
NEWSLETTER

International Association of Directors of Law Enforcement Standards and Training
3287 Tasa Drive; Meridian, Idaho 83642-6444
<http://www.iadlest.org>



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<http://below100.com/>

Editorial Note: The IADLEST Newsletter is published quarterly. It is distributed to IADLEST members and other interested persons and agencies involved in the selection and training of law enforcement officers.

The IADLEST is a nonprofit organization comprised of law enforcement training managers and leaders. Its mission is to research and share information, ideas, and innovations that assist in the establishment of effective and defensible standards for the employment and training of law enforcement officers.

All professional training managers and educators are welcome to become members. Additionally, any individual, partnership, foundation, corporation, or other entities involved with the development or training of law enforcement or criminal justice personnel are eligible for membership. Recognizing the obligations and opportunities of international cooperation, the IADLEST extends its membership invitation to professionals in other democratic nations.

Newsletter articles or comments should be sent to IADLEST; 2521 Country Club Way, Albion, MI 49224; or piudge@att.net.

MEETINGS HELD AND SCHEDULED

IADLEST held its business meeting Saturday, September 29, and Sunday, September 30, 2012, in San Diego, California, in conjunction with the IACP Conference.

The next Executive Committee meeting is scheduled for January 31 and February 1, 2013, at the J. W. Marriott Hotel, Washington, DC.

The 2013 IADLEST Annual Conference is scheduled for June 3-5, 2013, in Portland, Oregon.

CREDIT CARD PAYMENTS

IADLEST Membership renewals are due January 1. For the first time, IADLEST now accepts credit card payments for membership renewals. Members can log on to www.iadlest.org and click on "Join Now." Select "membership renewal" enter the member's user code, password, and provide the requested information.

Credit card payments are also available for purchases and those joining IADLEST for the first time.

New members can log on to the IADLEST web page and follow the prompts.

BELOW 100 CHALLENGE

By: Bill Muldoon, IADLEST President

One training session that really struck a chord with me in Savannah was the *Below 100* initiative as presented by FLETC's John Bostain.

As implied in its title, the *Below 100* initiative is an effort to reduce in-the-line-of-duty deaths to pre-1944 numbers, the last time that in-the-line-of-duty deaths was below 100.

While all in-the-line-of-duty deaths are tragic in both agency and personal loss an effort should be expended in preventing all in-the-line-of-duty deaths. A study of these tragedies reveals that a number were attributed to entirely foreseeable events that each of us knows. The *Below 100* is based on the mantra, "Predictable is preventable." Effort in these key areas could make *Below 100* a reality:

1. Wear your seatbelt
2. Wear your vest
3. Watch your speed
4. WIN-What's Important now?
5. Remember: Complacency kills

Do you know that the leading cause of in-the-line-of-duty deaths between 1999-2010 is traffic collisions? And of those, the leading causes were speed, lack of seatbelt use, or being struck by another vehicle?

While the solution seems simple, it is not that easy. Some of us know of training the seems to contradict other training or know officers who are not safe in their protective equipment use or their driving—or both.

I challenge all police academy and POST directors to audit their curriculums and trainers for inconsistencies in any teaching that contradicts the above tenants. Do you know what your instructors are teaching regarding mandatory seatbelt use while in emergency vehicle operations training? Many of us have

only to look out the window during driver's training to see if seatbelts are being worn; but have you gone the extra step to ensure that firearms, defensive tactics, and other subject matter instructors are not contradicting that valuable EVO training requirement of wearing the seatbelt? Are erroneous myths being challenged wherever they may be found? What happens in FTO?

The first step may be admitting that we have a problem. The second step is taking action and holding our people accountable. With a bit of effort, I believe that *Below 100* is attainable.

More information can be found at www.below100.com

My special thanks to FLETC and instructor John Bostain for bringing this training to our IADLEST conference and for all their efforts at making our profession safe.

OREGON PUBLIC SAFETY ACADEMY ADOPTS NEW PROTOCOL FOR HEAD INJURIES

submitted by: Gabliks Eriks, Director, Oregon POST

The Oregon Department of Public Safety Standards and Training (DPSST) provides training to city, county, state, tribal, and university law enforcement, corrections, and parole and probation officers. This training is provided at DPSST's 212-acre Oregon Public Safety Academy in Salem and through regional class deliveries across the state.

DPSST's training classes have adopted a scenario-based format through which students spend time in both the classroom and in hands-on skills training each day. DPSST has had a comprehensive risk management program in place for a number of years. This includes structured scenarios, qualified instructors, safety officers, and personal protective equipment, etc. As with any hands-on training, but especially in defensive tactics and confrontation simulation training, from time to time injuries still happen.

Based on newspaper articles over the past year regarding head injuries in both football and

hockey, DPSST staff met with their medical advisors at Oregon Health Sciences University (OHSU) and asked that they evaluate the current program and see if any changes should be made.

Overall the feedback was very positive, but one change was suggested. Based on the physician's input, DPSST has adopted the same guidelines which are being used by athletic trainers at high schools, colleges and universities, and in professional sports for concussions. These guidelines were adopted by the Center for Disease Control (CDC) and are available free of charge. The guidelines and supporting information can be found at: http://www.cdc.gov/concussion/headsup/clinicians_guide.html

WELCOME NEW MEMBERS

The IADLEST is proud and privileged to add the following new members. These professionals complement our Association's already extensive wealth of talent and expertise. We welcome them to the IADLEST.

Goce Bachahov, Skopje, Macedonia
Zana Djurovic, Danilovgrad, Montenegro
Michael Dooley, Essential Learning, San Diego, CA
M. Jordan Ferguson, Spokane PD, Spokane, WA
Wilfred Hill, Flanagan Campus, Lincoln, RI
Timothy Janowick, Mt Prospect PD, Mt Prospect, IL
Richard McKenna, Boise PD, Boise, ID
Jeffrey Mees, Loudoun Sheriff's Dept, Leesburg, VA
Ron Mullihan, Military Police, Ft. Leonard Wood, MO
Christopher Neuman, State Police, Fort McCoy, WI
Marko Osmajlic, Belgrade PD, Belgrade, Serbia
Akrem Racaj, Kosovo Police, Prishtina, Kosovo
Scott Rechtenbaugh, South Dakota POST, Pierre, SD
Andrew Schade, Spencer PD, Spencer, WA
Zivko Sipcic, Danilovgrad PD, Montenegro
Ismail Smakiqi, Kosovo Police, Vushtrri, Kosovo
Taib Spahic, Police, Sarajovo, Bosnia & Herzegovina
Ljupcho Todorovski, Dir. of Police, Skopje, Macedonia

TAKE NOTE

The Reid Technique of Interviewing and Interrogation 2013 training seminars schedule is now posted at: <http://www.reid.com>

POST DIRECTOR CHANGES

Rhode Island: Major Wilfred K. Hill is the Commanding Officer, Department of Public Safety - Director of Training. Major Hill is a 20-year veteran of the Rhode Island State Police and serves as the Commanding Officer of the Department of Public Safety - Director of Training. Major Hill oversees day-to-day operations and administrative functions the Rhode Island State Police Training Academy and the Rhode Island Municipal Police Training Academy. Major Hill also oversees all agencies within the Department of Public Safety including the Rhode Island Division of Sheriffs, the Rhode Island Capitol Police, the E 9-1-1 Uniform Emergency Telephone System, the Division of the Rhode Island State Fire Marshal, the Department of Public Safety Central Management Office, and the Public Safety Grants Administration Office.

Major Hill's previous assignments include Commandant of the Rhode Island State Police Training Academy, Division Accreditation Manager, Traffic Services/Planning & Research Unit, Night Executive Officer, Officer-In-Charge of the Division's Community Outreach program, and as Captain, the Special Assignment Officer assigned to the Division of Sheriffs.

Major Hill is a graduate of the 243rd session of the Federal Bureau of Investigation (FBI) National Academy in Quantico, Virginia. He holds a Bachelor of Science Degree in Sociology from Springfield College in Springfield, MA.

