**Summaries of Recent Court Decisions of Interest to Law Enforcement Officers**

**United States Supreme Court**
**First Circuit Court of Appeals**
**Maine Supreme Judicial Court**

# 2013 CASE LAW UPDATE

**SEPTEMBER 2012 – AUGUST 2013**

**Maine Criminal Justice Academy**
**Maine Chiefs of Police Association**
**Maine Office of the Attorney General**

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This publication and the 2013 New Law Update constitute the training outline of the Maine Criminal Justice Academy for recertification training in law updates for the year 2013.

# Preparers' Note

The preparers of this document reviewed the published decisions of the United States Supreme Court, the First Circuit Court of Appeals, and the Maine Supreme Judicial Court for the period September 2012 through August 2013, and selected cases believed to be of general interest to Maine law enforcement officers. This document is not a listing of all decisions of the three appellate courts.

In the interest of clarity and brevity, the 18 selected decisions have been summarized. These include five U.S. Supreme Court cases, nine First Circuit Court of Appeals cases, and four Maine Supreme Judicial Court cases. The summaries are those of the preparers, and do not represent legal opinions of the Office of the Attorney General or interpretations of the Maine Criminal Justice Academy or the Maine Chiefs of Police Association.

If a particular decision is of interest to the reader, an Internet link is provided so that the reader can review the entire text of the decision. This is highly recommended for a more comprehensive understanding, and particularly before taking any enforcement or other action.

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Questions, suggestions, or other comments?

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# United States Supreme Court

*Fourth Amendment – Detention during Execution of Search Warrant*

## Right to Detain Limited to Immediate Vicinity of Premises Searched

*The rule in Michigan v. Summers (1982) that officers executing a search warrant are permitted to detain the occupants of the premises while a proper search is conducted is limited to the immediate vicinity of the premises to be searched.*

While police were preparing to execute a search warrant for a basement apartment, detectives in an unmarked car outside the apartment saw two men, later identified as Bailey and Middleton, leave the gated area above the apartment, get into a car, and drive away. The detectives followed for about a mile, then stopped the car. They found keys during a pat-down search of Bailey, who said that he resided in the apartment. He later denied it when informed of the search. The men were handcuffed and driven to the apartment, where the search team had found a gun and illicit drugs. One of Bailey's keys unlocked the apartment. The trial court denied Bailey's motion to suppress the key and statement, holding that Bailey's detention was justified under *Michigan v. Summers* as a detention incident to execution of a search warrant, and, in the alternative, that the detention was supported by reasonable suspicion under *Terry*. Bailey was convicted. The Second Circuit affirmed, without ruling on the Terry claim. The U.S. Supreme Court reversed and remanded for determination of whether *Terry* justified the detention. The Court said that the rule in *Summers*, permitting detention even if there is no particular suspicion that an individual is involved in criminal activity or poses a specific danger to officers, is limited to the immediate vicinity of the premises to be searched. None of the law enforcement interests identified in *Summers* (e.g., officer safety, facilitating orderly completion of the search, preventing flight) applies with similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched.

*Bailey v. United States (February 19, 2013)*
*http://www.supremecourt.gov/opinions/12pdf/11-770_j4ek.pdf*

*Fourth Amendment – Probable Cause – Dog Sniff*

## Dog Sniff Can Establish Probable Cause if Dog is Reliable

*When the police provide evidence of a drug-sniffing dog's satisfactory performance in a certification or training program, the dog's alert can provide probable cause to search a vehicle.*

Officer Wheetley pulled Harris over for a routine traffic stop. Wheetley sought consent to search Harris's truck, based on Harris's nervousness and seeing an open beer can. When Harris refused, Wheetley executed a sniff test with his trained narcotics dog, Aldo, who alerted at the driver's side door, leading Wheetley to conclude that he had probable cause to search. The search turned up nothing Aldo was trained to detect, but did reveal ingredients for manufacturing methamphetamine. The trial court denied a motion to suppress. The Florida Supreme Court reversed, holding that if an officer failed to keep records of field performance, including how many times a dog falsely alerted, an officer could never have probable cause to think the dog a reliable indicator of drugs. The U.S. Supreme Court, in a unanimous decision, reversed. The Court noted that training and testing records supported Aldo's reliability in detecting drugs, so Wheetley had probable cause to search. Whether an officer has probable cause depends on the

totality of the circumstances, not rigid rules, bright-line tests, and mechanistic inquiries. Requiring the state to introduce comprehensive documentation of a dog's prior hits and misses in the field is the antithesis of a totality-of-the-circumstances approach. Field records may sometimes be relevant, but the court should evaluate all the evidence, and should not prescribe an inflexible set of requirements.

*Florida v. Harris (February 19, 2013)*
*http://www.supremecourt.gov/opinions/12pdf/11-817_5if6.pdf*

*Fourth Amendment – Search Requires Probable Cause*

## Dog Sniff Outside House is a Search Requiring Probable Cause

*A dog sniff at the front door of a house where the police suspected drugs were being grown constituted a search for purposes of the Fourth Amendment.*

After an anonymous tip that Jardines was growing marijuana in his home, police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. The officers then obtained a warrant for a search. Jardines was charged with trafficking in cannabis. The trial court suppressed the evidence and the Supreme Court of Florida affirmed, as did the U.S. Supreme Court. The investigation of Jardines' home was a search within the meaning of the Fourth Amendment. When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has "undoubtedly occurred." The right of a person to retreat into his or her own home and there be free from unreasonable governmental intrusion is the "very core" of the Fourth Amendment. The curtilage—that area immediately surrounding and associated with the home—is part of the home itself for Fourth Amendment purposes. The front porch is the classic example of an area to which the activity of home life extends. The officers' entry was not explicitly or implicitly invited. A police officer without a warrant may approach a home in hopes of speaking to occupants, because that is "no more than any private citizen might do" but the scope of such a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search.

*Florida v. Jardines (March 26, 2013)*
*http://www.supremecourt.gov/opinions/12pdf/11-564_5426.pdf*

*Fourth Amendment – Exigent Circumstances – OUI Blood Draws*

## If No Exigency or Consent, Warrant Needed for OUI Blood Draws

*In OUI investigations, the natural dissipation of alcohol in the bloodstream does not constitute in and of itself an exigency in every case sufficient to justify conducting a blood test without a warrant or consent.*

McNeely was arrested for drunk driving. After he refused breathalyzer and blood tests, Officer Winder, acting without a warrant, directed hospital personnel to remove blood from McNeely. McNeely asserted that this action violated his Fourth Amendment right to be free from unreasonable searches and seizures. The State of Missouri responded that the officer's action was constitutional because it fell into the "exigent circumstances" exception to the Fourth Amendment's warrant requirement because the blood evidence was likely to be destroyed during the time it would take to obtain a warrant. However, the U.S. Supreme Court ruled that the

natural dissipation of alcohol in the bloodstream does not in and of itself constitute an exigency in every case sufficient to justify conducting a blood test without a warrant or consent. The Court did, though, suggest that circumstances may make obtaining a warrant impractical such that the alcohol's dissipation would support an exigency, but that is a reason to decide each case on its facts and not accept the "considerable overgeneralization" that a *per se* rule would reflect.

