

SECTION ONE

TERRY STOPS

SUMMARY:

A. DEFINITION

A police officer can stop, detain, for a reasonable period of time, and question a person even though the officer lacks probable cause to arrest, if the officer has a reasonable suspicion that the person is either engaged in or is about to engage in criminal behavior. Terry v. Ohio, 392 U.S. 1 (1968); State v. Lamme, 216 Conn. 172 (1990).

1. SEIZURE OF A WEAPON

During a *Terry* Stop, the officer can also pat-down or frisk the exterior of the detainee's clothing if the officer reasonably suspects the detainee is in possession of a weapon. Terry v. Ohio, 392 U.S. 1 (1968); State v. Groomes, 232 Conn. 455 (1995).

2. SEIZURE OF CONTRABAND: THE "PLAIN FEEL" DOCTRINE

If during the pat-down or frisk, the officer feels an object which is not a weapon but it is "immediately apparent" to the officer that the object is contraband, he can lawfully seize it. Minnesota v. Dickerson, 508 U.S. 366 (1993); State v. Trine, 236 Conn. 216 (1996).

B. THE CONCEPT OF A SEIZURE

A *Terry* Stop results in the seizure of a person, i.e., a police officer restrains a person's freedom of movement. The person seized is detained rather than in custody. A *Terry* Stop seizure occurs when, "...in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." State v. Oquendo, 223 Conn. 635, 647 (1992).

A police officer can seize a person in either of the following ways:

1. "By means of physical force" (close encounter);

OR

2. "By a show of authority" (long distance).

State v Hill, 237 Conn. 81 (1996); State v. Oquendo, 223 Conn. 635 (1992).

C. REFUSAL TO PROVIDE IDENTIFICATION

Refusal to provide identification to a police officer during a lawful Terry Stop is a violation of Connecticut General Statute 53a-167a, Interfering with a Police Officer, where the refusal delays or hinders the police investigation to some appreciable degree. State v. Aloi, 280 Conn. 824 (2007); State v. Simmons, 86 Conn. App. 381 (2004), cert denied, 273 Conn. 923 (2005).

D. METHODS OF ESTABLISHING REASONABLE SUSPICION

1. Personal observation by a police officer.
Terry v. Ohio, 392 U.S. 1 (1968).
2. Information a police officer receives from a credible third party.
Adams v. Williams, 407 U.S. 143 (1972).
3. An anonymous tip, “significant aspects” of which are corroborated, is sufficient.
Alabama v. White, 496 U.S. 325 (1990). An uncorroborated anonymous tip, lacking “predictive information” that a person has a gun, is insufficient. Florida v. J.L., 529 U.S. 266 (2000).

E. DURATION OF A TERRY STOP

1. BRIEF DETENTION

“... an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500 (1983).

2. PROLONGED DETENTION

“If the purpose underlying a *Terry* Stop - investigating possible criminal activity - is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in Terry ...” Michigan v. Summers, 452 U.S. 692, 700 (1981).

“The results of the initial stop may arouse further suspicion or may dispel the questions in the officer’s mind. If the latter is the case, the stop may go no further and the detained individual must be free to go. If, on the contrary, the officer’s suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances.” State v. Watson, 165 Conn. 577, 585 (1973).

State v. Mitchell, 204 Conn. 187 (1987) (39 minute detention held reasonable); State v. Casey, 45 Conn. App. 32 (1997) (one hour detention held reasonable); State v. Foster, 13 Conn. App. 214 (1988) (one hour detention held reasonable).

3. **TRANSPORTING DETAINEE TO NEARBY POLICE STATION TO COMPLETE TERRY FRISK**

Transporting a suspect to the POLICE STATION to continue an investigative detention is equal to an arrest and may only be done with consent or probable cause, however, transporting a detainee to a nearby police substation to complete a *Terry* frisk is lawful and does not transform a *Terry Stop* into an arrest where it is unsafe for police to complete the *Terry* frisk at the scene of the *Terry Stop*. State v. Nash, 278 Conn. 620 (2006), Hayes v Florida 470 S.Ct. 1643 (1985).

F. **THE “DILIGENCE” TEST DETERMINES THE LEGALITY OF A PROLONGED TERRY STOP**

“Obviously, if an investigative stop continues indefinitely, at some point, it can no longer be justified as an investigative stop. But our cases impose no rigid limitation on *Terry* Stops.”

“In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to dispel their suspicions quickly, during which time it was necessary to detain the defendant.” United States v. Sharpe, 470 U.S. 675, 685-686 (1985).

G. **POLICE CAN CONDUCT A TERRY STOP OF A PERSON THEY REASONABLY SUSPECT WAS INVOLVED IN OR IS WANTED FOR A COMPLETED FELONY**

“... We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* Stop may be made to investigate that suspicion”. United States v. Hensley, 469 U.S. 221, 229 (1985).

H. **TERRY STOPS OF AUTOMOBILES**

1. Police can order the operator to exit his automobile. Pennsylvania v. Mimms, 434 U.S. 106 (1977).
2. Police can order the passengers to exit the automobile. Maryland v. Wilson, 519 U.S. 408 (1997)

3. Police can search the interior of the automobile for weapons if they have a reasonable suspicion the detainee is potentially dangerous. Michigan v. Long, 463 U.S. 1032 (1983); State v. Wilkins, 240 Conn. 489 (1997).

Stop Did Not Occur Until Officers Arrived at Vehicle and Identified Themselves

State v. Madison, 116 Conn. App. 327 (2009)

Undercover officers' approach of a vehicle on foot and in an unmarked police car does not constitute a stop. Observing an individual make a phone call from a payphone often used in drug transactions and then driving to a parking lot located in a high traffic area, meeting another person, meeting in the vehicle and being observed handing cash to the occupant of the vehicle amounts to reasonable suspicion of a drug transaction. Officers working undercover who approach the vehicle on foot in an unmarked cruiser without necessarily blocking it, observed the exchange of money before arriving at the vehicle and identifying themselves. It was at the point that they were at the vehicle that the stop occurred. When the defendant observed the officers he threw something in the back seat providing officers with probable cause to search the vehicle.

Second Circuit Adopts an Ongoing Emergency Exception to the Anonymous Tip Rule

United States v. Simmons, 560 F.3d 98 (2d Cir. 2009)

Officers responded to an anonymous tip of an assault possibly with a weapon in progress in an apartment building. The dispatcher stated, "There is a possible gun involved, of a black male, wearing a grey hoodie, black jacket." Officers arrived at the apartment building which is located in a neighborhood with drug problems, shots fired in the presence of gangs. People outside the building denied that anyone was being beaten up or seeing anyone being assaulted. Officers saw three individuals inside the lobby, including one black male wearing a grey, hooded sweatshirt and a black jacket. Upon entering the building they ordered the individual to stop twice, take his hands out of his jacket and when he did not comply, they grabbed him feeling the butt of a gun.

The arrestee relied on Florida v. J.L. in arguing that the police officers had no reasonable suspicion to stop him based on the anonymous 911 call. The court adopted the "on-going emergency exception" that had previously been adopted by five other circuits. These circuits adopted the exception when callers indicated that individuals were threatening or brandishing a weapon or gunshots were heard in a residence. The Second Circuit agreed that an anonymous 911 call reporting an ongoing emergency is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality. This exception would appear to have no applicability to either Florida v. J.L. or State v. Hammond where anonymous tips indicated an individual had a weapon on him and there was ongoing drug activity rather than an ongoing emergency.

Police May Pat Down Occupants of a Vehicle Stopped For a Motor Vehicle Infraction, Even if They Have No Reasonable Suspicion That Such Persons Have Committed an Offense but Do Have Reasonable Suspicion That a Person Is Armed and Dangerous

Arizona v. Johnson, 129 S.Ct. 781 (2009)

At approximately 9:00 p.m., three members of Arizona's gang task force stopped a vehicle in a Tuscan neighborhood associated with the Crips gang. After they stopped the vehicle, for a motor vehicle infraction, Officer Machado instructed all of the occupants to keep their hands visible, and asked whether there were any guns in the vehicle. The occupants denied that there were weapons in the car at which point the driver was ordered out of the car. Officer Gittings dealt with the front seat passenger, while Officer Travizio dealt with the backseat passenger, Johnson. Upon approaching the vehicle, Travizio noticed that Johnson was wearing clothing consistent with Crips membership. She also noticed a scanner in Johnson's jacket pocket which she believed would likely be carried by someone involved in criminal activity associated with trying to evade police. Johnson had no identification, but provided his name, date of birth and said he was from Eloy, a place Travizio knew was the home of a Crips gang. He also informed her that he served time in prison for burglary and had been out for about a year. Wanting to question Johnson away from the front seat passenger, Travizio asked him to get out of the car and suspecting that he might have a weapon on him, patted him down, finding a gun in his waistband.

In Pennsylvania v. Mimms, the court found that an officer may order a driver out of the vehicle and once outside may pat him down if there is reason to conclude that he might be armed and presently dangerous. In Maryland v. Wilson, the court recognized the risk of a violent encounter in a traffic stop stems from the fact that evidence of a more serious crime might be uncovered during the stop, therefore, officers are allowed to order passengers out of the vehicle. In Knowles v. Iowa, the court stated, in dictum that officers who conduct routine traffic stops need to perform a pat down of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous. Applying Wilson and Brendlin v. California, the court reasoned that when a vehicle is pulled over for investigation of a traffic violation, the driver and passengers remain seized for the duration of the stop up to and including the time when the driver and passengers are informed that they are free to leave. During that time an officer's questioning of a passenger on matters unrelated to the justification of the stop is lawful so long as the inquiries do not measurably extend the duration of the stop.

The court determined that Travizio was not constitutionally required to give Johnson an opportunity to depart the scene without first ensuring that she was not permitting a dangerous person to get behind her. The court remanded the case without deciding that Travizio had a reasonable suspicion that Johnson was armed and dangerous.

Officers' Approach of a Stopped Vehicle Does Not Constitute a Stop

State v. Burroughs, 288 Conn. 836 (2008)

Stamford officers responded to a call of a suspicious vehicle described as a black BMW with license plate 685 PXD. Upon observing a black Pontiac Grand Prix, with the license plate 695 PXD, they stopped their cruiser behind the parked vehicle, which was in front of a private residence. The officers approached from either side of the vehicle, and upon reaching the driver-side window which was lowered three to four inches, Officer Duguay smelled marijuana.

The Appellate Court concluded that the seizure occurred at the time the officers left their marked patrol cars and began their approach, because a reasonable person would not have felt free to leave in that situation. Because the police were acting on an anonymous tip which did not contain any criminal allegations or predictive information, they did not possess reasonable suspicion.

The Supreme Court reconsidered the issue as to whether or not Burroughs was seized within the meaning of Article 1st, Sections 7 & 9 of the Connecticut Constitution. Relying on prior precedent, the Court stated that a person is seized when "by means of physical force or show of authority, his freedom of movement is restrained." The Court further stated that the key consideration is whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The Court relied in part on the Supreme Court decision of the United States v. Mendenhall, which articulated some examples of circumstances that might indicate a seizure including the threatening presence of several officers, the display of a weapon, physical touching or certain language or tone of voice indicating a compliance with the officer's request, might be compelled. In the present case the record did not indicate that the police had activated their sirens or flashers, commanded the respondent to halt, displayed any weapons or operated a car in a manner to block the respondent or control his direction or speed of movement.

The Court also described the case which the trial court had relied upon. In State v. Lewis, 60 Conn.App. 219 (2000) an officer responded to investigate an anonymous report of a suspicious vehicle. The officer was alone, parked his car behind the vehicle, but did not activate his flashing lights or siren. He exited the car carrying a flashlight, tapped on the window and asked the occupants what they were doing there. The occupant responded that they were broken down and failed to produce identification leading to the officers finding out that he was wanted on a warrant. The Lewis Court noted that police had a right to investigate reports of a suspicious vehicle and to inquire as to the activity of its occupants.

The Court concluded that in the Burroughs case, the mere presence of two officers when unaccompanied by any aggressive or coercive police conduct did not constitute a show of authority sufficient to cause a reasonable person to have reason to believe that they were not free to leave. The Court also talked about the important policy consideration in allowing police officers to conduct

investigations under certain circumstances. They did, however, specifically decline to accept the United States Supreme Court's definition of a seizure as enunciated in California v. Hodari D., 499 U.S. 621 (1991).

**Failure to Obtain the Basis of an Informant's Information May
Effect an Officer's Ability to Conduct a Stop**

State v. Clark, 107 Conn.App. 819 (2008)

The Court found that the officers did not have reasonable suspicion to conduct a stop when a reliable confidential informant merely informed the officers that the defendant was selling marijuana in a particular part of town and described in detail the vehicle driven by the defendant. The majority opinion stated that there was no testimony as to how the confidential informant came across this information or whether there was personal observation.

The dissenting judge found that although this was a close case he did believe that the police had reasonable suspicion as the informant told the officer that Clark was selling drugs in the Hills section of New Haven, that he was driving a tan Chevrolet Cobalt with Pennsylvania license plates and the officer knew the defendant because of a prior arrest and because the defendant had worked as an informant for another officer. Applying the totality of the circumstances and because the informant had provided reliable information in the past, he believed that the stop was lawful.

**All Persons in Stopped Vehicle Have Standing To
Challenge the Constitutionality of the Stop**

Brendlin v. California, 127 S. Ct. 2400 (2007)

After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized defendant, a passenger in the car. Upon verifying that defendant was a parole violator, the officers arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. The State conceded that the police had no adequate justification to pull the car over. The Court held that when a police officer makes a traffic stop, the driver and all passengers are seized within the meaning of the Fourth Amendment and have standing to challenge the constitutionality of the stop. The Court thought that in such circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

**Reliable Information That a Person's License is Under Suspension Will
Justify a Stop and Officers Are Not Required to Do a Motor Vehicle Check Before Such a Stop**

State v. Batts, 281 Conn. 682 (2007)

Officer Setzer and two other uniformed officers in an unmarked police car observed the defendant driving in a high crime area. Setzer had obtained information from the defendant's parole officer two or three weeks earlier that the defendant's motor vehicle operator's license had been suspended. Setzer observed the defendant pull his motor vehicle over and approached the vehicle on foot. Upon smelling marijuana, he asked the defendant for the marijuana at which time defendant gave him a marijuana cigarette.

Assuming that the approach of the vehicle constituted a stop, the court found that the officers had reasonable articulable suspicion based on information received from the parole officer. The court further found it was minimally intrusive for Setzer to approach the defendant to inquire as to his license status whereas confirmation from the Department of Motor Vehicles might have required that the officer continue surveillance of the defendant for a considerably longer period of time.

**Officers Need Not Relate the True Reason for a Stop
As Long As Reasonable Suspicion Exists**

**The Fact That Stop Occurred Over an Hour After
The Alleged Offense Did Not Diminish Reasonable Suspicion**

State v. Sulewski, 98 Conn.App. 762 (2006)

Confidential informant notified New Britain Police that a drug dealer used the van owned by American Home Patient, Inc., to deliver cocaine. The informant conducted a controlled buy and officers observed the hand to hand transaction. A patrol officer stopped the van and informed the defendant that he was investigating an incident in which an automobile with a similar description had been involved. He then obtained the defendant's name and address during the course of a license and registration check before telling the defendant he was free to leave. The stop was lawful since the officer had reasonable suspicion of the illegal narcotics transaction. Therefore, stopping the van for the purposes of obtaining identification of the driver was also lawful.

When defendant left work, approximately 1 ¼ hours after the drug transaction, the officers conducted an investigative stop. The court ruled that the officers still had reasonable suspicion to conduct the stop and the fact that it was made a substantial time after the alleged criminal activity did not negate their reasonable suspicion. The court also affirmed the trial court's determination that the confidential informant was reliable even though there was no information with regard to his prior use

as an informant. The fact that the CI was not anonymous and because he could expect adverse consequences if he provided false information substantiated his reliability. Statements made by an informant are entitled to greater weight if corroborated by evidence independently gathered by the police. Finally, the fact that a patrol officer did not personally know the particular circumstances giving rise to reasonable suspicion was of no consequences as long as they were known by the observing officer under the collective knowledge doctrine.

**Suspicious Activity May Not Amount to Reasonable
Suspicion Officers Must Identify Some Illegal Act**

State v. Milotte, 279 Conn. 906 (2007)

At approximately 1:50 a.m. Officer McDonnell of the Coventry Police Department observed a vehicle on Route 44. Immediately upon drawing behind the vehicle, it turned into a U-Shape residential street which made the officer suspicious. She again observed the vehicle in the parking lot of a 7-11 where she ran the license plate which came back to a vehicle in Willimantic, making her believe that the vehicle had no reason to turn into a residential street. She then followed the vehicle which turned into another residential street and entered the private driveway at a farmhouse that was completely dark. The operator turned off his lights, and when the officer drove down the street and turned around passing the farmhouse, the suspect vehicle was gone. She returned to Route 44, activated her overhead lights and stopped the vehicle, finding an intoxicated driver.

The court determined that the officer's belief that the defendant wanted to avoid her and was acting suspiciously did not justify an investigatory stop. In order to stop a person, officers must be able to identify reasonable suspicion of some specific illegal act.

