because of the scope of the search conducted. The defendant's laptop computer was searched briefly at the border but then was found to have password-protected files. The computer was not cleared through Customs and was taken by law enforcement to Tucson to conduct a further forensic search, resulting in the discovery of child pornography. The court found that the removal of the laptop to Tucson did not alter the fact that a border search occurred. However, reasonable suspicion was required, which the court found existed in this case based on the facts. Thus, although the en banc court reversed the panel's determination that reasonable suspicion was not required for this particular border search, it reversed the district court's suppression order because the search was lawfully supported by reasonable suspicion.

H. Inventory Searches

In State v. Organ, 225 Ariz. 43, 234 P.3d 611 (App. 2010) (Div. 1), relying on Arizona law, the Court of Appeals set forth a two-prong test for valid inventory searches:

> An inventory search of a vehicle is valid if two requirements are met: (1) law enforcement officials must have lawful possession or custody of the vehicle, and (2) the inventory search must have been conducted in good faith and not used as a subterfuge for a warrantless search. State v. Schutte, 117 Ariz. 482, 486, 573 P.2d 882, 886 (App. 1977). Thus, when the inventory search is conducted solely for the purpose of discovering evidence of a crime, it is invalid. State v. Davis, 154 Ariz. 370, 375, 742 P.2d 1356, 1361 (App. 1987). However, an inventory search conducted pursuant to standard procedures is presumptively considered to have been conducted in good faith and therefore reasonable. Bertine, 479 U.S. at 372, 107 S.Ct. 738; Opperman, 428 U.S. at 372, 96 S.Ct. 3092.

225 Ariz at 48. Because the defendant was driving on a suspended license, the officer was required to impound his vehicle for thirty days, pursuant to A.R.S. § 28-3511(A)(1), (E) (Supp. 2007). "Because the officer had lawful possession of the vehicle, the first requirement for a valid inventory search was satisfied. *Cf.* In re One 1969 Chevrolet 2-Door, I.D. No. 136379K430353, 121 Ariz. 532, 535-36, 591 P.2d 1309, 1312-13 (App. 1979) (holding that inventory search was invalid where officers not required to take physical custody of the vehicle, the vehicle did not create a safety hazard and police made no inquiry into other methods of protecting vehicle)." Id.

As for the second "requirement of good faith," the defendant claimed that, although DPS policy permitted the search, he claims the search was a pretext. The court rejected this argument, noting that the officer prepared a standard DPS "Vehicle Removal Report," itemizing the presence and condition of items and listed personal property left in the vehicle. Omissions of miscellaneous items of minimal value "do not render the inventory invalid" and the officer testified it was DPS policy to note only "items of value." The defendant cited no cases, nor did the court find any, holding that every item in the vehicle, regardless of value, must be included on the inventory report in order to find an inventory search valid. (Citing contrary cases.) Nor was the search "pretextual" because the officer expressed an interest in searching the vehicle even before he learned of the suspended license. (The officer had asked for consent, which was refused, and he said he would call for a K-9 dog.) The officer already suspected that he was "looking at a prostitution case" and believed there might be evidence relating to that in the vehicle. "Further, while this fact may be relevant to determine whether the officer acted in good faith, it does not render the inventory search invalid. In re One 1965 Econoline, I.D. No. E16JH702043, 109 Ariz. 433, 435, 511 P.2d 168, 170 (1973) (holding that subjective motives of police need not be "simplistically pure"; rather, the inquiry is whether the inventory search was reasonable under objective standards)." "Because DPS policy required an inventory search, there was a presumption that the search was made in good faith. [The officer] testified that he performed an inventory search and not a search for evidence."

I. Implied Consent / Voluntariness of Consent

In Carrillo v. Houser, 224 Ariz. 463, 232 P.3d 1245 (2010), the Arizona Supreme Court held that Arizona's implied consent law, Ariz. Rev. Stat. § 28-1321 (Supp. 2009)—under which persons arrested for driving under the influence are asked to submit to testing, like a blood draw or a breath test, to determine alcohol or drug content—does not authorize warrantless testing unless the arrestee expressly agrees to the test. "Failing to actively resist or vocally object to a test does not itself constitute express agreement. Instead, to satisfy the statutory requirement, the arrestee must unequivocally manifest assent to the testing by words or conduct." 224 Ariz. at 466-67. This decision is expressly limited to A.R.S. § 28-1321, and does not consider "circumstances in which subsection (C) of the implied consent law or other statutes, such as A.R.S. § 28-673(F) (Supp. 2009) may allow warrantless testing of persons incapable of refusing the test." Id.

In State v. Butler (Tyler B.), 232 Ariz. 84, 302 P.3d 609 (May 30, 2013), the Arizona Supreme Court held that: "independent of [A.R.S.] § 28-1321, [the implied consent statute], the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw. If the arrestee is a juvenile, the juvenile's age and a parent's presence are relevant, although not necessarily determinative, factors that courts should consider in assessing whether consent was voluntary under the totality of the circumstances." It determined that the trial court had acted within its discretion when it ruled that the juvenile's consent was involuntary in this case, reversing the contrary decision of the Court of Appeals, Division Two. The juvenile defendant, a sixteen-year-old high school student, arrived to school late with two other boys. A school monitor smelled marijuana on the boys and saw drug paraphernalia in the defendant's car. School officials detained the boys in separate rooms and contacted the sheriff's office. A deputy sheriff arrived and read the Miranda rights to the defendant, who admitted smoking marijuana and owning some of the paraphernalia. He was told he was under arrest for DUI and other offenses. He became agitated and was handcuffed until he calmed down. The officer read an implied consent form twice, once verbatim and then in "plain English." The defendant agreed verbally and in writing to the blood draw.

After he was charged with DUI, the defendant moved to suppress the evidence of the blood draw, arguing that the lack of consent had not been voluntary and that, as a minor, he lacked the legal capacity to consent. The juvenile court granted the motion, finding that the blood draw violated the Arizona Parents' Bill of Rights ("PBR"), A.R.S. § 1-602, and that, in any event, the juvenile's consent was involuntary based on the totality of the circumstances under the Fifth Amendment. The Court of Appeals, Division Two, granted the State's petition for special action and reversed. It held that the PBR did not apply because the deputy was acting within the scope of his official duties and that the Fifth Amendment did not apply because blood was not testimonial evidence. It found that

the informed consent statute presents no Fourth Amendment issue and that the juvenile court abused its discretion in granting the motion to suppress.

The Arizona Supreme Court granted review and reversed the Court of Appeals. The State argued that tests applied under the implied consent statute are not subject to a Fourth Amendment voluntariness analysis. It also argued that juveniles should not be treated differently than adults in assessing the voluntariness of consent. The Supreme Court ruled that: 1) a blood draw is a "search," even when administered under the implied consent statute; 2) the State did not argue the exigency exception to the warrant requirement applied here; 3) a suspect's age and intelligence, and the length of detention, are relevant (not exhaustive) factors in determining the voluntariness of consent; 4) consent can be voluntary under the Fourth Amendment even where a confession may be considered involuntary under the Fifth Amendment; 5) a juvenile's age is relevant, citing recent United States Supreme Court precedent; 6) "consent" under the implied consent statute does not always authorize warrantless testing; and 7) in this case, the trial court did not abuse its discretion when it ruled that the juvenile's consent was not voluntary, "viewing the facts in the light most favorable to sustaining the ruling below." The Supreme Court noted that the defendant was detained for two hours in a school room in the presence of school officials and a deputy. Neither parent was present. He was shaking and visibly nervous. He became loud and upset. He was placed in handcuffs until he calmed down. The second deputy read the implied consent admonition, concluding with the statement "You are, therefore, required to submit to the specific tests."

Justice Pelander, who concurred in the result under the abuse of discretion standard, stated that de novo review should apply when reviewing the voluntariness of consent, rather than abuse of discretion. Under de novo review, he would have found that the State met its burden of proving by a preponderance of the evidence that the consent was voluntary.

J. Detention Incident to Search Warrant Execution

In Bailey v. United States, __ U.S. __, 2013 WL 598438 (Feb. 19, 2013), the Supreme Court clarified the rule of Michigan v. Summers, 452 U.S. 692 (1981), and held that officers could not detain the defendant "incident" to execution of the search warrant in this case, when he left the premises before officers executed the warrant. Although officers are permitted to detain someone incident to the execution of a search warrant pursuant to Summers, this rule does not extend to someone who is not within the immediate vicinity of the search premises. The defendant and another man left the apartment before the officers arrived to execute the warrant. They were stopped about a mile away. The defendant admitted he lived at the apartment, but then denied it when informed of the search warrant. After drugs and a gun were discovered in the house, the defendant was arrested. The trial court and the Second Circuit determined that the detention fell within

Summers. The Supreme Court reversed, and Justice Kennedy authored the opinion for six justices. The Court noted that there are three reasons justifying the seizure of a person incident to a search under Summers: officer safety, facilitating the completion of the search, and preventing flight. None of those reasons has the same impact when the occupant of the home is beyond the immediate vicinity of the premises to be searched. However, if the occupant had returned, he could have been detained under Summers.