South Dakota: Scott Rechtenbaugh is a native South Dakotan. He started his law enforcement career in 1997 as a State Trooper with the South Dakota Highway Patrol. In 2001, Scott accepted a position as a Special Agent with the South Dakota Division of Criminal Investigation. He was promoted to Supervisory Special Agent and held that position until his recent appointment as South Dakota Law Enforcement Training Administrator. Scott holds Bachelor of Science Degree from Northern State University and is a recent graduate of the FBI National Academy's 250th session.

Scott and his wife Shawnie have two daughters Drew, 4, and Halle, 2.

EXECUTIVE COMMITTEE MEETING MINUTES SAVANNAH, GEORGIA JUNE 10, 2012

CALL TO ORDER: President Clark called the meeting to order at 12:10 pm.

ROLL CALL: Members Present: Clark, Muldoon, Halvorson, Floyd, Bierne, Melville, Becar (Executive Director) and Judge (Deputy Director). Members Absent: Goodpaster, Flink, Vickers, Sadler, and Silva

AGENDA ADDITIONS: Request to add Bylaws Committee report to the agenda.

APPROVAL OF MINUTES: MOTION by Bierne to approve the minutes of the January 19, 2012, Executive Committee Meeting. **SECOND** by Melville. **MOTION CARRIED** with all in favor.

EXECUTIVE DIRECTOR BRIEFING:

New POST Directors: New Directors were appointed in Alaska, Arkansas, Florida, Iowa, Kansas, New Mexico, Oklahoma, Pennsylvania, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

IADLEST Inventory: IADLEST has sold a Barracuda SPAM firewall for \$880.51 and a Honda Generator for \$350.00. Some unusable or obsolete inventory from Maryland has also been disposed of.

International Opportunities: Mike Becar reported that there are Nigerian officials here at the conference, and they are looking for a couple of IADLEST representatives to teach Instructor Development. Puerto Rican officials have also expressed interest in working with IADLEST to help set up a police academy and a standards bureau of some kind. A presidential task force has been established to review law enforcement capabilities and make recommendations to

establish an effective local law enforcement capacity to combat violent crime. There is also a subgroup working on training chaired by Michael Hanneld from FLETC.

Grant Status: Becar met with NHTSA in May regarding an MOU with the International Association of Crime Analysts to provide technical support through DDACTS. Submitted a “Blue Courage” grant to DOJ for approximately \$60,000 to train officers to develop a “moral compass and the courage to do the right thing.” Becar is working on a COPS grant for \$306,000 to develop a training director desk reference guide; a \$20,000 partnership with PERF to assist with the Academy Survey for BJS; and a \$25,000 grant partnership with the Western Community Policing Institute for innovations in academy training.

Online Payments: IADLEST is presently working with Envisage to take credit card payments for membership dues, conference fees, and marketplace sales.

Clerical Assistance Request: Becar asked for permission to hire a clerical person. He asked that the salary be set at \$40,000 per year without benefits. He stated that we could save \$20,000 per year on our CPA/financial management contract with this person in place. **MOTION** by Muldoon to authorize the position as requested. **SECOND** by Bierne. **MOTION CARRIED** with all in favor. **DDACS:** Becar reported that Debra Peil will be moving away from her director duties and will be a full-time analyst. Peggy Schaefer has been hired as the program manager.

National Institute of Ethics: Neil Trautman sent a letter to IADLEST requesting that we take the lead on an ethics study that he will be unable to complete. It was the consensus of the group that we communicate to him that we are not in a position to take on the project at this time.

IADLEST TREASURY: Chuck Melville presented the financial statement of assets and liabilities and fund balances through April 2012. He reported that bills are being paid in a timely fashion. He stated that former treasurer Westfall sent several boxes of paper records. Melville

states that he has scanned the records and provided a digital copy to Becar and Judge. Becar stated that we need a retention schedule for paper records. He will work on this and present a policy to the committee at a later date. **MOTION** by Bierne to approve the Treasurer’s Report. **SECOND** by Muldoon. **MOTION CARRIED** with all in favor.

ADMINISTRATIVE REVIEW:

Source Book: Dick Clark reported that the Source Book update is completed and IADLEST does have an electronic copy.

Friendly Fire Prevention: Clark sits on the Advisory Council for FLETC, and they are currently working on a project called Friendly Fire Prevention to study and help prevent of duty or undercover officers from being shot by their on-duty counterparts.

Future Conferences: 2013: Portland, Oregon, June 2-5.

COMMITTEE AND SPECIAL ASSIGNMENTS:

Budget and Audit Committee: Dick Clark stated the auditor report shows that we are in very good shape financially. We have a sound business model in place and everything is very transparent. They found no areas of concern.

Nominating Committee: Bill Muldoon stated that Kim Vickers (TX) has been selected by the nominating committee as a candidate for 2nd VP. He has agreed to the nomination. He is currently the Midwest Regional Representative. **MOTION** by Bierne to accept the recommendation of the Nominations Committee and recommend Vickers as a nominee to the members at the General Business Meeting. **SECOND** by Melville. **MOTION CARRIED** with all in favor. Muldoon stated that additional nominations can still be made and members can nominate from the floor during the General Business Meeting.

Strategic Planning Committee: **MOTION** by Bierne to approve the new organizational chart and organizational structure as proposed.

SECOND by Melville. **MOTION CARRIED** with all in favor.

Rural Domestic Preparedness Consortium. Steve Otto provided the training report for the Rural Domestic Preparedness Consortium. The report showed where the training has been held and how many officers have been trained.

Bylaws Committee: Halvorson stated that he will work to have the bylaws committee accomplish the proposed revisions in a timeline for approval at the September meeting in San Diego.

REGIONAL REPORTS: Deferred to the General Business Meeting.

NEW BUSINESS:

Electronic Stability Controls: The members heard a presentation from Dane Pitarresi regarding new training that is available due to the new technology that is installed on most all new police cars. He stated traditional EVOC instruction is obsolete.

USBJS: Dr. Reaves was present to allow the members to review the Academy Survey that will be going out soon. He asked the members to provide input prior to distribution.

DDACS: Peggy Schaefer reintroduced herself to the members and was welcomed by the committee as the DDACS new Program Manager.

ADJOURNMENT: MOTION to adjourn by Bierne at 3:50 pm. SECOND by Melville. **MOTION CARRIED** with all in favor.

**IADLEST EXECUTIVE COMMITTEE:
SPECIAL MEETING MINUTES
JUNE 11, 2012 12:30 PM**

CALL TO ORDER: President Clark called the meeting to order at 12:30 pm.

ROLL CALL: Members Present: Clark, Melville, Floyd, Bierne, Halvorson, Muldoon, and Vickers.

NEW BUSINESS:

2013 Conference Seed Money: MOTION by Bierne to provide conference funds of \$10,000 to the Redden Group to begin preparations for the 2013 conference. SECOND by Vickers. **MOTION CARRIED** with all in favor.

ADJOURNMENT: Meeting adjourned at 12:35 pm.

**GENERAL BUSINESS MEETING
SAVANNAH, GEORGIA
JUNE 12, 2012**

CALL TO ORDER: President Clark called the meeting to order at 10:18 am June 12, 2012.

ROLL CALL: Present: Alaska, Arizona, Arkansas, California, Florida, FLETA, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming. Twenty-nine member states present.

AGENDA ADDITIONS: None.

Approval of Minutes: MOTION by Harvey (MI) to approve the minutes of the General Business Meeting from October 22-23 in Chicago, Illinois. SECOND by Pritt (FL). **MOTION CARRIED** with all in favor.

EXECUTIVE DIRECTOR BRIEFING: New POST Directors - New Directors were appointed in Alaska, Arkansas, Florida, Iowa, Kansas, New Mexico, Oklahoma, Pennsylvania, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

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Grant Status: Becar met with NHTSA in May regarding an MOU with the International Association of Crime Analysts to provide technical support through DDACTS. Submitted a "Blue Courage" grant to DOJ for approximately \$60,000 to train officers to develop a "moral compass and the courage to do the right thing." Becar is working on a COPS grant for \$306,000 to develop a training director desk reference guide; a \$20,000 partnership with PERF to assist with the Academy Survey for BJS; and a \$25,000 grant partnership with the Western Community Policing Institute for innovations in academy training.