**Transport and Subsequent Pat Down at Police Substation Did
Not Convert Investigative Stop Into Custodial Situation**

State v. Nash, 278 Conn. 620 (2006)

New Haven Officers Harkins, Maio, and Runlett conducted a narcotic surveillance. At approximately 5:00 in the evening Harkins observed a black male wearing a black winter hat and coat, a yellow t-shirt, blue jeans, and work boots walking on the sidewalk. The man stopped, waved to a woman who was walking north, at which point the two engaged in a short conversation, during which the woman handed a small item to the man which he placed in his left front pant pocket. He then reached down into his left boot and pulled out a plastic bag. He reached into the bag and retrieved a small item which he handed to the woman and walked back across the street. A few seconds later the man was approached again and the same process occurred. Harkins, who was using the camera, notified Maio and Runlett who proceeded in a patrol car stopping the man who matched the description. They handcuffed him and started to pat him down, however, approximately fifteen to twenty people began to gather in the area leading the officers to place the defendant in the patrol car

and drive one-half block away to the police substation. They continued the pat down in the substation during which Runlett heard a crinkling sound and detected an item near the top of the defendant's left boot. He withdrew a plastic bag containing thirty-eight (38) small pink-tinted, zip lock style baggies holding a white rock like substance believed to be crack cocaine. Runlett also found \$319.00 in the defendant's left front coat pocket.

The court found that the officers had reasonable and articulable suspicion that the suspect was armed and dangerous, justifying the pat down search. The court found that Harkin and Runlett had extensive experience and training in narcotics investigation and enforcement. The stop took place in a high crime area at approximately 5:00 p.m. in March. They observed the defendant in hand-to-hand exchange on two separate occasions consistent with narcotics transactions. Narcotics dealers are often armed and work with others who are in the immediate vicinity. The court also found that immediately upon being stopped the defendant engaged in verbal resistance. These facts and reasonable inferences drawn therefrom supported the conclusion that Runlett had a reasonable and articulate suspicion that the defendant might have been armed and dangerous. The Officers did not simply rely on their suspicion that the defendant was involved in drug dealings. Other factors which tightened their suspicion was the multiple apparent exchange of drugs for money, the high crime area at dusk, the gathering crowd, and the defendant's verbal resistance.

The court also found it reasonable for the officers to transport the defendant to the police substation. When the Officers began the pat down there were only two officers present and with the growing crowd around them, they did not know if anyone in the crowd had a gun or was going to divert the officers' attention. Where an officer has a reasonable basis to think that the person stopped poses a present physical threat to the officer or others, the Fourth Amendment permits the officer to take necessary measures to neutralize the threat without converting a reasonable stop into a de facto arrest. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet. (Quoting Terry v. Ohio).

The court cited a number of cases where it has been held that requiring a suspect to accompany a police officer to another place does not necessarily transform what would otherwise be a permissible investigative seizure into an arrest. "...Under the totality of these circumstances, handcuffing and removing the defendant to a secure location one-half block away from the gathering crowd did not, as a matter of law, exceed the permissible scope of an investigative stop and protective pat down. Indeed, we do not require police officers who are properly attempting to neutralize the threat of physical harm to do so at increased peril." State v. Wilkins, 240 Conn. 489 (1997).

The court further found that the continued pat down of the defendant at the police substation was reasonable. The fact that he was handcuffed and that his upper body had previously been patted down did not obviate the need for a full pat down to ensure that the defendant was not armed and dangerous, particularly when he had been observed using his boot area for storage. Therefore, the full

pat down conducted in the lobby of the police substation did not violate the defendant's Fourth Amendment Rights.

**Officer Who Grabbed the Suspect's Jacket Based on Reasonable Suspicion Felt
Contraband Leading to Probable Cause to Seize and Search the Jacket**

State v. Delvalle, 109 Conn.App. 143 (2008)

Trooper's testimony and videotape of the stop provided ample reasonable suspicion for the detention, the pat down and the subsequent search. On April 28, 2005 at approximately 9:56 p.m. Trooper Weiner observed a vehicle parked illegally in the Madison rest area. He observed the defendant, a Hispanic male, exiting the McDonald's Restaurant. The defendant looked at him, froze, and then quickly proceeded to a vehicle, entered it and began to pull away. Weiner activated his mobile video-recorder and body microphone as he pulled the vehicle over to complete a license plate check and to issue a ticket for illegal parking. Without being asked the defendant handed over a valid and expired driver's license. His hands were shaking, his forehead sweating and the trooper believed he was being evasive when asked questions about his day's activities. The plaintiff claimed that he was not being evasive but had a language barrier and was confused; however, the videotape confirmed that he was capable of conversing in English.

Although it was April 28th, the defendant was wearing a thick down coat with feathers falling out of a hole. The Court found that these facts justified the officer's reasonable belief that there might be a weapon in the jacket. Weiner grabbed the coat and immediately felt what he believed to be packets of street level narcotics based on his specialized narcotics training and field experience.

Weiner instructed the defendant to remove his jacket but the defendant dropped his coat halfway down his shoulders and started to walk away. Weiner then took hold of and removed the coat. After attempting to walk away twice, the defendant broke free, grabbed his coat pulling plastic bags from the hole and throwing them to the ground. Weiner apprehended the defendant, ascertained that the plastic bags contained heroin, and searched the jacket finding two hundred additional bags of heroin amounting to a total seizure of 597 bags.

The Court held that the grabbing rather than patting his coat was reasonable under the circumstances. His grabbing was only conducted to the extent necessary to detect weapons and he did not manipulate the objects. "[W]hile we respect the constitutional rights against unreasonable search and seizure of the citizenry... it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Citations omitted. Citing Dickerson and Trine the Court found that once the trooper determined that the defendant was carrying narcotics, he was authorized under the *Plain Feel Doctrine* to seize the narcotics.

**Are Anonymous Tips About Drunk Drivers Sufficient to Allow Officers to Conduct Stops?
Is Observation of an Object Merely Hanging From Rearview Mirror Sufficient to Justify Stop?**

State v. Cyrus, 111 Conn. App. 482 (2008)

A trooper stopped a vehicle upon confirming a description of the vehicle and license plate given through anonymous tips indicating that the vehicle was being operated erratically. The court found that the information was not sufficient to justify a stop and the State did not contest the validity of this finding. Therefore, at least for the purposes of this case, it remains unclear as to whether or not anonymous tips regarding drunk driving would justify a motor vehicle stop.

The trooper also noticed an 8 to 10 inch chain or a crucifix hanging from the car's rearview mirror. The Appellate Court discussed what they considered to be conflicting evidence regarding this issue. At an initial hearing, the trooper testified that the chain or crucifix moved back and forth. In a subsequent hearing, the trooper testified regarding observing objects hanging from a rearview mirror, "if it is not a busy night and I'm in a proactive mode, I try to stop as many cars as I can. If they have something hanging from the mirror, I will stop them, yes."

The Court looked at Connecticut General Statutes Section 14-99f(c) which provides: no article, device, sticker or ornament shall be attached or affixed to or hung on or in any motor vehicle in such a manner or location as to interfere with the operator's unobstructed view of the highway or to distract the attention of the operator.

Considering the language of the statute, and the trooper's testimony, the Court found insufficient evidence that the item attached to the rearview mirror was moving back and forth in a distracting or destructive manner.

Note: It is unknown what conclusion may have been reached if the State had argued that anonymous tips as to erratic driving justify stops for the purposes of highway safety. It is also interesting to note that rather than applying a reasonable suspicion standard to the infraction in question, the Court seems to require officers to meet the State's burden of proving each and every element of the statute prior to conducting a reasonable suspicion stop.

SECTION TWO

WARRANTLESS ENTRIES, ARRESTS & SEARCHES ARREST WITHOUT WARRANT

SUMMARY:

A. SCOPE

- 1) Felony - Conn. Gen. Stat. § 54-1f(b)
 - a. If an officer has probable cause to believe a felony has been or is being committed;
 - b. An officer can lawfully arrest outside his territorial jurisdiction. State v. Kuskowski, 200 Conn. 82 (1986).
- 2) Misdemeanor - Conn. Gen. Stat. § 54-1f(a)
 - a. In the officer's presence; or
 - b. On the "speedy information" of another.
- 3) Immediate Pursuit - Under Conn. Gen. Stat. §54-1f(c), police can pursue outside their own jurisdiction, any person they can arrest for a felony, misdemeanor or infraction. State v. Harrison, 228 Conn. 758 (1994); State v. Kowal, 31 Conn. App. 669 (1993).

B. PLACE OF ARREST

- 1) Public Place

Police can make a warrantless felony arrest in a public place or if the suspect retreats from a public place to a private dwelling. United States v. Watson, 423 U.S. 411 (1976); United States v. Santana, 427 U.S. 38 (1976).

- 2) Dwelling

Warrantless entries, searches and seizures inside a residence are presumptively unreasonable. Police cannot make a warrantless, nonconsensual entry into a suspect's residence, the residence of a third party, or a residence where the suspect is an overnight guest where they believe the suspect may be, in order to make a routine felony arrest. Only "exigent circumstances" permit such an entry Kirk v. Louisiana, 546 U.S. 635 (2002); Minnesota v. Olson, 495 U.S. 91(1990); Steagald v. United States, 451 U.S. 204 (1981); Payton v. New York,

445 U.S. 573 (1980); State v. Guertin, 190 Conn. 440 (1983); State v. Ruth, 181 Conn. 187 (1980).

3) Emergency Entries

- a. If police have reasonable grounds to believe that if an immediate entry and arrest is not made the suspect will flee, or destroy evidence or endanger someone's life; State v. Guertin, 190 Conn. 440 (1983)

OR

- b. If police have a reasonable belief that a person inside the building is in need of immediate aid or assistance. State v. Blades, 225 Conn. 609 (1993); Brigham v. Stuart, 126 S.Ct. 1943 (2006)

4) "Hot Pursuit" of a Fleeing Felon

Police, in hot pursuit of a fleeing felon, can make a warrantless entry into premises to search for and arrest the suspect. Warden v. Hayden, 387 U.S. 294 (1967); United States v. Santana, 427 U.S. 38 (1976).

- 5) There is neither a "murder scene exception" nor a "crime scene exception" to the search warrant requirement of the Fourth Amendment. Flippo v. West Virginia, 528 U.S. 11 145 (1999); Thompson v. Louisiana, 469 U.S. 17 (1984); Mincey v. Arizona, 437 U.S. 385 (1978).

- 6) Police can make a temporary warrantless seizure of premises in order to obtain a search warrant for contraband and in order to prevent the destruction of the contraband. Illinois v. McArthur, 531 U.S. 326 (2001).

C. SEARCH INCIDENT TO ARREST

1) "Custodial" Arrest

A police officer making a custodial arrest can fully search the arrestee without having to show that a weapon or evidence might be found. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973); State v. Christian, 189 Conn. 35 (1983).

2) Area of Search

In addition to searching the arrestee, police may also search the area “within his immediate control” that is, any area from which the arrestee “might gain possession of a weapon or destructible evidence.” Chimel v. California, 395 U.S. 752 (1969); State v. Reddick, 15 Conn. App. 342 (1988).

3) “Protective Sweep”

Police can conduct a protective sweep of a house where an arrest is made if they have a reasonable belief the area to be swept harbors a person posing a danger to them or others. Maryland v. Buie, 494 U.S. 325 (1990). Police can also conduct a protective sweep of a home where they make an arrest just outside a home if they have a reasonable belief the sweep is necessary to protect them. State v. Spencer, 268 Conn. 505 (2004).

4) “Station House Inventory”

At the police station, all containers and articles in the arrestee’s possession can be searched as part of the “routine administrative procedure only if the arrestee is going to be incarcerated.” Illinois v. LaFayette, 462 U.S. 640 (1983); State v. Billias, 17 Conn. App. 635 (1989).

5) Delayed Station House Search

Once a person is arrested and in custody, articles in his possession at the place of his detention may be seized without a warrant even though a substantial period of time has elapsed between the arrest and seizure. United States v. Edwards, 415 U.S. 800 (1974); State v. Magnotti, 198 Conn. 209 (1985); State v. Castagna, 170 Conn. 80 (1976).

Connecticut General Statutes Section 54-1f
Arrest Without Warrant: Pursuit Outside Precincts

- (a) For purposes of this section, the respective precinct or jurisdiction of a deputy sheriff shall be wherever he is required to perform his duties. Peace officers, as defined in subdivision (9) of section 53a-3, and special deputy sheriffs, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when the person is taken or apprehended in the act or on the speedy information of others.

- (b) Members of the division of state police within the department of public safety, or of any local police department, or any chief inspector, or inspector in the Division of Criminal Justice shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing a felony.
- (c) Members of any local police department, sheriffs, deputy sheriffs, and special duty sheriffs, when in immediate pursuit of one, who may be arrested under the provisions of this section, are authorized to pursue the offender outside of their respective precincts into any part of the state in order to effect the arrest. Such person may then be returned in the custody of such officer to the precinct in which the offense was committed.
- (d) Any person arrested pursuant to this section shall be presented with reasonable promptness before proper authority.

**Rhode Island Police Officer's Pursuit of Suspect into Connecticut
and Subsequent Search Were Deemed Lawful**

State v. Graves, 114 Conn. App. 852 (2009)

Defendant attempted to elude a Rhode Island police officer who upon stopping him obtained his license and observed a large brown paper bag on the front passenger's seat. The officer also smelled marijuana. When the officer returned to his cruiser to call in the vehicle stop defendant sped away. The pursuit in Connecticut reached speeds of 90 mph and proceeded into North Stonington where the officer lost the defendant. One of two additional Rhode Island police officers who joined in the pursuit knew the defendant's residence. They walked up defendant's driveway and behind the house found the vehicle, but the bag was no longer on the front seat. Upon retracing the route they located the bag in an open field.

The court first determined that the entry onto the defendant's property was lawful under the hot pursuit exception to the warrant requirement, enunciated in Warden v. Hayden, 387 U.S. 294 (1967), "...the rationale supporting the exception is that a suspect should not be able to thwart lawful police investigation by means of escape to a private place." The lapse of time between the officers losing the defendant and his proceedings to defendant's property did not exceed more than five minutes.

The court also determined that the Rhode Island police warrantless search outside of the officer's jurisdiction was lawful. Even if the Rhode Island officer's actions may not have been consistent with Conn. General Statutes, the United States Supreme Court has held that whether a police search violates the Fourth Amendment does not depend on the law of the state in which the police action occurs.

Finally, the court determined that the defendant could not challenge the discovery of the paper bag as it was located in an open field. “An individual may not legitimately demand privacy for activities conducted out of doors and fields, except in the area immediately surrounding the home.”

**Search Incident to Arrest Includes Kitchen Area Six to Eight Feet from
Where the Defendant Was Arrested in the Living Room**

State v. Williams, 110 Conn. App. 329 (2008)

New Britain and Waterbury police aided by two United States Marshals executed an arrest warrant on the defendant who they found sitting on a couch in the living room while his brother was found lying on the floor next to the couch. Detective Santopietro removed the cushions from the couch discovering a pistol. Sergeant Setzer noticed a box of what he believed to be ammunition and then conducted a protective sweep discovering on the nearby kitchen counter, numerous bags of a substance he believed to be heroin. Defendant argued that the kitchen was not within his immediate control because there was little or no probability that he could have launched an attack on the police from his position face-down and handcuffed on the living room floor. The court did not agree, explaining that the apartment had an open area between the kitchen and the living room and the counter where Setzer searched was located six to eight feet from where the defendant was sitting. The Court could not conclude that it would have been impossible for the defendant to have reached the items located in the area, and the fact that defendant was handcuffed did not foreclose the possibility that he might have been able to reach a weapon close by.

A concurring opinion disagreed with this conclusion but found that Setzer had a right to be in the location where he discovered the heroin while conducting a cursory sweep of the area both for other individuals who could be a threat to the police as well as for additional weapons.

**The United States Supreme Court Diminishes the Effect
Of Arrests That Violate State Procedural Rules**

Virginia v. Moore, 128 S.Ct. 1598 (2008)

Almost every state limits police authority to arrest especially without warrants even when the officers have probable cause. Some of these statutory limitations are complicated allowing arrests at certain times, with various jurisdictional limitations, for particular crimes and many of the statutes are peppered with a number of exceptions. Police academies spend appreciable time ensuring that their officers understand these statutory restrictions and place great import on compliance with such statutes. It seems the United States Supreme Court in Virginia v. Moore has done a great favor to law enforcement officers and administrators in eliminating many of the concerns about violations of state statute arrest procedural rules.

In Virginia v. Moore, David Lee Moore was stopped by two officers on reasonable suspicion that he was driving with a suspended license. Upon confirming that his license was suspended, the officers made a custodial arrest and conducted a delayed search incident to arrest finding sixteen grams of crack cocaine and \$ 516.00 in cash. Moore was found guilty on the drug charge and sentenced to a term of imprisonment of five years with eighteen months of the sentence suspended. Under state law, the officers should only have issued Moore a summons for driving with a suspended license as it is not an arrestable offense, except for some specific exceptions which did not apply in this case.

The Supreme Court found that the violation of the State procedural arrest rule did not make the arrest unreasonable under the Fourth Amendment. The Court found no early Fourth Amendment cases basing a constitutional claim on a violation of state or federal statute concerning arrest. Failing to find any historical basis to support the defendant's claims, the court analyzed the search and seizure issue in light of traditional standards of reasonableness. Citing a long line of cases, the Court stated that "when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interest is not in doubt. The arrest is constitutionally reasonable." Citation omitted.

