

CJA LESSON PLAN COVER SHEET

LESSON PLAN TITLE: Legal Update 2012-2013 (January)	LESSON PLAN #: I0280	STATUS (New/Revised): New
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TRAINING UNIT: Legal	TIME ALLOCATION: 2 Hours
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PRIMARY INSTRUCTOR: J. Fennell	ALT. INSTRUCTOR: 	REVISED & SUBMITTED BY: J. Fennell
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ORIGINAL DATE OF LESSON PLAN: November 2012	JOB TASK ANALYSIS YEAR:
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LESSON PLAN PURPOSE:

The purpose of this lesson is to update the student about changes in the laws and procedures that relate to law enforcement.

EVALUATION PROCEDURES:

None

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

Student Handout

PERFORMANCE OBJECTIVES

LESSON PLAN TITLE:

LESSON PLAN #:

STATUS (New/Revised):

Legal Update 2012-2013 (January)

I0280

New

PERFORMANCE OBJECTIVES:

1. Discuss Fourth Amendment, Exigent Circumstances, and GPS.
2. Discuss reasonable suspicion and probable cause.
3. Discuss evidence, out of court identification and sequestration.
4. Discuss Miranda.
5. Discuss DUI law.
6. Discuss civil liability.
7. Discuss Checkpoints.

LESSON PLAN EXPANDED OUTLINE

LESSON PLAN TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Legal Update 2012-2013 (January)	I0280	New

I. INTRODUCTION

This unit of instruction is designed to update the student about changes in law and procedure that relate to law enforcement.

II. BODY

A. FOURTH AMENDMENT

1. Exigent Circumstances

Supreme Court of the United States

KENTUCKY, v. KING. No. 09–1272. Decided May 16, 2011.

Police officers in Lexington, Kentucky, followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed that these noises were consistent with the destruction of evidence. The officers announced their intent to enter the apartment, kicked in the door, and found respondent and others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search. The Circuit Court denied respondent's motion to suppress the evidence, holding that exigent circumstances—the need to prevent destruction of evidence—justified the warrantless entry. Respondent entered a conditional guilty plea, reserving his right to appeal the suppression ruling,*1852 and the Kentucky Court of Appeals affirmed. The Supreme Court of Kentucky reversed. The court assumed that exigent circumstances existed, but it nonetheless invalidated the search. The exigent circumstances rule did not apply, the court held, because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence.

Held:

1. The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.

... (b) Under the “police-created exigency” doctrine, which lower courts have developed as an exception to the exigent circumstances rule, exigent circumstances do not justify a warrantless search when the exigency was “created” or “manufactured” by the conduct of the police. The lower courts have not agreed, however, on the test for determining when police impermissibly create an exigency.

2. Assuming that an exigency existed here, there is no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment.

... (b) Assuming an exigency did exist, the officers' conduct—banging on the door and announcing their presence—was entirely consistent with the Fourth Amendment. Respondent has pointed to no evidence supporting his argument that the officers made any sort of “demand” to enter the apartment, much less a demand that amounts

to a threat to violate the Fourth Amendment. If there is contradictory evidence that has not been brought to this Court's attention, the state court may elect to address that matter on remand. Finally, the record makes clear that the officers' announcement that they were going to enter the apartment was made after the exigency arose.

2. GPS Device

Supreme Court of the United States

UNITED STATES, Petitioner v. Antoine JONES.

No. 10–1259. Argued Nov. 8, 2011 Decided Jan. 23, 2012.

The Government obtained a search warrant permitting it to install a Global–Positioning–System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D.C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

Held: The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment.

- (a) The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Here, the Government's physical intrusion on an “effect” for the purpose of obtaining information constitutes a “search.” This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted.
- (b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, which said that the Fourth Amendment protects a person's “reasonable expectation of privacy,” *id.*, at 360, 88 S.Ct. 507.

Here, the Court need not address the Government's contention that Jones had no “reasonable expectation of privacy,” because Jones's Fourth Amendment rights do not rise or fall with the Katz formulation. At bottom, the Court must “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” Kyllo v. United States, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94. Katz did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The Katz reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.

3. U.S. v. Montieth (No.10-4264, decided December 5, 2011) (4th Cir. 2011)

FACTS -

On June 10, 2008, Officer Sean Blee of the Charlotte-Mecklenburg Police Department searched the trash outside Kwan D. Montieth's home after receiving a tip from ATF Agent Kevin Kelly that Montieth was selling marijuana. Based on the evidence of drug trafficking that Blee discovered in Montieth's trash, he obtained a warrant on June 11, 2008 to search Montieth and his residence for marijuana, firearms, and additional evidence of drug trafficking. Officers were aware that Montieth lived at the residence with his wife and two young children. In an effort to minimize both the trauma to Montieth's family as well as the safety risks of a search, the officers planned to detain Montieth away from his residence and secure his cooperation to execute the warrant.

After an undercover officer observed Montieth depart his residence by car, Officers LeClerc and Starnes pulled him over about eight-tenths of a mile from his home. LeClerc smelled a strong odor of marijuana coming from the car. The officers instructed Montieth to exit his vehicle, handcuffed him, and placed him in the back of the police car. Officers Blee and Tobbe arrived at the scene and they too smelled the strong odor of marijuana from Montieth's vehicle. Blee informed Montieth that the police planned to execute a search warrant at his home, and Montieth disclosed that he had marijuana at his residence. Blee explained that the officers preferred to execute the warrant with his cooperation to avoid an abrupt or forcible entry into the house while his wife and children were inside. Montieth opted to cooperate in the warrant's execution and asked especially that his children not see him in handcuffs.

Upon return to the residence, Montieth remained in the police car as the officers instructed Ms. Montieth that they had a search warrant for the residence and that she should leave the premises with her children. Once Montieth's wife and children departed, the officers—accompanied by Montieth in handcuffs—entered the residence without force. Blee and Tobbe testified that once inside Blee read to Montieth from the search warrant and informed him of his *Miranda* rights, which he verbally waived. Although the district court found Blee's and Tobbe's testimony to be credible, Montieth maintains that the officers interrogated him without administering *Miranda* warnings.

Montieth told the officers that he sold marijuana and in response to questioning identified locations in the residence where the officers would discover marijuana, firearms, and cash. The officers seized approximately one kilogram of marijuana, two firearms, ammunition, a digital scale, baggies, and cash. The officers also searched a storage shed in the backyard where they recovered additional drug paraphernalia. After the officers completed the search, Tobbe brought Montieth to the local law enforcement center and again read him his *Miranda* rights. Montieth signed a written waiver and provided a statement about his involvement in marijuana trafficking.

Meanwhile, an officer informed Ms. Montieth, who was waiting with a neighbor, that the search was over and that the officers had left a copy of the search warrant on a table in the house. Ms. Montieth returned home and did not find the search warrant for her residence. Instead, she discovered on the kitchen table an incomplete draft of a warrant and warrant application for a different residence that had no connection to Montieth.

ISSUES AND ANALYSIS –

Montieth argued that the search of his residence was without a valid search warrant. The Court stated: Officer Blee's affidavit in support of the warrant revealed the following

information. Blee conducted a trash pull at Montieth's residence after receiving a tip from ATF Agent Kelly that Montieth possessed a sizeable amount of marijuana. Blee confirmed Montieth's address at 5606 Nesting Court, Charlotte, NC, and searched bags retrieved from a trashcan left for pick up at the side of the Montieth residence. In the trash Blee found two bills addressed to Kwan Montieth at 5606 Nesting Court, which corroborated that the trash belonged to Montieth.

Blee also discovered in the trash extensive evidence of marijuana trafficking, including: (1) green saran wrap with suspected marijuana residue; (2) separate pieces of PVC pipe wrap (often used to package marijuana) with suspected marijuana residue; (3) pieces of green wrapper with brown tape with suspected marijuana residue; (4) several burnt marijuana cigarettes; (5) clear plastic baggies; and (6) marijuana stems. As part of his investigation, Blee inquired into Montieth's criminal history and learned that he had a prior criminal record that included several drug offenses. Blee detailed in the affidavit his considerable experience and training with drug investigations and arrests, which led him to conclude based on the trash pull that probable cause existed to search Montieth and his residence for additional evidence of drug trafficking.

Contrary to Montieth's assertions, the affidavit also described with particularity the residence to be searched and the items expected to be seized. *See Andresen v. Maryland*, 427 U.S. 463, 480 (1976). Blee described in detail the location and appearance of the house at 5606 Nesting Court and specified the items he expected to discover in the search, including, among other things: (1) marijuana; (2) records of illegal drug activities; (3) drug paraphernalia; (4) U.S. currency; and (5) firearms.

Montieth next claims that the officers' traffic stop and detention of him violated the Fourth Amendment. For the following reasons, we find his contentions unpersuasive.

We note initially that Montieth's detention qualifies as a valid *Terry* stop. An officer may stop and briefly detain a person "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *United States v. Hensley*, 469 U.S. 221, 227 (1985) (quoting *United States v. Place*, 462 U.S. 696, 702 (1983)); *see Terry v. Ohio*, 392 U.S. 1 (1968). In *United States v. Taylor*, 857 F.2d 210 (4th Cir. 1988), we held that under the circumstances presented, a narcotics search warrant furnished the reasonable suspicion necessary to conduct an investigative stop of the appellants, whose suspected drug trafficking was the target of the warrant.

As in *Taylor*, the officers here "possessed a search warrant based upon probable cause to believe that appellant [] [was] engaged in narcotics trafficking" and the stop likewise took place as appellant left his home where he was believed to keep narcotics and drug paraphernalia. *Id.* at 213. Moreover, the warrant in this case specified the defendant's person, in addition to his residence, as subject to search for evidence of drug trafficking. Once the officers pulled Montieth over, the odor of marijuana emanating from his car offered further reason to suspect he was presently engaged in criminal activity and to support his confinement to the police car. Under these circumstances, the detention was valid under *Terry*.

Montieth counters that any detention incident to the execution of a search warrant must take place inside the residence itself, or at most on the premises. To do otherwise, he contends, runs afoul of constitutional restrictions. Both the Supreme Court and the federal circuits have recognized, however, that such an inflexible rule would contravene the ultimate Fourth Amendment touchstone of objective reasonableness.

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), the Supreme Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." The reasonableness of the seizure in *Summers* was justified by three law enforcement objectives: (1) "preventing flight in the event that incriminating evidence is found"; (2) "minimizing the risk of harm to the officers"; and (3) facilitating "the orderly completion of the search" with the assistance of the detained occupants. *Id.* at 702-03; *see also Muehler v. Mena*, 544 U.S. 93, 98 (2005). *Summers* was detained as he descended the front steps outside his house but the Court emphasized that it did "not view the fact that [Summers] was leaving his house when the officers arrived to be of constitutional significance." *Summers*, 452 U.S. at 702 n.16. The Supreme Court has since clarified that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 705 n.19). Montieth asserts, however, that it is unlawful for the police to detain a person incident to the execution of a warrant once he is almost a mile away from the residence. Joining several circuits to have already considered this question, we cannot agree.

The law enforcement interests identified in *Summers* are no less salient here, where the stop and detention away from the home facilitated a safe and efficient execution of the search. We therefore decline to delineate a geographic boundary at which the *Summers* holding becomes inapplicable. Rather, in accordance with the analysis of our sister circuits, we consider whether the police detained the individual "as soon as practicable" after observing him leave the residence. *United States v. Bailey*, 652 F.3d 197, 206 (2d Cir. 2011); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991) ("*Summers* does not impose upon police a duty based on geographic proximity . . . rather the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence."); *see also United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011); *United States v. Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002) ("The proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, but it is by no means controlling."). *But see United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994) (declining to extend *Summers* to a detention that occurred at a distance from the residence under search, finding that under the circumstances "the officers had no interest in preventing flight or minimizing the search's risk").

Our holding should not be over read. We do not suggest that any detention away from the home to be searched is invariably a reasonable one. The test is an objective one, and in some circumstances the distance from the home may combine with other factors surrounding the search to present an objectively unreasonable plan of warrant execution. Fourth Amendment cases tend to turn on particulars and are often neither blanket authorizations nor blanket prohibitions. In this case, however, the officers acted reasonably when they decided to detain Montieth at a short distance from his home.