*Missouri v. McNeely (April 17, 2013)*
*http://www.supremecourt.gov/opinions/12pdf/11-1425_cb8e.pdf*

*Fifth Amendment – Voluntariness – Noncustodial Questioning*

## Suspect's Silence during Questioning OK as Evidence of Guilt at Trial

*The prosecution's use of the suspect's silence in response to a question as evidence of his guilt at trial did not violate the Fifth Amendment because the suspect had failed to expressly invoke his privilege not to incriminate himself in response to the officer's question.*

Without being placed in custody or receiving Miranda warnings, the defendant voluntarily answered questions about a murder. He fell silent when asked whether ballistics testing would match his shotgun to casings found at the murder scene. At trial in Texas state court, the prosecution used his failure to answer as evidence of guilt. Defendant was convicted and state courts of appeals affirmed. The U.S. Supreme Court affirmed, reasoning that the defendant did not expressly invoke the Fifth Amendment privilege in response to the question. This case did not involve an individual who was being held against his will by police officers. The individual, Salinas, had voluntarily gone to a police station when officers asked him to accompany them to talk about the murder of two men. In that situation, he was not entitled to *Miranda* warnings. He answered most of the officers' questions, but simply remained silent when they asked him whether shotgun casings found at the scene of the murders would match his gun. He shifted his feet, and otherwise acted nervously, but did not say anything. Later, at his trial, prosecutors told jurors that his silence in the face of that question showed that he was guilty, that he knew that the shotgun used to kill the victims was his.

*Note: While this case may be of more significance to prosecutors than law enforcement officers, it points out the need to accurately and completely document the silence of suspects to certain questions during an interview.*

*Salinas v. Texas (June 17, 2013)*
*http://www.supremecourt.gov/opinions/12pdf/12-246_7l48.pdf*

# First Circuit Court of Appeals

*Fifth Amendment – Miranda* *Fourth Amendment – De facto Arrest*

## ***Terry*** **Stop not** ***De facto*** **Arrest –** ***Miranda*** **Warnings not Required**

*It would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. Gun pointing, handcuffing, and frisking do not necessarily transform a stop based on reasonable suspicion into a de facto arrest that requires probable cause.*

Anthony Rabbia was indicted on two counts of being a felon in possession of firearms and ammunition. The trial court denied his motion to suppress the ammunition, as well as inculpatory statements he made in connection with his arrest. Rabbia appealed to the First Circuit arguing that the officers did not possess sufficient reasonable suspicion of criminal activity to detain him, and even if reasonable suspicion was present, the officers' actions amounted to a *de facto* arrest and his statements that were made prior to *Miranda* warnings should be suppressed.

The rule regarding investigative detentions is that a police officer is permitted to make a brief investigatory stop, commonly known as a *Terry* stop, based on reasonable suspicion of a violation of law. In this case, (1) the officers were in an area known for illegal drug activity, (2) the officers observed an apparent commercial transaction at 11:00 p.m. in a parking lot behind a known drug house, (3) the officers heard one man say to another "I already gave you $70…don't let me down," (4) the officer observed one of the men (Bleau) leave and Rabbia drive into the parking lot, pick up another man, and drop him off a few minutes later, and (5) the officers observed Bleau remove a bag from Rabbia's trunk, which appeared to complete the transaction.

Where an investigatory stop is justified at its inception, it will generally not turn into an arrest as long as the actions undertaken by the officers following the stop were reasonably responsive to the circumstances justifying the stop. The intrusiveness of the measures taken to accomplish a stop is only part of the equation. The court said that when officer safety is a legitimate concern, security measures (e.g., gun pointing, handcuffing, frisking) can be employed, even in combination, without exceeding the constitutional limits of a *Terry* stop. The relevant facts of this case provided the officer with a good reason to fear that Rabbia was armed and dangerous, and it was reasonable for the officer to neutralize the risk of harm by drawing his weapon, applying handcuffs, and conducting a pat-frisk. The court also found it significant that the officer told Rabbia he was not under arrest and would be un-handcuffed when back-up arrived. The use of guns and handcuffing in this case, while intrusive, was both proportional to the occasion and brief in duration. As such, the stop was not transformed into a *de facto* arrest and no Fifth Amendment (*Miranda*) violation occurred.

*U.S. v. Rabbia (November 8, 2012)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-1510P-01A.pdf*

*Fourth Amendment – Private Search – Government Agent*

## Search by Private Party does not Implicate Fourth Amendment

*Yahoo voluntarily searched the accounts for its own interests and without direction by the government; it did not act as a government agent. A private party has not acted as an agent of the government simply because the government has a stake in the outcome of a search.*

Yahoo, Inc., received an anonymous report that child pornography images were contained in a particular Yahoo photo account. Yahoo personnel searched the account and discovered images they believed to be child pornography. As part of its internal process after discovering child pornography, Yahoo created a child pornography (CP) report and sent a copy to the National Center for Missing and Exploited Children. Based on the Yahoo CP Report, the National Center for Missing and Exploited Children created and sent a CyberTipline Report to the Maine State Police. The Maine State Police eventually obtained a warrant to search Cameron's residence and seize his computers. Cameron argued that Yahoo's search for child pornography in his account violated the Fourth Amendment because Yahoo had acted as an agent of the government. The court disagreed. The Fourth Amendment does not apply to searches and seizures, even unreasonable ones, conducted by private individuals who are not acting as agents of the government. Here, there was no evidence that the government had any role in initiating or participating in the initial search. Yahoo began searching Cameron's accounts after it received an anonymous tip concerning child pornography in one of the Yahoo photo albums registered to him. The Yahoo employees conducted their search pursuant to Yahoo's own internal policy and there was no evidence that the government compelled Yahoo to maintain such a policy. Even though Yahoo had a duty under federal law to report child pornography to the National Center for Missing and Exploited Children, the court noted that the statute did not impose any obligation to search for child pornography; it only required Yahoo to report any child pornography it discovered.

A private search only implicates the Fourth Amendment if the private party acts as a "government agent." In determining whether a private party has acted as a government agent, courts must consider three factors: (1) the extent of the government's role in instigating or participating in the search, (2) the government's intent and the degree of control it exercises over the search and the private party, and (3) the extent to which the private party aims primarily to help the government or to serve its own interests.
Yahoo did not act as a government agent.

*U.S. v. Cameron (November 14, 2012)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-1275P-01A.pdf*

*Fourth Amendment – Anonymous Tip – Reasonable Suspicion – De facto Arrest*

## Vehicle Stop was Justified; Safety Concerns Justified "Felony Stop"

*The police had reasonable suspicion to stop the vehicle, and the manner in which the agents conducted the stop was reasonable in light of their legitimate safety concerns and, therefore, the stop did not escalate into a de facto arrest.*

A DEA Task Force agent received an anonymous call from an individual who claimed to have used cocaine and to have purchased it recently at a house located at 31 Saugus Street in Portland, Maine. In the course of the call, the individual stated that a red and black Saab or Audi located

at that address was associated with drug sales, that five individuals were at the address (Maria Strong and four males from Massachusetts), that two of the males were armed with handguns, and that the four men used the house to store drugs and money. According to the caller, he had seen about one ounce of crack cocaine while in the house, and a silver car parked on an adjacent street contained a large quantity of cocaine base. While agents observed the location, a male left the house, went to the silver Toyota, and drove the short distance back to 31 Saugus Street where three other males got into the car and drove off. When the vehicle pulled into a gas station, it was surrounded by four law enforcement vehicles. The five occupants in the car were detained and Anthony Jones was arrested.