The Court concluded, "when officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and to ensure their own safety." At 1608.

The clear benefit to law enforcement officers from this ruling is that if they violate state procedural arrest rules, but have probable cause, the arrest will be lawful, evidence seized will be admissible, and there will be no liability under the Fourth Amendment.

Discounting the significance of state statutes has been the rule in federal courts when evaluating liability under 42 USC Section 1983. For example in Hopper v Rinaldi, 2008 WL 559049 (D.N.J.) plaintiff alleged an unlawful arrest because it was made outside the officers' geographic boundary. The court rejected plaintiff's claim stating; "The federal courts consistently held that an arrest performed by police officers outside the officers' jurisdiction, especially in exigent circumstances, cannot amount to a claim of constitutional magnitude." The court then cited cases from the 6th, 7th, 8th and 10th Circuits finding that violations of state law do not amount to violations of the Fourth Amendment.

In Herrera v City of Brunswick, 2008 WL 305275 the plaintiff claimed her custodial arrest and the subsequent search were unlawful because under state statute the officer should have issued her a summons. The court noted "It is well established that a mere violation of state statute does not infringe the Federal Constitution." Snowden v. Hughes, 321 U.S. 1, 11 (1944). Similarly, the mere fact that an arrest was done in violation of police procedures can not, without more, establish a constitutional violation." Tanberg v. Sholtis, 401 F.3d 1151, 1163 (10th Cir. 2005) (citing Whren v. United States, 517 U.S. 806, 815 (1996)).

Simply put, if an officer makes an arrest in violation of a state procedural rule the arrest will be constitutional and evidence seized will be admissible under the Fourth Amendment, and the officer will not be held liable under Section 1983 as long as probable cause existed to make the arrest. However, there are a number of unanswered questions under state law. Will evidence be suppressed under state law? Can officers be held liable pursuant to state constitutional provisions? Will cases be successfully prosecuted if officers violate their state statutes? Finally, as Justice Ginsburg noted in her concurring opinion, an officer may be disciplined and the person arrested may bring a tort suit against the officer.

In conclusion, Virginia v. Moore does not provide officers with a cart blanche to ignore our State procedural rules and officers should always attempt to conform with statutes, however, the case does significantly diminish the potential effect of such violations. The case also does not bring most states within the realm of brilliantly simplistic state statutes such as Hawaii which authorize officers anywhere in the state to make an arrest when they have probable cause to believe an offense occurred, but it significantly removes the risk of mistaken procedural violations.

The Supreme Court's ruling should allow for the exercise of greater discretion amongst officers when they have to balance the potential risk of a state statutory violation against the interests of society. For example, let's assume a state statute prohibits a warrantless misdemeanor arrest for an offense not witnessed by the officer or outside his/her municipality. Further assume that the officer finds a husband across the border who several hours earlier had assaulted his wife. The officer knows he is not authorized to make the arrest but does not want to risk allowing the offender to remain free at the risk that he might return home and again assault his wife. Such an arrest would be lawful under the United States Constitution and any evidence found subsequent to the arrest would be admissible under the Fourth Amendment. Knowing that he can not be held liable under Section 1983 he might be more willing to take the minimal risk of facing some state tort claim to protect the potential victim.

Here are the questions you should ask to determine if there are any potential negative consequences in making an arrest in violation of state statute.

"Ms. State's Attorney, will the arrest be prosecuted if we have probable cause?"

"Will evidence seized be admissible under state law?"

"Mr. City Attorney/Police Legal Advisor, is such an arrest a violation of our state constitution?"

"Can we be sued for a state constitutional violation or some other state tort?"

"Are there immunities available for such claims?"

"Can plaintiff attorneys recover fees for state lawsuits?"

Officers should never intentionally ignore state statutes; however, understanding the negative ramifications of such mistakes will reduce the fear of acting when the countervailing interest is the protection of the public.

Abusive Language Which Hinders or Delays a Police Officer's Investigation Violates the Interfering With a Police Officer Statute

State v. Silva, 285 Conn. 447 (2008)

Bridgeport officers at a motor vehicle accident observed Silva back quickly into a parking lot where they had parked their police cruiser, nearly causing a collision. Observing that she did not have a front license plate they approached with the intent of issuing an infraction for unsafe backing and no front license plate. When asked for paperwork she responded "You Bridgeport cops are all the F--king same. To protect and serve? Yea, right, my ass." When the officers repeated their request she stated again, "F--k you. I ain't giving you s--t, asshole. I am taking my brother to the hospital. And you are not f--king stopping me." Officers indicated she was loud and belligerent, stamped her foot, and a crowd of about twenty-five to thirty people gathered. The officers intended on arresting Silva for interfering, but her mother and father began to interfere by stating that their daughter had done nothing wrong. As the officers talked to the mother, Silva ran to the street, entered a vehicle, and drove away leaving her car in the lot. The mother spoke to the defendant on her cell phone and told the officers that she would be returning after she went to the hospital, however, after waiting for a ½ hour, the officers conferred with their supervisor and went to the hospital where they arrested Silva for breach of peace and interfering with an officer. When the officers approached her, she stated "Not you assholes again..."

Considering these facts where a young female college student addressed two trained police officers it was unlikely that her words would provoke a violent reaction from the officers and therefore did not constitute fighting words. Connecticut General Statutes Section 53a-167a prescribes only physical conduct and fighting words that by their very utterance inflict injury, or tend to insight an immediate breach of the peace.

Officers May Arrest Suspects For Interfering When The Suspect Refuses To Identify Himself During A Lawful Investigative Stop

State of Connecticut v. Aloj, 280 Conn. 824 (2007)

The defendant resided for over twenty years on the side of a public park in Wethersfield. On the opposite side of the park is a Turf Farm which pumps water from a stream to irrigate its crops. The noise of the pumping was a cause of contention between the defendant and Turf Farm. In the summer of 2002, employees of the Turf Farm discovered that the fire truck used for pumping had been vandalized. The police installed video surveillance. The video captured the defendant opening the

door of the cab of the fire truck and leaning inside. Based on a complaint of the owner of the Turf Farm the Wethersfield Police told the defendant to stay off the property. Approximately two weeks later, after the fire truck unexpectedly stopped operating an employee approached the truck to inspect it and noticed the defendant standing nearby. The defendant stated, “why don’t you call the police and I’ll have you arrested for false arrest?” Sergeant Labonte and Officers Salvatore and Keyes responded to the complaint. The employee complained that the defendant was trespassing and possibly had damaged the fire truck. Upon Salvatore’s request that the defendant produce identification, he responded that he did not need to produce identification, that he was on public property and that, “this isn’t Russia. I’m not showing you any identification...”

At trial Alois was found guilty of several charges including interfering with the police in violation of 53a-167a. The Appellate Court found that the defendant’s refusal to produce identification did not constitute the crime of interfering. The Supreme Court reversed the Appellate Court decision with a direction to affirm the judgment of conviction with respect to the judgment of conviction with respect to the charge of interfering with an officer.

The court determined that a person may be convicted of interfering with a police officer under C.G.S. § 53a-167a for refusing to provide identification to an officer who is investigating possible criminal activity pursuant to a *Terry* stop. In evaluating the statute the court stated that obstruction, resistance, hindrance or endangerment have a broad scope indicating that the legislature intended to prohibit, “any” act which amounts to meddling in or hampering the activities of the police in the performance of their duties. “The purpose of the statute, which had its origin under common law, is to enforce orderly behavior in the important mission of preserving the peace; and any act that is intended to thwart that purposes is violative of the statute.” Therefore, it is now clear that even if refusal to identify oneself during a *Terry* stop is peaceful and unaccompanied by any physical force or other affirmative act, an arrest for such refusal is lawful.

The court did not expressly identify what other types of conduct which hinders an officer in the performance of their duties might amount to interfering. It explained that, “because police officers are confronted daily with a wide variety of diverse and challenging scenarios, it would be impractical, if not impossible, to craft a statute that describes with precision exactly what obstructive conduct is prescribed.” The court did employ the word “hinder” defining it as “to make slow or difficult the course or progress of.” And noted that “each case must be decided on its own particular facts.” With regard to the identification issue they cited a long list of Supreme Court decisions promoting the strong government interest in solving crimes and bringing offenders to justice, noting that obtaining the suspect’s name in the course of a *Terry* stop serves important government interests. “Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing the identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.” Hibell v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004).

A number of cases were cited where Connecticut courts have found sufficient evidence to support convictions for interfering:

- Where officers acting in good faith in the performance of their duties arrest the defendant who then physically resisted their attempt to search his pockets for evidence. State v. Biller, 5 Conn. App. 616 (1985)
- Where defendant acting in an aggressive and threatening manner flailing his arms and speaking in a loud voice verbally and physically resisted the officer's attempt to pat him down. State v. Simmons, 86 Conn. App. 381 (2004)
- Burglary suspect in window ignored officer's order at gunpoint to get down and show his hands, climbed into window and fled. State v. Hampton, 66 Conn. App. 357 (2001)
- Defendants physically and verbally resisted officer's attempt to arrest them. State v. Beckenbach, 1 Conn. App. 669 (1984) and State v. Williams, 205 Conn. 456 (1987)

**Observation of Improper Driving is not Necessary for an Arrest for Driving While Intoxicated.
Physical Resistance to Handcuffing is Sufficient to Support a Charge of Interfering.**

State v. Walters, 111 Conn. App. 315 (2008)

Officer Hebert of the Brookfield Police Department observed defendant's car moving back and forth within the lane and then across the solid yellow lines. Upon stopping the vehicle, the defendant had difficulty retrieving his registration and insurance information, his eyes were red and glossy, his speech was slurred and there was an odor of alcohol emanating from the vehicle. Defendant indicated he had consumed two or three alcoholic beverages approximately one half hour earlier. Defendant failed the walk and turn and one leg stand of the field sobriety test. Although pleasant and cooperative, he became agitated when told he was going to be placed under arrest. Defendant indicated that he would resist arrest, was not going to permit himself to be handcuffed, adopted a threatening stance, clenched his fist and when the officer grabbed his left arm, he straightened his arms making it difficult to lock the cuffs. These facts were sufficient for a finding that the defendant had committed the offense of interfering with an officer.

**“The Emergency Doctrine” Does Not Involve a Question of Probable Cause, and
it is not Dependent on the Truth or Completeness of the Facts Conveyed
to the Officer Entering the Premises.**

**The Reasonableness of the Entry is Evaluated on the Basis of
the Facts Known at the Time of the Entry”**

State v. Ryder, 114 Conn. App. 528 (2009)

Officer Andrew Kelly was informed by the dispatcher of numerous telephone calls from a frantic father in Vermont who claimed that his sons took a train to Greenwich for the weekend and were supposed to return twenty-four hours earlier. The father was able to contact one of his sons, who informed him that the other son was at the defendant’s house in Greenwich. The father and the defendant had a previous relationship and had resided together. Kelly also learned that officers from a prior shift had spoken to the defendant who provided wrong information claiming the son was at another address.

Upon arriving at the affluent Greenwich home at 4:30 p.m., Kelly noticed a couch sticking partly out of the garage and a BMW convertible with its top down in the driveway. He used the intercom at the gated driveway’s entrance, but received no response. He stepped over a white fence, walked around the house announcing his presence, rang the doorbell and knocked on the front door to no avail. Looking through glass doors in the back of the house, he observed a bag of clothes suitable for a teenager and some videogames. Upon realizing that the door was unlocked, he called for back-up before searching for the missing child in the house. In the bathroom on the second floor, he noticed a dark figure through a bathtub shower door. Upon opening the door, he observed a crocodile or large lizard in the tub, which he estimated to be between six and seven feet in length. After completing the search, the officers left. Four weeks later, the defendant was arrested on charges of risk of injury to a child and illegal possession of a reptile.

The warrantless entry of the home was evaluated on the emergency doctrine exception. The court explained that exigent circumstances generally refer to situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure for which probable cause exists, unless they act swiftly and without seeking prior judicial authorization. Another emergency justifying entry would be warrantless entries and searches when they believe that a person within is in need of immediate aid. The test for such an entry “is whether, under the totality of the circumstances, a well-trained police officer reasonably would have believed that a warrantless entry was necessary to assist the person inside in need of immediate aid.” The officers must have reason to believe that “life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate that threat...”

The defendant argued that no minor was ever in danger and that probable cause did not exist. The court stated that “the emergency doctrine does not involve a question of probable cause, and it is

not dependant on the truth or completeness of the facts conveyed to the officer entering the premises. The court held that the entry in this case was reasonable.

**Tenant Does Not Have an Objectively Reasonable Expectation of Privacy
in a Common Hallway Leading to His Apartment**

State v. Alexander, 115 Conn. App. 1 (2009)

Bridgeport detectives Martin and Lee entered the common hallway and entered the stairs of a building which was functionally a two-family house. Upon knocking on the door, the defendant opened it, at which point the officer smelled a strong odor of marijuana. While trying to pat-down the defendant he retreated into the apartment followed by the detectives who restrained him and found 9 lbs. of marijuana and then during a protective sweep, several rolls of currency on the defendant's dresser. The defendant's sole claim was that the trial court improperly denied his motion to suppress after concluding that he did not have a protected privacy interest in a common hallway leading to his third floor apartment. The Appellate Court agreed with the trial court that the defendant did not have an objectively reasonable expectation of privacy in the hallway. "A tenant has a reasonable expectation of privacy in areas where his use is exclusive, that is, where he has the legal right to control access and to exclude others." United States v. Holland, 755 F.2d 253 (2d Cir. 1985) cert denied. In this case defendant could not establish a reasonable expectation of privacy because he did not have exclusive control over the hallway and could not control access to or exclude others from the hallway. The fact that the door was unlocked was not significant as prior precedent had indicated the fact that police need a key to enter a common hallway is insignificant in determining whether the defendant has an expectation of privacy.

SECTION THREE

SEARCH WARRANTS

SELECTED CONNECTICUT STATUTES RELATING TO SEARCH WARRANTS

Sec. 54-33a Issuance of search warrant

- (a) As used in sections 54-33a to 54-33g, inclusive, “property” includes, without limitation, documents, books, papers, films, recordings and any other tangible thing.
- (b) Upon complaint on oath by any state’s attorney or assistant state’s attorney or by any two credible persons, to any judge of the Superior Court or judge trial referee, that such state’s attorney or assistant state’s attorney or such persons have probable cause to believe that any property (1) possessed, controlled, designed or intended for use or which is or has been used or which may be used as the means of committing any criminal offense; or (2) which was stolen or embezzled; or (3) which constitutes evidence of an offense, or that a particular person participated in the commission of an offense, is within or upon any place, thing or person, such judge, or judge trial referee except as provided in sections 54-33j, may issue a warrant commanding a proper officer to enter into or upon such place or thing, search the same or the person and take into such officer’s custody all such property named in the warrant.
- (c) A warrant may issue only on affidavit sworn to by the complainant or complainants before the judge or judge trial referee and establishing the grounds for issuing the warrant, which affidavit shall be part of the arrest file. If the judge or judge trial referee is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the judge or judge trial referee shall issue a warrant identifying the property and naming or describing the person, place or thing to be searched. The warrant shall be directed to any police officer of a regularly organized police department or any state police officer, to an inspector of the Division of Criminal Justice or to a conservation officer, special conservation officer or patrolman acting pursuant to section 26-6. The warrant shall state the date and time of its issuance and the grounds or probable cause for its issuance and shall command the officer to search within a reasonable time the person, place or thing named, for the property specified. The inadvertent failure of the issuing judge trial referee to state on the warrant the time of its issuance shall not in and of itself invalidate the warrant.

Sec. 54-33c. Application for warrant. Execution and return of warrant. Copy of affidavit to be given to owner, occupant or person named in warrant; exceptions. Disclosure of affidavit limited by prosecuting attorney, when

- (a) The applicant for the search warrant shall file the application for the warrant and all affidavits upon which the warrant is based with the clerk of the court for the geographical area within which any person who may be arrested in connection with or subsequent to the execution of the search warrant would be presented with the return of the warrant. The warrant shall be executed within ten days and returned with reasonable promptness consistent with due process of law and shall be accompanied by a written inventory of all property seized. A copy of such warrant shall be given to the owner or occupant of the dwelling, structure, motor vehicle or place designated therein, or the person named therein. Within forty-eight hours of such search, a copy of the application for the warrant and a copy of all affidavits upon which the warrant is based shall be given to such owner, occupant or person. The judge or judge trial referee may, by order, dispense with the requirement of giving a copy of the affidavits to such owner, occupant or person at such time if the applicant for the warrant files a detailed affidavit with the judge or judge trial referee which demonstrates to the judge or judge trial referee that (1) the personal safety of a confidential informant would be jeopardized by the giving of a copy of the affidavits at such time, or (2) the search is part of a continuing investigation which would be adversely affected by the giving of a copy of the affidavits at such time, or (3) the giving of such affidavits at such time would require disclosure of information or material prohibited from being disclosed by chapter 959a. If the judge or judge trial referee dispenses with the requirement of giving a copy of the affidavits at such time, such order shall not affect the right of such owner, occupant or person to obtain such copy at any subsequent time. No such order shall limit the disclosure of such affidavits to the attorney for a person arrested in connection with or subsequent to the execution of a search warrant unless, upon motion of the prosecuting authority within two weeks of such person's arraignment, the court finds that the state's interest in continuing nondisclosure substantially outweighs the defendant's right to disclosure.
- (b) Any order dispensing with the requirements of giving a copy of the warrant application and accompanying affidavits to such owner, occupant or person within forty-eight hours shall be for a specific period of time, not to exceed two weeks beyond the date the warrant is executed. Within that time period the prosecuting authority may seek an extension of such period. Upon the execution and return of the warrant, affidavits, which have been the subject of such an order, shall remain in the custody of the clerk's office in a secure location apart from the remainder of the court file.