K. Emergency Wiretaps / No Duty to Arrest When Probable Cause Exists

In State v. Hausner, 230 Ariz. 60, 280 P.3d 604 (2012), the defendant and his friend Dieteman engaged in a series of random shootings between June 2005 and August 2006 that killed six people, wounded 18 others, and injured or killed several dogs and a horse. A jury convicted the defendant of 80 offenses, including six counts of first-degree murder, and sentenced him to death for each of the murders.

Among other issues, the Arizona Supreme Court analyzed whether a wiretap was illegally obtained. After a witness told detectives that Dieteman said he was involved in the shootings, police followed Dieteman beginning in the evening of August 1 through the early morning hours of August 2. At that time, police saw the defendant meet with Dieteman and drive around in a manner suggesting he was looking for victims. On the afternoon of August 2, detectives notified the Maricopa County Attorney, who approved emergency wiretaps of the defendant's home and car. The defendant argued that the emergency wiretap was illegal because: (1) there was no emergency; (2) the wiretaps did not meet statutory requirements; and (3) the wiretap violated Article 2, Section 8 of the Arizona Constitution.

The Arizona Supreme Court first agreed with the trial court that an emergency existed because there had been a shooting days before the wiretap and the defendant had been trolling for victims on the night of August 1. The Court also rejected the defendant's claim that the emergency could have been avoided if police arrested Dieteman, noting that police had insufficient evidence to arrest Dieteman, and even if they had probable cause, police are under no constitutional duty to arrest someone once they have the minimum evidence to establish probable cause to arrest.

The Arizona Supreme Court also rejected the defendant's due diligence argument, noting that a due diligence requirement is implicit in A.R.S. § 13-3015, the statute under which the wiretap was obtained. Although the trial court did not recognize this requirement, evidence at the suppression hearing established that a conventional wiretap order could not have been obtained through due diligence on the night of August 2. Moreover, the Court held that the trial court need not have considered whether the county attorney approved the wiretap for investigative purposes. Finally, the Court also found that the warrant supported the officer's entry into Hausner's home to place the wiretap,

and exigent circumstances existed to justify the recording of conversations because the statutory requirements of § 13-3010 were met.

L. Dissipation of the Taint

Officers suspected a garage was storing marijuana, so they conducted a dog sniff of the seams of a garage. The dog alerted to the presence of marijuana and the officers asked for and obtained consent to search from the defendant's wife. Officers later obtained a search warrant after the dog alerted on a freezer, and they discovered marijuana in the home. Division Two ruled that the dog sniff of the seams of the garage was unlawful without reasonable suspicion. On review, the Arizona Supreme Court did not resolve this issue, and assumed, without deciding, that the dog sniff was unlawful, but held that the evidence was not tainted by that illegality. State v. Guillen, 223 Ariz. 314, 2223 P.3d 658 (2010). The court analyzed the three factors set forth in Brown v. Illinois: "(1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct." It found that the wife's consent was not tainted by the earlier dog sniff of the garage, noting that she was unaware of the dog sniff, and the officer's conduct was not flagrant considering that the legality of such a dog sniff is an unsettled question.

In State v. Hummons, 253 P.3d 275 (Ariz. 2011), the defendant was walking down a residential street, looking disheveled, but carrying a new weed trimmer. Officer Lewis saw the defendant and conducted a consensual encounter by asking Hummons questions and for identification. Hummons gave the officer identification and she conducted a warrant check. The check revealed that the defendant possessed a misdemeanor warrant. Hummons then became belligerent and Officer Lewis arrested Hummons on the outstanding warrant. A search incident to that arrest produced drugs and drug paraphernalia in his backpack. Hummons moved to suppress this evidence, arguing that it was obtained as the result of an illegal detention.

The court noted that officers are permitted to engage in consensual encounters, including asking for identification. If an officer discovers an outstanding arrest warrant during such an encounter, the officer may arrest the individual.

Although the trial court concluded the stop was consensual, the Supreme Court noted that the Court of Appeals had assumed, without deciding, that an illegal stop occurred, so the Supreme Court addressed whether the search incident to arrest was sufficiently attenuated from any illegal detention in order to permit admission of the seized evidence, as had the Court of Appeals.

The Arizona Supreme Court applied the three factors set forth in Brown v. Illinois (discussed above under Guillen summary). With regard to the first factor (time elapsed),

the officer discovered the drugs and paraphernalia shortly after the stop. Regarding the second factor (intervening circumstances), the court held that the subsequent discovery of a warrant is of minimal importance in attenuating the taint from an illegal detention, and found that the Court of Appeals erred in placing too much emphasis on this fact. The Supreme Court found that, if a warrant automatically dissipated the taint of illegality, law enforcement could create a new form of investigation by routinely illegally seizing individuals and arresting them upon discovery of a warrant. However, the third factor (flagrancy of the illegality) – the most important under the Supreme Court's analysis – militated against suppression. Officer Lewis did not approach Hummons with the hope of arresting and searching him, nor did she otherwise engage in purposeful or flagrant illegality. Rather, her initial conversation with Hummons was completely voluntary. Under the totality of the circumstances, the court held that the search incident to arrest was not the product of an illegal detention. The court also declined to find otherwise under the Arizona Constitution. "Because the exclusionary rule is applied no more broadly under our state constitution than it is under the federal constitution outside the home-search context, we decline to do so."

M. Good Faith Doctrine / Exclusionary Rule Generally

1. In Davis v. United States, __ U.S. __, 131 S.Ct. 2419 (June 16, 2011), the Supreme Court ruled that officers acted in good faith when searching a vehicle incident to arrest based on law authorizing such a search before Arizona v. Gant, 129 S.Ct. 1710 (2009). The Ninth Circuit relied on Davis when it ruled that, where officers placed a GPS device on a vehicle and tracked it, in good faith reliance on binding precedent issued before Jones v. United States, 132 S.Ct. 945 (Jan. 23, 2012), the fruits of that tracking activity should not be suppressed. United States v.Pineda-Moreno, 688 F.3d 1087 (9th Cir. 2013).

2. Warrants & Qualified Immunity

In Messerschmidt v. Millender, No. 10-704 (Feb. 22, 2012), the Supreme Court reversed the Ninth Circuit's en banc decision and held that petitioners were entitled to qualified immunity in a suit alleging that they obtained a warrant to search respondents' home that was lacking in probable cause and therefore violated the Fourth Amendment. Chief Justice Roberts, joined in full by Justices Scalia, Kennedy, Thomas, and Alito, concluded that the affidavit supporting the warrant was not so lacking in probable cause that petitioners could be deemed plainly incompetent for concluding otherwise. The Court explained that it will be rare when a magistrate so obviously errs in determining there is probable cause to support a warrant that any reasonable officer would recognize the error. The decision is significant for criminal law as well as for civil suits under Section 1983, because the Court has held, and reaffirmed in this case, that the test for the good faith exception to the exclusionary rule is the same as the test for qualified immunity.

Justice Breyer concurred, agreeing that under the circumstances of the case petitioners could reasonably have believed that the scope of their search was supported by probable cause. Justice Kagan concurred in part and dissented in part, concluding that the warrant was obviously overbroad in some but not all respects. Justice Sotomayor, joined by Justice Ginsburg, dissented. The dissent would have held that any reasonably well-trained officer in petitioners' position would have known that the affidavit did not establish probable cause.

3. Exclusionary Rule Inapplicable

In State v. Whitman, 232 Ariz. 60, 301 P.3d 226 (App. May 20, 2013), the Court of Appeals, Division One found that a "a traffic stop that is objectively lawful is not rendered illegal simply because an officer fails to appreciate or recite the legal ground that supports the action." The court also noted that the defendant's suppression argument "finds little support in the rational behind the exclusionary rule, which aims to deter unlawful police conduct." Although excluding evidence based on an officer's failure to recite a proper basis for an otherwise lawful stop may provide an incentive for officers to know the law and be thorough and precise when formulating grounds for a stop, "stretching the exclusionary rule this far would impose a heavy burden on law enforcement, and its minimal deterrent effect would come at a high social cost of providing a windfall to guilty defendants."

