Supreme Court Cases
2008-2009 Term

By LISA A. BAKER, J.D.

In the most recent term, the U.S. Supreme Court decided several cases of interest to the law enforcement community. A number of them addressed fundamental principles of criminal procedure, including significant rulings relating to the search of a vehicle incident to arrest; the taking of statements following the appearance of an individual before a judge; and the Sixth Amendment Right to Confrontation Clause as it relates to the use of certificates of forensic examination in lieu of actual testimony in a criminal trial. Also of interest to the law enforcement community is a decision relating to a claim of reverse discrimination in the promotional process. This article includes a synopsis of these cases in addition to a summary of cases of interest to law enforcement that the Supreme Court has agreed to consider next term.

DECIDED CASES

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

In this case, the Supreme Court clarified that the Fourth Amendment does not permit broad authority to search a motor vehicle incident to arrest simply because the arrestee is at the site of the arrest, which has been the general assumption since the Court's holding in *United States v. Belton.*[1] Rather, the Court in *Gant* clarified that the need to search the interior of the vehicle incident to arrest is limited to situations furthering the rationales behind this warrantless search authority—to protect officer safety and to prevent the destruction of

evidence. The Supreme Court held that these rationales can be furthered by limiting the authority to search the vehicle to situations where "the arrestee is within the reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of the arrest."[2]

Under the facts in this case, Gant was not within reaching distance of the vehicle at the time of the search (he was handcuffed and locked inside the police car) and there was no reason to believe the car contained evidence of the crime for which he was arrested (driving with a suspended license). Therefore, the search of his car violated the Fourth Amendment, and the contraband discovered during the search was suppressed.[3]

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***Montejo v. Louisiana,* 129 S. Ct. 2079 (2009)**

This case addressed whether the Sixth Amendment right to counsel was invoked by a defendant at a state proceeding when the judge ordered the appointment of counsel for the defendant on murder charges, even though the defendant stood mute at the hearing and made no such request or assertion. After the defendant's court appearance, police approached him and advised him of his *Miranda* rights, which he waived. He agreed to accompany police on a drive to locate the murder weapon. During this trip, he wrote a letter of apology to the victim's family. Defense counsel sought to suppress the letter, arguing that the police could not initiate the interrogation of the defendant once he invoked his Sixth Amendment right to counsel, which the attorney argued occurred at the initial appearance. Under established Supreme Court precedent set forth in *Michigan v. Jackson*,[4] if the Sixth Amendment right to counsel was invoked at the initial court hearing, police could not initiate subsequent interrogation of the defendant on the murder charges in the absence of the defendant's attorney, and any confession derived from this interrogation would be subject to suppression. The trial judge permitted the government to introduce the letter, a ruling later affirmed by the Louisiana Supreme Court on the grounds that because the defendant did not say anything at his court appearance, he did not invoke his Sixth Amendment right to counsel.[5] The defendant appealed this ruling to the Supreme Court, arguing that because counsel was appointed, the right was invoked, and *Michigan v. Jackson* should apply. The Supreme Court chose not to decide whether the defendant invoked his Sixth Amendment right to counsel, choosing instead to overrule *Michigan v. Jackson*.[6]

As a result of *Montejo*, the Sixth Amendment does not preclude law enforcement from initiating contact with a defendant in an effort to obtain a confession following a defendant's request for counsel or the court's appointment of counsel at the initial appearance or similar state proceeding. The Court reasoned that the antibadgering protection of *Michigan v. Jackson* did not outweigh its costs—the suppression

of an otherwise voluntary confession.[7] Moreover, in cases where the defendant remains in custody, the Fifth Amendment protection against compelled self-incrimination will continue to effectively protect defendants from police badgering after the defendant has requested the assistance of counsel at the time of custodial interrogation. The Fifth Amendment will protect a defendant who invoked the Fifth Amendment right to counsel from government-initiated interrogation while remaining in continuous custody.[8] The majority in *Montejo* was not concerned about the circumstances when the Fifth Amendment no longer applies, reasoning that these "uncovered situations are the least likely to pose a risk of coerced waivers" and stating that "when a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering."[9]