Sec. 54-33d Interference with search

Any person who forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of such duties, shall be fined not more than one thousand dollars or imprisoned not more

than one year or both; and any person who in committing any violation of this section uses any deadly or dangerous weapon shall be fined not more than ten thousand dollars or imprisoned not more than ten years or both.

Sec. 54-33e Destruction of Property

Any person who, before, during, or after seizure of any property by any police officer authorized to make searches and seizures, in order to prevent the seizure or securing of any property, named in the warrant by such police officer, breaks, destroys or removes or causes the breaking, destruction or removal of same, shall be fined not more than one thousand dollars or imprisoned not more than one year or both.

Sec. 54-33k Strip Search Defined

For the purposes of this section and section 54-33l, "strip search" means having an arrested person remove or arrange some or all of his or her clothing or, if an arrested person refuses to remove or arrange his or her clothing, having a peace officer or employee of the police department remove or arrange the clothing of the arrested person so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments used to clothe said anatomical parts of the body.

Sec. 54-331 Strip Search

(a) No person arrested for a motor vehicle violation or a misdemeanor shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or contraband.

(b) No search of any body cavity other than the mouth shall be conducted without a search warrant. Any warrant authorizing a body cavity search shall specify that the search is required to be performed under sanitary conditions and conducted either by or under the supervision of a person licensed to practice medicine in accordance with chapter 370.

(c) All strip searches shall be performed by a person of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search or not absolutely necessary to conduct the search.

(d) Any peace officer or employee of a police department conducting a strip search shall (1) obtain the written permission of the police chief or an agent thereof designated for the purposes of authorizing a strip search in accordance with this section and section 54-33k and (2) prepare a report of the strip search. The report shall include the written authorization required by subdivision (1) of this subsection, the name of the person subjected to the search, the name of any person conducting the search and the time, date and place of the search. A copy of the report shall be provided to the person subjected to the search.

(e) Nothing in this section shall preclude prosecution of a peace officer or employee under any other provision of the general statutes.

(f) Nothing in this section shall be construed as limiting any statutory or common law rights of any person for purposes of any civil action or injunctive relief.

(g) The provisions of this section and section 54-33k shall not apply when the person is remanded to a correctional institution pursuant to a court order.

Sec. 54-33n Search of school lockers and property

All local and regional boards of education and all private elementary and secondary schools may authorize the search by school or law enforcement officials of lockers and other school property available for use by students for the presence of weapons, contraband or the fruits of a crime if (1) the search is justified at its inception and (2) the search as actually conducted is reasonably related in scope to the circumstances which justified the interference in the first place. A search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. A search is reasonably related in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

ATTACKS ON SEARCH WARRANTS

I. LACK OF PARTICULARITY

A search pursuant to a search warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. Groh v. Ramirez, 540 U.S. 551 (2004); Massachusetts v. Sheppard, 468 U.S. 981 (1983); State v. Browne, 104 Conn. 314 (2007)

- A. Description of items to be seized.
- B. Description of place or places to be searched.
- C. Description of person or persons to be searched.
- D. Description of motor vehicles.

II. LACK OF PROBABLE CAUSE IN AFFIDAVIT

- A. Officer's training and experience
- B. Underlying circumstances: (See III).
- C. Corroboration:
 - 1. Surveillance - date or dates, times, results, meaning.

2. Other types of corroboration.

III. LACK OF INFORMER'S RELIABILITY

A. Why informer is "known and reliable."

1. How long you have known and dealt with the informer.
2. Past information - how many times.
3. Type of cases.
4. Results of past information - has it lead to arrests, or convictions or seizures of evidence.

B. Untested or new informer.

IV. BASIS OF INFORMER'S KNOWLEDGE

- A. State how the informant acquired his/her information.
- B. Personal - you must name the date the informer supplied you with the information, but not the time of day or place where the information was given.
- C. Recent - you must demonstrate the information is fresh - e.g., within the past week.
- D. Detail the current information from both the "known and reliable informer" and untested informer.

V. "STALE" PROBABLE CAUSE

VI. OATH AND SIGNATURES AT END OF AFFIDAVIT

Page three of the six page search warrant form must be signed, under oath, by two officers (affiants) in Judge's presence and by Judge.

VII. JUDGE'S SIGNATURE AT END OF WARRANT

Page five of the six page warrant form must be signed by the Judge.

VIII. EXECUTION OF WARRANT

A. Manner of Entry

1. The Connecticut Rule; State v. Mariano, 152 Conn. 85 (1964).
 - a. Knock, announce identity and purpose and request door be opened; “Police with a search warrant, open up”; enter by force after announcing and waiting a “reasonable time.”
 - b. Enter quickly after announcing if persons within know of your purpose, where you would be endangered or you believe evidence may be destroyed or persons inside will try to escape.
2. The Federal Rule; Hudson v. Michigan, 126 S.Ct. 2159 (2006); United States v. Banks, 540 U.S. 31 (2003); Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson v. Arkansas, 514 U.S. 927 (1995).

Police can conduct either a “no knock” entry or a knock and “quick” entry if they have reasonable suspicion that to do otherwise would either endanger their safety or result in the destruction of evidence.

B. Manner/Duration of search

C. Detention and/or Search of either occupants of premises or persons found on premises but not named in warrant to be searched. Muehler v. Mena, 125 S.Ct. 1465 (2005); Michigan v. Summers, 452 U.S. 692 (1981).

IX. DELAY IN EXECUTION

X. RETURN OF WARRANT

- A.** Must return within a reasonable time after execution of warrant.
- B.** List everything seized.

XI. FALSE AFFIDAVIT

- A.** Evidentiary hearing going beyond four corners of affidavit.

XII. INDEPENDENT SOURCE RULE

XIII. SEIZURE OF ITEMS NOT NAMED IN WARRANT

- A. Evidence related to crime being investigated
- B. Evidence of a different crime.
- C. Time and manner of location.

XIV. “GOOD FAITH” EXCEPTION TO THE EXCLUSIONARY RULE

- A. The Connecticut Rule, State v. Marsala, 216 Conn. 150 (1990); the exception does not apply.
- B. The Federal Rule, United States v. Leon, 468 U.S. 897 (1984); the exception applies.

**Minor Discrepancy in the Description of the Items
to be Seized May Be Acceptable**

State v. Browne, 291 Conn. 720 (2009)

In an affidavit supporting a warrant application, officers detailed defendant’s involvement in the sale of marijuana including the observation of two controlled purchases of marijuana. Unfortunately the warrant itself did not name marijuana as the item to be seized but listed the drug as “cocaine”, “crack cocaine”. Upon execution of the warrant, officers seized seven ½ lbs. of marijuana as well as paraphernalia. The State argued that because the affidavit described the drug to be seized as marijuana and the description of cocaine was merely a scrivener’s error, the seizure was lawful. The Court did not agree, finding that the adequate description in the affidavit did not save the warrant from its facial invalidity.

The State then argued that the warrant was valid because the executing officer had personal knowledge of the crime being investigated. The Court found that although it is true that an executing officer’s personal knowledge of the place to be searched may cure minor technical defects, the inadequacy of failing to describe the item could not be cured by the officer’s personal knowledge of the crime. Finally, the State argued that because it had probable cause to believe that some of the collateral items were located in the house, their officers could seize the marijuana under the *Plain View Doctrine*. The Court also rejected this argument stating that the *Plain View Doctrine* would allow officers to seize evidence within the parameters of a valid search warrant; however, in this case, the officers were not lawfully on the premises as they were on the premises pursuant to a defective warrant.

The Supreme Court overturned the Appellate Court finding this case distinguishable from Groh, in that the warrant in Groh did not describe the items to be seized at all, and the reference to cocaine rather than marijuana was just the type of technical mistake or typographical error that the court in Groh implicitly found would not invalidate an otherwise proper warrant. In this case, a neutral magistrate determined based on the sworn oaths of two detectives that probable cause existed that defendant was selling marijuana out of his apartment. The executing officers understood what they were searching for in the scope of their authority and the defendant understood exactly what the officers were searching for, as upon their entry he immediately informed them that the drugs were in the freezer. The court concluded that the officers lawfully detained the defendant and entered his premises on the basis of the warrant and were acting within the scope of the warrant when they searched the defendant's freezer. Upon opening the freezer, Sgt. Marino discovered two large bricks of marijuana in plain view.

The court noted several other interesting points including that the Fourth Amendment does not require the executing officer to serve the warrant on the owner before commencing the search; current law does not require incorporation an accompaniment of the affidavit with the warrant; the particularity requirement does not protect an interest in monitoring searches and the Fourth Amendment does not provide property owners a license to engage the police in debate over the basis of the warrant or protect their interests in monitoring searches.

**In Order to Take Enforcement Action on Trespass, the Property
Must Be Sufficiently Enclosed to Exclude Those Who Have No
Legitimate Reason to be on the Property**

State v. Robinson, 105 Conn.App. 179 (2008)

Police were in an area where they had received reports of ongoing drug activity. The premises in question was surrounded on three sides by a chain link fence and a fourth side by a five foot high cement wall that could be accessed by going up steps leading to a gateless opening to admit pedestrian ingress and egress. One of the officers recognized the defendant and his companion from previous drug related arrests. When the defendant saw the officers approaching he ducked down behind the wall. When the officers entered the courtyard, they saw the defendant squatting down on the ground with his hand down the back of his pants. They asked what he was doing, and he responded, "Tying my shoes". The defendant told the officers that he did not live at the property and was not visiting anybody. Officer Lepore conducted a pat down search which was resisted by the defendant. The defendant was arrested for trespass and taken to the police station where a strip search was conducted resulting in the officers finding cocaine.

The first issue was whether there was sufficient evidence for an arrest for trespass. The Court concluded that the trespass statute does not demand that the premises be completely enclosed to fall within it's purview but must be enclosed sufficiently to exclude intruders, namely, those who purposefully enter the property despite having no legitimate reason to do so. In this case the above

described property was sufficiently enclosed to give reasonable notice that it was not open to those who had no specific legitimate reason to be there.

The next question was whether the officers had sufficient reasonable suspicion at the stationhouse to conduct a strip search. Given the above circumstances, the officers' experience indicated that the defendant was apparently attempting to hide drugs between the cheeks of his buttocks thereby providing sufficient reasonable suspicion.

Finally, the defendant claimed that the evidence should be suppressed as the search conducted amounted to a body cavity search. The Court noted that Connecticut's Statute does not define a body cavity search but agreed with the trial court that as applied to this case a body cavity under the statute requires that the police actually have physically intruded into the defendant's anus in order to retrieve the contraband. In this case the officers dislodged the bag of contraband which protruded from between the defendant's buttocks by flicking it with a finger and the bag was wholly outside the defendant's rectum. Therefore, this action did not constitute a body cavity search.

A Person May Be In Possession Even If The Item(s) Are Not Found In Their "Physical" Control

It is clear that a person may be arrested when an illegal item is found on their person, seen in their possession or property is in their exclusive possession. The more difficult question is when can they be charged with possession when the item is merely near them or when others may have access to the item?

Doctrine of Non-Exclusive Possession: This doctrine requires that when an item is found in an area occupied by others who may have access to the item(s) other evidence such as incriminating statements, actions or other circumstances, connecting the suspect to the items are necessary to prove possession.

Constructive Possession: Constructive possession requires proof that the defendant intentionally exercised dominion or control over the item(s) in question, and have knowledge of the character and presence of the item(s).

Examples: Police executed a search warrant for narcotics finding weapons and contraband material in both the defendant's apartment and in the basement of the two-family home he resided in. With regard to the items found in the basement the court noted that where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that the defendant knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference." United States v. Williams, 64 Conn. App. 512 at 520 (2002). The court concluded that there were other incriminating circumstances that tended to establish that the defendant had constructively possessed the cocaine. The defendant housed his pit bull in the basement, where the apple bags and the guns were found.

Also, many unused small zip lock bags (apple bags) were found in the defendant's nightstand drawer, along with razor blades and his driver's license. Bullets for the guns that were found in the basement were discovered in defendant's dresser drawer. Accordingly, one can conclude that the evidence was adequate to support a finding that the defendant had constructively possessed the gun found in the shared basement.

Officer Lawrence of the Hartford Police Department saw defendant drive through a stop sign. He activated his lights and pursued the defendant who pulled into a driveway, got out of the car and walked up to a private home. As Lawrence approached the vehicle he looked in the car window seeing a .38 caliber semiautomatic pistol on the driver's seat. The defendant claimed that the gun was not his and it was undisputed that a Kirk Scott has rented the car.

The court noted that the Doctrine of Non-Exclusive Possession provides that, "where there exists access by two or more people to the (contraband) in question, there must be something more than the mere fact that the contraband was found to support the inference that the contraband was in the possession or control of the defendant." State v. Nesmith, 24 Conn. App. 158 (1991).

Thus, the Doctrine of Non-Exclusive Possession would apply when there is at least one other individual who has access to the item. In this case there was sufficient evidence to prove that the defendant had constructive possession of the weapon. If the defendant had been driving the vehicle and immediately after leaving the vehicle, the gun was seen on the driver's seat, he either was sitting on the weapon, or placed the weapon on the seat as he exited the vehicle. Either act demonstrated the defendant had dominion control over the weapon with knowledge of its character, thereby establishing possession.

THE "SEARCH WARRANT RULE" AND ITS EXCEPTIONS

"Under both the federal and the state constitutions, the police must first obtain a warrant before conducting a search, unless an exception to the warrant requirement applies." State v. Longo, 243 Conn. 732, 737 (1998).

Judicially recognized exceptions to the Fourth Amendment's search warrant rule include:

1. Plain view;
2. Abandoned property;
3. Search incident to a lawful custodial arrest;
4. Consent;
5. Third party search;

6. Emergency/exigent circumstances:
 - (a) Immediate entry required to prevent escape or to prevent destruction of evidence or because of danger to person (s) or police;
or
 - (b) Hot pursuit of a fleeing felon;
or
 - (c) Provide immediate aid.
7. Terry stop;
8. Open fields;
9. Search of a readily mobile automobile;
10. Inventory of automobile;
11. Community caretaker function.

Expectation of Privacy

A Person Who Called In On a Phone Without Identifying the Person Receiving the Call Has No Expectation of Privacy in the Ensuing Conversation

State v. Gonzalez, 278 Conn. 341 (2006)

Officer Heinz observed a known narcotics user engage in a hand to hand transaction. A drug user identified the individual who sold the heroin to her. During the stop of the drug dealer, his cell phone continually rang. Officer Reyes who was fluent in Spanish, answered the phone and was told by a male Hispanic caller, that he wanted to re-supply him and identified where he would be. Officers confiscated the cell phone and went to the area where another cell phone call was received by an individual saying he was waiting in a red van. Officers approached, conducted an investigation, found heroin and other items and arrested the defendant.

The sole issue on appeal was whether Gonzalez had a reasonable expectation of privacy in statements that he made to police officers who answered the cellular telephone. It was uncontested that the defendant had no standing to challenge the seizure of the co-defendant's property. More importantly, the court concluded that one who makes a telephone call assumes the risks that unintended persons may hear the subsequent conversation. Here, the defendant spoke voluntarily with police and made no effort to ascertain the identity of the person to whom he spoke, therefore, he lacked a reasonable expectation of privacy in the words he spoke when he called co-defendant's cell phone.

Police Officers May Conduct Searches of Parolees Absent Reasonable Suspicion

Samson v. California, 126 S.Ct. 2193 (2006)

An officer observed Samson, who he knew was on parole for felony possession of a firearm, walking down the street. He confirmed by radio that Samson was still on parole and that he did not have an outstanding warrant. Upon searching Samson, the officer found a plastic bag containing methamphetamine.

The Court noted its previous decision in United States v. Knights, 534 U.S. 112 (2001), where it held that “[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.” The Court determined that on a continuum, parolees have fewer expectations of privacy than probationers. The essence of parole is release from prison, before the completion of a sentence on the condition that the prisoner abides by certain rules. Without addressing whether the parolee or probationer needed to have accepted the search condition, the Court determined that the State’s interest in supervising parolees who are more likely to commit criminal offenses were sufficient to justify the search without reasonable suspicion. The ability to conduct suspicionless searches of parolees serves society’s interest in reducing recidivism and reintegrating parolees into a productive society.