*Reasonable Suspicion to Support Vehicle Stop*
Jones first argued on appeal that the stop of the vehicle in which he was riding was not supported by reasonable suspicion of a violation of law. The court said that to support a determination of reasonable suspicion, an anonymous tip must "be reliable in its assertion of illegality." The anonymous tip provided information about illegal activity that was taking place at the house in question and further stated the basis for that knowledge—the caller reported having purchased contraband drugs at the home. The caller also stated a specific connection between the occupants of the house and the silver Toyota parked in the area. The informant stated that the vehicle was owned by an occupant of the house and was used to store drugs. This information would not be available to the casual third-party observer.

The agents set out to corroborate the information. They independently verified, through motor vehicle records, the location of the home and that Maria Strong lived at that address. Agents also observed the location, and they also developed additional information connecting the silver car described by the anonymous source with an individual associated with a man arrested two weeks before for distributing drugs out of a motel room. The agents were able to verify that a connection existed between the house at 31 Saugus Street and the silver Toyota, and that the house and the car were occupied and owned by individuals earlier implicated in the very illegal activity that the informant had described as taking place in the house. This information would permit a reasonable drug enforcement agent to suspect, in light of his experience, that criminal activity was underway and that further inquiry of those suspected was required. Under these circumstances, the agents were permitted to stop the silver Toyota.

*De Facto Arrest*
Jones also argued that the seizure was a *de facto* arrest because the agents' conduct (in making a "felony stop") exceeded the scope necessary to conduct an investigatory stop and, therefore, had to be based on probable cause, not reasonable suspicion. The court determined that based on the information received from the anonymous source and the nature of the alleged criminal activity it was reasonable for the DEA agents to believe that the stop was a "high risk" operation involving armed drug traffickers. Cases make clear that officer safety is paramount and, when reasonably necessary based on information available to law enforcement, police officers may use multiple vehicles, multiple officers, handcuffs, and drawn weapons without turning a Terry stop into a *de facto* arrest.

*U.S. v. Jones (December 5, 2012)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-1764P-01A.pdf*

*Fourth Amendment–Emergency Doctrine* *Fifth Amendment–Custodial Interrogation*

## Warrantless Entry into Home Justified; No Violation of Miranda

*The firefighters' warrantless entry into Infante's residence and their search of his cellar fell within the emergency exception to the warrant requirement. Based on the circumstances surrounding the questioning, a reasonable person would have felt free to terminate the interviews and ask the officers to leave.*

Infante placed a 911 call and requested an ambulance. He explained that he had just severed the tip of his finger and lacerated the side of his hand when a propane tank exploded. Approximately ten minutes after his initial call, Infante called 911 again to report that he was driving himself to a hospital. Firefighter-paramedics intercepted Infante as they were driving to his residence. Infante told the firefighter-paramedics that he was fueling a butane lighter and he was injured when it exploded. Infante also stated that the explosion occurred inside his house, although he was vague about the location of the explosion. Once his injuries were bandaged, Infante drove himself to the hospital.

Other firefighters responding to the 911 call went directly to Infante's residence. The firefighters checked outside the residence and found no sign of a fire or an explosion. They learned from the firefighter-paramedics who assisted Infante on the road that the explosion had occurred inside the residence. When the firefighters looked into the house through a window, they observed a blood trail in a hallway between two doorways. They also heard a hissing sound like the sound of running water. The decision was made to enter the house to search for the source of the explosion to make sure there were no other hazards to the homeowner if he were to return from the hospital or to the public in the immediate area. Inside the house firefighters discovered marijuana plants and pipe bombs.

Infante moved to suppress the evidence seized from his home, claiming that it was discovered pursuant to a search that violated his Fourth Amendment rights.

*Warrantless Entry and Search*

Usually a Fourth Amendment challenge involves actions of law enforcement officers. However, the court said that the protection against unreasonable searches and seizures does not wane "simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime." Nevertheless, warrantless entry is justified when there is reasonable belief that swift action is required to safeguard life or prevent serious harm. The burden is on the government to show a reasonable basis, approximating probable cause, both for the government official's belief (the firefighter) in the existence of an emergency and for associating the perceived emergency with the area or place to be searched. The facts known to the firefighters provided a reasonable basis to believe that there was an emergency inside the house, which justified their entry. The marijuana plants and pipe bombs were discovered in plain view.

*Custodial Interrogation*

Infante also argued that his interviews by law enforcement in the hospital amounted to custodial interrogation and the officers failed to advise him of his *Miranda* rights, and that the interrogation should have ceased once he invoked his rights to remain silent and to have counsel present. During both interviews at the hospital, Infante was told several times that the interviews were voluntary, that he did not have to talk, and was not under arrest or in custody. The officers

who were present did not make physical contact with Infante, nor did they impede hospital personnel from coming and going freely. The interviews were relatively short, the officers were in plainclothes and their weapons remained in their holsters. The atmosphere during the interviews was non-confrontational, and Infante was coherent and responsive, showing no sign of mental impairment.

The court found based on the circumstances surrounding the questioning, that a reasonable person in Infante's position would have felt free to terminate the interviews and ask the officers to leave. Infante was not in custody; therefore, the officers were not obligated to respect his attempted invocation of his rights under *Miranda*. The courts have never held that a person can invoke his *Miranda* rights anticipatorily or in a context other than custodial interrogation.

*U.S. v. Infante (December 11, 2012)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-2156P-01A.pdf*

*Fourth Amendment – Warrantless GPS Tracker Pre-Jones – Good Faith Exception*

## Warrantless Installation of GPS Tracker Lawful Prior to *Jones*

*The good faith exception is properly applied in cases like this one where new developments in the law have upended the settled rules on which the police relied.*

In 2009, federal agents, acting without a warrant, placed a global positioning system (GPS) tracker on a car used by Sparks. The agents used the tracker to locate the car at the scene of a bank robbery and then to chase down the car on the highway after it fled. A search of the car revealed evidence tying Sparks and Michaud to the bank robbery, leading to their indictment. Sparks and Michaud appealed the district court's denial of their motion to suppress, arguing that under the Supreme Court's recent decision in *United States v. Jones* (2012), the agents' use of the GPS tracker was a Fourth Amendment "search" that required a warrant. At the time of the GPS surveillance in this case, binding case law authorized the agents' conduct. That binding case law changed when the Supreme Court decided *Jones* in 2012, which held that the Government's installation of a GPS device on a target's vehicle constituted a trespass and thus violated the Fourth Amendment. The good faith exception is, however, properly applied in cases like this one where new developments in the law have upended the settled rules on which the police relied. In this case, the First Circuit determined that suppression would be inappropriate because the agents' attachment and monitoring of the GPS tracker was authorized by settled, binding circuit precedent.