So it was here. The officers concluded reasonably that the most practicable means to execute the warrant was to detain Montieth at a short distance from his residence. As Officers Blee and Tobbe testified, the purpose of the traffic stop was to elicit Montieth's cooperation and to execute the warrant in the safest manner possible. The officers recognized that a forced or sudden entry into the home or one with guns drawn might have alarmed Montieth's wife and children. By securing Montieth's cooperation in the search, the officers hoped to avert any unnecessary danger to Montieth's family and to assure the officers' safety. Importantly, the district court found Blee's and Tobbe's explanation of their plan to seek a consensual execution of the warrant credible and reasonable. The court concluded that the plan was a

"very reasonable way to execute the search warrant" in light of the "officers' knowledge that there was a video camera in the front of the building, their training and experience which indicated to [them] that oftentimes drug traffickers carry weapons, and the other information available to them." To require officers to bypass less dangerous and disruptive methods of executing a search warrant and push them to harsher and more forcible modes of entry would be at odds with the Fourth Amendment's ultimate command of reasonableness.

Appellant claims, however, that "the officers had no information that Montieth possessed a firearm" and suggests that it was unreasonable for the officers to fear that a forced entry would be dangerous. Appellant's Br. at 16. This overlooks the fact that the inside of a home can often be a real unknown. Officers cannot always calibrate the scope of unanticipated hazards, whether from confederates or from firearms or from the structure and layout of the house itself. The Supreme Court has identified the heightened risk to police when encountering a suspect in his home, as officers perceive that "[a]n ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Maryland v. Buie*, 494 U.S. 325, 333 (1990).

The district court properly accounted for the dangers attendant to the execution of a search warrant for evidence of drug trafficking. If there were drugs in the house, there might also be guns. In *Summers*—even in the absence of any "special danger to the police . . . suggested by the evidence in th[e] record"—the Supreme Court recognized that execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Summers*, 452 U.S. at 702; *see also Cochran*, 939 F.2d at 339 n.3 (noting that facts offered by the government to "demonstrate the risk to the officers and support their decision to detain defendant" were "not required by *Summers*").

In light of these dangers, officers may reasonably conclude in appropriate circumstances that attempting to detain the resident inside his home may unnecessarily elevate the safety risks attendant to a search. As the Second Circuit recently recognized, foreclosing all detentions outside the residence could force officers to a choice between two problematic alternatives: [W]hen they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered). *Bailey*, 652 F.3d at 205. Here, the officers assessed the inherent risks of a drug search, along with the additional problem of forcing entry into a house with two young children inside, and took the precaution of first seeking a consensual entry.

Although Fourth Amendment reasonableness is of course adjudged at the time of the search or seizure, the prudence of the officers' plan in this case was illustrated by how it played out in practice. The officers detained Montieth and presented him with the option of averting a forcible police entry into his home by cooperating in the warrant's execution. As found by the district court: "[I]t appears from the credible testimony of Officer Blee that the defendant opted for the consensual entry, and made a reasonable request that his children not see him in handcuffs." Montieth's request was honored when the police left him in the police car while instructing his wife to escort the children off the premises before the search. The police then entered the home without force.

Everyone involved thus benefited from the consensual nature of the search. The officers minimized the threat to their safety, Montieth spared his children the sight of their father in handcuffs, and his family was protected from the consequences of an unanticipated police entry by force. As the district court observed, "the defendant would be hard-pressed to come up with a more reasonable method for" executing the warrant; "[i]t seems to be a very

reasonable way to do it; the easy way rather than the hard way." A judge's toolkit includes common sense. It seems only sensible to observe that the officers' detention of Montieth away from his residence was a constitutional alternative to effectuating the warrant in a more hazardous manner.

B. REASONABLE SUSPICION/PROBABLE CAUSE

1. Court of Appeals of South Carolina.

The STATE, Respondent, v. Kenneth Darrell MORRIS, II, Appellant.

No. 4872. Heard March 8, 2011. Decided Aug. 17, 2011. Withdrawn, Substituted and Refiled Nov. 2, 2011.

FACTS

On the afternoon of February 6, 2008, Morris and a passenger, Brandon Nichols, were traveling northbound on I-77 in York County in a rented Ford 500. While riding in an unmarked police cruiser, Officer L.T. Vinesett, Jr., and Constable W.E. Scott noticed the Ford following a truck too closely. The vehicle exited the interstate and proceeded to a gas station and rest area, where Officer Vinesett initiated a traffic stop.

Officer Vinesett approached the passenger side of the vehicle, where Nichols was sitting. Officer Vinesett asked for Morris's license and registration, and after a rental agreement was produced, Officer Vinesett noticed the car was rented to Nichols and Morris was not an authorized driver. Speaking through the passenger window, Officer Vinesett instructed Morris to exit the car, and as Morris opened the driver's side door, Officer Vinesett noticed hollowed Phillies Blunts^{FN1} in the center console and blunt tobacco in the center console and on the floorboard.

FN1. Phillies Blunts are a brand of inexpensive, American-made cigars. The tobacco inside a Phillies Blunt is often emptied in order to roll a marijuana cigar.

To avoid the rain, Officer Vinesett had Morris sit in the front passenger seat of the police cruiser while he inquired about Morris's travel plans. Morris told him Nichols rented the vehicle the previous day in Greensboro, North Carolina, and they were on their way back from visiting some women in Atlanta, Georgia. Officer Vinesett also asked Morris whether Morris had a drug record. Morris disclosed he had been arrested for a marijuana offense when he was a minor.

Officer Vinesett returned to the Ford, and outside the presence of Morris, Nichols stated the pair was returning from a basketball game in Atlanta. Officer Vinesett consequently radioed for a nearby canine unit to bring a drug dog to the scene. He explained that he pulled over two men who offered conflicting stories of their plans, one of whom had a previous drug conviction, and that he had seen loose blunt tobacco in the car, suggesting they had been rolling marijuana in the blunts.

While waiting for the drug dog, Morris consented to a search of his person, and the search yielded no contraband. Morris then went to the restroom under Constable Scott's supervision. Officer Vinesett asked Nichols to exit the car and requested consent to search Nichols's person. Nichols consented, and again, the search yielded no contraband.

Moments later, Officer Gibson arrived with a drug dog. While Morris was still in the restroom, Officer Vinesett and Officer Gibson asked Nichols for permission to search the car, saying the officers would use the drug dog if consent was not given. Nichols refused to give consent, so Officer Gibson walked the dog around the car twice. The dog did not alert

on either lap around the car and was returned to the police cruiser. Officer Vinesett again asked Nichols for consent to search the car, and Nichols again refused. Roughly thirteen minutes after the stop had been initiated; Nichols stated he “was ready to go.”

Shortly thereafter, the officers held a conversation away from Morris and Nichols. Officer Vinesett returned to the Ford, leaned through the still open window of the car, and looked around for a few moments. He then returned to Nichols, who was still seated in the police cruiser, and stated that he could have “swor[n he] could smell some marijuana.” Nichols responded that Officer Vinesett was confusing the smell of the Black & Mild he recently smoked with marijuana and he neither had marijuana, nor was he a marijuana smoker.

At that time, Officer Vinesett and Officer Gibson returned to the car and searched the passenger compartment. The emptied blunts contained no marijuana or marijuana residue, and the officers found no other evidence of contraband in the passenger compartment. However, Officer Vinesett searched the trunk and eventually found a plastic bag containing 393 ecstasy pills inside a gift box. The men were arrested slightly over fourteen minutes after the initiation of the stop. The car was impounded, and a subsequent inventory search of the car yielded nearly a half pound of marijuana hidden under the spare tire.

At trial, Morris moved to suppress the drug evidence, arguing the officers illegally extended the scope and length of the traffic stop and probable cause did not support the search of the trunk. During the suppression hearing, Officer Vinesett testified that, although he failed to mention it to Constable Scott at the scene or Officer Gibson when he requested the dog, he smelled the odor of burnt marijuana when he first approached the car. The trial court denied the motion. It specifically discounted what Officer Vinesett classified as Morris's and Nichols's “inconsistent stories.” However, it found Officer Vinesett's testimony regarding the smell of marijuana credible, and it held the length and scope of the stop was reasonable in light of the circumstances. Additionally, the trial court found that even though the dog did not alert on the car, the marijuana smell, loose tobacco, and hollowed blunts, in light of the officer's knowledge and experience, amounted to probable cause to search the entire car, including the trunk. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err in finding the officers had reasonable suspicion to expand the scope and length of the traffic stop?
- II. Did the trial court err in finding the search of the trunk was supported by probable cause?
 - I. Scope and Length of the Stop

Morris argues the trial court erred in failing to suppress the drugs because (1) Officer Vinesett's testimony he smelled burnt marijuana during the detention lacks credibility and (2) Officer Vinesett unlawfully extended the traffic stop.

...The extension of a lawful traffic stop is permitted if (1) the encounter becomes consensual or (2) the officer has a reasonable, articulable suspicion of other illegal activity. *Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848.

... Initially, we must reject Morris's first argument. Regardless of whether we believe Officer Vinesett's testimony that he smelled marijuana, the trial court found that testimony to be credible. The appellate court's task in reviewing the trial court's factual findings on a Fourth Amendment issue is simply to determine whether any evidence supports the trial court's findings.

... We must also reject Morris's second argument. Under the facts of this case as found by the trial court, we must affirm the trial court's holding reasonable suspicion existed to extend the duration and scope of the stop for a reasonable investigation of drug activity. Officer Vinesett testified he smelled marijuana as he approached the car, and after requesting Morris's license and registration, he learned Morris was not an authorized driver.

... He did so by asking both Morris and Nichols a series of questions, receiving consent to search their persons, and calling in a drug dog.

II. The Search

Morris next argues the trial court erred in declining to suppress the drug evidence as fruit of an illegal search. Morris does not contest Officer Vinesett's search of the passenger compartment, but he argues Officer Vinesett lacked probable cause to search the trunk. We disagree.

In this case, the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, "He had probable cause to search." In light of the summary nature of this ruling, we must determine whether the same factual findings that supported the finding of reasonable suspicion also support a determination of probable cause. Emphasizing our deferential standard of review, we determine they do.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

CONCLUSION

For the aforementioned reasons, the ruling of the trial court is **AFFIRMED**.

2. The STATE, v. ABRAHAM No. 4885. Decided Sept. 7, 2011.

FACTS

On the night of June 27, 2007, Deputy Tracey Tolson (Tolson) of the Florence County Sheriff's Office's K-9 and Crime Suppression Unit was patrolling Kershaw Street when she observed a vehicle abruptly stop after a bicycle crossed its path. Tolson exited her patrol car, identified herself, and attempted to speak with Abraham to ascertain whether he was impaired and if he was capable of operating his bicycle. At this point, Tolson testified she did not suspect Abraham was engaged in any criminal activity.

As Tolson attempted to speak with Abraham, Abraham cursed and threw his bicycle at her, striking Tolson's knee. Abraham fled the scene. Tolson ordered Abraham to stop, but he refused. Tolson deployed her taser but was unsuccessful in stopping Abraham. In pursuing Abraham, Tolson observed him toss an "orange-in-color medicine bottle" (the medicine bottle) out of his hand. Shortly thereafter, Abraham surrendered and was arrested. Tolson retrieved the medicine bottle and noticed what appeared to be narcotics inside the medicine bottle. Test results of the contents from the medicine bottle revealed the presence of 0.43

grams of cocaine. Abraham was indicted for possession of cocaine, possession of a controlled substance, and assault upon a law enforcement officer.

A. Reasonable Suspicion

[1] Abraham contends the officer did not have reasonable suspicion that he was engaged in criminal activity when the officer stopped him for improperly riding his bicycle. We find this issue is not preserved for our review.

The record reflects no attempt by Abraham, at trial, to object to or to move to strike Tolson's testimony. Instead, Abraham only raised the propriety of Tolson's seizure of Abraham in a motion after the close of the State's case-in-chief when the testimony pertaining to the stop had already been admitted. Therefore, we find this issue is not preserved for our review. Even if this issue is preserved for review, Tolson had reasonable suspicion to stop Abraham.