Regional Meetings - Becar attended all five regional meetings with NDI as the primary focus.
Online Payments - IADLEST is presently working with Envisage to take credit card payments for membership dues, conference fees, and marketplace sales.

BUDGET AND AUDIT COMMITTEE

REPORTS: Lyle Mann reported that the 2010 Audit was completed and no areas of concern were noted. The systems that IADLEST currently has in place are consistent with good business practices. The 2011 Audit should be done in the very near future. MOTION by Alzaharna (Alaska) to approve the Audit Committee Report. SECOND by Cappitelli (CA). **MOTION CARRIED** with all in favor.

IADLEST TREASURY: Chuck Melville provided the Statement of Assets and Liabilities for the year ending April 30, 2012. He explained how current bills are paid and the checks and balances that are in place. Melville also reported briefly on the Association's solid financial footing. MOTION to approve the

Treasurer's Report by Watson (LA). SECOND by Vickers (TX). **MOTION CARRIED** with all in favor.

ADMINISTRATIVE REVIEW:

Source Book: Dick Clark reported that the Source Book update is completed and IADLEST does have an electronic copy.

Friendly Fire Prevention - Clark sits on the Advisory Council for FLETC, and they are currently working on a project called Friendly Fire Prevention to study and help prevent off-duty or undercover officers from being shot by their on-duty counterparts.

Academy Survey - Academy and POST Directors will be asked to fill out the Law Enforcement Academy Census in 2013. Dr. Reeves was at the Executive Committee meeting asking for survey clarification and information. Members of the Executive Committee have a copy if anyone wants to help provide input on questions before it goes out.

Future Conferences - 2013: Portland, Oregon; June 2-5; 2014: Florida has volunteered to host. 2015: Alaska has volunteered to host the conference.

COMMITTEE AND SPECIAL ASSIGNMENT REPORTS:

Nominations Committee - Kim Vickers (TX) was nominated for 2nd Vice President by the Nominations Committee Chair. Clark called for nominations from the floor. Wayne Ternes (MT) stated he was approached and has agreed to a nomination for 2nd Vice President. MOTION by Lyle Mann (AZ) to close nominations. SECOND by Barthuly (WI). **MOTION CARRIED** with all in favor. Clark announced that ballots would be created and voting would take place with Vickers and Ternes on the ballot.

Training and Standards - Dave Harvey commented on a collaboration and partnership with members of the military.

Membership Committee - Jon Bierne spoke regarding a 50-50 strategy among POST Directors, the 50 largest police departments, the training academies, and a track program for conference training. He also spoke regarding the need to strengthen the regional approach to membership.

Bylaws Committee - Lyle Mann stated that the bylaws will be revised soon with a vote by the general membership in San Diego. Members will be sent the proposed revisions electronically in advance of the meeting.

Technology - Stephenson (UT) stated that the committee is planning to find ways to use technology to push training opportunities and programs out to the members and the LE community.

Driver Training and Education - Paul Cappitelli would like the efforts undertaken on driver training in California and get it out to the rest of the country. He would like to see IADLEST take the lead on this.

National Revocation Information Sharing Initiative - Muldoon reported on the training provided at all five regional meetings that he and Becar were able to attend. Strategic Planning - Muldoon briefed the members on the strategic planning initiative that is ongoing. He showed the members the new organizational chart and committee structure. RDPC - Hobson (filling in for Steve Otto) provided the training report for the Rural Domestic Preparedness Consortium. The report showed where the training has been held and how many officers have been trained. NSA - Kim Vickers represented IADLEST at the NSA meeting in January in Washington, DC. He stated that Bill Muldoon provided a presentation on NDI. IACP - Paul Cappitelli represented IADLEST on the technical advisory panel and spoke regarding DRE certification and related challenges. He will be stepping down as the IADLEST representative and asked for those that are interested in replacing him on the committee to notify incoming president Bill Muldoon.

REGIONAL REPORTS: West Region - Lyle Mann reported that Bill Flink was the regional representative. They did not hold an election due to the small number of members present today. Central - Five states were present for the regional caucus. Dave Harvey was elected as the new Representative. Northeast - Tony Silva was re-elected as the regional representative. Midwest - The Midwest Region met in San Antonio, Texas, and had six states represented with 16 members present. The caucus met this morning with 21 members present. Kim Vickers was elected as the new Representative. The region recommended that Arlen Ciechanowski (IA) be appointed should Kim Vickers be elected as 2nd VP. South - Bill Floyd was re-elected as the representative. They had 27 attendees from 8 states present at their regional meeting.

NEW BUSINESS: Election of Officers - Second Vice President: Secretary Lloyd Halvorson handed out the ballots for Second Vice President. After voting was concluded the Secretary counted the votes. Halvorson reported that Kim Vickers was elected as Second VP. He informed the President of the official tally and will retain the official ballots.

Regional Representatives - President Dick Clark appointed Arlen Ciechanowski (IA) to serve as Midwest Regional Representative as recommended and appointed Lyle Mann to serve as the West Regional Representative.

Swearing-in Ceremony - The officers of the institution were sworn in and took the oath of office. Dick Clark gave a closing speech summarizing his year as president and then turned the meeting over to incoming president Bill Muldoon. Muldoon presented Clark with a plaque thanking him for his year as president and his dedication to IADLEST.

ADJOURNMENT: Meeting Adjourned. Next meeting is September 29-30, 2012 in San Diego, CA.

APPLICATION FOR
IADLEST MEMBERSHIP

Print Name _____ Title _____

Organization _____

Address _____

City _____

State _____ Zip Code _____

Area Code _____ Telephone _____

Area Code _____ Fax _____

E-mail Address _____

Sponsoring State Director Member _____

Type of Membership Requested:

_____ Director (\$400)

_____ Sustaining (\$200)

_____ General (\$100)

Make check payable to **IADLEST** and mail with application to:

IADLEST
c/o 3287 Tasa Drive
Meridian, ID 83642-6444

MEMBERSHIP

Membership in the Association is available in one of the following categories:

Director Member is an agency membership available to the director or chief executive officer of any board, council, commission, or other policy-making body. This agency is established and empowered by state law and possesses sole statewide authority and responsibility for the development and implementation of minimum standards and/or training for law enforcement, and where appropriate, correctional personnel.

General Member is available to any professional employee of an agency represented by a director; any member of the board, council, commission, or other policy-making body of any state, to which a director is responsible; any professional employee of a criminal justice academy or training center at a national, state, or local level, or other persons actively involved in the training/education of law enforcement personnel; or individuals employed by or within any country other than the United States whose employment and responsibilities are deemed equivalent.

Sustaining Member is limited to any individual, partnership, foundation, corporation, or other entity involved with the development or training of law enforcement or other criminal justice personnel.

General and Sustaining members must have the sponsorship of a state director member upon application for membership.

RECRUIT A NEW MEMBER
SHARE IADLEST WITH A COLLEAGUE

We ask each IADLEST member to recruit other distinguished law enforcement professionals. If each member recruited one other member, we would double in size overnight! The more members we have, the greater influence we will have on law enforcement standards and training. There is no reason why we should keep the IADLEST organization our best-kept secret.

Why should you become a member?

You can:

- Belong to an international association of professional law enforcement training directors, managers, leaders, and educators.
- Exchange information and advice with other professionals.
- Participate in national conferences and keep abreast of state-of-the-art training and employment standards.
- Access the IADLEST POST-NET (Internet) national curriculum library.
- Use the IADLEST POST-NET (Internet) national training calendar to list your training programs.
- Access IADLEST research studies and training products, e.g., Emergency Driving Training Guide, Radar/LIDAR Training Manuals, *IADLEST Sourcebook*, etc.
- Provide input on national policies affecting law enforcement standards and training.