*U.S. v. Sparks & Michaud (March 26, 2013)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-1134P-01A.pdf*

*Fifth Amendment – Garrity – Coerced Statements*

## Statements Voluntary; No *Garrity* Immunization

*Garrity immunity is contingent upon the degree of certainty that an employee's silence alone will subject the employee to severe employment sanctions. Nothing that the investigator said or presented could have led the suspect to believe that he would automatically lose his job or suffer similarly severe employment consequences solely for having remained silent.*

In 2009, Bond, a criminal investigator for the Office of the Inspector General, interviewed Palmquist who worked as a civilian employee with the U.S. Department of Veterans Affairs. The interview took place in Palmquist's office at the Togus VA Hospital. Bond introduced himself to Palmquist and showed Palmquist his badge. Bond told Palmquist that the interview was voluntary, and that Palmquist could not be punished for refusing to answer questions during the interview. Bond also presented Palmquist with an advisement of rights form, which is similar in content to *Miranda* warnings. Palmquist was convicted of fraud in connection with his own receipt of veteran's benefits. He challenged his conviction on grounds that the statements he made during the interview with Bond should have been suppressed because they were induced through coercion when, by his claim, he was given a choice between loss of his job or surrender of his right to remain silent under the Fifth Amendment.

In *Garrity v. New Jersey* (1967), the Supreme Court prevented government entities from using the threat of discharge to secure incriminatory evidence against an employee. When an employee faces the choice between self-incrimination and job forfeiture, his statements are deemed categorically coerced, involuntary, and inadmissible in subsequent criminal proceedings. However, not every possible threat of adverse employment action triggers immunity under *Garrity*. Palmquist's interview was, by all accounts, calm and cordial. Nothing that Bond said or presented to Palmquist could have led Palmquist to believe that if he remained silent, he would automatically lose his job or suffer similarly severe employment consequences solely for having remained silent. Accordingly, the First Circuit Court decided that the district court properly denied the motion to suppress.

*U.S. v. Palmquist (April 11, 2013)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-2371P-01A.pdf*

*Fourth Amendment – Terry Stop – Reasonable Suspicion of Violation of Law*

## Detention Lacked Reasonable Suspicion of Violation of law

*Defendant's encounter with law enforcement officers was at first consensual, but by the time it became a Terry stop, the officers lacked reasonable suspicion to permit the detention.*

On Friday, March 9, 2012, two Portland police officers were on bicycle patrol near Monument Square at about 2:39 a.m. The officers were patrolling the downtown area because there had been recent burglaries of businesses and graffiti incidents in that area. The officers saw Dapolito standing alone in an alcove at 18 Monument Square. The officers did not recognize Dapolito and he appeared intoxicated or otherwise impaired. The officers asked Dapolito for identification. Dapolito told the officers that he did not have any identification on his person but voluntarily provided his name, his middle initial, his correct date of birth, that he had a Massachusetts driver's license, and that he was from Saugus. The officers also asked Dapolito what he was doing at 18 Monument Square and he stated that he lived at 18 Monument Square and that he was waiting for some friends. Dapolito stated that he did not have a key to the condominiums, and he could not provide the phone numbers of his roommates because his cell phone battery was dead. Dapolito spelled his name twice for the officers but no corresponding record was found. The officers asked Dapolito if they could pat him down for identification and Dapolito refused, saying that he was not comfortable being touched. When one of the officers asked Dapolito what he had in his pocket, Dapolito took a government-issued Massachusetts EBT card that had his name on it out of his pocket and provided it to the police officer. At this

point, a third police officer driving a cruiser joined the two bicycle patrol officers. By the time the third officer arrived, the encounter with Dapolito had lasted at least 20 minutes.

Now facing three officers, Dapolito was told that he was being deceitful, that he was going to be detained, and brought to the county jail. Dapolito was told to place his hands on his head, and when Dapolito did not initially comply with the order one of the officers drew his Taser and directed the red dot to Dapolito's chest. In response, Dapolito placed his hands on his head, which caused his shirt and jacket to lift revealing a handgun in his waistband. Dapolito was taken to the county jail where it was determined that he was a convicted felon.

Dapolito moved to suppress the gun, claiming that the search that resulted in the discovery of the gun derived from an unlawful seizure in violation of the Fourth Amendment. The motion to suppress was granted by the trial court and the government appealed to the First Circuit. In such cases, the Appeals Court is required to afford "due deference" to the trial court and reverse only if there is clear error.

The court determined that what began as a consensual encounter became a *Terry* stop either by the time Dapolito had produced the EBT card containing the name he had already provided or when he was told that he would be taken to the county jail. During the consensual encounter, Dapolito readily offered his name, his date of birth, that he was from Massachusetts, and when asked, gave the officers the EBT card. When the officers wanted to talk to him, he responded—behavior that does not fit the pattern of someone trying to avoid police attention either because of criminal activity or because the person is wanted on a warrant. The officers testified that they detained Dapolito in order to discover his identity because they believed he could possibly be a burglar or a wanted person using a false name to evade capture. The officers also testified that the pat down was initiated for officer safety reasons. However, the officer's report never mentioned officer safety as a factor in conducting the pat down, only the need to find identification. The officers also testified that they had no information about any recent burglaries or criminal activity at 18 Monument Square and they saw no evidence that Dapolito was or had been involved in a burglary, and he did not appear to have any of a burglar's usual tools. While it was certainly reasonable for the officers to approach Dapolito and engage him in a consensual encounter, the police lacked reasonable suspicion to justify the detention because the totality of the circumstances did not provide a particular and objective basis to suspect that Dapolito was engaged in a burglary, wanted on an outstanding warrant, or otherwise involved in criminal activity.

*U.S. v. Dapolito (April 11, 2013)*
*http://media.ca1.uscourts.gov/pdf.opinions/12-2023P-01A.pdf*

*Fourth Amendment – Searches Incident to Arrest*

## Searching Cell Phones Incident to Arrest is Unlawful—For Now

*In the absence of consent, or an exigency and probable cause, e.g., officer safety or preventing destruction of evidence, warrantless cell phone data searches are categorically unlawful under the search-incident-to-arrest exception.*

In May 2013, the First Circuit Court of Appeals vacated Wurie's convictions after ruling on his appeal that the police had no authority to search his cell phone incident to his arrest. The police, after seizing a cell phone from Wurie as part of his lawful arrest, searched the phone's data

without a warrant. Based on information obtained from the cell phone, Wurie was charged with drug crimes and being a felon in possession of a firearm and ammunition. Wurie unsuccessfully filed a motion to suppress the evidence obtained as a result of the warrantless search of his phone, and the trial court subsequently convicted Wurie as charged. The First Circuit Court reversed the denial of his motion to suppress and vacated his conviction, holding that (1) the search exceeded the boundaries of the Fourth Amendment search-incident-to-arrest exception and, (2) the government did not argue that the search was justified by any other exception to the warrant requirement.

Other Circuit Courts of Appeal have ruled differently. For example, in 2012, the Seventh Circuit determined that a search of a cell phone in possession of an arrestee is lawful without a warrant for the slightly invasive purpose of obtaining the cell phone's number. However, the First Circuit rejected that premise in *Wurie.* The First Circuit saw the need to establish a bright line rule that would apply to all warrantless cell phone searches, rather than resolving cases based solely on the particular circumstances of the search at issue. Accordingly, in the absence of consent, or an exigency and probable cause, e.g., officer safety or preventing destruction of evidence, the First Circuit said that warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception.