An Inventory Search May Be Conducted Regardless of Whether the Vehicle Will Be in the Possession of the Police or a Tow Company

Mutual Consent May Not Be an Issue Unless the Facts Indicate That Both Parties Have Common Authority

State v. Whealton, 108 Conn.App. 172 (2008)

Officer Redd of the Stamford Police Department received information from a confidential informant that the defendant was selling crack cocaine, lived at a certain address and drove a particularly described vehicle. Officers Martinez and Frank observed the defendant disobey a traffic signal and stopped him. Because the defendant did not have a license, the officers called for a tow truck and conducted an inventory, finding a plastic bag containing narcotics and a scale. After being placed under arrest, Redd told the defendant he believed there were more drugs at his apartment and asked for consent to search it. The defendant told Redd that he lived with Shirley Anthony and their six year old daughter. The officers and the defendant proceeded to the sixth floor apartment, but the defendant did not consent to the search of the apartment. After the building superintendent informed the officers that Anthony was on her way home, the officers conducted a protective sweep and then waited outside in the hallway until Anthony arrived. At this point the defendant had been removed to the police station. Anthony testified that when she arrived she was pressured into signing a consent to

search form. After obtaining Anthony's consent, the officers searched the apartment where they discovered narcotics.

Defendant argued that the officers had no authority to conduct an inventory because the vehicle was not going to be retained by the police but would be in the possession of a private towing company. The court found that there was no legal basis for distinguishing between a situation in which police take a vehicle into custody or turn it over to a private towing company for impounding.

With regard to the consent issue the defendant relied on the dual consent rule of Georgia v. Randolph, 547 U.S. 103 (2006). The court discussed prior U.S. Supreme Court precedent in which the court found that police need not seek out the consent of one who has mutual authority who is asleep in the apartment or seated nearby in a police vehicle. It was noted that the Randolph Court indicated it was drawing a fine line between situations in which the objector is in fact at the door or nearby but not invited to take part in the consent. The Court then went on to discuss the question as to whether Whealton had common authority over the apartment. The facts were insufficient to determine whether he had joint access or control over the apartment as Anthony testified that the defendant stayed there off and on, had a key and they had a child in common. There was no evidence regarding whether the defendant contributed to the rent, kept possessions there or used the apartment as his address. In the absence of sufficient facts to determine common authority the Court was unable to overrule the trial court's determination that the search of the apartment was conducted with appropriate consent.

Seeing Contraband in Plain View in Car Also Provides a Justification to Search the Car Under The Automobile Exception

Although Police Unlawfully Entered an Automobile the Discovery of a Weapon Was Lawful Under the Inevitable Discovery Rule

State v. Vallejo, 102 Conn. App. 628 (2007)

On May 8, 2002, the defendant was involved in road rage incident where the defendant fired several shots at the victim. An arrest warrant issued for the defendant.

On November 12, 2002, a police officer observed the defendant and a female inside a video store. The defendant was arrested and incident to his arrest police found a bag of marijuana, an electronic scale, a large amount of cash and a set of car keys. When police told the female she was free to leave she told them her purse was in the defendant's car. When police asked the defendant for permission to enter the car to retrieve the purse and to search the car, he stated police would enter the car to retrieve the purse but he would not consent to a search of the car because the car did not belong to him but to a friend.

Police attempted to locate the owner of the car but couldn't, so they decided to secure the car by bringing it to the police department.

Under the inevitable discovery rule, evidence illegally secured in violation of the defendant's constitutional rights need not be suppressed if the state demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means... To qualify for admissibility the state must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the constitutional violation. The inevitable discovery rule applies in a situation in which, as here, the police would have legally discovered the evidence eventually. Here, the police would have discovered the gun through the inventory conducted in accordance with the police department policy.

Entry Issues and Actions After Entry

Officers May Enter a Home Without a Warrant or Consent When They Reasonably Believe an Occupant is Seriously Injured or Imminently Threatened With Such Injury

Brigham v. Stuart, 126 S.Ct. 1943 (2006)

At about 3 a.m., four police officers responded to a loud party. They heard shouting inside and walked down the driveway where they observed two juveniles drinking beer in a backyard. Through a screen door and windows they observed an altercation in the kitchen. Four adults were attempting to restrain a juvenile who broke free and swung a fist at one of the adults hitting him in the face. Officers observed the adult spitting blood in a nearby sink while the other adults continued to restrain the juvenile pressing him against the refrigerator. Officers opened the screen door announced their presence, entered the kitchen, and again announced themselves at which time the altercation ceased. Arrests were made for contributing to the delinquency of a minor, disorderly conduct, and intoxication.

Previously the court has allowed warrantless entries to fight a fire and to investigate its cause, to prevent the imminent destruction of evidence, to engage in hot pursuit of a fleeing suspect, and to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Plaintiffs first claim that the officers' entry was unreasonable because their true subjective motivation was to make an arrest and not to quell violence. The Court rejected this argument noting that an action is reasonable under the Fourth Amendment regardless of the individual officer's state of mind as long as the circumstances viewed objectively justify the action. Plaintiffs also contended that the harm was not serious enough to justify the officers' intrusion into the home. Plaintiffs relied on Welsh v. Wisconsin, 466 U.S. 740 (1984) where the Court determined that the gravity of the underlying offense, driving while intoxicated, did not justify the officers' entry to preserve evidence

amounting to the suspect's blood alcohol level. In this case, the Court reasoned there was ongoing violence and it was objectively reasonable for the officers to believe that the injured adult might need help and that the violence was just beginning. "Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering."

The Court also commented on the manner of the officers' entry. The officers first announced themselves at the screen door and upon receiving no response stepped into the kitchen where they then announced themselves a second time. There was no violation of the Fourth Amendment's knock and announce rule, as once the officers announced themselves they were free to enter and it would serve no purpose to require them to stand at the door awaiting a response while those within brawled on, oblivious to their presence.

**Officers in a Premises Lawfully May Enter Other
Rooms When Exigent Circumstances Exist**

State v. Aviles, 277 Conn. 281 (2006)

Shortly before 8 p.m., defendant shot and killed the victim in front of a number of witnesses. The morning after the shooting the police received information that the defendant was hiding out in an apartment owned by his girlfriend's sister where he frequently stayed overnight. Upon knocking on the door, a female responded. Sergeant Pelosi identified himself, said he was looking for the defendant, at which time the female opened the door and invited Pelosi into the apartment. Pelosi observed the defendant sleeping or pretending to sleep through the open door of one of the bedrooms. He entered the bedroom, did not handcuff the defendant, but did search the immediate area. The defendant was taken to the police department where subsequently he provided oral and written confessions and took the police to the park where he had discarded the gun and the shirt that he was wearing at the time of the murder.

The issue in the case was whether the police entry into the bedroom and ensuing seizure were justified by exigent circumstances. The court concluded that once the officers were within the apartment pursuant to consent and observed the suspect who had recently shot someone, and the weapon could not be found, had exigent circumstances justifying entry into the bedroom. Police officers could reasonably believe that an emergency existed involving danger to human life and that entry into the bedroom was reasonable in order to neutralize any danger to themselves as well as other individuals. Under these circumstances it was not necessary for officers to obtain a warrant prior to making such entry.

Failure to Comply With A Knock And Announce Rule Does Not Require Application of The Exclusionary Rule

Hudson v. Michigan, 126 S.Ct. 2159 (2006)

Police executing a warrant authorizing a search for drugs and firearms announce their presence but only waited a short time (three to five seconds) before turning the knob and entering Hudson's home.

In Wilson v. Arkansas, 514 U.S. 927 (1995), the Court concluded that a violation of the knock and announce rule amounted to a Fourth Amendment violation. However, the Court reasoned that even if officers violate the rule, such violation does not warrant the suppression of evidence pursuant to the exclusionary rule.

The Court first noted that the exclusionary rule generates substantial social costs in that a constitutional violation does not automatically trigger the exclusion of evidence. In determining whether evidence is the fruit of the poisonous tree the question is whether the evidence was obtained by exploitation of the primary illegality. In other words, is there a direct causal connection between the illegality and the discovery of the evidence in question? The interests of the knock and announce rule are the protection of human life, the protection of property and the protection of the privacy and dignity of occupants of the premises. The rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. "Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable. Further, suppression of evidence would amount to a get-out-of-jail-free card. The substantial social costs in excluding the evidence outweigh the deterrence benefit. When the exclusionary rule was first created civil remedies under 42 U.S. Code Section 1983 did not provide meaningful relief. Dollree Mapp could not bring an action under Section 1983 and it was not until seventeen (17) years after the Mapp case that a plaintiff could reach the deep pockets of a municipality. (Monroe v. Pape and Monell v. New York City, Dept. of Social Services). Also, citizens could not sue federal agents for Fourth Amendment violations until ten (10) years after Mapp (Bivens v. Six Unknown Fed. Narcotics Agents).

The Court also recognized the developing professionalism in law enforcement including emphasis on internal discipline, other reforms related to education, training and supervision of police officers.

The Court also discussed the difficulty in applying the exclusionary rule to knock and announce violations. Unlike the warrant or Miranda requirements where violations are readily determined, it is not easy to determine whether police waited a reasonable time or whether there was a reasonable exception to the requirement that justified an entry without knocking and announcing.

In a concurring opinion, Justice Kennedy made two points. First, the knock and announce requirement is linked to ancient principles and protection of rights and this decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern. Second, the operation of the exclusionary rule is not in doubt and this decision determines only that in the specific context of the knock and announce requirement that the suppression of evidence is not justified.

SECTION FOUR

WARRANTLESS SEARCHES OF MOTOR VEHICLES

SUMMARY:

A. RECOGNIZED THEORIES

1) SEARCH INCIDENT TO A LAWFUL CUSTODIAL ARREST

This theory allows a police officer, following the custodial arrest of either the occupant of an automobile or the recent occupant of an automobile (the "passenger compartment") "...only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" and it is "...reasonable to believe evidence relevant to the crime of the arrest might be found in the vehicle." Arizona v. Gant, 555 U.S. ____ (April 21, 2009). If there is no "...possibility of access nor the likelihood of discovering offense-related evidence..." the warrantless search is unlawful and any evidence seized will be suppressed.

Arizona v. Gant, clarified an earlier decision, New York v. Belton, 453 U.S. 454 (1981) which had been interpreted as allowing police to automatically search the interior of an automobile following every custodial arrest of either the occupant or recent occupant of an automobile even if the arrestee had been secured by police (either handcuffed at the scene of the arrest or handcuffed and placed in a patrol car) and whether or not there was any likelihood police would expect to find physical evidence related to the arrest, e.g., operating under suspension, breach of peace, etc.

The scope of the search includes a locked glove compartment, State v. Farr, 84 Conn.App. 259 (1991), open or closed (but not locked) containers in the interior, State v. Longo, 243 Conn. 732 (1998), "passengers" belongings in the interior, Wyoming v. Houghton, 526 U.S. 295 (1999) and the hatchback area, State v. Delossantos, 211 Conn. 412 (1989).

The automobile can be searched only so long as the arrestee remains at the scene of his arrest. State v. Badgett, 200 Conn. 412 (1986).

Under the Fourth Amendment, a police officer can make a warrantless custodial arrest for a misdemeanor punishable only by a fine. Atwater v. City of Lago Vista, 532 U.S. 924 (2001).

The issuance of a summons does not permit a search of the vehicle's interior. Knowles v. Iowa, 525 U.S. 113 (1998).

Under the Fourth Amendment, a police officer's subjective motivation for making a motor vehicle stop is irrelevant so long as the officer had a lawful basis for the stop; any subsequent custodial arrest and search is lawful if the officer had probable cause for the arrest and search. Arkansas v. Sullivan, 532 U.S. 769 (2001); Whren v. United States, 517 U.S. 806 (1996).

In this theory the arrest precedes the search. The justification for a search incident to an arrest is the theoretical ability of the arrestee to obtain a weapon or destroy evidence.

2) PROBABLE CAUSE TO BELIEVE A MOTOR VEHICLE CONTAINS EITHER CONTRABAND OR EVIDENCE OF A CRIME

This theory allows a police officer to search a readily mobile automobile if he has probable cause to believe it contains contraband. Maryland v. Dyson, 527 U.S. 465 (1999); Pennsylvania v. Labron, 518 U.S.938 (1996). Police can also search any closed containers in the automobile that are capable of holding what they are looking for. State v. Longo, 243 Conn. 732 (1998). If the automobile's trunk is not searched at the scene, but is towed to the police department or other secured area, police cannot search the trunk without a warrant, but they must either obtain a search warrant, consent to search, or inventory it. State v. Miller, 227 Conn. 363 (1993).

A "dog sniff" does not violate the Fourth Amendment, Illinois v. Cabales, 125 S.Ct 834 (2005).

In this theory, the search may precede the arrest.

3) CONSENT

This theory allows a police officer to search an automobile with the consent of a person having authority to permit the search. Maryland v. Pringle, 538 U.S. 921 (2003); Ohio v. Robinette, 519 U.S.33 (1996); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Spellman, 153 Conn. 65 (1972). The consent includes the right to search closed containers capable of holding what the police are looking for. Florida v. Jimeno, 500 U.S. 248 (1991).

The consent must be voluntary; if possible, the consent should be in writing.

4) INVENTORY

This theory allows a police officer to conduct an "inventory" of the contents of an automobile. Colorado v. Bertine, 479 U.S. 367 (1987); South Dakota v. Opperman, 428 U.S. 634 (1976); Cooper v. California, 386 U.S. 58 (1967); State v. Badgett, 200 Conn. 412 (1986).

Containers, locked or closed, may be inventoried if the police department's inventory policy requires they be inventoried. Florida v. Wells, 495 U.S. 1 (1990).

5) **COMMUNITY CARETAKER FUNCTION**

This theory allows a police officer who has probable cause to believe an unattended motor vehicle, which is vulnerable to intrusion, contains an item which constitutes a danger to the public - a weapon or explosives - to enter the vehicle to remove the dangerous item. Any contraband or evidence of a crime seized is admissible. Cady v. Dambrowski, 413 U.S. 433 (1973); State v. Tully, 166 Conn. 126 (1974).

B) **CONTAINERS**

In New York v. Belton, 453 U.S. 454, 461 (1981), the court defined a container as "any object capable of holding another object", and stated it included "...closed or open glove compartments, consoles or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing and the like."

C) **TERRY STOP AND MOTOR VEHICLES**

A police officer conducting a Terry Stop of an automobile can search the interior of the automobile for weapons, limited to those areas where a weapon may be hidden if the officer has a reasonable suspicion that the person detained is potentially dangerous. Michigan v. Long, 463 U.S. 1032 (1983); State v. Wilkins, 240 Conn. 489 (1997); State v. D'Ambrosia, 14 Conn. App. 309 (1988).

* * * *

The Bright Line Rule Allowing Searches of Motor Vehicles Incident To Arrests Is No Longer Valid. A Search of a Vehicle Incident to a Recent Occupant's Arrest May Be Conducted Only When:

- 1. The Arrestee is Unsecured and Within Reaching Distance of the Vehicle or;**
- 2. When it is Reasonable to Believe the Vehicle Contains Evidence Relevant to the Crime the Occupant Was Arrested For.**

Arizona v. Gant, 129 S.Ct. 1710 (2009)

Gant was arrested for operating with a suspended license. After he was handcuffed and placed in the back of a locked police car, officers searched his vehicle and found cocaine in the pocket of a jacket found in the rear seat. The U. S. Supreme Court affirmed the Arizona Supreme Court which

held that the search incident to arrest exception DID NOT apply because Gant could not have retrieved a weapon or evidence at the time of the search.

Chimel v California, 395 U. S. 752, (1969) allows police to search areas within the immediate control of arrestees, meaning areas within which they may gain control of weapons or destroy evidence. Because Gant was secured and under police supervision the Chimel justifications of protecting officers or preventing the destruction of evidence did not exist.

In New York v Belton, 453 U.S. 454 (1981) a lone police officer stopped a car containing four occupants for speeding. Upon smelling marijuana and observing an envelope associated with marijuana, he separated the unsecured arrestees and searched the pocket of a jacket in the backseat. In Thornton v. United States, 541 U.S. 615 (2004) an officer found drugs in the pocket of the arrestee who was near the vehicle the officer recently observed him driving. The searches in Belton and Thornton would still be justified incident to arrest as in Belton the arrestees were unsecured and in Thornton the officer had reason to believe evidence of the arrest might be found in the vehicle.

Gant does not effect other motor vehicle exceptions such as; when officers have reasonable suspicion to believe an individual may gain access to a weapon in the vehicle; or there is probable cause to believe evidence of an offense is in the vehicle; or officers take possession and control of a vehicle and conduct an inventory pursuant to department policy.

Probable Cause May Exist To Search a Vehicle Even If the Defendant Is Arrested Outside the Vehicle and No Narcotic Sales Are Observed From the Vehicle

State v. Wilson, 111 Conn. App. 614 (2008)

Officer Higgins of the Bridgeport Police Department's Tactical Narcotics Team approached a man in front of a restaurant asking him if he had any "slabs". The man told him that his man would be arriving with some and Higgins joined a group of people who were also waiting for the man. A few seconds later, a man drove up in a vehicle and parked near an unmarked police vehicle occupied by Officer Ronan. The defendant got out of the car and walked toward the restaurant at which time the man announced, "that's the dude right there." The drug customers, including Higgins, walked inside and made their drug purchases. Higgins paid with a marked and copied \$20.00 bill and gave a description to other officers through a listening device. Ronan observed the defendant leave the restaurant and walked toward his vehicle radioing Officers Reilly and Andrews to move in. As these officers approached in their cruiser the defendant ran toward an alley. He was observed throwing two cellular phones to the ground and jumping over a fence. Reilly found eight small bags of suspected crack inside one of the phones. Other officers apprehended the defendant, searched him, finding marijuana, \$120.00, including Higgins's \$20.00 bill. While being patted down they found a key to the defendant's vehicle which was used to open the vehicle. Inside they found 34 bags of suspected crack, \$984.00 and another cellular phone.