In this case, Tolson testified she stopped Abraham after she observed him operating his bicycle in a manner that posed a significant risk to the driving public. Based on this observation, we conclude Tolson's actions were reasonable in determining whether Abraham was impaired and capable of operating his bicycle. Moreover, Tolson had the legal authority to arrest Abraham when he threw his bicycle at her, even though Tolson did not suspect Abraham of any criminal activity when she initially stopped him. *See S.C.Code Ann. § 17-13-30 (Supp.2009)* (“The sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter.”).

B. Suppression of Evidence

[6] Abraham also argues the circuit court erred in admitting the drug evidence because the officer lacked reasonable suspicion to stop him. We find this issue is not preserved for review.

Moreover, even if this issue is preserved for review, Abraham's argument is meritless. Tolson stated she observed Abraham toss a medicine bottle from his hand that was later retrieved from his flight path.

Because Abraham abandoned the medicine bottle when he tossed it, we conclude no Fourth Amendment violation occurred.

See State v. Dupree, (1995) (finding no Fourth Amendment violation when defendant could not have had a continued expectation of privacy in crack cocaine that was thrown on the floor of a business open to the public).

C. Directed Verdict Motion

[8] Abraham argues the circuit court erred in denying his directed verdict motion because the State's evidence was insufficient to support a guilty verdict. We disagree.

In support of his motion for directed verdict, Abraham argues the State did not present any evidence linking him to the medicine bottle.

Specifically, Abraham's position is that Tolson's description of the medicine bottle in her report and the lack of identifiable fingerprints on the medicine bottle, constitute insufficient evidence to support a guilty verdict.

At trial, Abraham questioned Tolson regarding her statement in her incident report that Abraham “toss[ed] an item out of his hand down Jarrott Street, at which time he then stopped and got on the ground.” In response, she testified her use of “item” was typographical error and she in fact observed Tolson toss an “orange medicine bottle” onto Jarrott Street. Additionally, Officer Andrew Clendinin of the Florence County Sheriff’s Office testified he conducted a fingerprint analysis on the medicine bottle. Officer Clendinin stated he was able to locate a few lines of a raised portion of a person’s finger but was unable to make a full identification of the fingerprint.

While Officer Clendinin’s testimony did not link Abraham to the medicine bottle, Tolson testified she observed Abraham toss the medicine bottle. Because Abraham’s argument regarding Tolson’s observation of the medicine bottle relates to the weight of the evidence, and not its existence, we conclude the circuit court did not err in denying Abraham’s motion for a directed verdict. *Gibson*, 390 S.C. at 353, (stating a court’s inquiry on a motion for directed verdict is limited to the existence, not the weight of the evidence).

CONCLUSION

Accordingly, the circuit court’s decision is **AFFIRMED**.

3. The STATE, v. BURGESS, No. 4871. Decided Aug. 17, 2011.

FACTS

On May 22, 2008, Narcotics Investigator John Lutz drove through the parking lot of the Hardee’s on Rosewood Drive in Columbia, South Carolina. According to Lutz, the Hardee’s parking lot is a known meeting location for drug sales in Richland County. Lutz explained a manager at the Hardee’s complained to another investigator about drug activity “every few months” over the course of a “couple of years.” According to Lutz, he personally spoke with the manager regarding the drug activity, and he and other officers had made arrests stemming from activity in the Hardee’s parking lot.

As Lutz drove through the lot, he observed a Jeep with lightly tinted windows backed into a parking space at the back of the parking lot. Lutz noticed the passenger was “looking around very intently and smoking a cigarette.”

Neither the driver nor the passenger appeared to be eating. Based on Lutz’s training and experience he believed the pair was waiting to purchase drugs. Lutz explained he formed this belief based on his twenty-two years of law enforcement experience, including nine years in narcotics investigations, and his training at the South Carolina Criminal Justice Academy.

According to Lutz, he had overseen “several hundred” undercover narcotics investigations during which an undercover purchaser would typically have to wait for the supplier to arrive in order to conduct a transaction.

After observing the Jeep and its occupants, Lutz parked nearby in order to continue observation of the parking lot and the Jeep and its occupants. A few minutes later, Burgess entered the parking lot in a white car, backed up, and parked her car askew in a parking space a few feet from Lutz’s location. The Jeep proceeded toward Burgess’s location, waited for her to park, and pulled along the passenger side of her vehicle.

The passenger in the Jeep got out and entered the back passenger seat of Burgess’s vehicle while extending his hand toward Burgess. Lutz observed Burgess look over her shoulder while the passenger in Burgess’s car looked down towards Burgess’s lap.

After approximately fifteen seconds, the passenger from the Jeep exited Burgess's car and returned to the Jeep. Lutz explained the complaints of drug activity in the parking lot, his training and experience, and his "prior knowledge of people doing the exact same thing" led him to conclude he had observed a drug transaction.

Burgess and the Jeep exited the Hardee's parking lot traveling west on Rosewood Drive. Lutz followed both vehicles but soon after, the Jeep turned off of Rosewood Drive. Lutz chose to follow Burgess's car because the fact that she arrived at the Hardee's parking lot second led him to believe she was the supplier.

Burgess turned onto South Maple Street and after a short distance entered a driveway. Lutz pulled in behind Burgess and initiated his blue lights. Burgess and the passenger quickly exited the vehicle, and Lutz observed a small black bag in Burgess's left hand. Lutz instructed Burgess and the passenger to reenter the vehicle.

Lutz explained as Burgess sat down in the driver's seat she leaned over to her left "like she was trying to put something up under the left side of the car." Lutz instructed Burgess to stand up and keep her hands visible.

As Burgess stood up she made a kicking motion with her right leg "like she was trying to kick an object under the vehicle." Lutz discovered a black bag containing several types of drugs on the driveway below the driver's seat. Lutz arrested Burgess and the passenger.

We find the evidence in the record supports the trial court's determination that Lutz had reasonable suspicion to stop Burgess.

At the time Lutz activated his blue lights, Lutz was aware the Hardee's parking lot was a known meeting location for drug sales and had personal knowledge of frequent complaints of drug activity in the parking lot. Lutz observed the Jeep parked at the back of the parking lot. Its occupants were not eating and appeared to be waiting for someone.

Lutz observed Burgess enter the parking lot and park haphazardly. The passenger from the Jeep entered the rear passenger seat of Burgess's car with his hand extended while Burgess looked in his direction. The events in Burgess's car lasted fifteen seconds.

Lutz explained this activity was suspicious because, in his experience with several hundred narcotics investigations, buyers usually arrive at a predetermined location to wait on a supplier in order to complete a drug transaction. Lutz further explained he had prior knowledge of similar drug transactions occurring in the same manner. In short, Lutz had personal knowledge of complaints of drug activity at the Hardee's parking lot and observed Burgess's behavior in the parking lot, which his training and experience informed him was consistent with a drug sale.

Burgess's contention the Hardee's parking lot cannot be a known location for drug activity because Richland County's online arrest database includes only one drug arrest at the Hardee's parking lot is without merit.

This fact indicates only the database contains one drug arrest which listed the Hardee's parking lot as the incident location. It does not foreclose the existence of other arrests related to drug activity in the Hardee's parking lot but not designating it as the incident location.

For instance, in this case the drug activity occurred in the Hardee's parking lot; however, the incident location is listed as the location where Burgess was arrested. Additionally, in finding Lutz had reasonable suspicion, the trial court relied upon Lutz's personal knowledge of frequent complaints by the Hardee's manager regarding drug activity in the parking lot.

Furthermore, while the activity in the Hardee's parking lot is capable of innocent explanation, “[t]he fact that this activity was taking place in a location well known [for drug sales] alters the landscape of reasonable inferences.” See U.S. v. Johnson, (4th Cir.2010).

Lutz was not required “to ignore the relevant characteristics of [the] location in determining whether the circumstances [were] sufficiently suspicious to warrant further investigation.” See Illinois v. Wardlow, (2000). Furthermore, Lutz's inferences regarding the degree of suspicion to attach to Burgess's conduct are entitled to deference. See Johnson,

Failing to afford the proper weight to Lutz's inferences “borne out of his experience would be to fail to consider the ‘totality of the circumstances.’” See U.S. v. McCoy, (4th Cir.2008).

The Johnson court explained:

Getting the balance right is never guaranteed, but the chances of doing so are improved if officers, through training, knowledge, and experience in confronting criminality, are uniquely capable both of recognizing its signatures, and by the same token, of not reading suspicion into perfectly innocent and natural acts. In this way, experience leads not just to proper action but to prudent restraint. ‘Reasonableness’ is a matter of probabilities, and probability in turn is best assessed when one has encountered variations on a given scenario many times before.

To find as Burgess would have us do would be to discount Lutz's training and experience with similar drug transactions.

We are mindful of concerns regarding the State “using whatever facts are present, no matter how innocent, as indicia of suspicious activity” and that the State “must do more than simply label a behavior as ‘suspicious’ to make it so.” See U.S. v. Foster, (4th Cir.2011).

The State must “be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.” Id.

Here, the State articulated why the events in the Hardee's parking lot were likely indicative of criminal activity at the time Lutz observed them:

- (1) the Hardee's parking lot was a known meeting location for drug sales, and
- (2) Lutz's training and prior knowledge of similar drug transactions led him to believe the activity he observed in the parking lot was a drug transaction.

See Johnson, (relying on officer's conclusion, based on his training and experience, that hand-to-hand contact between the defendant and several men in rapid succession in a location known for drug sales was indicative of a drug transaction in finding reasonable suspicion existed).

Finally, a finding that Lutz had reasonable suspicion under the facts present here is consistent with the recent decision by our supreme court in State v. Corley, (2011).

There, Officer Futch observed Corley drive up to a known drug house at 2:50 in the morning, walk to the back of the house, stay for less than two minutes, and return to his car and leave.

Futch followed Corley a short distance before stopping him after he failed to use his turn signal. Id. \\\

Although the court noted the traffic violation formed an independent basis for the stop, the court found the stop was justified based on the presence of reasonable suspicion.

In our view, the facts here are analogous to those in Corley.

Both the house in Corley and the Hardee's parking lot are known locations for drug activity. Additionally, Futch and Lutz both observed behavior that was consistent with the criminal activity the location was known for. For the foregoing reasons, we conclude the trial court properly determined Lutz had reasonable suspicion to stop Burgess.

CONCLUSION

The decision of the trial court is **AFFIRMED**.

4. State v. Adams, (Ct. App. Op. No. 4964) (Filed April 25, 2012)

Facts:

In July 2008, the North Charleston Police Department (the Department) learned that Adams was involved in a shooting and attempted robbery associated with a drug deal. Based on further investigation, the Department believed Adams was a drug dealer whose source of supply was in Atlanta, Georgia. The Department consequently installed a tracking device[1] on Adams's vehicle while the vehicle was parked in a public parking garage. The Department did not seek a warrant or judicial order before installing the device.

Five days later, the Department learned from the device that Adams's vehicle traveled to Atlanta, remained in that area for less than an hour, and began returning toward Charleston on Interstate 26.[2] Around 11:55 p.m., the Department contacted Sergeant Timothy Blair, who was accompanied by his drug dog and sitting in his cruiser at a rest area off of the interstate. The Department instructed Sergeant Blair to "be on the lookout" for the vehicle and stop it if it violated any traffic laws. As Sergeant Blair entered the interstate, he spotted the vehicle and observed it change lanes twice without using a turn signal. Sergeant Blair initiated a traffic stop at 11:57 p.m., and the vehicle pulled into a gas station.

Sergeant Blair approached the driver's side of the vehicle without his drug dog. Adams was driving, and Sergeant Blair advised him of the violations. At that time, Adams "was acting very nervous. He had his hands down below where [Sergeant Blair] couldn't see them." Sergeant Blair asked Adams to keep his hands visible and noticed another vehicle turn into the gas station as he initiated the stop. Sergeant Blair was worried the second vehicle was a "trail vehicle" because the driver was watching the traffic stop, acting "kind of panicky, looking back and forth," and "fidgeting with his jacket." Sergeant Blair requested backup out of concern for his safety.