**SIXTH CIRCUIT SUPPRESSES
EVIDENCE FROM SEARCH INCIDENT
TO ARREST OF AUTOMOBILE©**

by: *Brian S. Batterton, Attorney*

©Legal and Liability Risk Management Institute/ Public
Agency Training Council 1-800-365-0119 • www.patc.com

On March 21, 2012, the Sixth Circuit Court of Appeals decided the *United States v. McCraney*ⁱ, which serves as an excellent review of searches incident to arrest of automobiles in light of *Arizona v. Gant*. The facts of *McCraney*, taken directly from the case, are as follows:

At about 12:50 a.m., on July 4, 2010, Massillon Police Officer Curtiss Ricker was on routine patrol traveling eastbound on Lincoln Way in Massillon, Ohio. Defendant McCraney was traveling in the opposite direction as the passenger in a Buick Riviera that was registered to him and being driven by Rudolph Ammons. The Buick approached and passed Ricker without dimming its high-beam headlights, which is a traffic violation. Ricker made an immediate U-turn, followed the Buick for a few blocks, and observed an oncoming car flash its lights at the Buick. Ricker also testified that, following one car length behind the Buick, he observed both the driver and passenger lean over toward the floor of the car. Ricker explained that, in his experience, this kind of movement led to the discovery of contraband or firearms "95 to 100 percent" of the time. McCraney, however, testified that neither he nor Ammons had reached down as Ricker described.

Although Ricker did not activate his lights or siren, Ammons came to a stop and gestured to Ricker as if to flag him down. Not wanting to stop in the roadway, Ricker drove a short distance farther and pulled into a large parking lot belonging to the Massillon Moose Lodge. Ammons followed and once he stopped, Ricker swung his patrol car around to face the front of the Buick and

directed his spotlight into the passenger compartment.

Ricker approached and instructed the occupants to show their hands. They complied, and Ricker asked Ammons for identification and insurance information. Ammons explained that they were lost, provided an Ohio ID (not a driver's license), and asked for directions to Interstate 77. Taking the ID, Ricker returned to his patrol car, called in to check the driver's identification, and requested backup. While Ricker was doing this, the defendant attempted to get out of the Buick twice, seemed to be trying to get Ricker's attention, and complied when Ricker instructed him to get back into the Buick. McCraney testified that he was trying to give Ricker his vehicle registration and insurance information.

Once Massillon Police Officer Michael Maier arrived on the scene, Ricker radioed to him and asked that he run a check on the temporary vehicle registration tag. According to Ricker, Maier stopped behind and to the side of the Buick and then advised Ricker that he saw the occupants move as if bending down to reach under the seat. At the suppression hearing, McCraney again denied that either he or Ammons had made such movements. Maier's check revealed that the Buick was registered to McCraney, who also had a suspended driver's license.

Ricker approached the Buick, explained that Ammons did not have a valid license, and declined to lead them to I-77 because it was outside of his jurisdiction. McCraney then moved over to the driver's seat and started the Buick, but Maier interjected that McCraney had a suspended license as well. Ricker admitted during the suppression hearing that he would have let McCraney drive away if his driver's license had been valid. Ricker testified that since it was not, he decided that he would arrest

them both-Ammons for driving with a suspended license and McCraney for unlawful entrustment. However, without placing them under arrest, Ricker permitted McCraney to call his aunt, May Weems, and arrange for her to come get them and the Buick. Weems testified that she spoke to an officer who told her to come pick them up, but no one was there when she arrived 25 minutes later.

Only a minute after McCraney ended the conversation with his aunt, and with five officers and four patrol cars now on the scene, Ricker asked McCraney and Ammons to get out of the Buick. When they did so, they were patted down for weapons and instructed to stand near the rear of the Buick. Not yet in handcuffs or formally under arrest, McCraney and Ammons stood two or three feet from the rear bumper with three officers standing around them while the other two officers searched the passenger compartment. After the firearm was found under the driver's seat, McCraney and Ammons were handcuffed, placed under arrest, and transported from the scene. The Buick was impounded and towed away. McCraney, a convicted felon, later admitted to his probation officer that the revolver belonged to him.ⁱⁱ

McCraney was charged under federal law for being a felon in possession of a firearm. He filed a motion to suppress and argued that the search of his automobile violated the *Fourth Amendment*. The district court agreed and suppressed the evidence. The government appealed and argued that the search was justified as either a search incident to arrest in compliance with *Arizona v. Gant*ⁱⁱⁱ or as a "frisk" of the automobile under *Michigan v. Long*.^{iv}

Issue One: Did the search of McCraney's vehicle comply with requirements of Arizona v. Gant regarding searches incident to arrest?

In analyzing the lawfulness of the search incident to arrest of McCraney's vehicle, the Sixth Circuit first reviewed various rules regarding this type of

warrantless search. Regarding searches incident to arrest, the court noted the four following rules:

- This exception authorizes the warrantless search of "the arrestee's person and the area 'within his immediate control.'" *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).^v
- A formal custodial arrest need not precede the search as long as the formal arrest follows "quickly on the heels of the challenged search" and "the fruits of that search are not necessary to sustain probable cause to arrest." *United States v. Montgomery*, 377 F.3d 582, 586 (6th Cir. 2004) (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 n.6, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980)); see also *United States v. Dotson*, 246 F. App'x 897, 903 (6th Cir. 2007).^{vi}
- The exception was later extended to allow searches of the passenger compartment of an automobile incident to the lawful custodial arrest of its occupants or recent occupants. *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); *Thornton v. United States*, 541 U.S. 615, 622, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).^{vii}
- Under *Arizona v. Gant*, police are authorized to search a vehicle incident to a recent occupant's arrest only if: (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," *Gant*, 556 U.S. at 343; or (2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest," *Id.* at 351.^{viii}

In McCraney's case, the government argued that the first exception from *Gant* applied in that McCraney and the other vehicle occupant were unsecured and within reaching distance of the vehicle at the time of the search. In support of their argument they noted that McCraney and the other occupant were not handcuffed and were not secured in the back of a patrol car, as was the case in *Gant*.

In applying the facts of the case to the rules above, the Sixth Circuit noted that, while McCraney and

the other occupant were not handcuffed and were not secured in a police car, they were about two or three feet behind the rear bumper of the car. They were being guarded by three officers at that position and two other officers were searching inside the car. The Sixth then held that the district court did not err when it ruled that McCraney and the occupant were not within reaching distance of the passenger compartment based on the specific facts of this case.

As such the search cannot be justified as a lawful search incident to arrest, as the standards set forth in *Arizona v. Gant* were not met.

Issue Two: Did the search of McCraney's vehicle comply with the requirements as a lawful "frisk" of the automobile under Michigan v. Long?

In analyzing this issue, the Sixth Circuit first noted several rules regarding "frisks" of automobiles. The rules are as follows:

- *Michigan v. Long*, authorizes a protective search of the passenger compartment where the officer "possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).^{ix}
- A search based on such reasonable suspicion is permissible even if the suspect is detained outside the vehicle because "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside." *Id.* at 1052.^x
- Suspicious movements made in response to police presence may properly contribute to an officer's suspicions. *Caruthers*, 458 F.3d 459, 466 (6th Cir. 2006); *Graham*, 483 F.3d at 439.^{xi}

The Sixth Circuit also noted that, during the motion to suppress, the district court found, based on the officers testimony, the McCraney and his occupant,

on two separate instances, moved suspiciously inside the vehicle as if reaching under the seat.

The court then applied the facts of McCraney's case to the rules above. First, the court noted that McCraney's vehicle drew the attention of the police because it failed to dim its headlights. While this is a valid reason to conduct a stop, the court stated it is not indicative that the occupants of the vehicle are armed and dangerous. Further, the Sixth Circuit noted that the offense of driving with a suspended license and other offense were also not sufficient to arouse a belief that the occupants were armed and dangerous. Lastly, the court noted that, while McCraney did try to get out of the vehicle twice, Officer Ricker described this action as an attempt to get his attention rather than an attempt to flee or act aggressively.

As such, the Sixth Circuit held that the district court did not err in holding that the officers did not have sufficient reasonable suspicion to justify the "frisk" (limited search for weapons) of the vehicle. As such, the search was not reasonable and the evidence was properly suppressed.