***Corley v. United States,* 129 S. Ct. 1558 (2009)**

In *Corley,* the Supreme Court addressed the interplay of a federal statute addressing the admissibility of confessions in federal court, Title 18 U.S. Code §3501, and Rule 5 of the Federal Rules of Criminal Procedure, governing the presentment requirement. In this case, Corley was arrested at 8 a.m., and several hours later, he was transported to a local hospital to treat a minor injury sustained during the arrest. After 3 p.m., he was transported to the local FBI office to be interviewed. At approximately 5:30 p.m., he began confessing. About an hour later, he requested a break and was held overnight. The interview began again the next morning, during which he provided a signed written confession. Corley then was presented to a magistrate judge at 1:30 p.m., nearly 30 hours after his arrest. Corley argued that his confession should be suppressed as it was obtained during a period of unnecessary delay and, thus, subject to suppression under Supreme Court precedent known as *McNabb-Mallory*,[10] which "generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5(a)."[11] Rule 5 of the Federal Rules of Criminal Procedure generally requires that a federal officer making an arrest "must take the defendant without unnecessary delay before a magistrate judge."

The district court ruled in favor of the government, holding that the confession was obtained within a reasonable period of time after Corley's arrest because the time in which he obtained medical treatment should be excluded from calculating the delay, as the confession appeared otherwise voluntary.[12] The Third Circuit Court of Appeals affirmed, concluding that the federal statute governing the admissibility of confessions (§3501) in federal court imposed a pure voluntariness standard on judges. As such, as long as the confession was provided voluntarily, it would be admissible regardless of whether the delay in getting the arrestee to the presentment was unreasonable.[13] The Supreme Court agreed to hear this case to address the impact of §3501 on the admissibility of confessions obtained during a period of unnecessary delay.[14]

In reversing and remanding the case, the Supreme Court rejected the government's assertion that §3501 should be construed as a general blanket of protection, allowing for the admissibility of statements

provided they are voluntary. Rather, §3501 should be read in concert with Supreme Court precedent calling for the suppression of statements obtained as a result of an unnecessary delay in presenting an arrestee before a magistrate.[15] Furthermore, as stated by the Supreme Court, "delay for the purpose of interrogation is the epitome of unnecessary delay."[16]

Section 3501 creates a safe-harbor period for assessing the reasonableness of the delay. The statute states in relevant part that a confession "shall not be inadmissible solely because of delay in bringing [the defendant] before a magistrate judge [provided] the confession is found by the trial judge to have been made voluntarily…and if such confession was made or given by [the accused] within six hours immediately following his arrest or other detention."[17] If the confession was obtained beyond the safe-harbor period, its admissibility will depend on whether the delay was unnecessary even if the confession is otherwise voluntary. The Supreme Court remanded the case instructing the lower court to determine whether Corley's confession was actually obtained within the 6-hour safe-harbor period and if not, whether the delay was unnecessary.[18]

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

In this case, law enforcement officers patrolling a Tuscon neighborhood pulled over a vehicle containing several occupants for a minor infraction. At the time of the stop, the officers did not have any reason to suspect the occupants of the vehicle were engaged in criminal activity. While the lead officer was dealing with the driver, one of the other officers engaged the defendant, a passenger in the car, in conversation and asked him to step out of the vehicle to talk with her. The officer observed that he wore clothing indicative of gang membership and that he was holding a police scanner. Based on her concerns regarding possible gang affiliation, the officer conducted a limited search for a weapon by patting down his waistband area where she discovered a gun. The defendant was convicted of a gun-possession charge. The Arizona Court of Appeals reversed his conviction, concluding that because the officer did not have reason to suspect the defendant-passenger was engaged in criminal activity, the officer "had no right to pat him down for weapons, even if she had reason to suspect he was armed and dangerous."[19] The Arizona Supreme Court let the decision stand. The government appealed the ruling to the U.S. Supreme Court.

The Supreme Court reversed the Arizona Court of Appeals, citing precedent addressing the nature of the encounter between officers and individuals detained as part of a roadside encounter, and now such encounters are "especially fraught with danger to police officers."[20] The Supreme Court noted that consistent with previous rulings, a passenger in a vehicle stopped is seized within the meaning of the Fourth Amendment, just as the driver is seized, at the initiation of the stop and until it is over and that the passenger is not free to end the encounter or move about as he wishes.[21] The officer's efforts to engage the defendant in conversation about gang activities did not transform the encounter into an unreasonable seizure. As stated by the Court,

> An officer's inquiries into matters unrelated to the justification for the traffic

> stop…do not convert the encounter into something other than a lawful seizure, so long as those inquires do not measurably extend the duration of the stop.[22]

The Supreme Court reversed the lower court ruling, remanding the case for further proceedings as the lower court had not addressed whether the officer had reasonable suspicion that the defendant was armed at the time of the stop.[23]