N. Using Invocation of Fourth Amendment Rights as Evidence of Guilt

In State v. Stevens, 228 Ariz. 411, 267 P.3d 1203 (App. 2012) (Div. 1), the Arizona Court of Appeals held that a prosecutor cannot use a defendant's invocation of her Fourth Amendment rights as evidence of guilt. Stevens and her son got into a physical struggle and the son called 911 for help. Officers arrived and saw Stevens exit the front door of her house. When Stevens noticed officers were about to enter her home, she yelled "search warrant!" An officer detained Stevens in her front yard and another officer went inside the home to check on the son inside. The son directed the officer to drug paraphernalia and methamphetamine inside the house. Stevens was arrested and charged with possession of drug paraphernalia and possession of dangerous drugs. At trial, the state used Stevens' scream of "search warrant" as substantive evidence of her guilt. Specifically, the prosecutor argued in closing: "When Medina Stevens stood outside and said don't come in, you've got to have a search warrant, she had good reason. She knew what they would find in her house." Relying on cases stating that the State could not comment on a defendant's exercise of a Fifth Amendment right, Stevens argued that the state could not comment on her refusal to allow a warrantless search of her home. The appellate court agreed and found that using Stevens' invocation of Fourth Amendment right as substantive evidence of her guilt was fundamental error.

O. Strip Searches

In Florence v. Board of Chosen Freeholders of County of Burlington, _ U.S. _, 132 S.Ct. 1510 (April 2, 2012), the Supreme Court held, 5-4, that the Fourth Amendment permits jail officials to conduct strip searches of all arrestees who are to be placed in the general prison population. Florence was arrested based on an outstanding warrant - that turned out to be invalid - and subjected to strip searches that included visual inspection of "the most private areas" of his body, but not touching by the inspecting officer. In an opinion written by Justice Kennedy, the Court rejected Florence's argument that jail officials should be allowed to strip search a person who is arrested for a minor offense not involving a weapon or drugs only if they have a particular reason to suspect the arrestee of concealing contraband. The Court held that "correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." Florence's proposed standard would be "unworkable," the Court concluded, because "the seriousness of the offense is a poor predictor of who has contraband" and "it would be difficult in practice to determine whether individual detainees fall within the proposed exemption."

The Chief Justice and Justice Alito joined the majority opinion and also each wrote a separate concurring opinion emphasizing that the Court had not addressed whether it would be permissible to strip search a temporary detainee who could be held apart from the general prison population. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. In his view, a strip search of an individual arrested for a minor offense that does not involve drugs or violence is unreasonable under the Fourth Amendment unless prison officials have reasonable suspicion to believe the arrestee possesses contraband.

During an Arizona prison search, a search warrant was required to remove bag from defendant's rectum, discovered during a lawful strip search, even though the bag was partially protruding from the defendant's rectum and could be removed without the officer touching the defendant internally. The bag extended into defendant's body cavity and removal of the bag posed the risk of inflicting trauma or pain. State v. Barnes, 215 Ariz. 279, 159 P.3d 589 (App. 2007) (Div. 2) (majority noted that the State had not argued that there was any exigency, or that it was a jail search, or that item would have been inevitably discovered after booking). The dissent argued that officer's actions were reasonable.

Prison Authority - Involuntary Medication – In a recent case, the Ninth Circuit also discussed the deference given to prison officials when it affirmed the district court's finding that the Bureau of Prisons had not acted arbitrarily when it determined under its administrative authority that the defendant, a mentally ill pretrial detainee, should be involuntarily medicated with antipsychotic drugs in light of the danger he posed in the federal medical facility in Springfield, Missouri, where he was being evaluated to

determine whether his competency could be restored. United States v. Loughner, 672 F.3d 731 (9th Cir. 2012) (ruling that a prison's administrative authority to medicate a mentally ill inmate who poses a danger, pursuant to Washington v. Harper, 494 U.S. 210 (1990), applies equally to pretrial detainees, and that such determinations are to be made by medical staff at the prison, not a judge, although the court may review the prison's Harper decision for arbitrariness).

P. Motives and the Fourth Amendment

In Ashcroft v. al-Kidd, No. 10-98 (May 31, 2011), the Court unanimously reversed a Ninth Circuit decision that denied absolute and qualified immunity to former Attorney General John Ashcroft on a claim that he adopted and implemented a policy of using material witness warrants to detain terrorist suspects whom the government wished to investigate but did not have probable cause to arrest. In this case, plaintiff was detained as a material witness in conjunction with criminal proceedings against Sami Omar Al-Hussayen, who was charged with visa fraud and making false statements. He brought this action alleging, among other things, that former Attorney General Ashcroft had established an unlawful policy of using material witness warrants to detain individuals suspected of terrorism so that those individuals could be investigated. In a 2-1 ruling, the court of appeals affirmed a district court decision holding that Ashcroft was not entitled either to absolute or qualified immunity. The court denied former Attorney General Ashcroft's petition for rehearing en banc, with eight judges dissenting. The Supreme Court granted certiorari and has now unanimously reversed.

The Court (Scalia, J.) held that there was no Fourth Amendment violation and that, in any event, the law was not clearly established. The Court reaffirmed that allegations of improper motive cannot support a Fourth Amendment claim, except in very limited circumstances. [See slip op. 4-5 (noting "limited exceptions" for "special-needs and administrative-search cases, where 'actual motivations' do matter"). The Court distinguished City of Indianapolis v. Edmond, 531 U.S. 32 (2000), which held that suspicionless vehicle checkpoints whose primary purpose was to detect illegal narcotics were impermissible under the Fourth Amendment, on the ground that al-Kidd's arrest was authorized by a "judicial warrant based on individualized suspicion." Slip op. 5-6.] The Court explained that "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive." Given that holding, the Court said that there was no need to "address the more difficult question whether [Ashcroft] enjoys absolute immunity." Justice Kennedy joined the majority and issued a concurring opinion addressing how the Ninth Circuit's ruling "disregarded the purposes of the doctrine of qualified immunity." Justices Ginsburg, Breyer, and Sotomayor would have reversed on the basis of the lack of a clearly established violation and not reached the merits of the constitutional claim.

Q. State's Notice of Appeal from Suppression Order - Timeliness

In State v. Limon, 229 Ariz. 22, 270 P.3d 849 (App. 2011) (Div. 2), the Court of Appeals, Division Two, ruled that the State's filing of a motion for reconsideration does not extend the time for filing a notice of appeal from the original suppression order. The trial court issued a suppression order on January 20, 2011, and the State filed a motion for reconsideration, which was denied on March 23, 2011. The State filed a notice of appeal on March 30th from the denial of the motion for reconsideration and the suppression order. The court of appeals ruled that the State's appeal of the suppression order was untimely and dismissed the appeal.

II. FIFTH AMENDMENT & FOURTEENTH AMENDMENT DUE PROCESS

A. *Miranda* Invocation of Right to Counsel – Release From Custody – Re-initiation of Questioning

In Maryland v. Shatzer, 130 S.Ct. 1213 (2010), the Supreme Court ruled that the Edwards invocation of the right to counsel under Miranda (which ordinarily precludes officers from re-initiating questioning with a defendant) is not eternal, and that officers may reinitiate questioning with a defendant 14 days after a break in custody, after reading fresh Miranda warnings and obtaining a valid waiver. "When . . . a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely." Id. at 1221. The Court found that its newly-created 14-day rule would guard against the possibility that the police would release from custody a suspect who had invoked his right to counsel, only to immediately return him to custody and again seek a confession.

Here, the defendant was in prison serving a sentence on an unrelated crime when he was questioned by officers in 2003 about the possible sexual abuse of his son. He invoked his right to counsel and the interview ended. Two and one-half years later, in 2006, officers returned to prison, advised the defendant of his Miranda rights, and, after the defendant waived those rights, he confessed. That confession was admitted at trial. The Maryland Court of Appeals reversed under Edwards, but U.S. Supreme Court reversed. It found that the defendant, although in prison from the time of the first interview in 2003 to the second one in 2006, was not in Miranda custody. "Lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in Miranda." Id. at 1224. When the defendant was released back into the general

prison population after his first interrogation, this was considered akin to release from Miranda custody, so Edwards did not bar the confession.

In State v. Yonkman, 229 Ariz. 291, 274 P.3d 1225 (App. 2012), the Court of Appeals, Division Two, had ruled that the defendant's confession was obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981), after a detective suggested to the defendant's wife that the defendant could take a polygraph test and make a statement less than 14 days after he had invoked his right to counsel in earlier questioning at home. However, the Arizona Supreme Court granted review and reversed, ruling that the defendant reinitiated questioning when he called the detective, after the detective had returned the call made by the defendant's wife. Because the defendant reinitiated questioning with the detective, Edwards was not violated. State v. Yonkman, 231 Ariz. 496, 297 P.3d 902 (April 4, 2013) ("This case addresses whether a police officer's response to a phone call placed by a suspect's wife reinitiates an interrogation for purposes of Edwards. . . We conclude that it does not. When the suspect later contacted police and arranged an interview, the suspect reinitiated the interrogation.") (internal citations omitted).