It is important to note here that the court did acknowledge that furtive or suspicious movement of vehicle occupants are proper for officers to consider in determining if a "frisk" of a vehicle for weapons is reasonable, in light of the totality of the circumstances. However, this case was distinguished from the *United States v. Caruthers* in that in *Caruthers*, the officers testified that it was late at night, in a high crime area and the suspect at issue was reportedly armed. The district court found that distinguishable from McCraney's case, under the totality of the circumstances discussed above. As such, the facts of McCraney did not rise to proper legal standard for the Sixth Circuit to overturn the district court's decision.

ⁱ 674 F.3d 614 (6th Cir. 2012)

ⁱⁱ *Id.* at 617-618

ⁱⁱⁱ 556 U.S. 332 (2009)

^{iv} 463 U.S. 1032 (1983)

^v *McCraney*, 674 F.3d at 618-619

^{vi} *Id.* at 619

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.* at 620

^x *Id.*

^{xi} *Id.*

MISTAKEN IDENTITY AND THE FOURTH AMENDMENT©

By Brian S. Batterton, Attorney

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On June 4, 2012, the Eighth Circuit Court of Appeals decided the *United States v. Philips*ⁱ which is instructive regarding cases of mistaken identity during officer/citizen stops and the *Fourth Amendment's* reasonableness requirement. The facts of *Philips*, taken directly from the case, are as follows:

On October 25, 2010, a shooting took place at 1422 4th Avenue Southeast in Cedar Rapids, Iowa. Police officers had information that Gregory Hollie possessed a pistol when the shooting occurred and had given the pistol to another individual, who was later arrested. An investigation revealed information that Hollie possessed multiple firearms, was a convicted felon, and was wanted on a warrant for an unrelated incident. Officers believed that Hollie was staying at 1418 4th Avenue Southeast in Cedar Rapids.

During the early afternoon of October 27, 2010, Cedar Rapids Police Officer John O'Brien and his partner were attempting to locate Hollie. The officers had seen Hollie's booking photo and had been told Hollie's physical description—a black male in his mid-thirties, who stands six feet tall, weighs two hundred fifteen pounds, and is bald. O'Brien was driving an unmarked vehicle. As they headed westbound on the 1400 block of 4th Avenue Southeast, the officers observed a "male black subject" walking eastbound on the sidewalk adjacent to 4th Avenue, approaching 1418. According to O'Brien, he and his partner believed that the subject was Hollie. The officers saw the subject turn towards 1418, but were unable to ascertain whether he proceeded to the house located at 1418 or to the area between 1418 and 1422.

O'Brien then drove to the end of the block and later positioned his vehicle so that he could view the alley behind the house. The officers observed a white vehicle pull into the parking area behind 1418, and after again repositioning, saw the white vehicle driving down the alley towards 14th Street. The officers observed a white female driver, a white female passenger in the front seat, and the man they had seen walking on 4th Avenue Southeast, whom they believed to be Hollie, seated behind the driver. Although the officers did not see the subject enter the car, O'Brien testified that he was sure that it was the same individual they had seen walking near the front of 1418. According to O'Brien, "the bald head really stuck out."

After following the white vehicle for a few blocks, the officers initiated an investigative stop. O'Brien conceded that there had been no traffic violations or any other independent reason to stop the vehicle. According to O'Brien, when the occupants of the vehicle noticed the officers, the individual he believed was Hollie began "fidgeting" or "manipulating" something to the right side of his body.

O'Brien and his partner approached the vehicle and asked the occupants for identification. O'Brien testified that "[a]t that point, I was convinced that it was Mr. Hollie from all of the information that I had at that time." When the male subject reached for his right rear pants pocket to retrieve his identification, he turned his body away from O'Brien, which struck O'Brien as "a really unnatural maneuver." Id. According to O'Brien, "if your wallet is on your back right pocket, you're going to lean to the left and take the weight off of the wallet as opposed to putting more weight on it to get it out of your pocket." O'Brien became concerned at this point because "the suspect we were looking for was known to be armed, had just left an area where a shooting had taken place, and

now I'm getting this weird maneuver in the car to shield his body from me to get his wallet out of his back pocket[.]"

As the subject reached for his identification card, O'Brien asked him if he had come from the residence located at 1418 4th Avenue Southeast. The subject replied that he had not; but after O'Brien mentioned having seen him near that address, the subject admitted that he had stopped by the house to give some money to a friend.

The subject handed O'Brien his identification card, which listed the name Tony Phillips. O'Brien testified that he could not determine whether the person on the identification card was the same person who was sitting in the back passenger's seat, in part because O'Brien had stepped back from the car to shield himself when the subject was reaching awkwardly for his identification. O'Brien asked the subject to step out of the car. As the subject was doing so, O'Brien asked if he had any weapons in his possession. He replied that he had a pistol in his right front pocket. O'Brien and his partner then placed the individual in handcuffs. After the subject exited the vehicle, O'Brien "was able to get a good look at his face, was able to determine that the I.D. was good." Phillips was charged with being a felon in possession of a firearm.ⁱⁱ

Phillips filed a motion to suppress and argued that his stop violated the *Fourth Amendment*. The district court denied the motion, and he appealed to the Eighth Circuit Court of Appeals.

There were two issues before the court. The first was whether the officer's stop of Phillips based on the general physical description and distance from which the officer initially viewed Phillips was reasonable under the *Fourth Amendment*. The second issue was whether it was reasonable under the *Fourth Amendment* to order Phillips to exit the vehicle when officer could have verified his identification as he sat in the vehicle.

The court first sought out to determine if the initial stop was reasonable under the *Fourth Amendment*. Phillips argued that the physical description used by the officers (black male, mid-30's, 6 feet tall, 200 lbs, bald head) was too general in nature to justify his stop. Further, he argued that the officers observed him from too far a distance for too short a time to justify the stop. In examining the issue of whether the initial stop of Phillips was reasonable, the court noted that

A law enforcement officer may conduct an investigative stop of a vehicle if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot.ⁱⁱⁱ

Further, the court noted that

"[T]he validity of a stop depends on whether the officer's actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one."^{iv}

Applying the two rules above to the facts of the case, the Eighth Circuit observed that Phillips physical description closely matched Hollie's (the wanted person); and he resembled the book-in photo that the officer's had previously examined. Further, the officers observed Phillips approaching a house where Hollie was believed to be staying. The Eighth Circuit then held under the totality of the circumstances, the officer's mistaken belief that Phillips was Hollie was objectively reasonable under the *Fourth Amendment*. As such, the stop was reasonable.

The court then examined whether it was reasonable to have Phillips exit the vehicle to verify his identification. Phillips argued that the officers should have verified his identification through the car window. The Eighth Circuit noted that

During a lawful investigative stop, an officer may order a passenger to exit the vehicle. See *United States v. Cloud*, 594 F.3d 1042, 1045 (8th Cir. 2010) (citing *Maryland v. Wilson*, 519 U.S. 408, 415,

117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) ("We . . . hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.")).^v

The court then applied the above rule to the facts of the case. Here, the officer observed Philips make a furtive or unnatural type of body movement when reaching for his wallet while in the car. Further, the court noted that Hollie was known to be armed. In light of this, and the rule above, the court held that it was reasonable for the officer to require Philips to exit the vehicle for the purpose of verifying his identification. Specifically, the court stated

The investigative stop was pending when O'Brien asked Philips to exit the car, for O'Brien had not yet determined whether the subject was Hollie. O'Brien testified that he asked the subject to exit the vehicle because of the concern for officer safety. Immediately after exiting the vehicle and before his identity could be fully established, Philips admitted to having a gun in his front pocket. We agree with the magistrate judge's determination that O'Brien's "action seems particularly prudent in this case, since O'Brien believed that he was dealing with an armed fugitive who had been involved in a shooting two days earlier."^{vi}

As such, the stop did not violate the *Fourth Amendment*; and the gun which was found during the stop was not the fruit of a constitutional violation.

ⁱ No. 11-3014, 2012 U.S. App. LEXIS 11207 (8th Cir. 2012)

ⁱⁱ Id. at 2-5

ⁱⁱⁱ Id. at 6 (citing *United States v. Robinson*, 670 F.3d 874, 876 (8th Cir. 2012) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) and *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)) (internal quotations omitted).

^{iv} Id. (quoting *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005).

^v Id. at 8

^{vi} Id.