Officer James Greenawalt arrived approximately three minutes later. He removed Adams from the vehicle and began a license check. Meanwhile, Sergeant Blair used his dog to conduct a perimeter sniff of the vehicle. During this period, Adams repeatedly attempted to talk to the officers, and his eyes "were looking in other directions like trying to make a way for escape." The dog alerted at the driver's door and then on the driver's seat and center console.[3]

After the dog alerted, Officer Greenawalt began to pat down Adams for weapons. In doing so, he felt a "jagged, round object" in Adams's groin area that his training and experience led him to believe was drugs. He placed Adams in handcuffs and retrieved the item, which was 141.62 grams of packaged cocaine. The license check was not complete when the dog alerted and ensuing pat-down occurred. The drugs were found a little less than 8 minutes after Adams was pulled over. Adams was never issued a citation for the traffic violations.

Legal Analysis:

Adams contends the traffic stop and pat-down were unlawful because they were a mere pretext for a drug search. We disagree.

A traffic stop initiated pursuant to a traffic violation creating probable cause is not "rendered invalid by the fact that it was a mere pretext for a narcotics search." State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 191-92 (Ct. App. 2009) (internal quotation marks omitted), affirmed as modified by 392 S.C. 125, 708 S.E.2d 217 (2011); see also Whren v. United States, 517 U.S. 806, 813 (1996). A police officer's "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Corley, 383 S.C. at 241, 679 S.E.2d at 192 (internal quotation marks omitted); see also Whren, 517 U.S. at 813. Therefore, Sergeant Blair's and Officer Greenawalt's prior intentions and knowledge of Adams's involvement with drugs did not prevent the officers from conducting a lawful traffic stop and pat-down. A person stopped by the police in such a situation is protected from abuse of their rights by our Fourth Amendment framework.

a. The Traffic Stop

Evidence in the record supports the trial court's finding that the traffic stop was conducted consistently with Adams's Fourth Amendment rights.

"Temporary detention of individuals by the police during an automobile stop constitutes a 'seizure' of an individual within the meaning of the Fourth Amendment." State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). However, "[t]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Id.

During a lawful traffic stop, an officer may "request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Jones, 364 S.C. 51, 57, 610 S.E.2d 846, 849 (Ct. App. 2005) (internal quotation marks omitted). The officer may also order the driver to exit the vehicle. Id.; State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002); see also Pennsylvania v. Mimms, 434 U.S. 106, 110-11 (1977).

A lawful traffic stop can become unlawful if it exceeds the scope or duration necessary to complete its mission. State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 848 (Ct. App. 2005); see also Illinois v. Caballes, 543 U.S. 405, 407 (2005). An extension is permitted only if (1) the encounter becomes consensual or (2) the officer has at least a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. If an officer uses a drug dog to sniff the exterior of a defendant's car during a lawful traffic stop, the sniff does not make the traffic stop unlawful, even without any evidence of drug activity, so long as the sniff does not extend the length of the stop beyond that time necessary to complete the stop's purpose. Caballes, 543 U.S. at 407-09.

Here, Sergeant Blair had probable cause to stop Adams's vehicle because he witnessed Adams commit two traffic violations. The officers acted reasonably in instructing Adams to step out of the vehicle while they waited for a license and registration report. Sergeant Blair was also permitted to walk his drug dog around the vehicle while waiting for the completion of Adams's license and registration check. The first alert occurred a mere five to six minutes after the traffic stop began, and no evidence in the record indicates the drug sniff extended the duration of the stop.^[10] Consequently, the officers' conduct up to that point was within constitutional bounds.

Whether the drugs were admissible depends upon whether the resulting pat-down complied with Adams's Fourth Amendment rights.

b. The Pat-down

Evidence in the record supports the trial court's finding that the pat-down of Adams and retrieval of the drugs complied with his Fourth Amendment rights.

An officer conducting a lawful traffic stop may conduct a pat-down search for weapons if the officer "has reason to believe the person is armed and dangerous." State v. Smith, 329 S.C. 550, 556, 495 S.E.2d 798, 801 (Ct. App. 1998). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry v. Ohio, 392 U.S. 1, 27 (1968).

"The purpose of [a pat-down] search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." Dickerson, 508 U.S. at 373. Therefore, a Terry "protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Id. (quoting Terry, 392 U.S. at 26). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." Id.

Under the plain feel doctrine, an officer may seize an item felt during a lawful pat-down search for weapons if the item's contour or mass makes its incriminating character immediately apparent. Dickerson, 508 U.S. at 375-77; State v. Abrams, 322 S.C. 286, 288-89, 471 S.E.2d 716, 717-18 (Ct. App. 1996). If that character is not immediately apparent, any manipulation of the item constitutes a further, unlawful search and the item will be suppressed. Dickerson, 508 U.S. at 375-77.

In Minnesota v. Dickerson, the United States Supreme Court held that evidence obtained during a pat-down for weapons was inadmissible. During the pat-down, a police officer testified he "felt a lump, a small lump . . . [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." 508 U.S. at 369. The Supreme Court deferred to the state supreme court's interpretation of the record, which provided that the police's own testimony belied "any notion that [the police] immediately recognized the lump as crack cocaine. Rather, . . . the officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket—a pocket which the officer already knew contained no weapon." Id. at 378 (internal quotation marks omitted). The Supreme Court thus held that, although the police lawfully initiated the pat-down, "the officer's continued exploration of the [defendant's] pocket after having concluded that it contained no weapon" was a further search, unsupported by the concern for weapons. Id.

In State v. Abrams, this court held evidence seized during a pat-down was inadmissible. 322 S.C. at 287-89, 471 S.E.2d at 717-18. The officer testified that he felt a "hard instrument" that was "tube like" and "about the size of a shotgun shell." Id. Moreover, the officer explained that he thought the object "could have been 'an instrument used to transport contraband' when he 'found out that there were no weapons on [the defendant's] person.'" Id. Thus, the court determined the evidence's incriminating character was not immediately apparent and "[a]ny further search was

impermissible" because the officer did not believe the evidence was contraband until after he concluded the defendant was unarmed. Id.

In contrast, this court in State v. Smith held evidence obtained during a pat-down was admissible. 329 S.C. at 561, 495 S.E.2d at 804. Unlike in Abrams, the officer immediately determined the evidence was drugs during the initial pat-down search; even though he did squeeze the evidence further, the officer's "testimony indicate[d] he determined the object was contraband as soon as he felt it," and the "identification of the substance did not require additional squeezing or manipulation." Id. at 560-61, 495 S.E.2d at 803-04.

Here, evidence in the record supports the finding that Officer Greenawalt had reason to believe Adams was armed and dangerous to conduct a pat-down for weapons. Adams exhibited suspicious behavior, and the dog alerted for drugs before the pat-down began. See State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) ("This Court has recognized that because of the indisputable nexus between drugs and guns, where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns." (internal quotation marks omitted)); see also Terry, 392 U.S. at 30 (holding that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," he may conduct a pat-down for weapons).

Evidence in the record also supports the finding that Officer Greenawalt immediately recognized the identity of the item. He felt a "jagged, round object" in Adams's groin area while conducting the pat-down search, and his training and experience led him to believe the object was drugs. The record does not indicate he determined the evidence's identity because of further manipulation of the object or that he determined Adams was unarmed before concluding the evidence was drugs. In light of our standard of review, therefore, the trial court properly denied the motion to suppress.

5. U.S. v. McBride, (4th Cir. No. 10-5162) (Decided April 23, 2012)

Facts:

At 6:15 p.m. on August 12, 2009, Lieutenant Phillip Ardis and Agent Harold Kennedy III, undercover officers of the Clarendon County Sheriff's Office in South Carolina, drove by the Nu Vibe Club (the club), an establishment with which Ardis was familiar. In his decades in law enforcement, Ardis had driven by the club many times, and recalled that it generally did not open until about midnight. He became interested, therefore, when he observed two cars in the club's parking lot in the early evening.

Ardis also had personal knowledge of past criminal activity at the club. In 2007, he had been involved in an investigation regarding drug activity there. According to his information at that time, certain men were known to deliver illegal drugs to the club.

Based on this information and the unusual hour for activity at the club, Ardis and Kennedy decided to observe the club from a nearby automobile dealership. While looking through binoculars at the club's parking lot, the officers saw four vehicles stop at the club for varying lengths of time over the course of an hour. When the last vehicle, a blue Ford Explorer truck,

entered the lot, a black male in a white tee shirt immediately came out from the club and walked with the driver of the blue truck, a Hispanic male, to a black Cadillac SLS automobile that also was parked in the lot. The men conversed briefly, and opened the Cadillac SLS's passenger door. Although Ardis suspected that the pair was engaging in a drug transaction, he could not see their hands, and did not observe the men exchange anything between them. The black male then returned to the club, and the Hispanic male returned to his blue truck.

Following this interaction, the blue truck left the club and drove by the officers' location. It was raining at that time, and although the blue truck's windshield wipers were in motion, the truck's headlights were not activated, in violation of South Carolina law. On this basis, the officers initiated a traffic stop. When the driver of the truck was unable to produce a valid driver's license, he was placed under arrest. As the officers were escorting the passenger from the truck, they observed a black bag, which was found to contain a large amount of cash.¹

Based on the evidence retrieved from the blue truck, and his observations of the activity in the club's parking lot, Ardis decided to investigate the activity inside the club. He and Kennedy entered the club and were met at the door by the man who had been speaking earlier with the driver of the blue truck. At this closer range, Ardis recognized the man as McBride, whom he knew from a prior narcotics investigation.

Four other men were in the club at that time. Ardis recognized two of them, also from prior narcotics investigations. Ardis announced to the handful of patrons that the sheriff's office was conducting an investigation. He informed the patrons that after they provided him with identification and a description of the vehicle in which they had arrived, they would be free to leave. However, Ardis also informed the patrons that the vehicles in the parking lot were being detained by the police.

At this time, Kennedy left the club temporarily, and, while crossing the parking lot, observed that the engine of a champagne-colored Cadillac Escalade was running, and a man was sitting in the passenger seat. Kennedy reentered the club and provided this information to Ardis. They returned to the parking lot and opened the Escalade's door. Inside they noticed that the center console of the vehicle was stuffed with money to the extent that the armrest could not fully close. The officers thereafter escorted the man into the club.

After returning inside the club, Ardis began to record the patrons' information. Although McBride did not produce any identification, he stated that he was the owner of the black Cadillac SLS. Upon recording this information, and the information from the other five patrons, Ardis told all six men that they were free to leave. None left at that time.

Ardis returned to the parking lot and conferred with the sheriff, who had arrived at the scene. When Ardis asked the sheriff for authorization to request a canine narcotics unit from a nearby jurisdiction to inspect the vehicles,² he learned that such a unit was already en route from neighboring Florence County. Ardis reentered the club and stated again that the patrons were free to leave, but that their vehicles were being detained so that the canine unit could check them.

McBride's demeanor changed noticeably upon hearing that a canine unit soon would be arriving. According to Ardis, McBride "got very[,] very loud, nervous, [began] pacing back and forth, [and was] sweating profusely." At that time, contrary to his earlier statement, McBride denied ownership of the black Cadillac SLS. Next, McBride informed the officers that he intended to leave, provided the keys to the club to a patron with instructions to lock

the club after all the patrons had left, walked out of the bar, and began walking away from the club.

Following McBride's departure, a canine narcotics unit arrived at the club about 55 minutes after the vehicles first were detained. At that time, a dog trained in narcotics detection "alerted" on the black Cadillac SLS.

Using this information, and other details from the investigation, the officers obtained a search warrant for the black Cadillac SLS. A search of the vehicle revealed a photograph of McBride, his driver's license, \$1,500 in cash on the floorboard behind the driver's seat, a loaded nine-millimeter semiautomatic pistol in the glove compartment, and a "tin foil" package containing two plastic bags of white powder cocaine totaling 373.85 grams.

Legal Analysis:

In sum, the officers observed unexplained traffic at an unusual hour at a location having a history of drug activity. The officers also saw McBride, who they knew to have engaged in drug transactions in the past, engaged in what appeared to be a drug transaction with another individual who was found shortly thereafter in possession of over \$9,000.