The defendant's wife called police and reported that the defendant sexually abused her daughter. An officer went to the defendant's home and read him his Miranda warnings, and the defendant requested counsel. The officer ceased questioning and departed. A few days later, the defendant's wife called the police to say that her daughter had recanted. The detective told the wife that the defendant could undergo a polygraph test "if he wanted to" so that the detective could close the case. The detective did not ask her to relay the message to the defendant, but a few hours later, the defendant called the detective and scheduled a meeting at the station (several days after he had been questioned earlier at his home). The detective told the defendant he could come to the station, that he would not be under arrest, that he could leave at any time, and his Miranda warnings would remain in effect. The defendant arrived at the station 40 minutes early. Although the door to the interview room locked automatically, the detective reminded the defendant that he was not under arrest and was free to leave. The defendant asked what would happen if he requested an attorney and the detective replied that they would wait to question him until he obtained one. The detective read the defendant his Miranda warnings, and the defendant waived his rights and confessed to sexually molesting his daughter. He was then arrested and convicted at trial of sexual abuse and sexual conduct with a minor.

The trial court rejected the motion to suppress, finding that the defendant voluntarily reinitiated questioning by calling the detective. The Court of Appeals reversed, concluding that the detective had reinitiated questioning by extending the invitation through the defendant's wife after the defendant invoked his right to counsel at his home less than 14 days earlier, citing Maryland v. Shatzer, 559 U.S. 98 (2010). [The Court of Appeals noted in a footnote that the State did not counter the defendant's Edwards claim

on the ground that he was not in custody during the second interview at the station. After receiving supplemental briefing, the court declined to address the issue.]

The Arizona Supreme Court granted the State's petition for review and reversed. It noted that "[o]nce a suspect invokes his Miranda right to counsel, police may not subject him to custodial interrogation without counsel for fourteen days following his release from custody 'unless the accused himself initiates further communication, exchanges, or conversations with the police.'" State v. Yonkman, 231 Ariz. 496, 297 P.3d 902 (April 4, 2013) at ¶ 8, quoting Shatzer and Edwards. The Court observed that the Edwards rule is designed to "prevent police from badgering a defendant into waiving his previously-asserted Miranda rights." Id. Thus, a presumption of involuntariness arises if a waiver occurs after "police-initiated custodial interrogation" following an Edwards invocation of the right to counsel. However, "'[w]hen a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.'" Id., quoting Shatzer.

In this case, the Arizona Supreme Court assumed, without deciding, that the defendant effectively invoked his right to counsel when questioned at home, and that he was in custody during the subsequent police interview at the station. Because that subsequent statement occurred within fourteen days of his initial invocation of the right to counsel, then its admissibility turned on whether the defendant or the police reinitiated the contact, whether the defendant knowingly and voluntarily waived his Miranda rights, and whether the confession was voluntarily given. The Court determined that "reopening a dialogue about the investigation" is sufficient to reinitiate questioning, and that a third party can reinitiate such questioning. Id. at ¶ 11. The Court agreed with other courts that the "Constitution provides no protection against friends or family members who convince [a suspect] to talk with police or against third-party cajoling, pleading, or threatening." Id. (internal quotations and citations omitted).

Here, the Court found that the detective did not reinitiate questioning with the defendant. It noted that the defendant's wife contacted the defendant and the detective returned the call, which he likely had a duty to do. This action is "far removed from the coercive conduct that Edwards seeks to prevent." Id. at ¶ 15, citing Colorado v. Connelly, 479 U.S. 157 (1986) ("The sole concern of the Fifth Amendment is government coercion."). The Court rejected the defendant's argument that the detective used the wife to deliver a message to the defendant, noting that the detective did not ask to speak to the defendant, nor did he ask the wife to relay what he had said. The defendant then initiated a call to the detective to set up an interview, which "reopened the dialogue between them," and the interview took place a day or two later, which gave the defendant time to consider whether to speak to the detective. Id. at ¶¶ 15 and 16. The Court vacated the opinion of the Court of Appeals and remanded the matter back to that court for it to determine the remaining issues raised by the defendant on appeal, including whether his Miranda waiver was

involuntary, whether the wife was acting as an agent of the State, and whether there were two evidentiary errors at trial.

B. When Is a Prisoner "In Custody" For *Miranda* Purposes?

See also Maryland v. Shatzer, *supra*. In Howes v. Fields, __ U.S. __, 132 S.Ct. 1181 (Feb. 21, 2012), the Supreme Court held that a prisoner is not necessarily "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), when the prisoner is isolated from the general prison population for questioning about conduct that occurred outside the prison. Justice Alito, joined in full by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan, held that the custody determination should focus on all the features of the interrogation. The respondent (Fields) was a Michigan prisoner and was escorted from his prison cell by a corrections officer to speak to two state deputies about criminal activity occurring prior to his incarceration. He was not given Miranda warnings. Several facts led the Court to conclude that he was not in custody for Miranda purposes, including that he was repeatedly told that he could terminate the interview and return to his cell; that he was not physically restrained or threatened; and that he was questioned in a well-lit conference room with an open door, and he was offered food and water. These facts were such that a reasonable person would have felt free to terminate the interview and leave, subject to the ordinary restraints of life behind bars. Justice Ginsburg, joined by Justices Breyer and Sotomayor, concurred in part and dissented in part. While Justice Ginsburg agreed that Fields was not entitled to habeas relief under 28 U.S.C. § 2254, she added that if the case had arisen on direct review, she would have held that Fields was "in custody" for purposes of Miranda and would have suppressed the confession that resulted from his interrogation.

C. Adequacy of *Miranda* Warnings

In Florida v. Powell, 130 S.Ct. 1195 (2010), the Supreme Court held that pre-interrogation warnings that advised the defendant that "[y] ou have the right to talk to a lawyer before answering any of our questions" and "[y]ou have the right to use any of these rights at any time you want during this interview" was sufficient to convey the right to counsel under Miranda. Rejecting the Florida Supreme Court's conclusion that the warnings were inadequate because they did not include explicit advice of the right to the presence of counsel during questioning, the Court concluded that "[i]n combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times."

Adequacy of Warnings & Overall Voluntariness – In Doody v. Schriro, 596 F.3d 620 (9th Cir. 2010) (en banc), the Ninth Circuit reversed the conviction in the "temple murders" case from Phoenix, finding that the Miranda warnings were inadequate and the confession was involuntary under due process. The defendant was a 17-year-old who confessed to a murder of nine individuals inside a Buddhist temple, after 13 hours of overnight

interrogation. The Court held that the Miranda warnings he was given were deficient in a number of respects, but most strikingly because they suggested that he was only entitled to an attorney "if he was guilty." The giving of the warnings encompassed twelve pages of transcript, much of which involved an effort to make them more understandable, but which ended in confusion. In addition to the problem with the attorney advisement, the oral warnings also suggested that the warnings were "merely a formality," and that they were for the officers' benefit as well as Doody's. The court also found the confession involuntary under due process. "Specifically, we conclude that the advisement provided to Doody, which consumed twelve pages of transcript and completely obfuscated the core precepts of Miranda, was inadequate. We also hold that nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary." The error was not harmless, so the convictions were reversed.

D. Commenting on Defendant's Silence or Invocation

In State v. Van Winkle, 229 Ariz. 233, 273 P.3d 1148 (2012), the Arizona Supreme Court held, as a matter of first impression, that an officer's testimony and prosecutor's comment on a defendant's post-custody, pre-Miranda silence violated the defendant's Fifth Amendment right to remain silent. However, the error was harmless. The defendant shot the victim in the head when he and others were in an apartment. One of the men grabbed the defendant and disarmed him. When police arrived, another man (Cory) was restraining the defendant at the top of the stairs. The police ordered Cory to descend the stairs, and he exclaimed that the defendant was the shooter. The defendant said nothing in response. The officers ordered the defendant to descend the stairs, where he was handcuffed and arrested. At the defendant's trial for attempted murder and other offenses, the State introduced evidence of his silence in the face of Cory's allegation and argued that this was a tacit admission of guilt. The Court of Appeals affirmed, finding that the defendant was in custody when Cory made his allegation, but that Miranda did not apply because there was no police interrogation.