*Fast forward two months later.* On July 29, 2013, the First Circuit Court issued an order on a petition for rehearing *en banc*[1] that the petition be denied. However, at least two of the judges, including the chief judge, issued a request that the issue of searching cell phones incident to an arrest (without a warrant and in the absence of probable cause) be taken up by the U.S. Supreme Court. The Chief Judge wrote:

> I vote to deny rehearing *en banc* not because the case does not meet the criteria for *en banc* review. It clearly does. Indeed, the issues are very important and very complex. I vote to deny rehearing *en banc* because I think the preferable course is to speed this case to the Supreme Court for its consideration. There are two very able opinions from this court, and *en banc* review in this Court could not improve on their presentations of the issues. The decision in this case creates a circuit split with respect to the validity of warrantless searches of cell phones incident to arrest. State courts similarly are divided. As the government points out, the differing standards which the courts have developed provide confusing and often contradictory guidance to law enforcement. Indeed, the highest court in the state in which this case arose [Massachusetts] has taken a view of the law that is contrary to the decision in this case, leaving the police in need of further guidance. Only the Supreme Court can finally resolve these issues, and I hope it will.

*U.S. v. Wurie (May 17, 2013, & July 29, 2013))*
*http://media.ca1.uscourts.gov/pdf.opinions/11-1792P-01A.pdf*
*http://media.ca1.uscourts.gov/pdf.opinions/11-1792O-01A.pdf*

[1] In a court of appeals, an appeal is almost always heard by a "panel" of three judges who are randomly selected from the available judges (including senior judges and judges temporarily assigned to the circuit). Some cases, however, receive an *en banc* hearing, which consists of all of the circuit judges who are on active status

*Fourth Amendment – Investigative Detention*

## Investigative Detention and Frisk Reasonable in Scope and Duration

*The Terry stop was lawful, the duration of the stop was not unnecessarily prolonged, and the officer had a reasonable suspicion that the suspect might be armed and dangerous, thus justifying the frisk.*

On March 11, 2010, at approximately 12:30 p.m., an individual called 911 to report an assault. The caller reported that he saw a man beating up his girlfriend or his wife, adding that the man was "giving it to her pretty good." The caller also provided descriptions of the man and the woman. When the officers arrived at the corner of Belmont and Ferry Streets they found a man and a woman who fit the descriptions given by the 911 caller. The man was later identified as Mouscardy. Both Mouscardy and the woman told the officer that nothing had happened and that there had been no assault. When the officers asked Mouscardy for his name or any form of identification, Mouscardy refused to comply, simply repeating that nothing had happened. Mouscardy grew visibly "agitated and fidgety" during his interaction with the police. He kept his hand in his jacket pocket and began moving toward the street. In response to Mouscardy's actions and demeanor, one of the officers informed Mouscardy that he was going to search him for weapons. The officer asked him to take his hand out of his jacket pocket. Mouscardy did not comply and fled with the officers in pursuit. During the chase, one of the officers saw Mouscardy take a small handgun out of his pocket. Eventually, Mouscardy was trapped and after several commands from police to drop the gun, he placed the pistol on top of a green plastic container. Mouscardy was charged with being a felon in possession of a firearm. Mouscardy moved to suppress the firearm, arguing that it was obtained through an illegal search and seizure in violation of the Fourth Amendment. The trial court denied the motion and Mouscardy appealed to the First Circuit.

*Reasonable Suspicion.* The Appeals Court determined that the stop was reasonable at its inception. The officers were responding to a "possible domestic assault in progress" when they found Mouscardy and the woman. Mouscardy and the woman fit the descriptions provided by the 911 caller; they were at the location that the caller had provided no more than a few minutes after the 911 call. These facts were sufficient to establish that the officers had an objectively reasonable basis for suspecting wrongdoing on the part of Mouscardy.

*Duration of the Stop.* Mouscardy also challenged the duration of the stop, but the court pointed out that Mouscardy cannot profit from the delay he himself caused, that the duration of the stop was influenced by Mouscardy's unresponsiveness to the officers' reasonable inquiries, and that it was Mouscardy who prevented the officers from completing their investigation more quickly.

*Legality of the Frisk.* The officers were responding to a report of a man beating a woman in the street. When an officer has a reasonable suspicion that a crime of violence has occurred, "the same information that will support an investigatory stop will without more support a frisk." Mouscardy's conduct and disposition during the stop also supported a finding that the frisk was justified. He repeatedly refused to identify himself, and refused to remove his hand from his pocket. His refusal to remove his hand from his pocket was an important factor in supporting the officer's reasonable suspicion that he was armed and dangerous.

*U.S. v. Mouscardy (July 15, 2013)*
*http://media.ca1.uscourts.gov/pdf.opinions/11-2356P-01A.pdf*

# Maine Supreme Judicial Court

*Fifth Amendment – Miranda – Voluntariness*

## Questioning was Noncustodial and Confession was Voluntary

*A reasonable person in Jones's position would have felt free to leave each of the three interrogations. The detectives repeatedly told Jones that he was free to leave, was not under arrest, and did not have to speak to them. The detectives honored his requests to take a break and to leave the room.*

Nicklas Jones and Danielle Fitts brought their daughter, then approximately three months old, to the hospital with serious injuries. As a result of her injuries, the baby died four days later. Detectives from the Maine State Police interrogated Jones on three separate occasions: first at the hospital, then at Jones's apartment, and finally at the Maine State Police barracks in Houlton. Jones eventually confessed to throwing his infant daughter against her crib immediately prior to her hospitalization.

At the hospital, Detective Dale Keegan asked Jones for permission to speak with him. Det. Keegan told Jones not to "panic," and that it was "the rules" in Maine that "[a]ny time a child under five comes into a hospital very ill, we [the police] have to come." Jones agreed to talk to Det. Keegan. In a private room Det. Keegan questioned Jones about his relationship with Fitts and his work and educational background. About 13 minutes into the interrogation, Jones's mother knocked on the door. Det. Keegan told Jones's mother that it was routine for the police to investigate injuries to children under five years old. She responded "absolutely, absolutely" and left the room. (In the meantime, Det. Keegan had learned that Jones was 17, not 18 as originally thought, but Jones did not want his mother with him during the questioning.) Eventually, Det. Keegan asked Jones to tell him what had happened that day. Det. Keegan emphasized that the information was needed to properly treat the baby's injuries. Det. Keegan asked Jones if he had shaken the baby, or if there had been a violent blow. Jones said no. Det. Keegan ended the interrogation after approximately 30 minutes.

Before leaving the hospital, Jones agreed to allow detectives to make a video recording of him reenacting what had happened to the baby in his apartment. In the early hours of the following morning, Det. Keegan and two other plainclothes detectives arrived at the apartment Jones shared with Fitts. Det. Keegan asked Jones's mother if she would wait outside during the reenactment, and she said it was up to Jones. Jones agreed to have his mother wait outside. The detectives set up a video camera, and Jones reenacted his version of the events, which was consistent with his earlier description. The reenactment lasted approximately six minutes, after which one of the detectives left the apartment. Det. Keegan and a second detective remained. The two detectives asked Jones about his relationship with Fitts, his stress level, and his family life. After several minutes, Det. Keegan told Jones that the medical team had determined that the baby's injuries were "non-accidental." Det. Keegan suggested that Jones might have shaken the baby, but Jones maintained that the baby had fallen as he previously described. The detectives told Jones that they did not believe him, but Jones maintained that he was being truthful. The second interrogation, including the reenactment, lasted approximately 78 minutes.