Further, McBride was found in the company of other men known to have been involved in the drug trade. These factors, taken together, were sufficient to establish reasonable, articulable suspicion for the officers' detention of the Cadillac SLS on the ground that it may have contained illegal drugs.³

The length of the detention in the present case concededly was not brief. However, this detention of less than one hour was of materially shorter duration than the 90-minute detention at issue in *Place*. See also *United States v. White*, 42 F.3d 457, 460 (8th Cir. 1994) (80 minute wait for canine narcotics unit was reasonable). Moreover, unlike the agents in *Place*, the officers here were diligent in their investigation. Shortly after Ardis informed the club's patrons of the official decision to detain the vehicles in the club's parking lot, the sheriff requested the assistance of the nearest canine narcotics unit.

In the context of this 55-minute detention, the absence of a canine unit in Clarendon County does not weigh against a finding that the investigation was diligent.

Based on these considerations, we conclude that the length of time that McBride's vehicle was detained was reasonable given the officers' diligence in pursuing their investigation.

C. EVIDENCE/OUT OF COURT IDENTIFICATION/SEQUESTRATION/EXPERT

Court of Appeals of South Carolina.

The STATE, Respondent, v. Eugene J. SINGLETON, Appellant.

No. 4886. Submitted June 1, 2011. Decided Sept. 7, 2011.

Appellant Eugene Singleton was indicted in Bamberg County for first degree burglary, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy. After a trial, a jury convicted Singleton of first degree burglary and criminal conspiracy. Singleton appeals, arguing the circuit court erred in allowing

- (1) the victim to identify Singleton in court when her out-of-court identification was arguably unreliable and created a substantial likelihood of misidentification and
- (2) the State to call a reply witness who did not comply with the sequestration order imposed by the circuit court at Singleton's request. We affirm

FACTS/PROCEDURAL HISTORY

On the night of September 7, 2007, Mattie Singletary (Victim) and her one-year-old daughter were sleeping in her bedroom when she heard a “thump.” Moments later, a man walked into her bedroom, uttered an expletive, and ran out. Two other men then entered her bedroom and began threatening her with guns pointed in her and her daughter's direction. The two men ransacked the room and stole a cell phone, two pairs of shoes, jewelry,^{FN2} and more than one thousand dollars in cash.^{FN3} After the men left, Victim noticed her front door had been kicked in.

FN2. According to Victim, the shoes and jewelry that were stolen from her home belonged to Eugene Folk, her boyfriend and the father of her daughter.

FN3. Victim testified on cross-examination that the \$1,020 in cash that was stolen from her home came from a student loan refund.

During trial, Victim identified Singleton^{FN4} as the first man who entered her bedroom. Prior to this in-court identification, Singleton's counsel had moved to suppress Victim's identification of Singleton on the basis of inconsistencies between Victim's written and oral statements.

Specifically, Victim initially stated she did not recognize any of the perpetrators but later recalled that she recognized the first man who entered her room as “Jay.” Singleton's counsel argued Victim's identification was the product of her hearing of Singleton's arrest by law enforcement after the fact.

The circuit court agreed that there were inconsistencies between Victim's statements but ruled that any inconsistencies would go to her credibility and not to admissibility. The circuit court concluded the identification was sufficiently reliable to submit the issue to the jury because it was based on her own personal knowledge. Therefore, the circuit court denied the motion to suppress Victim's in-court identification of Singleton.

FN4. Eugene Singleton is also referred to throughout the record as “Jay” Singleton.

Victim testified she recognized Singleton “[b]ecause he used to be around my baby[']s father ... [b]ut then after a while, I guess they drifted apart.” Victim also noted she had seen Singleton several times on the campus of Denmark Technical College, where she attended school, and when she saw him he would greet her. Victim stated she had seen Singleton nine or ten times prior to September 7, 2007, and she got a good look at him the night of the robbery.

After the robbery, Victim called 911, but she did not mention that she recognized one of the perpetrators. Victim allegedly told one of the responding officers that she recognized one of the robbers as “Jay,” but she admitted her written statement did not mention this fact. Victim's initial written statement said “a boy came in the room and said, [oh] sh[*]t, and turn [ed] around.” Victim explained that her written statement given the day after the robbery did not mention she recognized Singleton because “it was just so much going on, and I was scared.” Singleton's trial counsel cross-examined Victim extensively regarding the absence of this information in her initial written statement.

Two other perpetrators involved in the robbery, Lonnie Rowe and Eugene Hosey, testified at trial on the State's behalf and identified Singleton as a participant in the robbery. Both Rowe and Hosey testified Singleton joined them in planning to go rob a drug dealer and steal drugs from his *11 mobile home. Rowe testified Singleton kicked in the front door and entered the mobile home first. Rowe said Singleton repeatedly asked Victim where her “stuff” was, and after she told them, Singleton went and got a white bag allegedly containing drugs out of the washing machine.

Rowe further testified he grabbed one or two pairs of sneakers and a cell phone before leaving the mobile home. Rowe claimed he did not know exactly what was in the white bag, and the State did not admit any drug evidence during the course of the trial. Rowe spent the night in the woods and

was apprehended by the police the next morning. He confessed to his involvement in the crime and directed the police to Latrell Tyler's home, where Rowe knew Singleton would be staying.^{FN5} Police proceeded to the address Rowe gave them and arrested Singleton.

FN5. Tyler was Singleton's girlfriend.

In April 2008, Victim gave another statement to a Solicitor's Office investigator. In that statement, Victim stated she saw a black male whom she knew as "J" come into her bedroom with a handgun. "J" said "oh sh[*]t" and then ran from the room. Victim said she was not sure why she did not initially tell the police that "J" Singleton was one of the people who entered her home. Victim claimed that "J" probably ran from the room when he saw her because she and "J" knew each other. Victim said she did not see any drugs in the mobile home that night, but she admitted that she had heard her live-in boyfriend, Folk, sold drugs.

With respect to the jewelry stolen from her home, Victim's handwritten statement noted the robbers took a gold chain, a gold watch, and two gold rings. Victim claimed that all the jewelry found on Singleton when **335 he was arrested belonged to Folk. Singleton's counsel cross-examined Victim regarding the fact that the jewelry found in Singleton's possession upon his arrest consisted of two gold bracelets, a watch, a ring, and did not include any gold chains.

In his case-in-chief, Singleton presented evidence that the jewelry found in his possession at the time of his arrest actually belonged to him and not to Folk. Specifically, Tyler, *12 Tanora Clemons, and Dorothy May Singleton^{FN6} described the jewelry in detail, and all three witnesses testified they had seen Singleton wearing the jewelry prior to September 7, 2007. Tyler noted:

FN6. Clemons is the mother of Singleton's child, and Dorothy May Singleton is Singleton's mother.

I remember the bracelet because I asked him could I wear the bracelet. He told me no, he wouldn't let me wear the bracelet. It got the real pretty Jesus on it and I liked it. It had the diamonds on it. I asked could I get it. He told me no. I did want this too, but he told me no.

The State sought to call a reply witness, Harriet Washington, Folk's mother, to testify that the jewelry in fact belonged to her son. During a bench conference off the record, Singleton objected to Washington's testimony on the grounds that Washington was not sequestered during the trial, and was in the courtroom when the other witnesses discussed the jewelry. The circuit court overruled Singleton's motion to suppress the testimony but limited any prejudice by requiring Washington to verbally describe the jewelry prior to the State showing it to her.

During her direct testimony, Washington described the jewelry and identified it as belonging to her son, Folk. Washington testified:

He got the Lord's piece, a big chain with the Lord face on it. And then he got another big gold chain like a, uh, it's something like some kind of like a head something, but then he got one with a Jesus in it with the diamonds on it and then he had, he got a gold bracelet with Jesus head because I had asked him for it ... he got his gold watch. He got several rings.

During cross-examination, Singleton's counsel questioned Washington extensively regarding her presence in the courtroom when the jewelry was displayed earlier that same day. Washington admitted she had last seen the jewelry that same morning when Singleton's counsel displayed it for three witnesses.

The jury convicted Singleton of first degree burglary and criminal conspiracy. The circuit court sentenced Singleton to *13 thirty-five years' imprisonment for first degree burglary, suspended upon the service of twenty-five years plus five years' probation. The circuit court also sentenced Singleton to five years' imprisonment for conspiracy, to run concurrently with the burglary sentence. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in allowing the victim to identify Singleton in court when her out-of-court identification was arguably unreliable and created a substantial likelihood of irreparable misidentification?
2. Did the circuit court err in allowing the State to call a witness for reply testimony when the witness did not comply with the sequestration order imposed at Singleton's request such that his right to due process was violated?

I. In-Court Identification of Defendant

[1] Singleton argues the circuit court erred in allowing Victim to identify him during her in-court testimony when her out-of-court identification was unreliable and created a substantial likelihood of misidentification. We disagree.

...“An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.”

...“The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.” *State v. Turner*, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors:

- (1) the witness's opportunity to view the perpetrator at the time of the crime,
- (2) the witness's degree of attention,
- (3) the accuracy of the witness's prior description of the perpetrator,
- (4) the level of certainty demonstrated by the witness at the confrontation, and
- (5) the length of time between the crime and the confrontation.

During trial, Victim testified she recognized Singleton because he was formerly friends with Folk. Victim recalled that Singleton had greeted her on the Denmark Technical College campus several times in the past. Furthermore, she got a good look at Singleton on the night of the robbery. Victim explained her written statement did not mention she recognized Singleton because she was scared. Because Victim had prior personal knowledge of Singleton, we conclude the identification process was not unduly suggestive. In addition, based on the totality of the circumstances, we find there was no substantial likelihood of irreparable misidentification such that the identification was unreliable as a matter of law.

[8] Regardless, any error was harmless in light of the overwhelming evidence of guilt presented at trial. *See State v. Sims*, 387 S.C. 557, 566–68, 694 S.E.2d 9, 14–15 (2010) (finding error in admission of hearsay statement harmless in view of the overwhelming evidence of guilt presented at trial); *15 *Fields*, 363 S.C. at 26, 609 S.E.2d at 509 (noting that to warrant reversal based on the admission of evidence, an appellant must demonstrate both error and prejudice). Specifically, two co-conspirators testified against Singleton and identified him as a participant in the robbery.

Accordingly, we affirm the circuit court's decision to admit Victim's in-court identification of Singleton because the identification process was not unduly suggestive, there was no substantial likelihood of irreparable misidentification, and there was no resulting prejudice.

II. Motion to Suppress Unsequestered Witness's Testimony

[9] Singleton argues the circuit court's decision to allow an unsequestered witness to testify deprived him of fundamental fairness and violated his right to due process of law.

Specifically, Singleton contends it was prejudicial error to allow Harriet Washington, Folk's mother, to provide rebuttal testimony regarding ownership of the jewelry found on Singleton at the time of his arrest.

During trial, Singleton's counsel objected to the reply testimony by Washington because she was sitting in the courtroom when other witnesses described and identified all four pieces of jewelry.

We conclude Singleton's right to due process of law was not violated by the admission of this reply testimony. First, Singleton was not entitled to a sequestration order as a matter of right. *See Fulton*, 333 S.C. at 375, 509 S.E.2d at 827 (“A party is not entitled to the sequestration of witnesses as a matter of right.”).

Furthermore, the circuit court did not abuse its discretion in allowing Washington to testify regarding her belief that Folk owned the jewelry found in Singleton's possession at the time of his arrest. Washington's testimony was in direct response to three witnesses who testified Singleton owned the same jewelry.

The reply testimony was limited in scope and not admitted to complete the State's case-in-chief. *See Huckabee*, 388 S.C. at 243, 694 S.E.2d at 786. Finally, Singleton's counsel cross-examined Washington extensively regarding her presence in the courtroom when the jewelry was displayed earlier that day.

Therefore, any possible prejudicial effect was limited by Singleton's counsel repeatedly questioning Washington regarding the source of her knowledge of the jewelry.

CONCLUSION

We affirm the circuit court's decision to admit Victim's in-court identification of Singleton because the identification process was not unduly suggestive, the identification was reliable based on the totality of the circumstances, and there was no resulting prejudice.

We also affirm the circuit court's decision to allow the State to call a previously unsequestered witness to give reply testimony because the admission of Washington's testimony did not deprive Singleton of either fundamental fairness or due process of law. The testimony was offered by the State in reply to directly contradictory testimony by Singleton's witnesses.