The defendant claimed the search of the vehicle was unlawful as the officers never observed any drug transactions from the vehicle. The court described four situations where warrantless searches of cars are lawful including: (1) search incident to arrest; (2) probable cause; (3) consent, and (4) inventory. Finding the search to be lawful under the automobile exception, the court did not address the other theories. The facts above, based on the officer's testimony, were sufficient for officers to believe that there was a fair probability that defendant was storing more narcotics in his vehicle for future sales. Of particular note was the comment that the defendant had provided sufficient narcotics for all of the customers inside the restaurant indicating that he was in possession of a substantial quantity of narcotics that were not for his personal use.

A Dog Sniff Conducted During a Lawful Traffic Stop That Reveals No Information Other Than the Location of a Substance a Person Has No Right To Possess, Does Not Violate the Fourth Amendment

Illinois v. Caballes, 543 U.S. 105 (2005)

Illinois State Trooper Gillette stopped the defendant for speeding. Trooper Graham, of the narcotics interdiction team, oversaw the stop, and responded to the scene with his drug dog. When Graham arrived, the defendant was sitting in Gillette's car while Gillette wrote out a written warning. While the warning was being filled out, Graham walked his dog around defendant's car. The dog alerted on the trunk, and the troopers searched the car and found marijuana. At trial, the court rejected defendant's motion to suppress on the ground that officers unnecessarily prolonged the stop to conduct the dog search and also that the dog sniff was not probable cause to search. The Illinois Appellate Court affirmed the trial court, but Illinois's Supreme Court reversed, saying that officers had no reasonable articulable suspicion justifying enlarging the scope of a routine traffic stop to do the drug sniff.

The U.S. Supreme Court granted certiorari to decide "Whether the Fourth Amendment requires reasonable articulable suspicion to justify using a drug detection dog to sniff a vehicle during a routine traffic stop?"

Held:

- 1) Even assuming the trooper had no independent reasonable suspicion or probable cause to justify detaining the defendant for anything but the traffic offense, the Fourth Amendment does not require officers to have reasonable suspicion to have a drug dog sniff around the car during the stop.
- 2) Because people have no expectation of privacy in contraband, "the use of a well trained narcotics detection dog...during a lawful traffic stop generally does not implicate legitimate privacy interests."

- 3) The Court hints that a drug sniff during a routine traffic stop where officers have no independent reasonable articulable suspicion that there is contraband in the car, should be done during the time it takes to conduct the inquiries and activities of a normal traffic stop; otherwise the detention may be an unreasonable seizure and unconstitutional.

Note:

Officers need to understand what this case is not. This is not a case where troopers stopped a car and saw a number of drug indicator clues justifying further detention of the suspect on the basis of Terry until a drug dog arrived. This is a case where troopers pulled over a car for speeding, saw no special clues of drug activity, and had a drug dog do a sniff during the time it took to write up a warning ticket. The Supreme Court is simply saying that even without reasonable suspicion of drugs, officers can “dog sniff” cars during the time it takes to conduct a lawful traffic stop. It is likely the Court would not allow an officer to detain a person for a drug sniff on a routine traffic stop for a period of time that is longer than usual to conduct a basic traffic stop unless there is at least reasonable articulable suspicion of drug activity.

SECTION FIVE

CONSENT

Consent is an Exception to the General Rule That Police Must Obtain a Warrant Before Searching

Georgia v. Randolph, 547 U.S. _____, 164 L.Ed2d 208, 218-219 (2006)

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, one "jealously and carefully drawn exception recognizes the validity of a voluntary consent of an individual possessing authority."

The State Has the Burden of Proving Consent Was Voluntarily Obtained and the person Who Consented Had Authority to Consent.

State v. Reagan, 209 Conn. 1, 7 (1988)

The State has the burden of proving that the consent was free and voluntary and that the person purported to consent had the authority to.

Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)

...the question whether a consent to a search was in fact "voluntary" or was a product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.

State v. Jones, 193 Conn. 70, 79 (1984)

The question whether consent to a search has in fact been freely and voluntarily given, or was the product of coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. As a question of fact, it is normally to be decided by the trial court, upon the evidence before the court, together with the reasonable inferences to be drawn from that evidence.

Knowledge Of The Right To Refuse Consent Is One Important Factor On The Issue Of Voluntariness

Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)

While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.

United States v. Watson, 423 U.S. 411, 424 (1976)

...under Schneekloth, the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance.

United States v. Mendenhall, 446 U.S. 544, 558-559 (1980)

Although the Constitution does not require “proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.” ...such knowledge was highly relevant to the determination that there had been consent.

The Voluntariness Of The Consent Given By An Arrestee Is Measured By The Totality Of The Circumstances But The Fact Of Custody Will Result In More Careful Judicial Scrutiny

United States v. Watson, 423 U.S. 411, 424 (1976)

...the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search.

State v. Adams, 176 Conn. 138, 142 (1978)

...whether the defendant is within police custody at the time consent is given is merely one factor to be considered in determining whether the consent was “voluntarily and freely given.” The fact of custody may require more careful scrutiny, but it does not alone preclude the giving of voluntary consent.

The Consent of A Person Who Possesses Common Authority Over Premises or Effects Is Valid Against the Absent, Non-Consenting Person with Whom That Authority Is Shared

United States v. Matlock, 415 U.S. 164, 171 (1974)

...when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

State v. Jones, 193 Conn.70, 80 (1984)

In order for third-party consent to be valid, the consenting party must have possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Where a Physically Present Occupant Refuses to Consent to a Warrantless Search Consented to by Another Physically Present Occupant, the Search is Unlawful as to the Occupant's Refusal.

Georgia v. Randolph, 547 U.S. ____, 164 L.Ed2d 208, 217 (2006).

...a physically present co-occupant's refusal to permit entry... rendered the warrantless search unreasonable as to him.

Not All Third Parties Can Lawfully Consent

United States v. Matlock, 415 U.S. 164, 171 (1974)

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority that justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements. See Chapman v. United States, 365 U.S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another), Stoner v. California, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property of persons who generally have joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right, and that the others have assumed the risk that one of them might permit the common areas to be searched.

State v. Zindros, 189 Conn. 243 (1983)

The general rule of law is that a landlord may not consent to a search of the tenant's premises and this is true even when the landlord has some right to enter for purposes of inspecting and cleaning.

Consent Can Be Limited or Later Withdrawn

State v. Reagan, 209 Conn. 1 (1988)

An invitation to enter one's home does not necessarily imply an invitation or consent to enter all areas of that home. See People v. Brown, 162 Ill. App. 3d 528, 515 N.E. 2d 1285, 1291 (1987), appeal denied, 119 Ill.2d 331 (1977); State v. Monahan, 76 Wis 2d 387, 394, 215 N.W. 2d 421 (1977). "When the police are relying upon consent as the basis for their warrantless search, they have no more authority than they have been given by the consent. It is thus important to take account of any express or implied limitations or qualifications attending that consent which establishes the permissible scope of the search in terms of such matters as time, duration, area or intensity." 3 W. LaFave, Search and Seizure (2d Ed.) Section 8.1(c), p. 160. The state bears the burden affirmatively to establish that consent was voluntary; State v. Jones, *supra*, 78 Dotson v. Warden, *supra*, 619; and the consent shall

not be lightly inferred. See United States v. Impink, 728 F.2d 1228, 1232 (9th Cir. 1984); 68 Am. Jur. 2d 699, Search and Seizures, Section 46.

A consent to enter or to search, once given, can be withdrawn or limited at any time prior to the completion of the search; United States v. Dyer, 784 F.2d 812, 816 (7th Cir. 1986); Mason v. Pulliam, 557 F.2d 426, 428-429 (5th Cir. 1977); 3 LaFave, supra, Section 8.1(c), pp. 172-173; by some verbal or physical act indicating that the consent has been withdrawn, State v. Wargin, 418 So. 2d 1261, 1263 (Fla. 1982).

Application of Apparent Common Authority to Authorize Entry

State v. Vazquez, 87 Conn. App. 792 (2005)

Following the robbery of a pizza delivery man, the police escorted the victim to the police station to view an array of computerized photographs. Within two hours of the robbery, the victim had viewed approximately three hundred (300) photographs. Prior to the conclusion of his review, he was taken for a one-on-one identification, but did not identify the individual as the one who robbed him. After his return to view more photographs, he identified the defendant as the perpetrator. He was then taken to the defendant's home where a one-on-one procedure was conducted. Because the victim identified the defendant from among three hundred (300) photographs of individuals similar in appearance and was not urged to pick out the defendant's photograph, the court found that the procedure was not unnecessarily suggestive.

Prior to the identification, the police obtained consent from defendant's girlfriend to search for a gun in the apartment. A detective and three officers from the Bridgeport Police Department were told by defendant's girlfriend that she lived in the apartment and was the renter. The detective observed several children who the girlfriend identified as hers. She indicated that no other adults were home and after Detective DePietro explained that he believed that a firearm was in the home and requested that she give consent to search for the firearm, she agreed and signed a handwritten consent which DePietro prepared. Several minutes into the search, DePietro discovered the defendant partially hidden under a bed. Money was seized from the defendant and the apartment. At the time of the seizure the girlfriend withdrew her consent and stated that she was not, in fact, the renter, and did not reside there. The police immediately ceased their search. The Defendant claims that the girlfriend did not have common authority or apparent authority to consent to the search.

The court explained that the test for common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. Given the facts presented to the officers prior to and during their search it was objectively reasonable for them to believe that the girlfriend had authority to consent.

**Declining to Sign a Consent to Search Form Does Not Amount to a Refusal
to Consent But it is One Factor On the Issue of Voluntariness**

State v. Brunetti, 279 Conn. 39 (2006)

Thirty five year-old Doris Crane encountered the nineteen year-old defendant after leaving a bar. She asked the defendant if he had any marijuana and asked to smoke with him behind a local school. After sharing the marijuana they engaged in sexual intercourse. After about fifteen minutes the victim asked the defendant to stop because it was hurting. The defendant ignored her request and continued until he reached an orgasm. After the intercourse the victim cursed the defendant and told him she was going to call the police. The defendant grabbed her in a choke hold, punched her, and repeatedly beat her over the head with an empty glass bottle. The defendant left the victim's body in a high grass area behind the school.

The next day detectives following up on information suggesting that the defendant might be a suspect, approached the defendant's parents sitting on the front porch of their home and asked to speak to the defendant. They told the defendant they wanted to bring him to the police department for questioning and asked him to produce his clothes. The defendant retrieved some clothing then drove with the police to the department followed by the parents who drove their own car. At the police station, an officer asked the parents to sign consent forms. The father signed the form but the mother refused. Officers went with the parents to conduct the search while the defendant remained at the police station. During the search the officers found clothing in a washing machine including sweat pants with bleach/like stains and a tank top with reddish brown blood like stains. When informed of the discovery, the defendant become upset and requested a Bible. The detective issued *Miranda* warnings to the defendant who described in detail the manner in which he had murdered the victim.

The court originally construed the mother's declining to sign the form as a refusal to give consent to the search. The question before the court, therefore, was whether the father's consent or the mother's refusal prevailed when both had common authority over the property. In discussing this issue, the court reviewed Article 1st, Section 7 of the Connecticut Constitution with the Fourth Amendment. The court noted the similar language in both provisions and historical development of both as having the same source.

In evaluating the common authority principal, the court stated that "the authority which justifies...third-party consent does not rest upon the law of property...but rests rather on the mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right..."

After reviewing the differing opinions of other states, the court originally found most persuasive the reasoning that focused on the constitutional right of the present objecting co-occupant. Following Florida, the court determined that an objecting party should not have his constitutional

rights ignored merely because he shares a property interest with another. “Requiring the consent of both present joint occupants for a valid consent search is consistent with our manifest preference for warrants and our well-established regard for the sanctity of the home.”

Upon reconsideration, the court opined that it is beyond dispute that the act of declining to sign a “consent to search form” is not tantamount to a refusal to consent to the search, rather it is simply one of several relevant factors a court considers in determining the reliability of a consent to search. Because the refusal to sign a consent form is one of several factors to be considered in determining the validity of consent, such refusal does not invalidate consent otherwise found to be valid in light of all the circumstances.

Consent Once Removed

Pearson v. Callahan, 129 S.Ct. 808 (2009)

After being charged with possession of methamphetamine, Bartholomew, agreed to make a controlled buy from his supplier. The officer searched Bartholomew to make sure he had no controlled substances on his person, gave him a marked \$100.00 bill and concealed an electronic transmitter to monitor his conversation. He agreed to give a signal after completing the purchase. After the transaction was completed, Bartholomew gave the signal and officers entered the defendant’s trailer confiscating the narcotics and conducting a protective sweep of the premises.

After the Utah Court of Appeals vacated respondent’s conviction, finding that the warrantless arrest and search were unsupported by exigent circumstances, the defendant brought a Section 1983 action claiming a violation of his Fourth Amendment rights, based on the officer’s alleged unlawful entry into his home without a warrant. The court held that the officers were entitled to qualified immunity because their entry did not violate clearly established law. At the time of the entry in 2002, the “consent-once-removed” doctrine had been considered by three federal courts of appeal and two State Supreme Courts. Going back to the early 1980’s, every court considering this doctrine accepted it and no courts had rejected it. Therefore, the officers were entitled to rely on these cases even though their own circuit had never ruled on the issue. Principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.

SECTION SIX

THE “MIRANDA RULE”(THE FIFTH AMENDMENT RIGHT TO AN ATTORNEY AND RIGHT TO REMAIN SILENT)

CUSTODY + INTERROGATION = "MIRANDA" WARNINGS = WAIVER = ADMISSIBLE STATEMENT

Miranda v. Arizona, 384 U.S. 436 (1966) continues to be the subject of much controversy, debate, and misunderstanding. In *Miranda*, the Court, at page 439, stated, that the issue before it was the “...admissibility of statements obtained from an individual who is subjected to *custodial police interrogation*.” (Emphasis supplied.)

The Court, at page 444, defined “custodial interrogation” as follows: “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

In Dickerson v. United States, 530 U.S. 428 (2000), the United States Supreme Court refused to overrule its Miranda decision. The Court stated that Miranda announced a constitutional rule which provided “...concrete constitutional guidelines for law enforcement agencies and courts to follow”. At several places in its opinion the Court reiterated that police are required to administer Miranda warnings only when a person is subjected to “custodial interrogation”. The Court stated, at page 432:

We hold that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Hopefully the Dickerson decision will eliminate police confusion concerning Miranda warnings.

Cases subsequent to Miranda make it clear that courts no longer determine the admissibility of statements under the outdated “investigatory” versus “accusatory” stages test; the test is not whether the police investigation has “focused” on a particular person; the test is not whether police consider someone to be a “suspect”. “The mere fact that an investigation was focused on a subject does not trigger the need for Miranda warnings in noncustodial settings. Minnesota v. Murphy, 465 U.S. 426, 431 (1984). The sole *Miranda* test to determine the admissibility of statements is whether a person was “in custody” and “interrogated” when he made the statements. If both custody and interrogation are present, police must administer the *Miranda* warnings; if either custody or interrogation are lacking, police are not required to administer *Miranda* warnings.

Those who instruct police officers to “Mirandize early and often” obviously do not understand the *Miranda* Rule. Premature *Miranda* warnings are a disservice to crime victims and result in unsuccessful investigations and unsolved crimes. Innumerable decisions of the United States Supreme Court and the Connecticut Supreme Court since *Miranda* was decided have re-affirmed that only custody and interrogation require *Miranda* warnings. The following decisions illustrate this basic principle.

1. In *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977), the Court stated:
"Our decision in *Miranda* set forth rules of police procedure applicable to custodial interrogation".
2. In *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984), the Court stated:
"... we ... emphasize that police officers questioning persons suspected of crimes often consciously seek incriminating statements. The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in non-custodial settings..."
3. In *New York v. Quarles*, 467 U.S. 649, 654 (1984), the Court stated:
“In *Miranda*, this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police”.
4. In *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984), the Court stated:
“In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of [his] rights..., his responses cannot be introduced into evidence to establish his guilt”. (Citations omitted.)
5. In *Stansbury v. California*, 511 U.S. 318, 319 (1994), the court stated:
“We hold, not for the first time, that an officer’s subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody”.
6. In *Davis v. United States*, 512 U.S. 452, 457 (1994), the Court stated:
“... we held in *Miranda v. Arizona*, 384 U.S. 436, 469-473 (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins”.

7. In Dickerson v. United States, 530 U.S. 428, 431 (2000), the Court stated:

“In Miranda v. Arizona, 384 U.S. 436 (1996), we held that certain warnings must be given before a suspect’s statement made during custodial interrogation could be admitted in evidence”.

The Connecticut Supreme Court has also repeatedly held that only custody coupled with interrogation triggers *Miranda* warnings.

In State v. Piorkowski, 236 Conn. 388, 405 (1996), the Court stated: “... *Miranda* ... is ... a judicially created prophylactic rule designed to safeguard the defendant’s Fifth Amendment right to remain silent because of the inherently coercive quality of custodial interrogation”.

In State v. Atkinson, 235 Conn. 748, 757 (1996), the Court stated: “Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation”.