The Arizona Supreme Court disagreed. It first noted that the defendant did not contend that his silence was improperly admitted under the rules of evidence as a "tacit admission of the facts stated," which would have required the defendant to "have been able to clearly hear the statement and the circumstances must have been such as naturally call for a reply if [the defendant] did not intend to admit such facts." The defendant appealed only the issue of whether it should be excluded under the Fifth Amendment. The State relied on State v. Ramirez, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994), in which the Arizona Supreme Court had stated that "a prosecutor may comment on a defendant's pre-Miranda warning's silence, either before or after arrest." However, the court stated its language in Ramirez was dictum. Although it agreed with the Court of Appeals that admission of the defendant's silence did not violate Miranda because it was not in response

to police interrogation, it did violate the Fifth Amendment right against self-incrimination, incorporated into the Fourteenth Amendment's due process clause. (Like the Court of Appeals, the court assumed, arguendo, that the defendant was in custody when Cory made his statement.) The court noted that the United States Supreme Court has not resolved whether post-arrest, pre-Miranda silence was admissible, and that the federal circuits were split. The court adopted the rule of the Ninth and D.C. Circuits and held that "the admission of post-custody, pre-Miranda silence and prosecutorial comment on such silence" violate a defendant's constitutional right to remain silent. However, it found the error harmless because of the other testimony showing the defendant was the shooter.

In Salinas v. Texas, __ U.S. __, 133 S.Ct. 2174 (June 17, 2013), the defendant, who at that time had not been placed in custody or received Miranda warnings, voluntarily answered questions at the station during a murder investigation. However, the defendant balked when he was asked whether a ballistics test would show that the shell casings found at the crime scene would match his shotgun. The defendant was subsequently charged with murder, and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. The defendant claimed that the prosecutors violated the Fifth Amendment, which guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court (Justices Alito, Kennedy, and Roberts, with Scalia and Thomas concurring in the judgment) ruled that the defendant's Fifth Amendment claim failed because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It noted that such silence is "insolubly ambiguous." It stated that it has long been settled that the privilege "generally is not self-executing" and that a witness who desires its protection "must claim it." Although "no ritualistic formula is necessary in order to invoke the privilege," a witness does not do so by simply standing mute. Because the defendant was required to assert the privilege in order to benefit from it, the Fifth Amendment was not violated. The Court noted that its ruling was consistent with Berghuis v. Thompkins, 130 S.Ct. 2250 (2010).

In State v. Lopez, 230 Ariz. 15, 279 P.3d 640 (App. 2012) (Div. 2), the Court of Appeals held that when a defendant's silence is not the result of state action, the Fifth Amendment does not preclude the State from commenting on that pre-arrest, pre-Miranda silence. The defendant and his girlfriend drove to her brother's house to get her children. When they got there, the girlfriend went inside to warn everyone that the defendant was on his way to kill her brother. The defendant went inside and fired a shot at the brother's girlfriend. He then left with his girlfriend and her children. Her brother followed them and cut them off at a stop sign, where the defendant fired several shots at the brother before driving away. The defendant evaded the police for three weeks before he was arrested, and he was convicted of attempted first-degree murder, five counts of aggravated assault, two counts of disorderly conduct, misconduct involving weapons, and attempting to influence a witness. He argued on appeal, among other things, that the prosecutor committed misconduct by commenting on his right to remain silent. At trial, the

prosecutor asked an officer whether the defendant ever turned himself in to give his side of the story. Following the reasoning of the Fifth, Ninth and Eleventh Circuits, the Court of Appeals held that "when a defendant's silence is not the result of state action, the protections of the Fifth Amendment do not prohibit the state's comment on that defendant's pre-arrest, pre-Miranda silence." Because the prosecutor's question inquired about the defendant's pre-arrest, pre-Miranda silence, it was not improper.

In State v. Parker, __ P.3d __, 2013 WL 950032 (Ariz. March 13, 2013), the Arizona Supreme Court reviewed the defendant's first-degree murder and other convictions and death penalty sentence. The defendant argued that his Fifth Amendment rights were violated by the admission of his videotaped interviews with police and the prosecutor's comment in closing. In response to the defendant's suggestion in closing that the interviews were inadequate, the prosecutor responded by asking the jury who terminated the interview. Because that comment could be interpreted as asking the jury to draw a negative inference from the defendant's invocation of his right to remain silent, the statement was improper. However, the Court found that the statement was harmless because the defendant stipulated to the admission of the videotaped interviews, so the jury was aware he invoked his right to counsel, and the judge sustained the defense objection and struck the comment.

In State v. Hernandez, 295 P.3d 451, 2013 WL 646318 (Ariz. App. Feb. 21, 2013) (Div. 1), the Court of Appeals, Division One, ruled that the Fifth Amendment does not preclude a sentencing court from considering a defendant's refusal to answer questions about the offense when determining whether or not to place that person on probation.

E. "Anticipatory Invocation" of *Miranda* Rights by Non-Custodial Suspect

In Bobby v. Dixon, No. 10-1540 (Nov. 7, 2011) (per curiam), the Court summarily reversed the Sixth Circuit's decision granting a state prisoner's petition for a writ of habeas corpus under 28 U.S.C. 2254. *See* 28 U.S.C. 2254(d) (authorizing federal court to grant habeas petition only where state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law" or was "based on an unreasonable determination of the facts"). Dixon confessed to murder and was convicted and sentenced to death. The Ohio Supreme Court denied his habeas petition, but the Sixth Circuit reversed based on several perceived errors in the state court's decision. The Supreme Court held that the Sixth Circuit was "plainly wrong" in concluding that the police could not question Dixon because in an earlier non-custodial encounter with police, he had refused to speak to them without his lawyer. (Court has "'never held that a person can invoke his Miranda rights anticipatorily, in a context other than custodial interrogation'") (quoting McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991)). The Supreme Court also disagreed with the Sixth Circuit's conclusion that police had violated the Fifth Amendment by urging Dixon to "cut a deal" before his accomplice did so. (Court has

never suggested that this "common police tactic" is unconstitutional). Finally, the Court rejected the Sixth Circuit's conclusion that the state court's decision was contrary to Missouri v. Seibert, 542 U.S. 600 (2004). In Seibert, the Court held that where a police officer intentionally withheld Miranda warnings until an interrogation had produced a confession and then gave the defendant Miranda warnings and led her to repeat her confession, the second confession was inadmissible. 542 U.S. at 604-606, 615-617 (plurality opinion). Seibert's holding was inapplicable here, the Court held, because Dixon did not confess to the murder during the first, unwarned interrogation, and there was a "significant break in time and dramatic change in circumstances" between the first and second interrogations.

F. Questioning of Juveniles

1. Interviews of Children at School

In Camreta v. Greene, No. 09-1454, and Alford v. Greene, No. 09-1478, opinion below, 588 F.3d 1011 (9th Cir. 2009), the Supreme Court considered whether the Fourth Amendment requires police officers and social workers to obtain a warrant before they interview a suspected child abuse victim at school without the consent of the child's parents. An Oregon child protective services worker and a police officer sought review of the Ninth Circuit's ruling that their in-school interview of a 9-year-old girl to investigate possible sexual abuse by her father violated the Fourth Amendment in the absence of a warrant, court order, exigent circumstances, or parental consent. The Court held that it had jurisdiction to consider the merits of the constitutional ruling even though petitioners had prevailed below on qualified immunity grounds. The Court did not reach the merits, however, concluding that the case was moot because the plaintiff could no longer be subject to the challenged conduct: she now lives in Florida, is months away from her 18th birthday, and has no plans to move back to Oregon. Because mootness frustrated the petitioners' right to appeal, the Court vacated the part of the Ninth Circuit's opinion that decided the Fourth Amendment issue.

2. Custody Analysis for Juveniles

In J.D.B. v. North Carolina, No. 09-11121, 131 S.Ct. 2394 (June 16, 2011), the Court ruled (5-4) that a child's age is a factor that "properly informs" the analysis whether a juvenile is in custody for purposes of determining whether Miranda warnings are required prior to interrogation. After seeing J.D.B., a 13-year-old, seventh-grade student, at the site of two home break-ins and finding a stolen digital camera in his possession, a uniformed police officer took J.D.B. from his classroom to a closed-door conference room. Before questioning, J.D.B. was not given Miranda warnings or an opportunity to leave the room, nor was he afforded an opportunity to notify his legal guardian, his grandmother. Police and school administrators questioned him for at least 30 minutes. J.D.B. first denied his

involvement, but later confessed after officials urged him to tell the truth and told him about the prospect of juvenile detention. The police only then told him that he could refuse to answer questions and was free to leave. After asking whether he understood, J.D.B. nodded and provided further detail, including the location of the stolen items. He also wrote a statement at police request. When the school day ended, he was permitted to leave to catch the bus home. Two juvenile petitions were filed against J.D.B., charging him with breaking and entering and with larceny. His attorney moved to suppress his statements and the evidence derived therefrom, arguing that J.D.B. had been interrogated in a custodial setting without being afforded Miranda warnings and that his statements were involuntary. The trial court denied the motion and J.D.B. was adjudged delinquent.