The baby died from her injuries four days after her initial hospitalization. After her death, Det. Keegan contacted Jones and his mother to ask if they could meet to go over the autopsy results. Jones needed to go to Bangor for an unrelated appointment, and he and his mother agreed to stop by the Houlton barracks on the way. At the beginning of the interrogation at the barracks, Det. Keegan told Jones and his mother that they were not required to speak, and that they could leave at any time. Det. Keegan explained that the door to the interview room was closed for privacy but was not locked. There was only one other officer in the room, and Jones's mother was present throughout the interrogation. The detectives began by describing what they had learned from the medical team. The detectives repeatedly told Jones that they did not believe his version of events, and that they believed he had harmed the baby. After approximately 52 minutes, Jones's mother said that they needed some air, and she and Jones left the room. They returned about ten minutes later, and the interrogation continued in the same manner as before. Then, Jones's mother said, "I think we'd like to get an attorney."

Det. Keegan acknowledged the request for an attorney, clarified that Jones was not under arrest, said that he would stop the interrogation, and told Jones that he could come back to talk to them at any time. After several minutes, Jones left the room to sit outside in his mother's car, but his mother agreed to remain to speak with the detectives. Det. Keegan suggested to Jones's mother that she talk to Jones alone, to encourage him to tell the truth, and that they come back in if Jones wanted to talk more. She agreed, went to talk to Jones, and returned alone, emotional and crying. Jones's mother told the detectives that Jones had admitted that he had harmed the baby, and that Jones was hysterical in the car. About ten minutes later, without further prompting, Jones and his mother returned to speak to the detectives. Det. Keegan reiterated that Jones was not under arrest and did not have to speak with them. Jones then admitted that he "threw [the baby] into the crib" and "she hit her head off of the side of the crib." The entire interrogation, including the ten-minute break and the 58 minutes Jones spent outside in his mother's car, lasted approximately three hours.

Jones alleged that because he was subject to custodial interrogations, the police were required to give him *Miranda* warnings and to cease questioning after he requested an attorney. The motion also asserted that Jones's statements to the detectives were not voluntary because the detectives' questioning "did not comport with due process."

Relying on earlier Maine cases, the Maine Supreme Court reiterated that an interrogation is custodial if "a reasonable person standing in the shoes of [the defendant] would have felt he or she was not at liberty to terminate the interrogation and leave." In making this objective determination, a court may consider in their totality a number of factors, including (1) the locale where the defendant made the statements; (2) the party who initiated the contact; (3) the existence or non-existence of probable cause to arrest (to the extent communicated to the defendant); (4) subjective views, beliefs, or intent that the police manifested to the defendant, to the extent they would affect how a reasonable person in the defendant's position would perceive his or her freedom to leave; (5) subjective views or beliefs that the defendant manifested to the police, to the extent the officer's response would affect how a reasonable person in the defendant's position would perceive his or her freedom to leave; (6) the focus of the investigation (as a reasonable person in the defendant's position would perceive it); (7) whether the suspect was questioned in familiar surroundings; (8) the number of law enforcement officers present; (9)

the degree of physical restraint placed upon the suspect, and; (10) the duration and character of the interrogation.

Relying on these factors, the Court determined that none of the three interviews were custodial in nature. Because a reasonable person in Jones's position would have felt free to terminate and leave each of the three interrogations, at no point during those interrogations was Jones in custody within the meaning of *Miranda.* With respect to the voluntariness claim, the Court concluded that Jones's confession was voluntary—even under the standard in Maine that requires proof of voluntariness beyond a reasonable doubt. The interrogations were non-custodial, and during those interrogations, the detectives did not threaten Jones, promise him leniency, or deceive him. Although Jones was a juvenile at the time of the interrogations, he was nearly 18, and his mother was present or available to him for all of the interrogations. During the third and final interrogation, Jones was, at times, highly emotional, but there is no indication that the detectives unreasonably took advantage of his emotions, or that his emotions interfered with his ability to make rational judgments. Jones's conduct also suggests that his statements were voluntary. Over the course of the interrogation, Jones left the room twice to take breaks, for a total of more than an hour, but chose to return both times.

*State v. Jones (November 8, 2012)*
*http://www.courts.state.me.us/opinions_orders/supreme/lawcourt/2012/12me126jo.pdf*

*Fifth Amendment-Custody-Voluntariness* *Fourth Amendment-Fruit of the Poisonous Tree*

## Questioning was Noncustodial; "Miranda-in-the-middle" Unintentional

*Nightingale was not in custody during the first interrogation. Shatzer's 14-day waiting period does not apply. The detectives' actions did not reflect a deliberate strategy to use "Miranda-in-the-middle." The State proved beyond a reasonable doubt that Nightingale's post-warning statements were voluntary in light of the totality of the circumstances. Because Nightingale's post-warning statements were voluntary, there was no error in admitting the physical fruits of those statements.*

Michael and Valerie Miller were shot to death in their home in Webster Plantation on November 28, 2009. At some point in the investigation, it was determined that Nightingale was either the last person or one of the last persons to be at the Millers' home. The police contacted Nightingale to see whether he would be willing to take a polygraph test after Nightingale told the police that a woman came to the Millers' house just as he was leaving. Nightingale agreed and drove himself to the Criminal Investigation Division located at the Dorothea Dix building on Hogan Road in Bangor, arriving at the scheduled time on December 11, 2009.

Maine State Police Supervisor Warren Ferland conducted the polygraph examination. The entire process lasted just over nine hours and was captured on video. At the beginning of the interview, Ferland informed Nightingale that he was not under arrest. Ferland gave Nightingale the *Miranda* warnings as part of a polygraph waiver form. Ferland told Nightingale that the examination could only be administered if it is undertaken voluntarily, that Nightingale was not in custody, and Nightingale had the right to stop the test at any time and leave.

The pre-test interview started at about 10:30 a.m. The actual polygraph data collection started at 12:42 p.m. and lasted until 1:42 p.m. The post-test interview began at 2:20 p.m. after an extended break. At about 3:40 p.m., Ferland was joined by Detective Dale Keegan. They took a

second break at 4:30 p.m. When Nightingale returned, Ferland offered him a drink, which he declined. The third break was at about 6:15 p.m. During the third break, Nightingale was given a sandwich and the questioning resumed at about 7:10 p.m. Ferland testified that he "went over Miranda again" with Nightingale. Again, Nightingale told Ferland and Keegan that he understood his rights and wanted to continue to talk. Ferland testified that just before 7:35 p.m., he told Nightingale that he knew that Nightingale killed Mr. and Mrs. Miller, at which point Nightingale indicated that he should have an attorney. Ferland terminated the interview and Nightingale said that he wanted to talk with some family members and would be back in contact with Keegan the next day.

During the post-test interview, Ferland and Keegan suggested to Nightingale that they potentially had satellite photography of his car at the Millers' home; had DNA test results showing that Nightingale's DNA was on a doorknob and a locking mechanism at the Millers' home, which was significant because it appeared that the last person out had locked the door; had found flakes of Nightingale's skin on the Millers' bodies; and had recovered fingerprint or DNA evidence on money that the detectives told Nightingale they had seized from his father. These were "realistic bluffs," but untrue.