Kansas v. Ventris,
129 S. Ct. 1841 (2009)

In *Kansas v. Ventris,* the Supreme Court addressed whether a statement obtained in violation of the defendant's Sixth Amendment Right to Counsel could be used to impeach the defendant when he chose to take the stand and provided testimony that conflicted with his earlier statements. In this case, the defendant was arrested and charged with various crimes, including murder and aggravated robbery. Prior to trial, officers placed a cell-mate informant into the defendant's cell, instructing him to just keep his ears open for incriminating statements. According to the informant, at one point, he commented to the defendant that he seemed to have "something more serious weighing on his mind."[24] The defendant responded by admitting to killing the victim. The defendant took the stand at his trial and testified that his accomplice was the shooter. The government sought to introduce the statements the defendant provided to the informant to impeach his testimony. The defendant argued that they should not be admitted as they were obtained in violation of his Sixth Amendment Right to Counsel, prohibiting the government from deliberately eliciting information about charged criminal activity without either a waiver of the right or counsel being present.[25] The government conceded that the statements could not be used in the case in chief.[26] However, the government argued that the statements should be admissible for the purpose of impeaching the defendant. The trial court allowed the statements to be used, and the defendant was convicted at trial. The Kansas Supreme Court reversed the defendant's conviction, concluding that the use of the statements violated the Sixth Amendment.[27] The U.S. Supreme Court disagreed.

In reaching this result, the Supreme Court found that the violation of the Sixth Amendment Right to Counsel occurs at the critical stage in which it is denied a defendant, not when evidence is sought to be used at trial. Therefore, the case does not involve preventing a constitutional violation but, rather, the proper scope of the remedy for a violation that has already occurred. In this case, the interests furthered by excluding the statements are "outweighed by the need to prevent perjury and to assure the integrity of the trial process."[28] The Supreme Court held that "the informant's testimony, concededly elicited in violation of the Sixth Amendment, was admissible to challenge [the defendant's] inconsistent testimony at trial."[29]

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

In this case, a civil suit alleging a violation of constitutional rights was brought against officers following their warrantless entry into the plaintiff's residence and his arrest for possession of methamphetamine. The entry and subsequent arrest of the plaintiff occurred after a police informant, working at the direction of the police, engaged in a drug transaction inside the plaintiff's home. Once the informant signaled police that the drug transaction had occurred, police entered the residence, relying on the informant's consent. The plaintiff successfully challenged the admissibility of evidence seized as a result of the entry in his criminal case, arguing that the warrantless entry was not supported by consent or exigent circumstances.[30] Following this victory, he brought a civil action in federal court, arguing that his Fourth Amendment rights to be free from unreasonable searches and seizures were violated.

The officers sought a dismissal of the lawsuit on the grounds that they should be entitled to qualified immunity as they did not violate a clearly established constitutional right. The officers argued that several courts had recognized a consent-once-removed doctrine, permitting a warrantless entry into a home when consent has already been granted to an officer or informant who then observes evidence in plain view. The district court recognized that this theory may be in jeopardy in light of the Supreme Court's decision in *Georgia v. Randolph*;[31] however, it concluded that the officers should be afforded qualified immunity as it was reasonable for them to believe that their conduct was lawful.[32] The Tenth Circuit Court of Appeals reversed, concluding that the consent-once-removed doctrine was limited to situations in which an undercover officer enters someone's residence with that person's consent and then summons law enforcement inside once the criminal activity occurs.[33] The circuit court concluded that this doctrine did not apply to situations in which an informant has been admitted into the residence. The circuit court further concluded that the relevant right that was violated was the right to be free from unreasonable searches and arrests and that this right is clearly established. With this as the foundation, the circuit court concluded that no reasonable officer would have believed that the warrantless entry into the plaintiff's home was reasonable and, therefore, qualified immunity was denied.[34]

The Supreme Court agreed to hear this case, primarily focusing on the continued viability of the rigid two-step process to resolve the issue of qualified immunity[35] set forth by the Court in *Saucier v. Katz*.[36] In *Saucier*, the Supreme Court mandated a two-step process requiring the courts to first address whether the facts as alleged by the plaintiff make out a violation of a constitutional right and if so, the court must then decide whether the right at issue was clearly established at the time of the alleged misconduct. After reviewing the impact of the *Saucier* process in subsequent litigation, the Supreme Court concluded that "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."[37] Instead, judges should exercise discretion in how the two prongs of the qualified immunity analysis should be addressed in light of the facts and circumstances of the case at hand.