The Supreme Court concluded that "a reasonable child subject to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go," and that "courts can account for that reality without doing any damage to the objective nature of the custody analysis." The Court stated that its holding that the age of a child is relevant to the custody determination applied only when "the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer." Justice Sotomayor wrote the majority opinion; Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented.

See also State v. Butler (Tyler B.), 232 Ariz. 84, 302 P.3d 609 (May 30, 2013) (Arizona Supreme Court noted that if an arrestee is a juvenile, the juvenile's age and a parent's presence are relevant, although not necessarily determinative, factors that courts should consider in assessing whether consent to search was voluntary under the totality of the circumstances, also citing J.D.B.).

G. Adequacy of *Miranda* Warnings & Waiver (Suspect's Recitation)

In State v. Carlson, 266 P.3d 369 (Ariz. App. 2011), the Court of Appeals affirmed a trial court's suppression of incriminating statements taken in violation of Miranda. In Carlson, the defendant was arrested and taken into custody. Before questioning began, the detective attempted to recite the Miranda rights, and the following exchange occurred:

> [Detective]: . . . I wanna talk to you about this, um, case. . . . And because of the conditions that we're under here I'm gonna read you your rights.
>
> [Carlson]: I waive my rights. I know my rights. I have the right to remain silent. Anything that I say can and will be used. And I do have the right to remain silent. Anything that I say can and will be used against me in a court of law. An attorney will be appointed to represent me if I cannot afford one. I waive my rights.

[Detective]: All right, sir. I think you understand.

A lengthy interrogation followed in which Carlson was never given his Miranda rights. Carlson made numerous incriminating statements. The court addressed whether the suspect's own recitation demonstrated he knew the rights protected by Miranda such that he voluntarily and intelligently could waive those rights even without an advisory having been given by law enforcement officials.

Citing Maryland v. Shatzer, 130 S.Ct. 1213 (2010), the court determined that "there should be little question but that law enforcement officers must affirmatively discharge their duties under Miranda whenever conducting a custodial interrogation." There can be, however, instances where Miranda warnings are not given and the suspect still constitutionally waives his rights. Here, that was not the case because Carlson did not display recognition of the critical third element of Miranda—the right to have counsel present during interrogation, not just appointment of an attorney. Although the court agreed that Miranda warnings do not need to be read as an incantation, the absence of the third Miranda element was dispositive. Thus, the court affirmed the trial court's determination that "the same recitation did not demonstrate Carlson's knowledge of the rights protected by Miranda so as to effectuate a valid waiver."

H. Invocation of Right to Silence or Counsel (and Ambiguous Invocations)

In State v. Petersen, 2011 Ariz. App. 217 (Ariz. App. 2011), Division Two found that the defendant had sufficiently alleged a Miranda violation to constitute a prima facie case to merit a suppression hearing. The court held that it was immaterial whether she claimed to have invoked the right to silence at the outset of questioning or at some point in the middle of it; the right to silence could be invoked at any time. Peterson had stated during questioning that she did "not have anything else to say about how it all happened," and that the officer nonetheless continued questioning. The court noted that statements similar to the defendant's were found to have constituted an invocation of the right to silence. (Citing Castaneda, Szpyrka, Strayhand, and Finehout). The court found that the state's argument that the invocation was ambiguous was something to be addressed at a hearing. The court also noted that a defendant need not make a prima facie case to demonstrate overall involuntariness, but merely object. The defendant was also entitled to a hearing on this ground. The case was remanded to the trial court to determine whether there was a Miranda violation or if the statement was involuntary, and remanded for this limited purpose, declining to overturn the conviction, and staying the rest of the appeal pending that hearing on remand. (The court discussed this remedy and the reasons for it.)

During the interrogation, the defendant stated "I think I need a lawyer" and when the officers did not respond, he asked them "Do you think I need a lawyer?" This was

considered an ambiguous request for counsel, so the officers were not required to stop questioning. State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069 (App. 2009) (Div. 2).

In Berghuis v. Thompkins, 130 S.Ct. 2250 (2010), the Supreme Court found that the defendant, who refused to sign a waiver form after being advised of his Miranda rights and was silent for two hours and 45 minutes of three hour interrogation before giving incriminating answer, did not invoke his right to remain silent; he implicitly waived his right to remain silent by responding to questions; Court reiterated rule of Davis. *See also* Salinas v. Texas, __ U.S. __, 133 S.Ct. 2174 (June 17, 2013) (defendant's actions of standing mute during interrogation did not constitute invocation of right to remain silent).

I. Polygraph Examinations

The trial court ordered the defendant (sex offender) to undergo periodic polygraph testing as a condition of probation, asking him his behavior. The Court of Appeals reversed, finding that the limited immunity granted from prosecution granted under A.R.S. § 13-4066 was not sufficient to protect the defendant's right against self-incrimination. Jacobsen v. Lindberg, 225 Ariz. 318, 238 P.3d 129 (App. 2010) (Div. 1).

J. Due Process – Suggestive Identifications

In Perry v. New Hampshire, , __ U.S. __, 132 S.Ct. 716 (Jan. 11, 2012), the Supreme Court held, in an 8-1 vote (with Justice Ginsburg authoring the opinion), that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification obtained under suggestive circumstances unless the suggestive circumstances were arranged by law enforcement. The police received a call that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked an eyewitness to describe the man, the witness pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to an officer. The Court found that, under its two-step inquiry to determine whether due process prohibits an out-of-court identification at trial, the trial court must first decide whether the police used an unnecessarily suggestive identification procedure, and if so, whether the procedure so tainted the identification to make it unreliable. Perry's argument stumbled on the first factor because the witness's identification did not result from an unnecessarily suggestive procedure employed by the police. The Court rejected Perry's argument that a preliminary judicial inquiry is necessary because eyewitness identifications are uniquely unreliable. The Court explained that the jury, not the judge, traditionally determines the reliability of evidence. The Court added that certain trial safeguards – including the right to confront and cross-examine the eyewitness; eyewitness-specific instructions warning juries to consider such evidence with care; and rules of evidence permitting judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial

impact – protect defendants from unduly unreliable identifications. The Court noted that the defendant's view would open the door to judicial review of most, if not all, witness identifications. In a concurring opinion, Justice Thomas took the view that the Court's cases holding that police officers violate due process when they obtain an unreliable eyewitness identification using an unnecessarily suggestive identification procedure are wrongly decided because the Due Process Clause guarantees only "process" and is not a "secret repository of substantive guarantees against 'unfairness.'" Justice Sotomayor dissented.

In State v. Nottingham, 231 Ariz. 21, 289 P.3d 949 (App. 2012) (Div. 2), abrogating State v. Strickland, 113 Ariz. 445, 556 P.2d 320 (1976), the Court of Appeals, Division Two analyzed pre-trial identification in the wake of Perry and determined that: 1) a Dessureault hearing is not required when the pretrial eyewitness identification occurred at a prior trial or hearing; and 2) the trial court must give a cautionary jury instruction when a defendant presents evidence that a pretrial identification was made under suggestive circumstances that might bring the reliability of the eyewitness testimony into question, even if a pretrial Dessureault hearing is not required.

Three Tucson convenience stores were robbed in 2010 and none of the store clerks was able to identify the defendant from a photographic lineup within weeks after the robberies. After he was charged based on other evidence, the court allowed the clerks to identify the defendant at trial over his objection. The jury was unable to reach a verdict. Before the second trial, the defendant filed a motion to suppress any pretrial and in-court identifications based on the clerks' identification of him at the first trial. The trial court denied the motion, finding that Dessureault did not apply to identifications that occur at trial. At the retrial, the clerks identified the defendant as the robber and the jury convicted him on all counts.

On appeal, the defendant argued that the in-court identifications at the first trial were unduly suggestive because the clerks had previously been unable to pick him out of a lineup and his presence as the only non-attorney at the defense table made it clear he was the suspect. The Court of Appeals noted that in State v. Strickland, 113 Ariz. 445, 556 P.2d 320 (1976), the Arizona Supreme Court applied Dessureault and found a witness's identification at the preliminary hearing was unduly suggestive. However, the Court of Appeals held that the United States Supreme Court's ruling in Perry essentially abrogated Strickland. As noted earlier, Perry held that a trial judge does not need to conduct a pretrial hearing on the reliability of eyewitness identification that was not arranged by the police. Based on this ruling, the Court of Appeals found that Strickland has been "overtaken by Perry to the extent the former case found that subsequent in-court identifications could be precluded based on suggestive in-court identification procedures that did not involve 'improper state conduct.'" Thus, the Court affirmed the denial of a pretrial Dessureault hearing. However, the Court found that Perry supported that the trial

court should have granted the defendant's request for a jury instruction on identification evidence. Perry's holding was based in part on the fact that the adversary system provides several protections for identifications made during criminal trial proceedings, including the right to cross-examination of the eyewitness and the use of a specific jury instruction. Because the defendant was denied one of these protections, the instruction, remand was appropriate. The Court of Appeals held that a cautionary jury instruction is required when a defendant presents evidence that a pretrial identification was made under suggestive circumstances that might bring the reliability of the eyewitness testimony into question, circumstances that existed in this case. Thus, the matter was remanded for a new trial.