Approximately three hours after the nine-hour interrogation ended, law enforcement received information that Nightingale had confessed to his mother and a friend. Keegan called Nightingale on the telephone because a friend had suggested that Nightingale was suicidal. Nightingale seemed very calm and told Keegan that he would meet with him the next day. Nevertheless, Keegan and Detective Darrin Crane went to and entered Nightingale's residence, which was his mother's home, in order to initiate contact with him again. A third officer remained outside.

Keegan acknowledged that although concern for Nightingale's well-being, based on the report of suicide risk, was the primary reason for contacting Nightingale, a secondary purpose was to talk with Nightingale in light of his confessions to others. Keegan also acknowledged that he was the one to initiate the questioning on the topic of Nightingale's confession to his mother and his friend. After confirming that Nightingale had spoken to his mother and friend, Keegan asked whether Nightingale had told them "that one [killing] was an accident and one was on purpose." Nightingale responded in the affirmative. The State concedes that Nightingale was in custody shortly after the two officers entered his residence and therefore the initial statements were inadmissible.

Keegan then read Nightingale his *Miranda* rights, after which Nightingale made further and more detailed inculpatory statements. At the outset of the post-*Miranda* questioning, Keegan referred back to Nightingale's pre-*Miranda* statements, and got Nightingale to confirm that he had previously said he was "responsible for this" and that "one was an accident and one was on purpose." It is evident in the transcript that Keegan was interrupted by the arrival of Nightingale's mother as he was going over the *Miranda* warnings. He did not obtain an express waiver before getting Nightingale's post-warning confession. He obtained the waiver at the end of the in-home interrogation. After Nightingale confessed, he told the police that he had taken the Millers' safe and some other things to a camp belonging to his mother and stepfather, and he agreed to take the officers there. At the camp, the officers found a safe and a bag with some items in it, all belonging to the Millers.

Nightingale was indicted in December 2009 on two counts of murder. He moved to suppress all statements he made during the polygraph interview, all statements made during the interrogation at his residence, and the physical evidence seized at the camp. Nightingale argued that he was in custody for purposes of *Miranda* during the interrogation at the Criminal Investigation Division, and that Keegan's re-initiation of questioning at Nightingale's home several hours after the first interrogation was a violation of the Shatzer 14-day waiting period. Nightingale further argued that his statements during the second interrogation at his home were unconstitutionally obtained because Keegan employed a two-step interrogation procedure, and because the officers' fabrication of evidence during the first interview rendered his later statements involuntary. Lastly, Nightingale argued that the court should have suppressed the physical evidence found at the camp as the fruit of the alleged constitutional violations.

*Custody.* The trial court did not err in finding that Nightingale was not in custody during the first interrogation. In determining whether a defendant was in custody, "the ultimate inquiry is whether a reasonable person standing in the shoes of [the defendant would] have felt he or she was not at liberty to terminate the interrogation and leave or if there was a restraint on freedom of movement of the degree associated with a formal arrest." The most compelling factor against the notion of custody was that Nightingale terminated the marathon interview after the detectives accused him of committing the killings. He said he wanted to consult with a lawyer. He left because he decided to leave and the police officers let him leave.

*The Shatzer Rule.* In *Shatzer,* the U.S. Supreme Court set a minimum 14-day waiting period between the time a suspect is released from custody and when the police can reinitiate interrogation after the suspect initially invoked his or her right to counsel. However, for this protection to come into play, a suspect must first invoke his or her *Miranda* right to counsel while in custody. The trial court did nor err in concluding that Nightingale was not in custody during the interrogation surrounding the polygraph; *Shatzer's* 14-day waiting period did not apply.

*Two-Step Interrogation, aka "Miranda-in-the-Middle."* Nightingale argued that his post-warning statements at his home should have been suppressed because the police employed a two-step interrogation procedure — that is, Keegan elicited a confession from Nightingale, administered *Miranda,* and then obtained a post-warning confession. The U.S. Supreme Court has previously addressed this "*Miranda*-in-the-middle" situation, finding that there is no presumption of coercion where the suspect's initial inculpatory statement, though technically in violation of *Miranda,* was *voluntary*. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. A suspect who has once responded to unwarned yet uncoercive questioning is not disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings. However, the result is very likely different when an interrogating officer makes a conscious decision to initially withhold *Miranda* warnings, and then give the warnings and ultimately get a suspect to repeat the unwarned statements. The State bears the burden of demonstrating by a preponderance of the evidence that the two-step procedure was not deliberately employed to undermine the efficacy of the *Miranda* warnings. The trial court found that the detectives' actions did not reflect a deliberate strategy to use "*Miranda*-in-the-middle," and the Law Court found no error in that determination.

*Voluntariness.* Nightingale argued that the use of deception by the police during the nine-hour interrogation rendered his in-home, post-warning confession involuntary. The State bears the burden of proving voluntariness beyond a reasonable doubt. To be voluntary, a confession must be the "free choice of a rational mind," "fundamentally fair," and "not a product of coercive police conduct." To determine whether a statement was voluntary, the court assesses the totality of the circumstances, including both external and internal factors, such as: the details of the interrogation; duration of the interrogation; location of the interrogation; whether the interrogation was custodial; the recitation of *Miranda* warnings; the number of officers involved; the persistence of the officers; police trickery; threats, promises or inducements made to the defendant; and the defendant's age, physical and mental health, emotional stability, and conduct. The court noted that it has recognized in the past the practical necessity for the use of deception in criminal investigations. Police trickery may, however, rise to a level where it calls into question the voluntariness of a confession, as where police mislead the individual during an interrogation as to that individual's constitutionally protected right against self-incrimination. A deception that actually compromises a suspect's ability to make a free choice of a rational mind is inherently coercive and fundamentally unfair. In this case, the trial court found with respect to the first interrogation that the detectives' false statements about the evidence did not have any appreciable effect on Nightingale, as he largely deflected their questioning and proceeded through the interrogation undaunted. Accordingly, the Law Court determined that the trial court did not err in concluding that the State proved beyond a reasonable doubt that Nightingale's post-warning statements were voluntary in light of the totality of the circumstances.

*Fruit of the Poisonous Tree.* Finally, Nightingale argued that the physical evidence obtained as a result of his statements should have been suppressed as the fruits of constitutional violations. Because Nightingale's post-warning statements were voluntary, the court did not err in admitting the physical fruits of those statements.

*State v. Nightingale (November 29, 2012)*
*http://www.courts.state.me.us/opinions_orders/supreme/lawcourt/2012/12me132ni.pdf*

*Fifth Amendment – Custodial Interrogation - Voluntariness*

## Questioning was not Custodial, but Confession was Involuntary

*The suspect was not in custody for purposes of Miranda during questioning. However, the suspect's confession was involuntary in that it was motivated by inappropriate offers of leniency by the detective. A confession is voluntary only if it results from the free choice of a rational mind, if it is not a product of coercive police conduct, and if under all of the circumstances its admission would be fundamentally fair.*

On April 15, 2009, Wiley's stepdaughter, then 18 years old, reported to the police that Wiley had sexual contact with her for a period of six months when she was approximately 12 years old. The same day, a detective went to Wiley's residence to discuss the victim's allegations with him. He informed Wiley that he was conducting an investigation in which Wiley's name had come up, but did not disclose the subject matter of the investigation. Wiley agreed to ride with the detective in his unmarked cruiser to the sheriff's office to answer questions. Upon arrival, the detective took Wiley upstairs to an interview room. With Wiley's knowledge, the detective started the video and audio recording machines. The detective informed Wiley that he was not under arrest and was free to leave the interview room at any point. The door was closed, the

detective explained, for their privacy. The detective did not advise Wiley of his *Miranda* rights at any point before or during the interview.