WARRANTLESS AUTOMOBILE SEARCHES©

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On June 5, 2012, the Eleventh Circuit Court of Appeals decided the *United States v. Carter*^{vi}, which serves as an excellent review of two rules regarding warrantless searches of automobiles. The facts of *Carter*, taken directly from the case, are as follows:

In 2006, Tampa Police Officer Petit frequently communicated with a concerned citizen about the drug activity in her neighborhood. The concerned citizen received no compensation for her phone calls and was generally considered a reliable source. In July 2006, she called Officer Petit and advised him of a possible drug transaction. When he arrived, Officer Petit observed two men standing near a building. One of the men walked away from the other and conducted a drug transaction with a woman. The other man (later identified as Carter) then approached a different woman who had just arrived at the scene. From his vantage point, Officer Petit could not see what happened between Carter and the second woman, but he could see that they "made brief contact with their hands." Given his prior experience as a narcotics officer, Officer Petit was convinced that he had witnessed a hand-to-hand drug transaction. During Petit's observation of the transaction, he identified Carter and discovered that he had a suspended driver's license. He conveyed this information to the concerned citizen and asked that she call him if she ever saw Carter driving.

In August 2006, the citizen called Officer Petit to report that Carter was driving around her neighborhood. Officer Petit called for backup, and the backup officer saw Carter near a local

park. This officer saw Carter drive his car into a parking space, get out of his car, and walk toward the nearby pavilion approximately thirty to forty feet away from his car. When Officer Petit arrived, the two officers positively identified Carter, verified that his license was still suspended, approached him, and arrested him for driving with a suspended license. The officers detected a strong smell of marijuana on Carter and discovered more than \$500 in small, disorganized bills stashed in various pockets. Carter stated that he did not have drugs on his person, and the officers did not find drugs on him.

The officers then searched Carter's car. When they opened the door, they detected a strong stench of marijuana. They found approximately 30 pieces of crack cocaine, some grams of marijuana, and a digital scale. In early 2007, Carter pled guilty to the charges stemming from this transaction.ⁱⁱ

Carter later appealed and argued that, in accordance with the United States Supreme Court's decision in *Arizona v. Gant*ⁱⁱⁱ, the search of his vehicle incident to arrest was unreasonable under the *Fourth Amendment*.

As a review, the Supreme Court, in *Gant*, held that the:

[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Arizona v. Gant*, 556 U.S. 332, 351, 129 S. Ct. 1710, 1723, 173 L. Ed. 2d 485 (2009). [emphasis added]^{iv}

Carter argued that he was not within reaching distance of his vehicle at the time of the search of his vehicle. He also argues, that there is no evidence related to his suspended license that could be found in his vehicle, just as was the case in *Gant*.

However, the Eleventh Circuit further noted that the Supreme Court, in *Gant*, stated that there can be multiple justifications for the warrantless search of an automobile.^v One other possible exception to the

warrant requirement is the "automobile exception." The Eleventh Circuit stated

Under the automobile exception, police officers may conduct a warrantless search of a vehicle if the vehicle is readily mobile and if they have probable cause to believe that the vehicle contains contraband. *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S. Ct. 2485, 2487, 135 L. Ed. 2d 1031 (1996) (*per curiam*); *United States v. Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003) (*per curiam*). Accordingly, under the automobile exception, a vehicle search does not violate the Fourth Amendment if, "under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in the vehicle." *Tamari*, 454 F.3d at 1261-62 (*internal quotation marks omitted*). [emphasis added]^{vi}

In light of the above rule and the fact that the Supreme Court emphasized in *Gant* that a search would still be valid if some other justification for a warrantless search applied, the Eleventh Circuit held

Because it is undisputed that the car was operational at the time of the arrest, and because we agree with the district court that Officer Petit had probable cause to believe that the car contained contraband, we find that the search was valid under the automobile search exception to the warrant requirement and did not violate the *Fourth Amendment*. See *Tamari*, 454 F.3d at 1261-62; *Gant*, 556 U.S. at 351, 129 S. Ct. at 1723-24.^{vii}

As such, the court affirmed Carter's conviction.

ⁱ No. 11-11867, 2012 U.S. App. LEXIS 11265 (11th Cir. 2012 Unpub)

ⁱⁱ Id. at 2-3

ⁱⁱⁱ 556 U.S. 332 (2009)

^{iv} Carter at 6

^v Id. (citing *Gant*, 556 U.S. at 351)

^{vi} Id. at 5

^{vii} Id. at 7

SIXTH CIRCUIT UPHOLDS INVENTORY SEARCH OF AUTO©

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On June 19, 2012, the Sixth Circuit Court of Appeals decided *United States v. Jackson*ⁱ, which serves as an excellent review of the law related to inventory searches of automobiles. The facts of *Jackson*, taken directly from the case, are as follows:

During a roll call meeting on the afternoon of August 17, 2010, supervisors at the Akron, Ohio, Police Department ("APD") issued a "BOLO" (be on the lookout) alert for a suspect involved in a recent nightclub shooting. The suspect was thought to be driving a black Chevrolet Tahoe with yellow stripes and chrome wheels. Almost immediately after starting his afternoon shift in a marked patrol car, APD Officer Troy Meech, who was familiar with the suspect, spotted a vehicle that resembled the Tahoe. It was traveling in the opposite direction on Rhodes Avenue, a two-lane residential street. The yellow stripes and the chrome wheels on the SUV caught Officer Meech's attention. As soon as it passed by him, Officer Meech looked in his rear-view mirror and saw the brake lights come on, "as if [the driver] was waiting to see what [Meech] was going to do." Meech turned around and followed the SUV while attempting to read a temporary license tag on the back of it. As he did so, the driver made a quick left turn into the driveway of a house at 83 Rhodes Avenue without using a turn signal. After observing this traffic infraction, Officer Meech activated his lights and siren and performed a traffic stop. He radioed the vehicle's license number to APD dispatch and exited his patrol car.

As Officer Meech approached the vehicle, the driver, later identified as defendant Jackson, opened his door. Officer Meech saw that Jackson and his passenger,

Kenard Gay, were each holding open, partially consumed bottles of Heineken beer as they sat in the vehicle. Officer Meech asked Jackson whether he had a valid driver's license. Jackson responded that he did not.

Officer Meech testified at the suppression hearing that once he saw Jackson sitting in the SUV, he realized that neither Jackson nor the vehicle had any connection with the incident that precipitated the BOLO alert. The vehicle was a dark blue and yellow GMC Yukon, an SUV very similar in style and design to the Chevy Tahoe. Officer Meech nonetheless removed Jackson from the vehicle and placed him under arrest for having an open container of an alcoholic beverage in a motor vehicle. He then conducted a background check on both Jackson and Gay. APD dispatch reported that Jackson not only had a suspended license, but also an outstanding warrant for his arrest. Gay, too, had a suspended license.

Officer Meech determined that in accordance with APD's Vehicle Impoundment and Inventory Procedure Policy ("the APD Policy"), the Yukon would have to be towed from the scene because it was illegally parked in the driveway of a residence with no discernible connection to either Jackson or Gay, and neither Jackson nor Gay could drive it to another location in light of their consumption of alcohol and suspended licenses.

Before releasing the vehicle to the towing company, Officer Meech performed an on-site inventory search of the interior and exterior of the Yukon, pursuant to the APD Policy. Inside the vehicle was a six-pack of Heineken beer with two opened bottles. While checking under the driver's seat, Officer Meech noticed that "part of the carpet on the floor board had been ripped up and just appeared to be like loose as if someone could have put something underneath there. I went to lift it up and noticed there was [a] loaded .380

Cobra handgun on the floor of the car." He further explained:

Where the emergency brake pedal is and the brake pedal, the carpet that goes underneath that, you know how they kind of fold it over, and I mean it looks like it's supposed to look. That was tor[n] up and the carpet was like pushed up against it so the extra carpet was just up against the-under the dash there. It was obvious it had been tor[n] up.