III. SIXTH AMENDMENT RIGHT TO COUNSEL

1. Interrogations

In Montejo v. Louisiana, 129 S.Ct. 2079 (2009), the defendant was arrested for robbery and murder. After his Sixth Amendment right to counsel had attached at a subsequent preliminary hearing and before he met with his attorney, officers asked the defendant whether he would accompany them to locate the murder weapon. During the excursion, the defendant wrote an inculpatory apology letter to victim, which was introduced at trial. The Supreme Court ruled that asking for counsel at arraignment or similar proceeding or having counsel appointed does not constitute a presumption that any subsequent waiver by defendant to police-initiated interrogation is invalid, overruling Michigan v. Jackson, 475 U.S. 625 (1986). It noted that a defendant may be approached by police after counsel is appointed and that a valid Miranda waiver also waives the Sixth Amendment right to counsel. "Our precedents place beyond doubt that the Sixth Amendment right to counsel can be waived by a defendant, so long as the relinquishment of that right is voluntary, knowing and intelligent. . . The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. . ." Montejo, 129 S.Ct. at 2085. "[I]t would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary and coerced simply because he had previously been appointed a lawyer." Id. at 2088 (defendant can be approached and interrogated on related offense after Sixth Amendment right to counsel has attached, if he waives his Miranda rights). A waiver of Miranda rights is sufficient to waive the Sixth Amendment right to counsel. Id. at 2085. The Court remanded for a determination of whether the defendant had invoked his Miranda right to counsel.

2. Interference with Right to Counsel - DUI

In State v. Penney, 229 Ariz. 32, 270 P.3d 859 (App. 2012) (Div. 1), the Arizona Court of Appeals found that the defendant was denied his Sixth Amendment right to counsel. The defendant was stopped on suspicion of DUI and asked to voluntarily submit to alcohol

testing under the implied consent law. Penney refused and asked to speak with a lawyer. The investigating officer took Penney to the police station and gave him a phone book and telephone to call a lawyer. In the meantime, the officer went to secure a telephonic search warrant. Penney claimed that the attorney portions of the phone book had been torn out, but the officer did not assist Penney. ("The officer replied: "That is not my F-in problem.") After the officer secured the search warrant, Penney's blood was drawn. He later moved to suppress the alcohol evidence pursuant to his Sixth Amendment argument.

Arizona Rule of Criminal Procedure 6.1(a) provides that the right to be represented by an attorney includes the right to consult with an attorney, in private, "as soon as feasible after a defendant is taken into custody." Police may not prevent a suspect's access to an attorney unless allowing access would unduly delay the DUI investigation. When police refuse a DUI suspect's right to counsel, the State has the burden of proving that allowing the suspect to confer with counsel when requested would have impeded the investigation. State v. Rumsey, 225 Ariz. 374, 377, 238 P.3d 642, 645 (App. 2010). Here, there was no indication that the DUI investigation would have been unduly delayed. The search warrant was returned at 4:25am and the blood draw occurred at 5:09a.m. The trial court concluded that Officer Thomas could have "taken a minute or two" to at least verify whether the attorney pages had been removed or given Penney another telephone book. Because he did neither, the appellate court sustained the trial court's ruling that Penney's right to counsel had been denied. The court consistently reiterated that when a DUI suspect invokes his right to counsel, police must provide the suspect with reasonable means of contacting a lawyer. Where, such as in this case, a suspect informs police that he requires assistance in contacting a lawyer, "the police must take reasonable steps to provide that assistance." However, the court reversed the trial court's dismissal order, noting that, although dismissal with prejudice is the appropriate remedy when police conduct interferes with the right to counsel and the ability to obtain exculpatory evidence, "no evidence was presented pertaining to the prejudice or threat of prejudice." Thus, the matter was remanded for the trial court to address this issue.

TIPS FOR RESPONDING TO MOTIONS TO SUPPRESS EVIDENCE

Warrantless Situations

1) Always consider what evidence you intend to use at trial. Sometimes a motion seeks to suppress evidence you have no intention of using at trial.

2) When responding to a motion to suppress, do not rush to justify the officer's actions and do not let the other side frame the issues.

3) First , step back consider whether the Fourth Amendment applies at all. Are there expectation of privacy issues? For example, is the driver of one car trying to suppress the evidence found in another car? Is a visitor trying to suppress evidence seized in a home? Is a co-conspirator trying to suppress evidence found in a place over which he has no privacy interest? Similarly, consider whether there was a search or seizure at all, and whether the disputed action was conducted by a non-state actor. If you have a procedural argument to make (lack of standing, etc.), make that argument first.

4) Second, if the Fourth Amendment does apply, properly characterize the intrusion. Look at the reports and determine when a "stop" occurred and, if applicable, when any "arrest" occurred. This will help clarify the level of justification needed (reasonable suspicion or probable cause). Identify the evidence you wish to use and when and how it was seized. You'll be able to assess whether there was any illegal action before the evidence was discovered.

5) Third, review the motion to suppress generally to see the essence of his complaint, but then ignore the organization of that pleading and organize your response for maximum effect. When writing the facts, relate facts that tell the story needed for purposes of the motion. Deal with the facts chronologically for the most part. Include what happened and, as needed, what did not happen. In the argument section, argue from the step-by step perspective of "why is everything the officer did lawful?" If you show why each step was lawful, the other side's arguments become less impressive. Make your arguments first, and then address the other side's points/cases, as needed. (Avoid "ping-pong" argument.) Use argument headings.

6) Fourth, consider whether to organize your arguments based on the actions (stop, search), or the pieces of evidence you want to use (drugs in car, guns at home). Consider reminding court about who does or does not have standing to challenge a specific piece of evidence.

7) Fifth, argue in the alternative and set forth *all* the exceptions that apply to show why the evidence was lawfully obtained. It is best tactically and vital to preserve arguments for appeal if you lose below.

8) Sixth, if the evidence was unlawfully seized, consider whether the exclusionary rule applies, whether there was inevitable discovery, etc.

9) Finally, always read the request for relief in the motion to suppress. Sometimes the other side will argue that "all evidence" should be suppressed as a result of an illegality. As needed, clarify what evidence is or is not subject to suppression, depending on the arguments raised. This point also dovetails with the point about whether the exclusionary rule applies.

Challenges to Warrants

1) Begin with the law stating that: 1) deference is given to a magistrate's determination; 2) by obtaining a warrant, the officers did everything they could to comply with the Fourth Amendment; and 3) the defendant has the burden to invalidate this search conducted pursuant to a warrant. This should help focus the court on the fact that the defendant has a high mountain to climb.

2) Remember good faith. It may not apply all the time (i.e. if officer intentionally misleads under Franks), but it ordinarily should save most searches where the warrant is later determined to be invalid. Courts may also choose to address this issue first, thereby obviating the need to analyze the warrant's probable cause.

3) If one piece of evidence in the warrant is excised as unlawfully seized (perhaps seen during unlawful entry), and the court determines there is still probable cause for the warrant, then that piece of evidence is still admissible (inevitable discovery).

4) Don't forget expectation of privacy issues (i.e. standing) with houses. Defendants have the burden of proving "overnight guest" standing and other expectations of privacy. Moreover, a "guest" may not have an expectation of privacy in certain areas (i.e. the host's bedroom, the attic, the basement, the garage, etc.). If a defendant lacks standing, make this argument first.

5) Points # 8 and # 9 above apply here as well.

Use good judgment. Make logical arguments. Do not be too single-minded. Look at both sides. If your case is weak, you could make bad law on appeal even if you prevail in the trial court, so evaluate suppression issues early and use good judgment about what issues to litigate and what arguments to advance.

HYPOTHETICAL – SEARCH & SEIZURE

Officer Hutch was patrolling on a road near Arivaca, Arizona, at 10:00 a.m., in an area notorious for alien and drug smuggling. An informant, Huggy, had told him that a vehicle might be coming north with drugs that morning on that road or another one nearby, but Huggy did not know what kind of car and who would be driving. Hutch saw a Ford LTD drive up onto the paved road. A Chevy car was parked by the side of the road near where the Ford appeared. The Chevy drove off and the Ford drove off soon afterwards. Hutch followed the Ford and saw it travel with the Chevy for about 1 mile. Hutch thought they were driving in tandem, which he knew was a technique used by drug and alien smugglers. Hutch thought he saw someone raise his head and then lower it quickly in one of the passenger seats of the Ford. The Ford's windows were tinted so it was difficult to see inside. Suspecting smuggling, Hutch activated his overhead lights and the Ford kept going for about ½ mile, slightly increasing speed but not exceeding the limit, before stopping. It then stopped. Hutch radioed for another officer to stop the Chevy.