Perhaps the clearest statement that police officers are not required to “Mirandize the world” but only those people who are in their custody and about to be interrogated, is found in Oregon v. Mathiason, 429 U.S. 492, 495 (1977):

“But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police might suspect: *Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody’. It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.”

1) **CUSTODY DEFINED:**

The United States Supreme Court has held that custody is not limited to a formal arrest but included where a person’s “freedom of action is curtailed to a degree asserted with formal arrest...” Berkemer v. McCarthy, 468 U.S. 420, 440 (1984). The Court also stated, in California v. Beheler, 463 U.S. 1121, 1125 (1983):

Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

2) INTERROGATION DEFINED:

The United States Supreme Court has also held that interrogation is not limited to express questioning. In Rhode Island v. Innis, 446, U.S. 291, 300-02 (1980), the court stated:

[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police....A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

3) WAIVER:

In *Miranda*, the Court, at page 444, also stated that a person could “waive” his *Miranda* rights but the prosecution had the burden of proving by a preponderance of the evidence, that the waiver was made “... voluntarily, knowingly, and intelligently.” “Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State must prove waiver only by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168 (1986).

The Court, in *Miranda* and subsequent cases, also made it clear that in the following five instances, police are not required to give *Miranda* warnings:

1. **General On-the-Scene Questioning;**

“When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding.” Miranda v. Arizona, at 477-478.

2. **Volunteered Statements;**

“There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.” Miranda v. Arizona, at 478; State v. Turner, 267 Conn. 414 (2004).

3. **Public Safety;**

Miranda warnings are inapplicable to those situations where police officers interrogate a person in custody where the interrogation is reasonably prompted by a concern for public safety. New York v. Quarles, 467 U.S. 649, 655 (1984); State v. Betances, 265 Conn. 493 (2003).

4. **Routine Booking Questions**

Miranda warnings do not have to be given before police ask questions designed to secure the “biographical data” necessary to complete bookings or pretrial services, rather than to elicit incriminating admissions. Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990).

5. **Roadside Questioning of Motorist During a Traffic Stop**

Roadside questioning of a motorist detained during a traffic stop is not custodial interrogation requiring *Miranda* warnings. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

RECOMMENDATIONS

Motions to suppress claiming that statements were illegally obtained in violation of the *Miranda* rule are routinely filed and litigated. The police officers who interrogated the defendant are crucial witnesses at hearings on such motions. In order to ensure that statements made during such interrogations are admitted into evidence, police reports must include, but not be limited to, the following basic information:

1. The identity of the police officer or officers who gave the *Miranda* warnings;
2. The time or times the warnings were given;
3. The manner in which the warnings were given - orally, read from a departmental form or read from a *Miranda* card;
4. The manner in which the defendant acknowledged receiving the warnings - if orally, did the defendant say he understood his rights; if he was read a department form or *Miranda* card, did he sign the same. Any form or card signed by the defendant must be retained for later use in court;
5. The time and manner of the defendant's waiver - did the defendant say he was willing to answer questions or tell the officer what happened; if he was read a departmental form did he sign the waiver section of said form. This form must also be retained for later use in court;
6. The time the interrogation began and ended;
7. The time or times, manner and duration of any interruptions of the interrogation;
 - a. The identity of friends, relatives, etc. who visited the defendant;
 - b. Telephone calls made by or to the defendant;
 - c. Coffee or food breaks, either at the request of or on the behalf of the defendant;
 - d. Rest room breaks; and
 - e. Any other interruptions of the interrogation.
8. The words used by the defendant in making an oral statement or confession. If the defendant refused a request to make a written or taped confession, the reason he gave for such refusal.

Police Do Not Have to Inform an Arrestee of the Nature of the Crime They Are Investigating Before Obtaining a Waiver of Miranda Rights or a Consent to Search

State v. Foreman, 288 Conn. 684 (2008)

Defendant and three of his friends driving a stolen car pulled along side the victim in West Haven, ordered her out of the car at gunpoint and forced her to climb into the trunk of her vehicle. They took her to a wooded section in Woodbridge where each forced oral and vaginal sex with the victim. One of them then tried to snap the victim's neck by violently twisting it and then struck her on the back of the head with a sharp rock. The victim successfully feigned death and the defendant and his accomplices fled the scene. Approximately ten months later the defendant voluntarily accompanied New Haven detectives to the police department where he was questioned about some shootings. Another suspect in the shootings provided information that led the police to believe that the defendant may have been involved in the crimes at issue. On the basis of that information the police sought defendant's consent to obtain a DNA sample consisting of an oral swab. Among other claims the defendant alleged that he had not made a voluntary, knowing and intelligent waiver of his rights under Miranda.

He claimed the police did not inform him of the crime they were investigating prior to signing a waiver of his Miranda rights. The court found no legal authority to support this contention and, in fact, cited Colorado v. Spring, 479 U.S. 564 (1987) where the Supreme Court held, "the failure of law enforcement officials to inform [the defendant] of the subject matter of the interrogation could not affect [the defendant's] decision to waive his [f]ifth [a]mendment privilege in a constitutionally significant manner."

The defendant next claimed that he was denied access to counsel in violation of State v. Stoddard, 206 Conn. 157. This claim failed as the facts indicated that defendant's counsel did not arrive at the police department until after the defendant waived his Miranda rights and consented to the DNA oral swab.

Defendant also claimed that his consent to the taking of the DNA sample was not voluntary as the detective never informed them as to why they wanted the sample. Again, the defendant cited no legal authority to support his claim and the only authority available directly contradicted defendant's claim. In United States v. Andrews, 746 F.2d 247 (5th Cir. 1984) the court held that a mere failure to state a purpose does not render the defendant's consent involuntary.

A Suspect Who Voluntarily Comes To Police Station And Is Interrogated Under Circumstances Where A Reasonable Person Would Feel Free To Leave Is Not In Custody

Question of Suspects During a High Risk Investigative Stop May Require Miranda Warnings

State v. Mitchell, 108 Conn.App. 388 (2008)

At about 4:30 a.m. the victim who was looking to purchase marijuana in Bridgeport was pulled from her car and brutally beaten by two men and two women. Immediately after escaping, she asked the taxicab driver to call the police. She pointed out that the attackers were getting into a car, which the taxicab driver followed reporting the license plate number to the police. State troopers stopped a vehicle on I-95 and Officer Jones of the Bridgeport Police Department transported the victim to the site for identification.

Before the victim arrived at the scene, the troopers had taken the suspects out of the vehicle at gunpoint and ordered them to lie on the ground. The suspects were then searched, placed in handcuffs and separated. One of the troopers questioned the suspects as to where they were going and what they were doing to confirm whether he had stopped the right vehicle and whether the suspects were the individuals involved in the assault. The defendant replied, something to the effect that he wasn't paying attention and doesn't know where they had been. The suspects were then advised of their Miranda warnings before further questioning.

The Court concluded, and the State conceded, that the defendants were in police custody at the time of the questioning. In evaluating whether these questions amounted to interrogation, the Court restated precedent indicating that interrogation includes any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Although the defendant's response was relatively innocuous, the court agreed with the defendant that the statement was not harmless error because the trial court compounded the admission by charging the jury on consciousness of guilt and thereby cast the statement in a light unfavorable to the defendant.

The defendant also claimed that the one-on-one identification was unnecessarily suggestive. The Appellate Court concluded that the identification was properly admitted. It recognized prior precedent in finding that the use of the spotlight was appropriate in the darkness, the crime involved unprovoked violence for which the police were justified in taking immediate action, the witness who had been in close proximity to the defendant was injured and needed medical assistance, making it reasonable that she identified a suspect without delay. They also concluded that the identification was reliable given the opportunity to view the defendant, her description of the vehicle and her certainty in identifying him. In spite of the reliable identification the Court found the judgment had to be reversed and remanded for a new trial based on the Miranda violation.

**Defendant Was Not In Custody When the Police Officers Consensually Entered His Motel Room
and Asked a Simple Potentially Incriminating Question**

State v. Hasfal, 106 Conn.App. 199 (2008)

Defendant's prior girlfriend obtained a protective order preventing the defendant from entering her place of employment where she worked as an exotic dancer. The victim went to the East Hartford Police Department to complain that the defendant had entered the lounge where she worked that evening. After confirming that there was a valid protective order and confirming with employees of the lounge that the defendant had been there, they traveled to a local motel at 12:30 a.m. Officers Cutler and Sullivan knocked on the door announcing themselves as police officers and were permitted to enter. When asked if he had been at the victim's place of employment, the defendant admitted he had been at which time he was placed under arrest. During booking his socks were removed and officers found a glassine bag containing crack cocaine. The defendant claimed that his incriminating response which led to his arrest and the subsequent finding of the cocaine was based on interrogation while he was in custody at the motel.

The Court determined that the defendant, under the circumstances, would not have believed that he was in police custody of the degree associated with a formal arrest. He voluntarily admitted the officers into the motel room, had not been asleep, was not drowsy, had access to a telephone which he used while the officers were present, and the interrogation was neither intimidating nor protracted. Further, the defendant never expressed a desire to stop talking nor did he ask the officers to leave. Finally, there was no threat of display of force and he was not handcuffed or restrained until he admitted visiting the victim's place of employment.

**A Suspect Who Voluntarily Accompanies Officers to the Police Station and is Questioned Under
Circumstances Which Are Not Custodial Was Not Successful in Suppressing His Statement
Given at The Police Station**

State v. Britton, 283 Conn. 598 (2007)

Police investigating a murder found two palm prints on the outside of the vehicle driven by a victim. During the investigation they identified three suspects, including the defendant. Officers visited the defendant's home and asked him to accompany them to the police station. The officers did not show any force, informed the defendant he was not under arrest and said they would drive him back to his home, after they finished collecting his palm prints. He rode in the front seat of the police car and was told that he could refuse their invitation.

After taking the defendant's palm prints, the defendant was interviewed in an office where the door remained unlocked and he was repeatedly told that he was free to leave throughout the interview. During the course of the questioning, he changed his story several times, but when the story became consistent, he was asked if he would put his statement in writing. He agreed and signed a six page

statement. The defendant was offered food, but declined accepting only soda and was permitted to go to the bathroom where he was not followed inside. At some point, he became upset when someone questioned his veracity and he tore his statement up in four parts. Afterward he apologized and agreed to draw a diagram of where the victim was buried. He was at the police department for 6 ½ hours and the interview lasted approximately five hours. He was driven home after he completed drawing the diagram. The Court found that because he accompanied the officers to the police station voluntarily, and given the above facts related to his stay at the station, he was not in the custody. Therefore, the officers were not required to give him his Miranda warnings.

WARNINGS/WAIVER

Statement May Be Admitted Over Defendant's Qualified, Unprovoked Indication That He Did Not Want to Talk to the Police

State v. Smith, 107 Conn. App. 746 (2008)

The defendant, a suspect in a murder case, was being interviewed for the third time by the police. Officers properly informed him of his Miranda rights both orally and in writing. There was no evidence that the police acted in a coercive or a threatening manner during questioning. During the questioning, he repeatedly asserted that he was not involved and at one point he indicated that he did not want to talk to the police and immediately clarified the statement by saying that "he would speak only to the State's Attorney who could give him a deal." His statement represented a desire to speak with someone who could offer a deal was relevant to a material issue as it could be viewed as inculpatory. The issue in the case was whether by making the above statement he invoked his right to remain silent. The court noted that "there is no particular proscription for behavior or words that amounts to an expression of a defendant's right to remain silent." Also, "the defendant does not have the right to remain 'selectively silent', and the refusal of the defendant to answer a particular question during a custodial interrogation is not an invocation the right to remain silent." State v. Talton, 197 Conn. 280 (1985). The court ultimately determined that this conditional statement indicating that he did not want to talk to the police but to another authority did not amount to an invocation of his right to remain silent.

Subsequent Invocation of Rights is Indicative of a Suspect's Understanding of His Rights

State v. Kalican, 110 Conn. App. 743 (2008)

Officer Marely of the Stonington Police Department conducted a high-risk stop of the defendant on I-95. Upon the arrival of Sergeant Strecker and Officer Kanaitis of the New London Police Department, the defendant was read his Miranda rights. He indicated he understood his rights by nodding up and down and stating that he understood his rights.

Kanaitis indicated that the police would work with him. Kanaitis inquired about the location of the revolver and was told by the defendant where it could be found. At some point the defendant tapped his head on the window of the police vehicle and when Kanaitis opened the door asked, "How much am I going to get for this?" Kanaitis responded that it was up to the courts. At the stationhouse the defendant refused to sign a notice of rights form and indicated that he wanted to speak to an attorney.

Defendant maintained that he did not waive his Miranda rights on I-95 and that the officers' statement that they would work with him was equivalent to "we'll help you if you cooperate with us." Applying the following factors, the court determined that the defendant did waive his rights. He indicated that he understood his rights, was willing to speak, expressed no desire to remain silent and there were no facts casting doubt on the voluntariness of his waiver. A month earlier he had refused to sign a waiver form and, although a native of Turkey, demonstrated an understanding of the English language. Finally, the Court noted precedent that the assertion of the right to remain silent after an initial willingness to speak with police is a strong indication that the defendant understands his rights.

When Interviewing a Juvenile, Officers Should Repeat Advisement of Rights Before Interviewing on Subsequent Dates

In Re Kevin K., 109 Conn. App. 206 (2008)

When interviewing a juvenile suspect, an officer must advise the juvenile and his parent of their rights, even if the advisement has been given on a previous date.

Officer Hicking of the Vernon Police Department interviewed a juvenile at his home in his mother's presence. Prior to the interview which took place on October 9th, Officer Hicking advised both the juvenile and his mother of their rights and had the juvenile execute a waiver form and his mother execute a parental consent form.

Officer Hicking returned and interviewed the juvenile in the presence of his mother on October 11th, without again advising the mother or the juvenile of their rights or having them execute consent and waiver forms.

The Court concluded that Connecticut General Statute Section 46b-137(a) is unclear and ambiguous as to the word "after" advisement of rights. Ultimately they determined that because the facts did not necessarily support whether the advisement had assisted the respondent and his parent in making a decision as to whether to remain silent on October 11th that the statement was inadmissible.¹

¹ §46b-137(a), provides: "Any admission, confession or statement, written or oral, made by a child to a police officer or **Juvenile** Court official shall be inadmissible in any proceeding concerning the alleged delinquency of the child making

State v. McColl, 74 Conn. App. 545, cert. denied, 262 Conn. 953 (2003)
State v. James 390 Conn. 411 (1996).

As to the statement Reyes “better tell the truth or he was going to do a lot of time in jail,” the Appellate Court found this was not coercive. The court noted that a statement by a law enforcement officer to an accused that his cooperation would be beneficial “falls far short of the compelling pressures which work to undermine an individual’s will to resist and to compel him to speak where he would not otherwise do so freely,” and that as a matter of law encouraging a suspect to tell the truth does not overcome a confessor’s will. (citations omitted). The court held that in the present case, the officer’s statement was an attempt to “convince the defendant to tell the truth and nothing more,” and was not coercive.

As to Reyes’ claim that officers told him if signed a waiver of rights form his bond would be reduced to a non-surety, the trial court found a lack of evidence to support this claim, and the Appellate Court chose to credit the trial court’s finding, based on the detective’s testimony and signed waiver form, that no promises were made.

Note: Officers should also note that Reyes attempted to use the fact that the investigating detective did not put his statement in to writing to impeach that detective’s credibility because Reyes alleged such statements do not become part of the public record and thus not reducing them to writing did nothing to protect Reyes. The implication was that by not reducing them to writing the detective could lie about the contents of the statement. While this was unsuccessful in this specific case, it is a better to reduce statements to writing.

The Fact That the Defendant’s Sixth Amendment Right to Counsel had not Attached at the Time of His Extradition Proceedings Had No Bearing on the Validity of His Waiver of His Fifth Amendment Right to Counsel With Respect to the Custodial Interrogation

In Re: Melody L., 290 Conn. 131 (2009)

Defendant was arrested in So. Carolina for a murder he committed in New Haven, Connecticut. He expressed the desire to speak to the police and New Haven Detectives, Dadio and Quinn met with him in So. Carolina and took a tape-recorded statement. They fully advised him of his Miranda rights and under a totality of the circumstances there was no question that he knowingly and voluntarily waived his rights. The defendant claimed that he could not have waived his rights because under So. Carolina law he was not entitled to representation during an extradition proceeding.

such admission, confession or statement unless made by such child in the presence of his parent or parents or guardian and *after* the parent or parents or guardian and child have been advised (1) of the child’s right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child’s behalf, (2) of the child’s right to refuse to make any statements and (3) that any statements he makes may be introduced into evidence against him.”

The Court held that the defendant confused his Sixth and Fifth Amendment rights. The Sixth Amendment right to counsel does not attach in Connecticut or most other states during extradition proceedings. The fact that he signed a waiver form informing him that he had a right to request counsel and all the other factors indicated that there was no coercion and he was competent in all ways to waive his rights clearly indicated no violation of his Fifth Amendment or Sixth Amendment rights.