Officer Meech testified that there were no nails or fasteners to remove from this area; and in the process of lifting the carpet, he did not damage it in any way. He "simply checked under [the carpet]" by lifting the loose flap and discovered the loaded firearm. When asked about the gun, Jackson claimed that he did not know it was in the vehicle, stating that he had just purchased the car a couple of weeks ago. Officer Meech informed Jackson that the firearm would be tested for fingerprints and asked him if his fingerprints would be found on it, to which Jackson replied, "they might be." After Jackson's arrest, Officer Meech issued him a traffic citation for driving with a suspended license and failure to use a turn signal. The vehicle was then towed and impounded.ⁱⁱ

Jackson was indicted on a federal firearms violation, and he filed a motion to suppress. The district court denied his motion, and he entered a guilty plea with a right to appeal the denial of his motion to suppress. He filed a timely appeal with the Sixth Circuit Court of Appeals.

Issue One: Was the initial stop of Jackson reasonable under the Fourth Amendment?

Jackson argued that the BOLO did not provide sufficient reasonable suspicion for his stop because there was no evidence presented in court that established that it came from a reliable source. However, the court noted that, even if this were true, there was an independent reason for the traffic stop, particularly the traffic violation of failing to signal a turn. The Sixth Circuit stated

Because probable cause existed for the traffic stop, the district court correctly held that the officer's subjective or pretextual motivation for making the stop was not relevant under *Whren*[""]; *United States v. Miller*, 413 F. App'x 841, 843 (6th Cir. 2011)ⁱⁱⁱ

Thus, the traffic stop was reasonable under the *Fourth Amendment* based upon the traffic violation that was observed by the officer.

Issue Two: Was it reasonable under the Fourth Amendment for the officer to continue to detain Jackson after he realized that he was not the subject of the BOLO?

Jackson argued that once the officer realized that he did not meet the description contained in the BOLO, the officer should have ended the stop and released him. However, the Sixth Circuit noted that, upon walking up to the vehicle, the officer immediately observed another offense, particularly the open container of alcohol. This provided the officer with a valid basis to continue the stop.

Issue Three: Was the vehicle properly impounded according to the police department's policy since it was stopped on private property (in a driveway of a residence)?

Jackson argued that the officer did not have to impound his vehicle because, based on Akron city ordinance, they were allowed to leave his vehicle on private property with the permission of the property owner. As such, he asserted that it was improper for the officer to impound his vehicle without first contacting the property owner and asking whether the vehicle could remain on the premises.

As to this issue, the Sixth Circuit first noted that since the driver was being arrested and the passenger had a suspended license, it was not an option to allow either to drive the vehicle from the scene. Second, the court noted that Jackson cited no case law, and the court is aware of no case law, that requires the police to contact another person on behalf of an arrested driver and ask if they will take possession of the arrestee's vehicle. The court cited the Sixth

Circuit case of the *United States v. Pryor*^{iv}, in which they previously held that

“...the impoundment of the defendant's vehicle was valid under standard police procedure where the car was parked on private property at an apartment complex, the defendant did not live there, he could not obtain permission from the property owner because the manager's office was closed, and he could not turn the keys over to his wife because she did not appear on the scene until after the police had concluded the inventory search.”^v

Third, the Sixth Circuit noted that it is permissible for officers to exercise some discretion in deciding to impound a vehicle as long as that discretion is based upon standard criteria and as long as the discretion is not simply based on a premise of obtaining evidence of criminal activity.^{vi}

The court then concluded that the police properly towed Jackson's vehicle because there was nobody on-scene that could drive the vehicle, and he and his passenger had no apparent connection to the home where they stopped. Further, the officers were not required by law to contact the homeowner to determine if it was permissible for Jackson to leave the vehicle at that location. It was noted by the court that Jackson did not tell the officers that he had permission to park at that driveway or state that he knew the residents of that location.

Issue Four: Did the officer exceed the permissible scope of the inventory search when he looked under the apparently ripped carpet such that the search violated the Fourth Amendment?

Jackson argued that just because his vehicle appeared to have worn carpeting did not give the officer justification to search under that carpeting during the inventory search.

Noting rules regarding inventory searches, the Sixth Circuit stated

It is settled law that the police may conduct an inventory search of an

automobile that is being impounded without running afoul of the *Fourth Amendment*. *United States v. Smith*, 510 F.3d 641, 650 (6th Cir. 2007). "In order to be deemed valid, an inventory search may not be undertaken for purposes of investigation, and it must be conducted according to standard police procedures." *Id.* at 651 (citation and internal quotation marks omitted). A general written inventory policy does not grant officers carte blanche when conducting a search; rather, it must be sufficiently tailored to only produce an inventory. *Tackett*, 486 F.3d at 232. Thus, "[i]n conducting an inventory search, officers do not enjoy their accustomed discretion; they simply follow the applicable policy." *Id.* "Nonetheless, officers may exercise some judgment based on concerns related to the purposes of an inventory search; for example, they may decide to open particular containers if they cannot determine the contents." *Id.*^{vii}

The court then examined the Akron Police Department inventory policy and compared it to the search conducted in Jackson's case. The court held that the officer followed policy when he looked under the already ripped up piece of carpet. The court noted that had the officer ripped up the carpet it would likely not have been permissible under the policy. However, in this case, the officer "simply lifted an already loose flap of carpet that appeared to have been tampered with..."^{viii}

As such, the Sixth Circuit affirmed the denial of the motion to suppress.

ⁱ No. 11-3688, 2012 U.S. App. LEXIS 12344 (6th Cir. 2012)

ⁱⁱ *Id.* at 2-5

ⁱⁱⁱ *Id.* at 9 (citing *Whren v. United States*, 517 U.S. 806 (1996))

^{iv} *United States v. Pryor*, 174 F. App'x 317, 320 (6th Cir. 2006)

^v *Id.* at 13

^{vi} *Id.* (citing *Colorado v. Bertine*, 479 U.S. 367 (1987))

^{vii} *Id.* at 15-16

^{viii} *Id.* at 17

SECURITY NOT SUBJECT TO FOURTH AMENDMENT© TENTH CIRCUIT HOLDS OFF-DUTY OFFICER WORKING

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Many law enforcement officers work some form of secondary employment while off-duty to supplement their income. In most cases, these law enforcement officers work with the approval of their agency, and they wear their official uniform. In circumstances such as this, the general rule is that these officers are typically considered acting in their official capacity as government officials when they use their law enforcement authority during secondary employment. However, there are exceptions to the general rule. On June 5, 2012, the Tenth Circuit Court of Appeals decided the *United States v. Cintron*¹ which serves to illustrate one of the exceptions to this rule.

The facts of *Cintron*, taken direction from the case, are as follows:

On April 18, 2011, Shawn Reed was working as a security guard at the OK Corral Club, a bar in Oklahoma City. Mr. Reed was also a part-time reserve officer for the Boley Police Department and had 27 years of law enforcement experience. He had worked off-duty security jobs for the past 20 years. Although the Boley Police Department knew of his work at the OK Corral Club, it was not involved in the arrangement of this employment.

When Mr. Reed worked at the OK Corral Club, he did not wear his police uniform or his badge. Instead, he wore a shirt that said "Security." Mr. Reed also carried a firearm and a personal set of handcuffs.

On the night of April 18, 2011, Mr. Reed was working with the outside security team—a group that patrolled the parking lot area at the OK Corral Club. Mr. Reed testified at the

suppression hearing that his supervisor told him that other security guards had seen "somebody that was flashing a gun or that they—had pulled their shirt up and they saw a gun while they [were] talking to some people." His supervisor was concerned about the incident because, according to Mr. Reed's testimony, "there [were] some people earlier in the night that had threatened to go get guns and come back and shoot some of the inside bouncers that had thrown them out."

Mr. Reed testified that the only description his supervisor gave him was that the individual with the gun "[was] in a red Camaro" and was with other men "that were in a black SUV." Around 3 a.m., Mr. Reed entered the parking lot to investigate. He observed three vehicles: a black SUV, a truck, and a red Camaro. Both doors of the Camaro were open. Mr. Reed approached the Camaro and looked inside to make sure no one was lying in the back seat.

Mr. Cintron then walked toward the Camaro and told Mr. Reed that it was Mr. Cintron's car. Sometime during this encounter, Mr. Reed unholstered his weapon. When Mr. Cintron claimed the Camaro as his vehicle, Mr. Reed pointed his gun at Mr. Cintron. He instructed Mr. Cintron to step to the side and put his hands on the car.