Hutch walked up to speak to the occupants of the Ford. The driver was Jack and the passenger was Jill. Agent Hutch asked Jack if they were traveling with the Chevy, and Jack said they were. (Jack also stated that he and Jill were on their way to climb a hill near Arivaca.) Hutch asked for consent to search, and Jack said "sure," but Jill said "no." Hutch opened the door and saw a marijuana roach in the open ashtray. The report is not clear when Hutch saw this roach in relation to when he opened the door. In the trunk, Hutch found marijuana in a backpack with a tag saying "Jill."

When Hutch radioed, Officer Starsky responded. Starsky saw the Chevy and activated his emergency lights. The driver, later identified as Ralph, tossed a small plastic-wrapped package from the window. [Around this time, Hutch had found the marijuana in the backpack in the Ford]. Ralph stopped the Chevy and ran from it, but was caught by Starsky, who leapt over the front of his car's hood to tackle Ralph. Starsky searched the vehicle moments later, and found 40 pounds of marijuana in the trunk, with a piece of a bill from Jill's house. Starsky then went and retrieved the item that Ralph had thrown from the window. It was a cellophane-wrapped bundle of cocaine with a note from Jill.

Officer Starsky went to obtain a search warrant for Jill's house based on the above information. Officer Hutch went to the house and eagerly entered before the warrant was obtained. He found a guitar and played his favorite song for a bit. Then he opened a kitchen drawer and found a white powdery substance with a note from Jack (Jack and Jill are a very verbose duo) that said: "Enjoy the coke, sis. It's the real thing . . . I can get some more from the Ralphster later." Officer Hutch immediately called Officer Starsky and told him to include this information in the warrant, which Starsky did. Hutch also mistakenly told the judge that Jill's driver's license had been found with the marijuana in Ralph's car,

rather than just a piece of a bill from her house. The judge issued the search warrant. Officers found 50 pounds of marijuana and other drug paraphernalia in a bedroom.

Ralph, Jack and Jill are charged with conspiracy related to all the drugs discovered above. Assume each of the defendants is challenging the seizure of all drugs listed above. What are the legal issues and how do you organize your pleadings and argument?

TIPS FOR RESPONDING TO MOTIONS TO SUPPRESS STATEMENTS

1) Consider the practicalities. Which statements are really necessary for trial? If you will not be using a statement at trial that the defendant contends is unlawfully obtained, that should end any debate.

2) Along those same lines, if you believe (or the court finds) that a statement has been obtained in violation of Miranda, you may wish to advise the court that you do not plan to introduce the statement in your case in chief, but you are reserving the right to use it to impeach the defendant if he takes the stand and testifies inconsistently.

3) When arguing that a statement is admissible, address Miranda and voluntariness (due process) separately under separate headings. Address Miranda admissibility first.

4) If there is more than one statement, consider addressing the admissibility of each statement under a separate argument heading.

5) Use facts to paint a picture. Discuss not only what happened, but what did not happen. For example, when determining whether someone was in custody or whether the confession was voluntary under due process, it can be helpful to note that: the defendant was not handcuffed or restrained; the officer did not draw a weapon or point it; the officer did not tell the defendant he was under arrest (and rather, advised him he was not under arrest and was free to leave); the interrogation room door was not locked; the officers did not withhold food or water, etc.

6) Be vigilant and ensure that a defendant's request to suppress "all evidence" does not go unaddressed if this remedy is inaccurate. For example, physical evidence should not be suppressed after a Miranda violation. Remember "dissipation of taint" arguments, etc.

7) In the request for relief, ask the court to deny the motion to suppress because the statement is both voluntary under Miranda *and* voluntary under due process. This emphasizes that these are two separate determinations for the court to make. If the court finds the statement "involuntary," but it is unclear whether the court found the statement involuntary under Miranda or due process, seek clarification. As noted above, you may use a defendant's statement obtained in violation of Miranda to impeach, but you may not use a statement that is involuntary under due process.

Use good judgment. Make logical arguments. Do not be too single-minded. Look at both sides. If your case is weak, you could make bad law on appeal even if you prevail in the trial court, so evaluate suppression issues early and use good judgment about what issues to litigate and what arguments to advance.

HYPOTHETICAL – STATEMENTS

On March 20, 2009, DPS Officer Callahan was parked on the median of I-10 near Casa Grande. At approximately 1:30 p.m., he saw a Dodge minivan pass his location heading south towards Tucson, with a driver and a passenger. The minivan was traveling at 85 m.p.h. in the posted 75 m.p.h. speed zone, so Officer Callahan activated his emergency lights and siren to conduct a traffic stop. The minivan pulled over and stopped on the shoulder. As Callahan stopped his vehicle behind the minivan, the driver of the minivan jumped out and ran into the desert.

Officer Callahan approached the passenger side of the vehicle and immediately recognized the passenger as Mr. Jackson, a man that Callahan had arrested for smuggling marijuana two weeks earlier. Jackson apparently recognized Callahan and said, "You got me again." Callahan ordered Jackson out of the Impala stating, "You know the drill." As Jackson exited the vehicle, he stated "yes," and turned and put his hands on top of the minivan. Callahan asked, "So, what do you have this time, punk?" Jackson replied, "Pot again."

A back up patrol unit arrived a few minutes later. After Jackson was secured in a patrol car, officers searched the Impala and found 30 kilograms of marijuana in the trunk. He took Jackson to jail at approximately 3:00 p.m.

After finding out that Jackson had one prior arrest for smuggling marijuana on March 8, 2009, Detectives Riggs and Murtaugh began to speak with him in an interview room. Riggs read Jackson his Miranda warnings. The interview began at approximately 3:25 p.m. Murtaugh asked Jackson if he had just recently been arrested for the same thing. Jackson responded, "Ya know, I don't know whether I should talk to you without my attorney. Do you think I need my attorney?" Riggs responded, "Look Jackson, did you know about the pot today or not?" Riggs' hand was resting on his holstered Beretta. Jackson stated, "Maybe." After a pause, Jackson added, "I don't know what you're talking about." Murtaugh continued asking Jackson questions and Jackson continued to deny he knew marijuana had been in the Impala. At one point, Jackson claimed he was hitchhiking and had been picked up only a short distance from where he was arrested. Murtaugh said "Look, you told the cop about the dope. Why deny it now?" Jackson then said, "I'm done. I don't want to talk to you anymore." Murtaugh said he was tired of talking with Jackson as well, and Jackson was placed in a holding cell at 3:55 p.m.

Later, because of overcrowding, Jackson was transported to another jail facility at 7:45 p.m. While Officer MacLane was driving Jackson to the jail, he said to Jackson: "Look, I know you got Miranda and all that. Do you want to talk or not?" Jackson replied, "Man, you guys never give up. And I can't believe you didn't give me any food or nothing in that *&*^% cell." MacLane was not aware that Jackson was also a diabetic who needed regular insulin shots. MacLane asked Jackson if he was "going to give it up or not?" Jackson

started to feel lightheaded and sighed and stated, "Yeah, I'll give you what I've got." Jackson then gave a full confession to MacLane when they arrived at the jail, regarding his smuggling of marijuana on March 8 and 20.

On March 21, 2009, Jackson had his Initial Appearance before the same judge who had released Jackson two weeks earlier. Jackson's previously appointed defense attorney was present and made an eloquent appeal for Jackson's release. The judge was so impressed that he decided to give Jackson another chance and released him again pending trial, noting that Jackson had not been indicted yet on either crime.

Two days later, Officer Callahan went into the Dairy Queen at Picacho Peak and recognized Jackson standing in line, waiting to pay for a Peanut Buster Parfait. Jackson also recognized Callahan and said, "Hey." Surprised to see Jackson out and about, Callahan asked Jackson, "What's going on?" Jackson replied, "Just having bad luck I guess. Can't believe you caught me twice this month." Callahan gave a supplemental report to the prosecutor with this information.

Jackson has filed a motion to suppress all evidence (statements and physical evidence), arguing that: 1) his admission to Callahan at the scene was made in violation of Miranda and the physical evidence was discovered as a result of that statement; 2) his statements to Riggs and Murtaugh, as well as MacLane, were involuntary under Miranda and due process; and 3) his statement to Callahan after his release was obtained in violation of Miranda and the Sixth Amendment.