Furthermore, Singleton's counsel cross-examined Washington extensively regarding her presence in the courtroom during the other witnesses' testimony.

AFFIRMED.

The STATE, v. Bennie MITCHELL, # 5009 July 25, 2012. The Court of Appeals, Lockemy, J., held that:

- (1) testimony of police officer identifying defendant from photographs from computer disk was admissible;
- (2) photographs from digital camera in burglarized residence were “originals” within scope of applicable rules of evidence; and
- (3) verdicts convicting defendant of first-degree burglary and acquitting him of petit larceny were not necessarily inconsistent.

...In this criminal action, Bennie Mitchell argues the trial court erred in:

- (1) allowing a **police officer to identify Mitchell from photographs** taken by the victim's deer camera because it was in violation of Rule 403, SCRE, and Rule 701, SCRE;
- (2) admitting a **disk containing photographs** from a deer camera because it was in violation of Rules 1001, 1002, and 1003, SCRE; and
- (3) failing to grant Mitchell's post-trial motion for a new trial on the first-degree burglary charge when all of the **elements of the charge were not met**. We affirm the trial court.

FACTS

In the early morning of October 28, 2008, Stephen Potts returned to his home in Newberry County and discovered someone had broken into his home during his absence. After reviewing a motion-activated deer camera that had been placed on top of his refrigerator, Potts saw photographs of a man in his kitchen. A police officer subsequently identified the man in the photographs as Mitchell.

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his refrigerator. Potts stated that upon returning home from work at approximately 1:00 a.m. on October 28, 2008, he noticed someone or something had tampered with the window next to his back door. After going inside his home and checking the deer camera, he discovered photographs of someone in his kitchen that he did not recognize. He waited to contact the police until around 10 a.m. and then told them of the photographs.

Potts testified during the in camera hearing that he had possession of the deer camera from the time he returned home on the night of the alleged incident until he took it to his business and downloaded the data onto a laptop. He identified the photographs on the disk as the ones he downloaded directly from the camera. Potts stated the police officer viewed the photographs on his personal laptop at his home on October 28 but that laptop could not download the photographs to print them out. He then took the camera to the police station, but the police station was not able to download and print the photographs either. At that point, Potts took the deer camera back to his business where he downloaded the photographs and copied them onto a disk.

Potts admitted the pictures had a timestamp of 3:00 a.m., even though he testified he returned home from work around 1:00 or 1:30 a.m. He stated the clock was wrong on the deer camera because he had just set it up and had not properly programmed the clock feature yet.

Potts then testified before the jury regarding the photographs and stated he did not know the person pictured in them. Further, he testified that approximately one hundred dollars in quarters, some clothing, and some beer were taken from his home.

Corporal (Cpl.) Allison Moore of the Newberry Police Department testified she responded to Potts's residence on October 28, 2008. She stated Potts showed her the photographs on the deer camera, and she thought they depicted the unknown suspect well. Cpl. Moore could not determine where the person entered Potts's home and could not recover any fingerprints. When Potts came to the police station with the deer camera as requested, he met Cpl. Moore and they discovered the police station did not have the ability to download and print the photographs either. Potts informed Cpl. Moore that he could download the photographs at his place of business. She advised him to bring the photographs to the police department after he downloaded them, and he did so later that day on October 28.

Lt. McClurkin stated that Potts and Cpl. Moore came to his office with the disk on the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs taken from Potts's deer camera. Lt. McClurkin testified, over Mitchell's objection, that he viewed the photographs from the disk on his office computer and recognized Mitchell as the person in the photographs. He stated

that in one of the photographs, the person he believed to be Mitchell was standing with a flashlight and a bag in his hands. Lt. McClurkin explained he knew Mitchell from living in Newberry for over twenty years.

The jury convicted Mitchell of first-degree burglary and possession of burglary tools, but it acquitted him of the petit larceny charge. Mitchell moved for a new trial based on the ground that the State failed to establish all elements of the burglary charge because the jury acquitted him of petit larceny. The trial court denied his motion, and this appeal followed.

I. Identification of Mitchell

...If the witness is **not testifying as an expert**, the witness' **testimony in the form of opinions or inferences is limited** to those opinions or inferences which (a) are **rationaly based on the perception** of the witness, (b) are **helpful to a clear understanding** of the witness' testimony or the **determination of a fact in issue**, and (c) **do not require special knowledge, skill, experience or training**. Rule 701, SCRE.

...Mitchell also argues the police officer's testimony violated Rule 403, SCRE, which states:

...Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE.

... **Here, we find** these facts are analogous to *Fripp*, and the trial court did not err in introducing Lt. McClurkin's testimony pursuant to Rule 701, SCRE. Lt. McClurkin's perception of the person in the photographs was based on his firsthand knowledge of Mitchell. While Lt. McClurkin was not present during the alleged crime, he knew Mitchell through his twenty years of living in the Newberry area. This was the only fact presented at trial that allowed Lt. McClurkin to identify Mitchell, whereas in *Fripp*, the witnesses seemed to be able to describe their knowledge of the defendant from the community in more detail. However, that fact did give a basis for concluding that Lt. McClurkin was more likely to correctly identify the defendant from the photograph than the jury. Furthermore, the identity of the person in the photographs was a fact in issue, and Lt. McClurkin's identification of who he thought was in the photographs was surely helpful to the jury.

... As we noted, we do not find Lt. McClurkin's testimony's probative value was outweighed by the prejudicial value under Rule 403, SCRE, based on Mitchell's contention that it was a lay opinion not based on personal observation. We also find the probative value of his testimony was not outweighed by the prejudicial effect based upon Mitchell's argument that Lt. McClurkin was a police officer offering his opinion as to Mitchell's identity. Lt. McClurkin was available for cross-examination by Mitchell, and his basis for identification was stated as simply having been in the Newberry community for twenty years. The trial court's jury instructions further undermined any prejudicial effect Lt. McClurkin's testimony may have had.^{FN3} For the foregoing reasons, we affirm the trial court.

FN3. The jury instructions included the following statements, “[A]s I told you, you must consider and determine the credibility of the witnesses and of the exhibits. And I told you some things you could use in engaging credibility ...[Y]ou may believe everything a witness says, you may believe nothing a witness says. You may believe parts of a witnesses [sic] testimony and disregard other parts. You may believe one witness over several or several over one. But remember that your job is to determine the true facts of the case and whether the state has met its burden of proof and you do that by weighing all the evidence, regardless of who called the witness.”

II. Authentication of the disk with downloaded photographs

[5] Mitchell contends the trial court erred in allowing the disk with the downloaded deer camera photographs to be admitted when the photographs were not properly authenticated. Specifically, Mitchell maintains that because the police did not take the camera into custody but left it with Potts to download the photographs onto his business computer, the evidence was admitted in violation of Rules 1001, 1002, and 1003, SCRE.^{FN4} We disagree.

The pertinent section of Rule 1001, SCRE, states:

An “***original***” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.Rule 1001(3), SCRE.

Further, Rule 1001 defines a ***duplicate*** as “a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.” Rule 1001(4), SCRE.

... **We find the photographs from the disk were originals** pursuant to Rule 1001, SCRE. Rule 1001(3), SCRE (“If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original’.”). A digital camera was used, and the photographs from the disk were testified to as being the same photographs that were on the deer camera on October 28, 2008. **Mitchell had the opportunity to cross-examine Potts and the police officers** as to the handling of the photographs and disk on which the photographs were downloaded. **We conclude the trial court properly admitted the photographs from the disk as originals,** and thus, Rule 1003 is not relevant to our analysis. For the foregoing reasons, we affirm the trial court.

III. Motion for New Trial

Mitchell argues the trial court erred in denying his post-trial motion for a new trial on his first-degree burglary charge. Specifically, Mitchell contends all of the elements of first-degree burglary were not met because the intent to steal element was not proven since the jury found Mitchell not guilty of petit larceny. We disagree.

... Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime. Thus, the trial court did not err in denying Mitchell's post-trial motion for a new trial. For the forgoing reasons, we affirm the trial court.

CONCLUSION

Accordingly, we find the trial court did not abuse its discretion regarding the issues on appeal. Thus, we affirm the trial court.

AFFIRMED.

The STATE, v. Gerald FRIPP # 4928 Decided Jan. 18, 2012.

Holdings: The Court of Appeals, Konduros, J., held that:

(1) testimonies of manager and employee of burglarized store, that defendant was the person depicted on store surveillance videotape, were admissible as lay opinions;

... We conclude Fripp's remaining arguments are without merit. In his appellate brief, Fripp does not dispute the correctness of the trial court's ruling that he opened the door to Officer Heany's hearsay testimony. Therefore, that ruling is the law of the case. As to Fripp's claim the State failed to establish his statement to police was knowingly and voluntarily given, the evidence in the record establishes Fripp turned himself in to police and was advised of his *Miranda* rights. The fact that he was not advised a second time of his *Miranda* rights upon questioning at the detention center does not, under the facts of this case, negate his knowledge of his rights or the voluntariness of his statement. With respect to the admission of two prior burglary convictions, case law is clear that the State may introduce such evidence as it is an element of second-degree burglary. Finally, as to the trial court's decision not to disqualify the Juror, the record demonstrates Fripp failed to utilize all of his peremptory strikes and the Juror affirmed, upon questioning by the trial court, that he could be fair and impartial in the case. Consequently, we find no abuse of discretion in the trial court's decision not to remove the Juror for cause.

We affirm

FACTS

The Callawassie General Store, a convenience store, (the Store) in Beaufort County was burglarized around 4:00 a.m. on July 10, 2004. An alarm was tripped causing police to respond to the scene and the burglar's image was captured on the Store's surveillance tape. Employees of the Store indicated Fripp, who was staying in a car on a property near the Store, might be a suspect. Fripp eventually contacted police for a meeting. Officer Kelly Heany and Officer Christopher Madson met Fripp at an area business, where Officer Madson read Fripp his *Miranda* rights. Fripp then rode with Officer Madson to the jail where he gave a statement to Officer Heany indicating he had not committed the robbery but heard the alarm and walked to the Store to see what happened. Officer Heany indicated Fripp might be on the surveillance video, and Fripp stated the camera could have recorded him when he looked in the doorway of the Store.

At trial, the State presented Patricia Brown and Edwina Young, a Store manager and Store employee respectively. Brown testified she reviewed the videotape and, in her opinion, the suspect depicted on the tape was Fripp. She testified that in the tape he was wearing "a jacket pulled up over his head, a blue shirt—a blue shirt I always see him with it on, and I guess it was a[sic] dark pants." Brown stated she knew Fripp "very well" and "saw him all the time." Young also testified that Fripp was the man on the videotape, although when initially questioned about the suspect's identity at the time of the robbery, she could not make an identification. Young further testified the burglar was wearing the same clothes in the videotape as Fripp had worn when she saw him the previous day. She indicated she knew Fripp because she lived in the area and knew him through his family.

Officer Heany testified as to Fripp's statement over Fripp's objection that the State failed to establish the statement was knowingly and voluntarily given. On cross-examination Fripp asked Officer Heany if Officer Zarkman, another officer involved with the case, told her he saw Fripp the day after the burglary. On re-direct the State asked Officer Heany what Officer Zarkman said Fripp was wearing that day and she responded: "He told me he—Mr. Fripp was wearing the same clothes as the individual he observed on the tape at the store." Fripp objected, but the trial court overruled the objection on the grounds that Fripp had opened the door to this testimony on cross-examination.

The jury found Fripp guilty of second-degree burglary, and the trial court sentenced him to fifteen years' incarceration, provided that upon service of ten years and payment of costs and assessments, the balance was suspended with five years' probation to follow. This appeal followed.

LAW/ANALYSIS

We find the record demonstrates the criteria set forth in Rule 701 are met. **First**, Brown's and Young's testimonies were based on their perceptions of Fripp, not only on the videotape, but during the time they had known and observed him in the Store. **Brown indicated** she knew Fripp “very well” and “saw him all the time” and he came into the Store frequently—“once a day, sometimes twice a day.” She further testified the videotape contained a “good shot of his face” “on one of the angles on the tape.” In her statement to police, **Young testified** she had worked at the Store for several years and also knew Fripp through his family. **Therefore, the witnesses' testimonies were rationally based on their perceptions** of Fripp's appearance including his physical appearance, mannerisms, and clothing.