SECTION SEVEN

MISCELLANEOUS

Supreme Court's Invocation of Its Supervisory Power to Require Jury Instruction Leads to Policy Requiring Officers to Instruct Witnesses During Identification Procedures That the Suspect Might Not Be Present

State v. Ledbetter, 275 Conn. 534 (2005)

One of several victims during nighttime assault/robberies participated in the following identification procedure. The victim, Leonard, described his assailants in their vehicle to Officer Droun of the East Hartford Police Department. After broadcasting the description, they heard that five individuals in a vehicle matching the description had been stopped by other East Hartford officers. Droun drove Leonard to where the vehicle had been stopped. Five black males that had occupied the vehicle were lined up in front of the police cruiser with officers on either side of them, and the light from the headlights of several police cruisers shining on them. Droun stopped his cruiser approximately fifty to one hundred feet from the suspects with his headlights shining on them. After verifying that Leonard could see the suspects clearly, Leonard identified two of the suspects and tentatively identified a third but could not be 100% positive.

The Court determined that the street show up was not unnecessarily suggestive. Although the police had no reason to suspect that Leonard would be unavailable for future identification, the suspects were not under arrest and without probable cause to arrest the suspects there was no practical method to arrange for a series of lineups involving each of the individuals. There was also a real need to determine whether they had apprehended the correct individuals in a timely manner. At the time of the identification, the police had received three telephone calls involving four or five black males in the general vicinity. If Leonard had not identified any of the occupants, the police could have continued their search for the perpetrators. Leonard viewed the suspects within proximately twenty (20) minutes of being attacked while his recollection of his assailants was fresh in his mind. Finally, there was nothing unnecessarily suggestive about the identification procedure itself. Officer Droun told Leonard to take his time, take a look and be sure.

The Court also found that the identification procedure was reliable. Even though the attack happened at night, it happened in a well-lit area. Also, the victim had an opportunity to observe his assailants' faces as they approached him and as he struggled with them from a very close range. Although the struggle occurred over a matter of seconds, the man looked at and focused on their faces. His level of certainty in the identification was exceedingly high and the procedure occurred within a short time of the robbery. The factors weighing against reliability included the fact that Leonard had been awake for approximately eighteen (18) hours and had 3 to 4 ½ oz. of alcohol earlier that evening. Also, his initial description was not particularly specific. These factors, however, did not outweigh the factors demonstrating that the identification was reliable.

The Court refused to modify the identification process pursuant to the United States or Connecticut Constitutions. It did, however exercise its supervisory power and required jury instructions consistent with *National Institute of Justice Eyewitness Evidence Guide for Law Enforcement* which suggests that witnesses should be instructed "that the person who committed the crime may or may not be present in the group of individuals." Where police fail to provide such instruction the court directed trial courts to incorporate an instruction to charge the jury warning them of the risk of misidentification. Based on this ruling, the Chief State's Attorney's Office provided instructions for such an admonishment to witnesses during identification procedures.

Pre-Trial Detainee Had No Expectation of Privacy in a Note Seized From His Person Without A Warrant

State v. Pink, 274 Conn. 241 (2005)

Pink was convicted of murder and other violent crimes. He appealed his conviction claiming that prosecutors withheld exculpatory evidence and also that the lower court improperly denied a motion to suppress a damaging note seized by corrections officials without a warrant. Apparently, prison officials monitoring the defendant's non-privileged telephone calls discovered a plot to pass a note to a relative during one of his upcoming court appearances. Before this court appearance, defendant was searched and corrections officers seized a note involving a scheme to find "someone to take the blame" for defendant's crimes. This was passed on to the State's Attorney and used at defendant's trial to show consciousness of guilt.

Held: Generally, there is no legitimate expectation of privacy in a prison cell given the lack of privacy

inherent in prison life (i.e. the constant surveillance) and the important societal need for prison security. Applying the rationale of cases holding prisoners have no expectation of privacy in non-privileged phone calls, Pink had no legitimate expectation of privacy in the note and no Fourth Amendment claim. The State, however, had an important security interest in searching prisoners before transporting them and defendant should have reasonably known this. Furthermore, the note was contraband under corrections policies, was potential evidence of witness tampering, and also could have been used to jam a lock. Its seizure was valid.

Photo Array Was Not Unnecessarily Suggestive

State v. Falcon, 90 Conn. App. 111 (2005)

Defendant and two accomplices walked up to a man on a Bridgeport street, surrounded him, hit the victim repeatedly, and stole his wallet, keys and cell phone. During the street robbery, defendant held a gun to victim's side. Within an hour of the robbery, the victim saw defendant, flagged down a cruiser and identified defendant as his assailant. Defendant was apparently arrested based on that. In a follow-up investigation a detective showed the victim three photo arrays where he again identified the defendant. At defendant's trial for robbery, evidence of the second identification came out during testimony and the State had not introduced the photo arrays because they were not in the main case file. Defendant moved for a mistrial claiming failure to disclose the arrays was unfair and the court treated it as motion to suppress. Among other things, he claimed the photo array was used to improperly bolster his first identification of the defendant because only after he saw it did he tell police defendant had a "lazy eye," as opposed to general descriptions of height, color, build and clothing. Testimony at trial was that defendant was shown three photo arrays and identified the defendant as his assailant before he was shown an individual mug shot of the defendant, and also that police did not tell him defendant was in the array or who to pick. Defendant also moved to suppress the array as unnecessarily suggestive because only defendant had a "lazy eye." He appealed trial court's denial of his motions.

Held:

1. Photo array was not unnecessarily suggestive. Besides, the photo array was the second identification of the defendant by the victim, and his arrest was supported by the first identification because victim identified his assailant to police within an hour of his attack and victim had an opportunity to see the assailant during the robbery.
2. Detectives did not improperly taint second identification by the photo array because (1) they did not show the victim defendant's separate mug shot until after he identified assailant in three photo arrays; (2) did not tell victim to pick defendant or suggest anything to him, (3) did not even say suspect was in photo array, and (4) there was no hesitation or uncertainty by victim in picking defendant from array.
3. In fact, it was not absolutely necessary for police to do a photo array after the victim identified the assailant from back of cruiser.

The Exclusionary Rule Will Not Apply If an Officer Reasonably But Mistakenly Believes That an Arrest Warrant Exists For the Party and Conducts a Search Incident to What is Actually an Unlawful Arrest

Herring v. United States, 129 S.Ct. 695 (2008)

Anderson learned from a neighboring county warrant clerk that there was an active arrest warrant for Herring's failure to appear on a felony charge. After arresting Herring, a search incident to arrest revealed Methamphetamine and a pistol. Within ten to fifteen minutes from the time of the stop, it was learned that the warrant had been vacated five months earlier. The Court in determining whether the exclusionary rule would apply stated, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence. The error in this case does not rise to that level."

Officers Do Not Have a Duty to Record the Entirety of Their Interviews or to Create a Record of the Manner in Which the Interview Was Conducted

State v. Johnson, 288 Conn. 236 (2008)

The State's key witness repeatedly changed his story. He first told the police that he knew nothing and then after hours of questioning identified a photograph of the defendant and said he saw the defendant running away from the crime scene. In his first statement he denied seeing a gun. After the witness identified the defendant, he gave the police a formal statement which was recorded by audiotape. Prior to this, the police made no recordings nor did they take any notes of their discussions. When asked at the first trial why he had not initially identified the defendant or mentioned a gun, he indicated that he was afraid of the defendant. At the second trial the witness recanted all of his prior inculpatory statements and testified that he felt pressured by the police and his statements had been compelled.

The defendant filed a motion to dismiss claiming the police failed to preserve evidence of the interrogation prior to the audio-taped statement which denied the defendant a right to a fair trial. He also claimed it is important that there be some record made of any interview of any witness in a homicide case.

The Court noted that "it is well-established that there are two areas of constitutionally guaranteed access to evidence that may constitute a due process violation. The first is the withholding of exculpatory evidence and the second is the failure of the police to preserve evidence that might be

useful to the accused. The United States Supreme Court has held that the due process clause requires that a defendant show bad faith on the part of the police for failure to preserve potentially useful evidence. The court held that fundamental fairness does not impose on the police an absolute duty to retain and preserve all material that might be conceivably significant in a particular prosecution, Arizona v. Youngblood, 488 U.S. 51 (1988). In State v. Morales the Connecticut Supreme Court rejected the federal bad faith requirement for claims alleging a failure to preserve in violation of our State Constitution, however, the court concluded that the failure to create a record of the pre-interviews did not constitute a failure to preserve exculpatory or potentially useful evidence. Neither the federal rule, nor the Jencks Act or Connecticut's Rules of Practice established an affirmative duty to create records. The Court recognized that the adoption of such a rule would place a substantial burden on the administration of law enforcement and would amount to an unwarranted intrusion by the courts into the professional practices of trained law enforcement personnel. If the interview or records with regard to the manner of interviews had been created determining whether the failure to preserve such records violated the constitution, would be determined by a balancing test including the reasons for unavailability against a degree of prejudice to the accused. If created records had not been preserved, the court would balance the totality of the circumstances surrounding the missing evidence including: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its non-availability to evidence." State v. Morales, 232 Conn. at 726-27.

Employment of the Double-Blind Procedures May Be Better, However, Due Process Does Not Require Abandonment Of Present Identification Procedures

State v. Marquez, 291 Conn. 122 (2009)

Marquez was convicted of felony murder in an attempt to commit robbery based on two eyewitness identifications. One of the witnesses observed Marquez four days after the crime while visiting his parole officer. The two witnesses were shown photo arrays consisting of photographs of eight men fitting the description that the witnesses provided. Printed on the bottom of the photo arrays was the statement, "you have been asked to look at this group of photographs. The fact that they are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the person who committed the offense under investigation. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss this case with other witnesses or indicate in any way that you have, or have not identified someone." The first witness immediately selected the photograph of the defendant. The second viewing of an almost identical array a few days later was more cautious but also picked out the defendant. The lead detective informed the second witness that he had done well because he had chosen the same photograph as the first witness.

Federal and State constitutional standards are the same with regard to identification procedures. The first question is whether or not the identification procedure was unnecessarily suggestive. It is if

there is a very substantial likelihood of irreparable misidentification. The second question is whether or not the identification is nevertheless reliable, based on examination of the totality of the circumstances. The two questions to be asked in determining the suggestiveness of a photo array are: (1) The composition of the photographic array itself (whether they were selectively displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect) and (2) whether the actions of the law enforcement personnel directed the witness to the suspect's photo.

The court rejected the trial judge's determination that the procedure was suggestive as it was not "double-blind". To qualify as double-blind, a photographic array must be administered by an uninterested party without knowledge of which photograph represents the suspect. After reviewing a number of studies the court concluded that while the double blind procedure may, in many cases, be a preferable identification procedure, failure to use the procedure does not amount to a constitutional violation.

The court also rejected the defendant's argument that photo displays should be sequential. Finally, the Court rejected Justice Palmer's concurring opinion that the detective's comment to one of the witnesses confirming his selection of the defendant's photograph was suggestive, as the comment was made following the identification.

Note: Many have suggested that the double-blind procedure is better because an investigating detective knowing the identity of the suspect might consciously or subconsciously say or act in a manner which might direct the witness' attention to the suspect. The sequential process is thought to be better because if all of the photos are shown at one time a witness may be inclined to select the individual who looks most like their recollection even with the admonishment that the suspect may not be in the photo array. Finally, the recommendation that an officer should not comment on the correctness of identification should be avoided as it may affect the witness' trial testimony by confirming their belief.

School Officials Strip Searching Students Must Justify Such Searches Based Upon The Evidence Of Danger And Reason To Believe The Item Is Presently In The Student's Undergarments

Safford Unified School District No. 1 v. Redding, ___ S.Ct. ___ (2009)

The question before the Court was whether a thirteen-year-old student's Fourth Amendment rights were violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. The Court found that because there was no reason to suspect the drugs presented a danger, or were concealed in her underwear, that the search violated the Fourth Amendment.

The Assistant Principal acting on reasonable suspicion that thirteen-year-old Savana Redding was distributing prescription strength Ibuprofen and over-the-counter medications brought Redding into his office. He showed her a day planner which a friend said she was loaned by Savana which

contained several knives, lighters, a permanent marker and a cigarette. Savana admitted that the planner was hers, but that the other items were not. He also showed her four Ibuprofen 400-mg pills and one blue Naproxen also used for pain and inflammation which she obtained from her friend. Redding said she knew nothing about the pills and agreed to a search of her belongings. When the search of her backpack revealed nothing, the Assistant Principal instructed a female administrator to take Redding to the nurse's office where she removed her jacket, socks, shoes, stretch pants and a t-shirt. She was then told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, exposing her breasts and pelvic area to some degree. No pills were found.

In evaluating the constitutionality of the search the Court applied the standard enunciated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Court explained the search must be justified by the presence of reasonable grounds for suspecting that the search would turn up evidence that the student has violated or is violating either the law or rules of the school. The search must also be permissible in scope which means it is reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction. The Court determined that the school officials had reasonable suspicion to conduct a search of Redding's belongings and outer clothing based on information from a student that medications were being distributed, were going to be taken at lunch, as well as, Redding's connection to prior Rowdy activities at a school dance at which alcohol and cigarettes were found in the girl's bathroom and a party at her house where alcohol was served. In addition her good friend had just been searched and was found in possession of the day book and contents, as well as, the aforementioned medications which her friend claimed belonged to Redding.

The Court explained that the "knowledge component" for law enforcement officers was probable cause which amounts to a "fair probability" or "a substantial chance" of discovering evidence of criminal activity. On the other hand, the lesser standard for school searches could be described as a "moderate chance" of finding evidence of wrongdoing. A strip search or a similarly highly intrusive search cannot be justified unless there is sufficient evidence of danger and reason to believe that the items are concealed on the person. In the present case there was no reason to suspect that large amount of drugs were being passed around or that individual students were receiving great numbers of pills. The nature of the medication was also not particularly dangerous. Finally, there is little evidence supporting a belief that Redding presently had the pills on her person let alone in her underwear. The vice principal did not determine when her friend obtained the pills. The Court noted that, "what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear." "We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts."

The Court found that based on the difference of opinions regarding such searches in schools that the administrators were entitled to qualified immunity, however, the case was remanded to determine whether the municipality could be held liable under *Monnell*.

SECTION EIGHT

Public Acts of Special Interest to Police 2009

Note: The following summaries of public acts are to be used as notice of highlights of the statutory changes. The purpose is to bring such statutes to the attention of officers interested in reading the full statute for the complete and accurate analysis.

Public Act 09-62

An Act Prohibiting the Transfer of Machine Guns to Minors (53a-202(c))

Makes it a misdemeanor for a person to transfer, sell or give (even for the purposes of target shooting or firing at a shooting range) a machine gun to anyone under sixteen years of age unless it is authorized by the National Firearms Act.

Public Act 09-138

An Act Concerning Larceny (53a-122, 53a-123, 53a-124, 53a-125, 53a-125a, 53a-125b)

Doubles the monetary thresholds required to commit the various degrees of larceny. The thresholds as of October 1, 2009 are as follows: Larceny 1st Degree – exceeding twenty thousand dollars; Larceny 2nd degree – exceeding ten thousand dollars; Larceny 3rd degree – exceeding two thousand dollars or a motor vehicle which his valued at ten thousand dollars or less; Larceny 4th degree – exceeding one thousand dollars; Larceny 5th degree – exceeding five hundred dollars; Larceny 6th degree – five hundred dollars or less.

Public Act 09-140

An Act Concerning Boating Safety (New)

Creates the crime of Manslaughter in the Second Degree With a Vessel. Manslaughter In the Second Degree With A Vessel is a Class C Felony and is defined as a person, while operating a vessel upon the waters of the state under the influence of intoxicating liquor or any drug or both, causes the death of another person as a consequence of the effect of such liquor or drug.

Public Act 09-191

An Act Concerning the Penalty for Engaging a Police Officer in Pursuit and Assaulting a Public Safety Employee
(14-223, 53a-167c)

Increases the penalties from a D Felony to a C Felony for parties engaging in a pursuit that causes death or serious physical injury.

Includes public transit personnel in the Assault on a Public Safety or Emergency Medical Personnel statute.

Public Act 09-199

An Act Concerning Notification of the Release of a Registered Sexual Offender into the Community
(54-258)

Mandates that the Department of Public Safety notify the superintendent of schools when a registered sexual offender is released into that community. Such notification shall include the registry information that is available on the internet.

Public Act 09-239

An Act Concerning Privacy and Identity Theft
(New, 53a-129a, 53a-129b, 53a-129c, 53a-130)

Makes the unlawful possession of a personal identifying information access device a class A misdemeanor. The crime is defined as: a person possesses an access device, document-making equipment or authentication implement for the purpose of fraudulently altering, obtaining or using the personal identifying information of another person.

Changes the Identity Theft statutes so that the knowing use of personal identifying information of another person is illegal without that other person's consent.

Public Act 09-243

An Act Concerning Sexual Activity Between School Workers and Students and Including School Superintendents as Mandated Reporters of Child Abuse or Neglect
(53A-65; 53a-71, 53a-73a)

Includes in the definition of school employee for the sexual assault statutes, “any other person who, in the performance of his or her duties, has regular contact with students and who provides services to or on behalf of the students enrolled in (1) a public elementary, middle or high school, pursuant to contract with the local or regional board of education, or (2) a private elementary, middle or high school, pursuant to contract with the supervisory agent of such private school.

Public Act 09-243

An Act Concerning Interruption of Telecommunications Service, Scrap Metal Processors and Motor Vehicle Recyclers
(53a-123)

Includes Larceny Second degree “the property, regardless of its value, consists of wire, cable or other equipment used in the provision of telecommunications service and the taking of such property caused an interruption in the provision of emergency telecommunications service.”

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