Turning to the facts of this case, the Supreme Court ruled that the law was not clearly established at the time of the alleged constitutional violation and, thus, qualified immunity is appropriate. The Supreme Court noted that in earlier rulings, the consent-once-removed doctrine had been accepted by other courts, including in the context of private citizens acting as informants, and prior to the decision in this case, no other court of appeals had issued a contrary decision.[38]

***Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)**

During the prosecution of the defendant for possession of cocaine, the prosecutor introduced a certificate from a state laboratory documenting the analysis of the substance seized on the defendant at the time of his arrest as a certain quantity of cocaine. As provided under state law, the certificate was sworn to by an examiner before a notary public and submitted as part of the government's case in chief. The defendant was convicted, in part, based on this evidence. The defendant challenged his conviction, arguing that his Sixth Amendment right to confront the witness against him was violated by the introduction of a certificate as opposed to the testimony of the examiner. The Supreme Court agreed. The Supreme Court referred to its previous decision in *Crawford v. Washington*[39] to support its position that the Sixth Amendment requires the examiner to testify in person. In *Crawford*, the Supreme Court held that a defendant has a right to confront witnesses providing testimony against him or her. Accordingly, a witness' testimony is not admissible unless the witness appears at trial or if not available, the defendant was able to cross-examine the witness previously.[40] Applying these principles to this case, whether the substance found on the defendant was cocaine was a fact in question and would be the testimony that the examiner would be expected to provide. The Sixth Amendment requires that this type of testimonial statement be provided by the witness against the accused as opposed to the introduction of a certificate. This decision will have a significant impact in cases that previously relied upon the introduction of similar certificates in support of forensic examinations, a common practice in many prosecutions for driving under the influence and drug possession.

***Herring v. United States,* 129 S. Ct. 695 (2009)**

The Court in this case was presented with the issue of whether the exclusionary rule should apply when an arrest occurs that should not have because the original arrest warrant had actually been recalled months prior to its execution. The defendant was arrested after it was determined that a warrant for his arrest was outstanding. During the search incident to his arrest, drugs and a firearm were seized. The defendant sought to suppress this evidence as the arrest should not have happened in the first place. The arrest warrant had been recalled but remained in the system apparently due to negligent records handling by police personnel. The Eleventh Circuit Court of Appeals ruled that the evidence should not be suppressed as the purpose of the exclusionary rule would not be furthered by its suppression given that there was no indication of any malicious or willful misconduct on the part of the police.[41] The Circuit Court noted that this result is supported by the Supreme Court's analysis in *Arizona v. Evans*,[42] holding that the purpose of the exclusionary rule is not served when court personnel are the source of the error. The Supreme Court agreed to hear the case to resolve the split of opinion that existed on the applicability of the exclusionary rule in the face of police clerical error.[43]

The Supreme Court ruled that the evidence should be admitted. In reaching this conclusion, the Supreme Court engaged in a detailed analysis of the history and purpose of the exclusionary rule, concluding that its deterrent effect would not be furthered in cases where the decision to arrest the defendant was based on reasonable but mistaken assumptions, namely that an outstanding arrest warrant existed.[44] The Supreme Court did caution that its holding does not mean that all errors, such as those that occurred in this case, are immune from the exclusionary rule. The Court stated,

> If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrest, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.[45]

***Ricci v. DeStefano,* 129 S. Ct. 2658 (2009)**

In a closely watched employment rights case of interest to the law enforcement community, the Supreme Court addressed the sensitive issue of racial discrimination. At issue was the city of New Haven's decision to discard test results following the administration of objective examinations to determine those firefighters qualified for promotion. The city decided to discard the results based on a statistical racial disparity. If the results of the examinations were used to fill the vacancies, the top 10 candidates for the lieutenant position were

all white, and with respect to the captain position, the results produced 7 white and 2 Hispanic candidates.[46] The city decided to disregard the results of the examinations, concluding that it would face a claim of disparate-impact discrimination in violation of Title VII of the Civil Rights Act of 1964[47] if the results were considered and promotions followed.[48]

A group of firefighters, including Frank Ricci, filed suit, arguing that by declining to use the test results, the city violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution, as well as Title VII of the Civil Rights Act, by engaging in intentional discrimination.[49] The city countered by arguing that it had a good faith belief that if it certified the test results, it would have violated the disparate-impact prohibition in Title VII in which case it could not be liable under another theory of liability.[50] The lower courts agreed with the city.[51]