Secondly, Brown's and Young's opinions were **helpful in determining a key fact in issue**—whether Fripp was the person depicted on the videotape. Rule 701 states: “If the witness is **not testifying as an expert**, the witness' **testimony in the form of opinions or inferences is limited to those opinions or inferences which are**

- (a) **rationally based** on the perception of the witness,
- (b) **helpful to a clear understanding** of the witness' testimony or the **determination of a fact in issue**, and
- (c) **not based on scientific, technical, or other specialized knowledge** within the scope of Rule 702.”

We believe ... testimony by those who knew defendants over a period of time and in a variety of circumstances **offers to the jury a perspective** it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These **witnesses had interacted with defendants** in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their **testimony provided the jury with the opinion** of those whose exposure was not limited to three days in a sterile courtroom setting.

This fuller perspective is especially helpful where, as here, the photographs used for identification are less than clear.

CONCLUSION

We conclude the trial court did not abuse its discretion in admitting Brown's and Young's identification testimonies, Fripp's statement, or evidence of two of Fripp's prior burglary convictions.

Furthermore, the trial court did not err in refusing to strike the Juror for cause and the trial court's ruling that Fripp opened the door to Officer Heany's hearsay testimony is the law of the case. Based on all of the foregoing, the trial court is

AFFIRMED.

D. MIRANDA

Supreme Court of the United States

Carol HOWES, Warden, Petitioner v FIELDS.

No. 10–680. Argued Oct. 4, 2011. Decided Feb. 21, 2012.

Following affirmance of his convictions for third-degree criminal sexual conduct, 2004 WL 979732, petitioner sought habeas corpus relief, arguing that he was subjected to custodial interview without being given Miranda warnings while serving jail sentence for unrelated offense.

The United States District Court for the Eastern District of Michigan, Victoria A. Roberts, J., 2009 WL 304751, conditionally granted petition. Warden of correctional facility appealed.

The United States Court of Appeals for the Sixth Circuit, Dan Aaron Polster, District Judge, sitting by designation, 617 F.3d 813, affirmed.

Certiorari was granted. **Holdings:** The Supreme Court, Justice Alito, held that:

- (1) no categorical rule has been clearly established that questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison;
- (2) service of a term of imprisonment is not enough to constitute Miranda custody;
- (3) taking a prisoner aside for questioning does not necessarily convert a noncustodial situation to one in which Miranda applies;
- (4) questioning a prisoner about criminal activity that occurred outside the prison does not necessarily convert a noncustodial situation to one in which Miranda applies; and
- (5) defendant was not taken into custody when he was escorted from his cell and interviewed in conference room within prison.

Respondent Fields, a Michigan state prisoner, was escorted from his prison cell by a corrections officer to a conference room where he was questioned by two sheriff's deputies about criminal activity he had allegedly engaged in before coming to prison.

At no time was Fields given Miranda warnings or advised that he did not have to speak with the deputies. As relevant here: Fields was questioned for between five and seven hours; Fields was told more than once that he was free to leave and return to his cell; the deputies were armed, but Fields remained free of restraints; the conference room door was sometimes open and sometimes shut; several times during the interview

Fields stated that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell; after Fields confessed and the interview concluded, he had to wait an additional 20 minutes for an escort and returned to his cell well after the hour when he generally retired.

Held:

1. This Court's precedents do not clearly establish the categorical rule on which the Sixth Circuit relied. The Court has repeatedly declined to adopt any such rule.

The Sixth Circuit misread Mathis, which simply held, as relevant here, that a prisoner who otherwise meets the requirements for Miranda custody is not taken outside the scope of Miranda because he was incarcerated for an unconnected offense.

It did not hold that imprisonment alone constitutes Miranda custody. Nor does the statement in Maryland v. Shatzer, that “[n]o one questions that [inmate] Shatzer was in custody for Miranda purposes” support a *per se* rule. It means only that the issue of custody was not contested in that case.

Finally, contrary to respondent's suggestion, Miranda itself did not hold that the inherently compelling pressures of custodial interrogation are always present when a prisoner is taken aside and questioned about events outside the prison walls.

2. The Sixth Circuit's categorical rule—that imprisonment, questioning in private, and questioning about events in the outside world create a custodial situation for *Miranda* purposes—is simply wrong.

(a) The initial step in determining whether a person is in *Miranda* custody is to ascertain, given “all of the circumstances surrounding the interrogation,” how a suspect would have gauged his freedom of movement.

However, not all restraints on freedom of movement amount to *Miranda* custody. See, *Shatzer*, distinguishing between restraints on freedom of movement and *Miranda* custody, held that a break in *Miranda* custody between a suspect's invocation of the right to counsel and the initiation of subsequent questioning may occur while a suspect is serving an uninterrupted term of imprisonment.

If a break in custody can occur, it must follow that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*. At least three strong grounds support this conclusion:

Questioning a person who is already in prison does not generally involve the shock that very often accompanies arrest; a prisoner is unlikely to be lured into speaking by a longing for prompt release; and a prisoner knows that his questioners probably lack authority to affect the duration of his sentence.

Thus, service of a prison term, without more, is not enough to constitute *Miranda* custody.

(b) The other two elements in the Sixth Circuit's rule are likewise insufficient.

Taking a prisoner aside for questioning may necessitate some additional limitations on the prisoner's freedom of movement, but it does not necessarily convert a noncustodial situation into *Miranda* custody.

Isolation may contribute to a coercive atmosphere when a nonprisoner is questioned, but questioning a prisoner in private does not generally remove him from a supportive atmosphere and may be in his best interest.

Neither does questioning a prisoner about criminal activity outside the prison have a significantly greater potential for coercion than questioning under otherwise identical circumstances about criminal activity within the prison walls.

The coercive pressure that *Miranda* guards against is neither mitigated nor magnified by the location of the conduct about which questions are asked.

3. When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation.

The record in this case reveals that respondent was not taken into custody for *Miranda* purposes. While some of the facts lend support to his argument that *Miranda*'s custody requirement was met, they are offset by others.

Most important, he was told at the outset of the interrogation, and reminded thereafter, that he was free to leave and could go back to his cell whenever he wanted. Moreover, he was not physically restrained or threatened, was interviewed in a well-lit, average-sized conference room where the door was sometimes left open, and was offered food and water.

These facts are consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave, subject to the ordinary restraints of life behind bars.

REVERSED

E. DUI LAW

1. State v. Johnson (Op. No. 4917, filed December 14, 2011)

The facts in this case are undisputed. Johnson was arrested on suspicion of DUI on August 3, 2008. Prior to trial, Johnson made two motions to dismiss. First, Johnson argued the charge should be dismissed because the incident site videotape was missing audio for the first two and a half minutes. However, audio was recorded when Trooper Patterson gave Johnson a Miranda warning and performed roadside sobriety tests. Second, Johnson asked the court to dismiss the charge because Trooper Patterson moved Johnson off-camera to administer the breath test. When Trooper Patterson tried to administer the breath test he discovered the machine was not working, so he administered the test from another machine but failed to activate that machine's video camera. Johnson asserts that the viewer can hear the breath test machine running, but Johnson is not seen on the videotape. Trooper Patterson did not submit an affidavit regarding either videotape.

The magistrate denied Johnson's motions to dismiss. Instead, the magistrate suppressed the breath test because Johnson was out of range of the camera during administration of the breath test. As to the incident site videotape, the magistrate denied the motion to dismiss in full. The circuit court affirmed, expressing concern that the officer did not submit an affidavit but finding Johnson failed to establish reversible error. Johnson did not file a motion to alter or amend the judgment. This appeal followed.

ISSUES AND ANALYSIS:

Johnson argues the officer violated the statute when the officer moved Johnson to a different breath test machine for the administration of the breath test, such that Johnson could not be seen on the videotape. The State concedes the video did not capture the administration of the breath test.

To determine whether the officer violated section 56-5-2953(A)(2), we look at the plain language of the statute. "The videotaping at the breath site . . . must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test." S.C. Code Ann. § 56-52953(A)(2)(c). In light of the concession by the State, we find the officer violated section 56-5-2953(A)(2)(c) when he failed to capture the administration of the breath test on the videotape.

We must next decide if the State should be excused from its noncompliance with the videotaping requirements found in section 56-52953(A). Johnson claims when an officer does not provide a sworn affidavit certifying that the equipment was inoperable, that reasonable efforts were made to maintain the equipment in an operable condition, and that there was no other operable breath test facility in the county, a DUI charge must be dismissed. The State argues the magistrate and the circuit court correctly considered language in section 56-5-2953 permitting a court to consider any other valid reason for the failure to produce a video.

Pursuant to subsection (B) of section 56-5-2953, [n]oncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was

impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. Roberts, 393 S.C. at 346, 713 S.E.2d at 285.

The first three excuses above are inapplicable to the present case. The State admits the officer did not submit a sworn affidavit. Further, although the State argues in its appellate brief that the officer was working at an accident scene on I-26 when Johnson nearly collided with the officer, the record does not support a finding that there was an emergency circumstance that prevented the officer from complying with the statute. The officer left the scene of the accident to pursue Johnson. Thus, we must consider whether the State offered any other valid reason for the failure to produce the videotape under the totality of the circumstances.

The magistrate noted the reason the officer asked Johnson to stand out of range of the camera was because the first machine was not working. The officer moved Johnson to another machine in the same room but failed to activate the videotape for that second machine. The officer remained on camera from the first machine the entire time. Based on these facts, the magistrate decided to suppress the breath test and deny Johnson's motion to dismiss the charges.

At the hearing before the circuit court, counsel for the State argued for the first time that the officer believed the camera was activated for the second machine and did not realize it was not activated until after he had administered the test. We find this new argument unpreserved. In considering whether the officer had a valid reason for his failure to capture Johnson's breath test on video, we consider only the grounds argued before the magistrate. See State v. Carmack, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) ("[I]n order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Here, the record does not indicate that the video recording equipment for the second datamaster machine was inoperable or that the police otherwise lacked the ability to create a videotape of the administration of the breath test. Rather, we have only the officer's assertion that the first machine was not functioning, so he moved over to the second machine. Under the totality of the circumstances, we find the State did not articulate a valid reason for the officer's failure to comply with the mandates of section 56-52953 when the officer moved to the second machine to administer the breath test.

Finally, we must decide the appropriate remedy for the State's unexcused failure to comply with section 56-5-2953.

In City of Rock Hill v. Suchenski, the supreme court held an inexcusable violation of section 56-5-2953 requires dismissal of the charge. 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007). On appeal, the City argued its noncompliance was excused pursuant to the exceptions listed in section 56-52953(B); however, the supreme court refused to consider the City's arguments because they were not preserved for appellate review. Id. at 1516, 646 S.E.2d at 880. In finding dismissal appropriate, the supreme court stated "failure to produce videotapes would be a ground for dismissal if no exceptions apply." Id. at 16, 646 S.E.2d at 881. Suchenski has been interpreted as a case involving the failure to preserve error for appellate review. See, e.g., Roberts, 393 S.C. at 346, 713 S.E.2d at 285; State v. Oxner, 391 S.C. 132, 135, 705 S.E.2d 51, 52 (2011); State v. Branham, 392 S.C. 225, 229 n.3, 708 S.E.2d 806, 809 n.3 (Ct. App. 2011).

In Roberts, the supreme court returned to the Suchenski decision and found that unexcused noncompliance with section 56-5-2953 mandates dismissal of a DUI charge:

As evidenced by this Court's decision in Suchenski, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. Id. § 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to section 56-5-2930 . . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56-5-2953.

Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in Suchenski. 393 S.C. at 348-49, 713 S.E.2d at 286.

Therefore, the magistrate's remedy of suppression constitutes reversible error. Just as the Supreme Court found in Roberts, we also find dismissal is the appropriate sanction for the officer's unexcused violation of section 56-5-2953.