Mr. Cintron complied with Mr. Reed's requests. Mr. Reed proceeded to pat him down. He found a .380-caliber automatic firearm in Mr. Cintron's waistband. Mr. Reed pulled the gun out of Mr. Cintron's waistband and placed it behind him on the ground. Mr. Reed testified that, when he found the gun, Mr. Cintron said: "Hey man, I've just got that . . . because . . . I was picking up my sister, and the last time that I was up here some guys jumped me." Mr. Reed finished his patdown search and handcuffed Mr. Cintron.

When the head of outside security at the OK Corral Club learned of the situation, he called the Oklahoma City Police Department. While Mr. Reed and Mr. Cintron were waiting for the police to arrive, Mr. Cintron repeated his statement about why he had the firearm. He also stated that he had "a tail" on him.

Sergeant David Van Curen, a member of the Oklahoma City Police Department, was the first on-duty officer to respond to the scene. When Sergeant Van Curen arrived, Mr. Reed handed him the firearm and explained what had transpired. Sergeant Van Curen then secured and cleared the firearm.

Mr. Reed testified that during his conversation with Sergeant Van Curen, Mr. Cintron "jumped in on the conversation," and repeated his explanation of why he was at the club and had the firearm. According to Mr. Reed, Mr. Cintron said, "Hey, you know, that's it, man, that's the only reason I got that and the only reason I'm up here is to get my sister."

Sergeant Van Curen testified at the suppression hearing that after Mr. Cintron made this statement about the firearm, Sergeant Van Curen took off the handcuffs that Mr. Reed had applied, put on a different pair, and placed Mr. Cintron in a squad car. Sergeant Van Curen then performed a records check on Mr. Cintron to determine if he had a permit for the firearm. He discovered that Mr. Cintron was a convicted felon and that he had five outstanding city warrants. Sergeant Van Curen then told Mr. Cintron that he was under arrest.ⁱⁱ

Ultimately, Cintron was charged under federal law with a federal firearms violation. Cintron filed a motion to suppress the firearm and his statements. For the purpose of this article we will focus solely on Cintron's motion to suppress the firearm. The trial court denied the

motion and Cintron appealed to the Tenth Circuit Court of Appeals.

In order for Cintron to prevail on his motion to suppress, he must show that Mr. Reed (the off-duty officer/security guard), conducted an illegal detention under the *Fourth Amendment* and that illegal detention resulted in the discovery of evidence (the firearm). The detention would be illegal if it was not supported by reasonable suspicion of criminal activity or if the manner of the detention exceeded the permissible scope. However, in order for Cintron's *Fourth Amendment* argument to apply, he must first show that the *Fourth Amendment* was implicated by Mr. Reed's actions in this specific case.

Thus, the first issue to resolve was whether the Fourth Amendment applied to Mr. Reed, who was an off-duty police officer acting as a non-uniformed security guard at a bar.

In deciding this issue, the Tenth Circuit first examined the legal principals related to the issue. At the outset, they noted that

Fourth Amendment protections do not apply against "private individual[s] not acting as . . . agent[s] of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (quotations omitted)ⁱⁱⁱ

Further, Tenth Circuit observed that, in the *United States v. Poe*, they previously held

When a private individual conducts a search not acting as, or in concert with, a government agent, the *Fourth Amendment* is not implicated, no matter how unreasonable the search.^{iv}

Next, noting that it can be difficult at times to determine when an individual is acting as a private citizen or a government actor, the court examined various cases for guidance on this topic.

Here, the Tenth Circuit looked at two cases that are instructive in Cintron's case. First, the court

examined the *United States v. Souza*.^v In *Souza*, the court considered two factors in determining whether a person acted as a private individual or a government actor. The court stated

We have used the *Souza* test to decide whether a search by a private individual constitutes government action within the meaning of the Fourth Amendment. Under that test, we ask "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *Id. at 1201* (quotations omitted)^{vi}

However, after examining this test, the court stated that it preferred the standard set forth in *David v. City & County of Denver*^{vii} to be more applicable. In that case, the Tenth Circuit decided whether an off-duty officer was a state actor. The court stated

In *David*, we explained that such a determination "rarely depends on a single, easily identifiable fact, such as the officer's attire, the location of the act, or whether or not the officer acts in accordance with his or her duty." *Id. at 1353*. "Instead [we] must examine the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Id.* (quotations omitted).^{viii}

The court then noted that, in *David*, they relied on two key factors from cases in the First and Seventh Circuits. The first factor considered was

whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law," *Id.* (quoting *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995)).^{ix}

The second factor considered in *David* was

whether the officer's actions related in some way to the performance of a police duty." *Id.* (quoting *Gibson v. City of Chicago*, 910 F.2d 1510, 1517 (7th Cir. 1990)).^x

The court then examined facts from Cintron's case that are relevant to the tests from *Souza* and *David*. First, the court noted that the OK Corral Club hired and paid Mr. Reed for his security guard work at the club. Further, not all security guards at the club were off-duty police officers. Second, Mr. Reed was not wearing a police uniform, did not have his badge, and never identified himself as a police officer. Third, at the suppression hearing, Mr. Reed testified that he was working to further the interest of the club (security and safety) rather than those of the police department (enforcing criminal law). Fourth, Mr. Reed did not formally arrest Cintron; rather, Mr. Reed's security supervisor called the local police department to "sort it out."

Thus, based on the facts above, the Tenth Circuit held that under both the test from *Souza* and the test from *David*, Mr. Reed was acting as a private individual rather than a government official (police officer) and as such, the *Fourth Amendment* did not apply. Since the *Fourth Amendment* did not apply there was no need to address whether Mr. Reed's conduct was reasonable under the *Fourth Amendment*.

ⁱ No. 11-6316, 2012 U.S. App. LEXIS 11308 (10th Cir. 2012 Unpub)

ⁱⁱ *Id.* at 2-5

ⁱⁱⁱ *Id.* at 7-8

^{iv} *Id.* at 8 (quoting *United States v. Poe*, 556 F.3d 1113, 1123 (10th Cir. 2009)

^v 223 F.3d 1197 (10th Cir. 2009)

^{vi} *Id.* at 9

^{vii} 101 F.3d 1344 (10th Cir. 1996)

^{viii} *Id.* at 9-10

^{ix} *Id.* at 10

^x *Id.*



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ENVISAGE ADDS INVENTORY MANAGEMENT TO THE ACADIS® READINESS SUITE

by: Cory Myers, Envisage Technologies, Inc.

*Latest module enables organizations to easily
track, manage, certify
and deploy critical response resources*

Envisage Technologies, a Bloomington, Indiana-based software technology firm, announced today the release of the newest module within the Acadis Readiness Suite – *Acadis Inventory*. Acadis Inventory is designed to track critical operational and emergency resources (such as vehicles, service animals, and weapons) and to ensure that essential assets are accounted for and fully ready.

Resource managers can define and track specific attributes for their assets, including ownership, location, NIMS type, identification number, status, and other specific identifying information. The tool is also well suited for departments required to maintain legally defensible records of issued high-liability items, such as firearms, Tasers, and OC Spray.

Envisage developed the module as part of its Readiness Suite to enable its law enforcement and public safety organizations to easily manage their assets and maintain accurate “Chain of Custody” records to easily locate inventory and help eliminate instances of lost, missing, or unusable assets.

“A crisis is the worst time to try and figure out what resources or equipment you have to work with,” stated Ari Vidali, Envisage Founder and CEO. “Our goal is for accurate information to be instantly available when needed. For this to happen, our customers needed a simple tool specifically designed to keep close tabs on their critical resources.”

Acadis Inventory is an essential component of Envisage’s readiness measurement strategy. The company observed that during a crisis, immediate access to available equipment and resources is vital. Having this information available to crisis managers and first responders

before, during, and after an event can make a great difference. Unfortunately, many organizations keep this information on paper records which are not easily accessible when needed. Acadis Inventory aims to provide the necessary tools to fix this pervasive problem and make emergency response more effective.

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