The detective informed Wiley that his investigation was complete, and he knew that Wiley had molested the victim. Wiley denied having had any sexual contact with the victim. Shortly after the interview began, Wiley became extremely emotional and began making statements such as "my life is over now" and "this is my life you're holding." Wiley sobbed at times and eventually slid to the floor of the room in a fetal position. Approximately 40 minutes into the interview, Wiley raised the prospect of being sent to jail, and the detective continued to urge Wiley to describe what he had done. The detective informed Wiley that he had two options: he could "own up" to his mistake and serve "a little bit of jail time" in the county jail followed by probation, thus preserving his relationship with his son, or he could refuse to disclose the sexual contact with the victim and serve a sentence in state prison. The detective further urged Wiley to confess in order to prevent putting his family through a public proceeding.

At one point, Wiley asked the detective, "Do I need a lawyer or anything?" The detective replied, "That's your choice, I can't make that decision for you." Wiley did not address the lawyer issue further or suggest that he wanted to terminate the interview. He made a statement of concern for his family, and the interview continued. Nearly two hours into the interview, Wiley described certain sexual contacts he had with the victim, but would not admit to penile penetration. Because the detective did not believe that Wiley was fully cooperating, he stated that he would terminate the interview. Wiley responded that he was trying to help the detective. The interview continued. Ultimately, Wiley admitted to all of the victim's allegations except penile penetration. At some points, Wiley admitted to or described certain acts with the victim. At other times, when asked about allegations made by the victim he responded with "whatever she says" or similar statements. Wiley was placed under arrest shortly after the conclusion of the interview.

Wiley was convicted of seven counts of Class C unlawful sexual contact and three counts of Class B unlawful sexual contact. He appealed, arguing that the trial court erred in denying his motion to suppress statements he made to the detective because he was not advised of his *Miranda* rights prior to his custodial interrogation and because his statements made prior to and after his arrest were involuntary. Wiley contended that his statements were involuntary because he made the statements while under severe emotional distress, the detective induced his statements by making offers of leniency, and the detective induced his statements with threats of what his family would have to endure if he did not admit to his sexual abuse of the victim. The Law Court determined that Wiley was not in custody for purposes of the *Miranda* requirements.

*Voluntariness.* Approximately 37 minutes into the interrogation, the detective plainly stated his belief that Wiley had sexually abused the victim, and Wiley expressed his fear of jail. In response, the detective introduced the notion that if Wiley cooperated with the detective, Wiley would face only a short county jail sentence and probation. Several minutes later, the detective told Wiley that Wiley was in control of what would happen. The detective further stated that if Wiley was not truthful with him, Wiley would face much harsher consequences. Approximately one hour into the interrogation, the detective returned to the theme of jail versus prison, at which time Wiley crawled onto the floor of the interrogation room and assumed a fetal position. Approximately ten minutes later, Wiley returned to his chair, and the interrogation again turned

to the possibility of a county jail sentence and its connection to Wiley's relationship with his son. Approximately eight minutes later, the detective told Wiley, "This offer's going to expire if ... you're not going to do the right thing." The interrogation continued on the topic of county jail, with the detective alternately saying that he could not "promise" such a sentence, but that he could "guarantee" that the judge would be more lenient and that people who "take this option ... get maybe a little bit of jail time and some probation."

The detective's representation as to how certain it was that Wiley's cooperation would secure him a short jail sentence and probation was equivocal at times. Nonetheless, the Court said, it is inescapable that the overall effect of the detective's representations—which he alternately described as an "offer," "option," "opportunity," and chance to "write your own punishment"—was to establish that if Wiley confessed to the crimes, he would get a short county jail sentence with probation. Wiley was told, "The only reason you're getting this opportunity is because people spoke very highly of you," and that "this offer's going to expire if ... you're not going to do the right thing."

The Law Court concluded that a confession is not voluntary where, as here, an interrogating officer leads a suspect to believe that a confession will secure a favorable, concrete sentence, and that belief motivates the suspect to confess. Considering the circumstances as a whole, and mindful that it is the State that bore the burden to prove voluntariness beyond a reasonable doubt, the court concluded that the trial court's finding that the detective did not engage in any conduct or invoke any techniques that would render the defendant's statements involuntary was clear error. The court vacated the judgment and remanded the case to the Superior Court for a new trial consistent with the opinion.

*State v. Wiley (March 14, 2013)*
*http://www.courts.state.me.us/opinions_orders/supreme/lawcourt/2013/13me30wi.pdf*

*Fourth Amendment – Stop or Seizure – Consensual Encounter*

## No Seizure or Stop—No Fourth Amendment

*The Fourth Amendment is implicated only when an encounter results in a seizure of a person. Such a seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The mere fact that a trooper was driving behind the vehicle cannot support the finding of a seizure.*

Shortly after 1 a.m. on October 1, 2011, a State Police trooper, who had a second trooper in his vehicle, noticed that a vehicle he had been following for a mile or two had pulled into a business park in Bangor. Because he believed that all the businesses in that business park were closed, the trooper also turned into the park. Almost immediately, the trooper saw Collier, the driver of the vehicle, pull into a parking area for one of the businesses. The trooper drove slowly past Collier's vehicle, turned around in the parking area, and then drove back toward Collier. As the trooper was driving back, he noted that Collier's car was parked, and saw Collier getting out of his vehicle and then walking toward the front of his car. The trooper stopped the cruiser and asked Collier through the cruiser's open driver-side window, "What's going on?" At that time, the trooper was approximately ten feet from Collier. Collier stated that he thought he had a headlight out. The trooper, who did not see anything wrong with the headlights, got out of his cruiser. As soon as he did so, he noticed the smell of alcohol coming from Collier. The trooper performed field sobriety tests on Collier and ultimately arrested him for OUI.

Collier moved to suppress all evidence obtained from the stop of his vehicle for lack of reasonable suspicion of a violation of law. The trial court agreed with Collier that the trooper had stopped Collier's vehicle without the required reasonable articulable suspicion. The State appealed.

The Law Court noted that not every contact between police and a citizen implicates the Fourth Amendment, such as in a consensual encounter where no suspicion of a violation of law must be articulated. The Fourth Amendment is implicated only when an encounter results in a seizure of a person. Such a seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The court said that the mere fact that a trooper was driving behind Collier cannot support the finding of a seizure. Although a driver might be somewhat nervous about, or even intimidated by, being followed by a police car, that anxiety does not create a seizure if the officer does not make other indications that the driver is not free to continue on his way.

The court determined that Collier was not seized. The undisputed facts establish that Collier had already stopped his vehicle before the trooper approached him, Collier appeared to be approaching the trooper's vehicle before the trooper even exited his vehicle, and the trooper did not inform Collier he was not free to leave, employ the blue lights on the vehicle, use a siren or loudspeaker, block Collier's way out, touch Collier in any way, raise his voice to Collier or speak in an intimidating tone, display a weapon, or make any demand of or instruction to Collier.

*State v. Collier (May 7, 2013)*
*http://www.courts.state.me.us/opinions_orders/supreme/lawcourt/2013/13me44co.pdf*