2. The STATE v. Justin ELWELL (Court of Appeals of South Carolina Decided November 23, 2011) 721 S.E.2d 451 *Rehearing denied, pending S.C. Supreme Court Petition*

Facts:

On January 3, 2009, Elwell was arrested for Driving Under the Influence (DUI) and subsequently taken to a breath-testing site. While there, the arresting officer informed Elwell that he was being videotaped, gave Elwell his Miranda rights and asked Elwell if he would submit to a breath test. Elwell refused the test, affirming that he understood his driver's license would be suspended as a result. The officer turned off the video recorder after Elwell's refusal and before twenty minutes had elapsed.

Procedural History:

Elwell was subsequently indicted for DUI, second offense. During a pretrial hearing, he moved to dismiss the charge because his conduct at the breath-testing site was not videotaped for the entire "twenty-minute pre-test waiting period", which he alleged is mandated in all situations covered by subsection 56-5-2953(A)(2)(d). The motion to dismiss was granted.

Issues:

1. Did the State comply with subsection 56-5-2953(A)(2)(d)?
2. If the State did not comply with subsection 56-5-2953(A)(2)(d), was Elwell's refusal to take the breath test a "valid reason" to turn off the video recorder under subsection 56-5-2953(B)?

Analysis:

The court analyzed the language of 56-5-2953(A)(2)(d), particularly the provision that says the videotape must include the suspects conduct “during the required twenty-minute pre-test waiting period”.

The court reasoned that the use of the two modifiers “required” and “pre-test” limits the application of the subsection. The use of “pre-test” indicates the entire waiting period must precede a breath test. The use of “required” indicates the waiting period must be videotaped only if the waiting period itself is required.

To decide if the waiting period itself is required, the court looked to State v. Parker, 245 S.E.2d 904 (1978) (establishing a four-part test to admit a breath test into evidence) and State v. Jansen, 408 S.E.2d 235 (1991) (holding that the State need not comply with the waiting period requirement in implied consent cases when a suspect refuses to take a breath test).

The court reasoned that if a breath test is administered, the waiting period’s videotaping provides evidence that helps resolve credibility disputes as to the procedure used in administering the breath test. If the breath test is not administered, none of those credibility disputes will arise.

Holding:

The defendant’s refusal to take a breath test rendered the twenty minute waiting period inapplicable, such that it did not need to be videotaped. The statute does not require a police officer to turn off the video recorder after the person refuses to take the test, nor does it frustrate the statute’s general requirement that a person arrested for DUI “have his conduct at the breath test site videotaped.”

In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so.

3. The STATE v. Mark Allen HOYLE (Court of Appeals of South Carolina) Decided April 4, 2012 725 S.E.2d 720

Facts:

On March 21, 2009, Hoyle was charged with Driving Under the Influence (DUI). Upon his arrest, the officer advised Hoyle of the following: (1) he had the right to remain silent; (2) anything he said could be used against him in a court of law; (3) he had the right to an attorney; and (4) if he could not afford an attorney, one would be appointed for him prior to questioning.

The officer did not advise Hoyle that he had the right to terminate the interrogation at any time and to not answer any further questions.

Procedural History:

Hoyle was convicted of DUI. Hoyle appealed, arguing the magistrate’s court erred in refusing to dismiss the charge, or in the alternative, erred in failing to suppress certain evidence because he was not fully advised of his Miranda rights. (Hoyle asserted a second reason for suppression of the evidence- that certain audio portions of the sequence of events were missing- but did not argue this reason to the circuit court or the court of appeals.)

Before the circuit court, Hoyle argued the incident site video recording should be suppressed because it did not contain the officer instructing Hoyle of the Miranda warning that a suspect has the “right to terminate the interrogation at any time and not to answer any further

questions”. The circuit court agreed, remanded for a new trial, and ordered the incident site video recording be suppressed. This appeal followed.

Issue:

Whether the circuit court erred in suppressing the incident site video recording and remanding for a new trial because Hoyle was given appropriate Miranda warnings.

Analysis:

In Miranda v. Arizona, 384 U.S., 479 (1966), the Supreme Court held that a suspect in custody must be warned of the following rights: “He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.”

The South Carolina Supreme Court considered the sufficiency of Miranda warnings in State v. Cannon, 197 S.E.2d 678 (1973). In that case, the police gave the defendant the following warning: “You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one.” The court found these warnings sufficient and found that Miranda does not require an officer to inform a suspect of his right to stop answering questions at any time.

Holding:

Miranda does not require the arresting officer to inform the defendant he has a right to terminate questions at any time. Miranda only requires four warnings, and the United States Supreme Court did not include the right to terminate the interrogation at any time as one of the four warnings.

F. CIVIL LIABILITY

SUPREME COURT OF THE UNITED STATES

RYBURN, ET AL. v. HUFF, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 11–208. Decided January 23, 2012

Petitioners Darin Ryburn and Edmundo Zepeda, along with two other officers from the Burbank Police Department, responded to a call from Bellarmine-Jefferson High School in Burbank, California. When the officers arrived at the school, the principal informed them that a student, Vincent Huff, was rumored to have written a letter threatening to “shoot up” the school.

The principal reported that many parents, after hearing the rumor, had decided to keep their children at home. The principal expressed concern for the safety of her students and requested that the officers investigate the threat.

In the course of conducting interviews with the principal and two of Vincent’s classmates, the officers learned that Vincent had been absent from school for two days and that he was frequently subjected to bullying. The officers additionally learned that one of Vincent’s classmates believed that Vincent was capable of carrying out the alleged threat.

The officers found Vincent's absences from school and his history of being subjected to bullying as cause for concern. The officers had received training on targeted school violence and were aware that these characteristics are common among perpetrators of school shootings.

The officers decided to continue the investigation by interviewing Vincent. When the officers arrived at Vincent's house, Officer Zepeda knocked on the door and announced several times that the officers were with the Burbank Police Department. No one answered the door or otherwise responded to Officer Zepeda's knocks. Sergeant Ryburn then called the home telephone. The officers could hear the phone ringing inside the house, but no one answered.

Sergeant Ryburn next tried calling the cell phone of Vincent's mother, Mrs. Huff. When Mrs. Huff answered the phone, Sergeant Ryburn identified himself and inquired about her location. Mrs. Huff informed Sergeant Ryburn that she was inside the house. Sergeant Ryburn then inquired about Vincent's location, and Mrs. Huff informed him that Vincent was inside with her. Sergeant Ryburn told Mrs. Huff that he and the other officers were outside and requested to speak with her, but Mrs. Huff hung up the phone.

One or two minutes later, Mrs. Huff and Vincent walked out of the house and stood on the front steps. Officer Zepeda advised Vincent that he and the other officers were there to discuss the threats. Vincent, apparently aware of the rumor that was circulating at his school, responded, "I can't believe you're here for that."

Sergeant Ryburn asked Mrs. Huff if they could continue the discussion inside the house, but she refused. In Sergeant Ryburn's experience as a juvenile bureau sergeant, it was "extremely unusual" for a parent to decline an officer's request to interview a juvenile inside. Sergeant Ryburn also found it odd that Mrs. Huff never asked the officers the reason for their visit.

After Mrs. Huff declined Sergeant Ryburn's request to continue the discussion inside, Sergeant Ryburn asked her if there were any guns in the house. Mrs. Huff responded by "immediately turn[ing] around and r[unning] into the house." Sergeant Ryburn, who was "scared because [he] didn't know what was in that house" and had "seen too many officers killed," entered the house behind her.

Vincent entered the house behind Sergeant Ryburn, and Officer Zepeda entered after Vincent. Officer Zepeda was concerned about "officer safety" and did not want Sergeant Ryburn to enter the house alone. The two remaining officers, who had been standing out of earshot while Sergeant Ryburn and Officer Zepeda talked to Vincent and Mrs. Huff, entered the house last, on the assumption that Mrs. Huff had given Sergeant Ryburn and Officer Zepeda permission to enter.

Upon entering the house, the officers remained in the living room with Mrs. Huff and Vincent. Eventually, Vincent's father entered the room and challenged the officers' authority to be there. The officers remained inside the house for a total of 5 to 10 minutes.

During that time, the officers talked to Mr. Huff and Vincent. They did not conduct any search of Mr. Huff, Mrs. Huff, or Vincent, or any of their property. The officers ultimately concluded that the rumor about Vincent was false, and they reported their conclusion to the school.

The Huffs brought this action against the officers under Rev. Stat. §1979, 42 U. S. C. §1983. The complaint alleges that the officers violated the Huffs' Fourth Amendment rights by entering their home without a warrant.

With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent.

But we have instructed that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of

reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, (1989).

Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners’ belief that entry was necessary to avoid injury to themselves or others was imminently reasonable.

In sum, reasonable police officers in petitioners’ position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court.

The petition for certiorari is granted, the judgment of the Ninth Circuit is reversed, and the case is remanded for the entry of judgment in favor of petitioners. *It is so ordered.*

G. CHECK POINTS

STATE v. VICKERY (Ct. App. Op. No. 5025) (Decided August 22, 2012) *Pending Rehearing*

Facts

Sometime between 9 p.m. April 25, 2009 and 3 a.m. April 26, 2009, officers with the Greenwood Police Department conducted a license checkpoint at the intersection of New Market Street and Milwee Avenue in Greenwood, South Carolina. That checkpoint location was chosen due to citizen complaints about speeding and loud music; locations of incident reports, traffic tickets and statistics. During the checkpoint, while detaining Randy Jason Vickery for suspicion of driving under the influence, officers spotted methamphetamines and drug paraphernalia in his vehicle and arrested him. That same night, the Greenwood Police Department conducted three other checkpoints in the same vicinity from 9 p.m. until 3 a.m. The four checkpoints produced a total of fifty-six violations, including forty-eight traffic cases and eight criminal cases.

Vickery was indicted for possession of methamphetamine with intent to distribute and possession of methamphetamine with intent to distribute within proximity of a school.

Procedural History

At trial, Vickery made a motion to suppress the evidence discovered as a result of the stop, challenging the stop’s constitutionality, arguing it violated the Fourth Amendment. Vickery argued the State had not laid the proper foundation to establish the checkpoint’s constitutionality, and that the State must present empirical data gathered **prior** to the checkpoint to justify setting up the checkpoint. The trial court found the roadblock did violate his Fourth Amendment rights because “the State provided insufficient empirical data to support the effectiveness of the roadblock in question. Without sufficient empirical data to justify the implementation of the roadblock and without sufficient data derived from conducting this roadblock, the Court is unable to do the necessary comparison analysis to determine the effectiveness of this roadblock as required under Brown v. Texas, 443 U.S. 47 (1979).”

The trial court granted Vickery’s motion to suppress and suppressed all drugs and drug paraphernalia located in Vickery’s vehicle and on his person, as well as all statements made, observations of his behavior, and recordings. This appeal followed.

Issue

Whether the trial court erred in suppressing the stop by finding the State failed to produce sufficient empirical data to justify the effectiveness of the checkpoint.

Analysis

The court used a three part balancing test from Brown v. Texas, 443 U.S. 47(1979) to determine the Constitutionality of a checkpoint: (1) the gravity of the public interest served by the seizure; (2) the degree to which the seizure serves the public interest; and (3) the severity of the interference with individual liberty.

The court found that the cases on point do not require the State to present pre-existing empirical data to justify setting up the checkpoint. The case law does require some basis for the location of the checkpoint.

The court reasoned that the purpose of the empirical data on the effectiveness is to be able to assess the degree to which the checkpoint satisfies the gravity of the public interest involved, the degree to which the checkpoint serves the public interest and the severity of the interference with individual liberty.

Holding

By showing the stops resulted in a total of forty-eight traffic violations and eight criminal cases including two drug arrests, the State met its burden under the second prong of Brown and the trial court erred in determining the State had to put up more evidence to show the checkpoint's effectiveness.

III. SUMMARY

This handout addresses issues across a wide spectrum of legal issues. The cases are summarized to offer the officer a shorter if not easier version for study.

BIBLIOGRAPHY

LESSON PLAN TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Legal Update 2012-2013 (January)	I0280	New

1. Selected case law from the United States Supreme Court.
2. Selected case law from the South Carolina Court of Appeals.
3. Selected case law from the South Carolina Supreme Court.
4. Selected case law from the Fourth Circuit United States Court of Appeals.