Disparate-impact discrimination is established by a plaintiff by demonstrating that the employer uses an employment practice, such as a promotional examination, that serves to exclude a significant portion of a particular group. The employer then can attempt to defend itself by demonstrating that the practice is job related and consistent with business necessity.[52]

The Supreme Court reversed the lower courts, concluding that by failing to use the examination results, the city engaged in unlawful intentional discrimination in violation of Title VII of the Civil Rights Act.[53] In support of its ruling, the Supreme Court determined that the city engaged in race-based decision-making with respect to the examination results in violation of Title VII unless there is a valid defense. As stated by the Court,

> Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.[54]

To engage in this type of intentional discrimination, the Court concluded that the employer had to have a "strong basis in evidence to believe" it will be subject to disparate impact liability if it fails to take the race-based action.[55] Applying this standard, the Court concluded that the city did not meet this standard simply by arguing the existence of a significant statistical disparity as liability would be appropriate only if the examinations were not job related and consistent with business necessity.[56] The Supreme Court noted that there was no evidence suggesting the examinations were deficient, citing the substantial amount of testimony supporting their validity.[57] The Court stated,

> Fear of litigation alone cannot justify an employee's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.[58]

The Court concluded by noting that once the city certifies the examination results and if the city ultimately faces a disparate-impact lawsuit, the city would avoid liability based on the strong basis in evidence to believe that had it not certified the results, it would have been subjected to a claim of intentional discrimination.[59]

CASES FOR NEXT TERM

The Supreme Court has agreed to hear three cases of interest to law enforcement next term.

Maryland v. Shatzer, 954 A.2d 1118 (Md. 2008), *cert granted* 129 S. Ct. 1043 (2009)

This case places the issue of whether a passage-of-time exception exists to the barrier placed on law enforcement in initiating contact to interview an in-custody subject who has previously invoked the *Miranda* right to counsel and has remained in continuous custody. In this case, the defendant was incarcerated when he was approached by law enforcement about allegations that he sexually abused his 3-year-old son. He was advised of his *Miranda* rights and initially agreed to talk, but once he found out what the interview related to, he invoked his right to counsel. The investigation remained closed for several years during which time the defendant remained incarcerated. New information surfaced about the case nearly 3 years later while the defendant still was in prison serving his sentence in the unrelated case. A different detective went to the prison in another attempt to interview him. This time, the defendant waived his rights and made incriminating statements.

During his trial, the defendant argued that the statements should be suppressed as they were obtained in violation of *Edwards v. Arizona* and its progeny.[60] The state court of appeals agreed with the defendant, holding that the mere passage of time is not sufficient to lift the protections afforded a defendant who invokes the *Miranda* right to counsel and remains in continuous custody.[61]

This case may clarify the scope of the protections afforded a subject who is incarcerated and has previously invoked the *Miranda* right to counsel and provide guidance as to whether law enforcement officers are precluded from contacting the subject, even if the subject is simply serving a sentence.

United States v. Comstock, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, _ S. Ct. _ (2009)

The constitutionality of a federal statute contained in Title 18, U.S. Code, §1465, allowing the federal government to place in indefinite civil commitment individuals determined to be sexually dangerous persons will be addressed by the Supreme Court in this case. The statute was enacted as part of the Adam Walsh Child Protection and Safety Act of 2006 and was designed to protect children from sexual exploitation and sexual predators.[62] Federal courts that have addressed §1465 are split as to whether Congress

exceeded its authority under the Commerce and Necessary and Proper Clauses when enacting the commitment provision.[63]

State v. Powell, 998 So.2d 531, *cert. granted*, _ S. Ct. _ (2009)

The Supreme Court agreed to hear this case involving the adequacy of *Miranda* warnings administered as part of a custodial interrogation. The warnings provided to the defendant in this case were set forth in a standard police department form. The form did not explicitly indicate that the defendant had the right to have an attorney present during questioning. The pertinent language contained in the form stated, "You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before questioning. You have the right to use any of these rights at any time you want during this interview." The Florida Supreme Court ruled that the warnings as set forth above were insufficient to properly inform the defendant of his right to counsel according to the dictates of *Miranda*.✦

Endnotes

[1] 541 U.S. 615 (1981).

[2] *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009).

[3] For a more thorough discussion of the *Gant* decision, refer to Richard G. Schott, "The Supreme Court Reexamines Search Incident to Lawful Arrest," *FBI Law Enforcement Bulletin*, July 2009, 22-31.

[4] 475 U.S. 625 (1986). *See also Wade v. Jackson*, 388 U.S. 218 (1967) and *Massiah v. United States*, 377 U.S. 201 (1964) for the general principle that once adversarial proceedings are initiated against the accused, the Sixth Amendment guarantees the right to have counsel present at all critical stages of the prosecution.

[5] *State v. Montejo*, 974 So.2d 1238 (La. 2008).

[6] *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009).

[7] *Id.* at 2090-2091.

[8] *See Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990).

[9] 129 S. Ct. at 2090.

[10] *McNabb v. U.S.*, 318 U.S. 332 (1943); *Mallory v. U.S.*, 354 U.S. 449 (1957).

[11] *Corley* at 1563, *quoting U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 354 (1994).

[12] *United State v. Corley*, 2004 WL 1102637 (E.D.Pa.).

[13] *United States v. Corley*, 500 F.3d 210 (3rd Cir. 2007).

[14] *Corley v. United States*, 129 S. Ct. 29 (2008).

[15] *Corley v. United States*, 129 S. Ct. 1558, 1568-1569 (2009).

[16] *Corley* at 1563, *quoting Mallory v. United States*, 349 U.S., 449, (1957).

[17] 18 U.S.C. 3501(c). The statute further provides that the time limit is not to apply "in any case in which the delay in bringing such person before [the magistrate judge] beyond such six-hour period is…reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]."

[18] *Corley* at 1572.

[19] *State v. Johnson*, 217 Ariz. 58, 170 P.3d 667, 673 (2007), *cert. granted*, *Arizona v. Johnson*, 128 S. Ct. 2961 (2008).

[20] *Arizona v. Johnson*, 129 S. Ct. 781, 787, *quoting Michigan v. Long*, 463 U.S. 1032, 1047 (1983).

[21] *Id*. at 787, *citing Brendlin v. California*, 551 U.S. 249 (2007).

[22] *Id.* at 788, *citing Muehler v. Mena*, 544 U.S. 93 (2005).

[23] *See* 129 S. Ct. 781 at FN 2.

[24] *Kansas v. Ventris,* 129 S. Ct. 1841, 1844 (2009).

[25] *See Massiah v. United States*, 377 U.S. 201 (1964).

[26] In his opinion, Justice Scalia stated,

> The State has conceded throughout these proceedings that [the defendant's] confession was taken in violation of *Massiah's* dictates and was therefore not admissible in the prosecution's case in chief. Without affirming that this concession was necessary, see *Kuhlman v. Wilson*, 477 U.S. 436 (1986), we accept it as the law of the case.

129 S. Ct. at 1845.

[27] *State v. Ventris* 285 Kan. 595, 176 P.3d 920 (Kan. 2008), *rev'g State v. Ventris*, 142 P..3.d 338 (Kan. 2006), *cert granted*, 129 S. Ct. 29 (2008).

[28] *Kansas v. Ventris*, 129 S. Ct. 1841, 1846, *quoting Stone v. Powell*, 428 U.S. 465, 488 (1976).

[29] *Id.* at 1847.

[30] *See State v. Callahan*, 93 P.3d 103 (2004).

[31] 547 U.S. 103 (2006) (holding that if a party who has authority over premises is physically present and objecting, another

party cannot provide consent and law enforcement is bound by the party withholding consent).

[32] *Callahan v. Millard City*, 2006 WL 1409130 (2006).

[33] *Callahan v. Millard City*, 494 F.3d 891 (10th Cir. 2007).

[34] *Id.* at 895-899.

[35] *Certiorari granted* by *Pearson v. Callahan*, 128 S. Ct. 1702 (2008). "[I]n granting certiorari, we directed the parties to address the question whether *Saucier* should be overruled." 129 S. Ct. at 815 (2009).

[36] 533 U.S. 194 (2001).

[37] *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

[38] *See United States v. Paul*, 808 F.2d 645 (1986); *United States v. Diaz,* 814 F.2d 454 (7th Cir. 1987); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *State v. Henry*, 133 N.J. 104, 627 A.2d 125 (1993); *State v. Johnston*, 184 Wis.2d 794, 518 N.W.2d 759 (1994).

[39] 541 U.S. 36 (2004).

[40] *Id* at 54.

[41] *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007).

[42] 514 U.S. 1 (1995).

[43] *Certiorari granted*, *Herring v. U.S.*, 128 S. Ct. 1221. For cases opposing the application of the exclusionary rule, *see United States v. Santa*, 180 F.3d 20 (2nd Cir. 1999); *United States v. Sutherland*, 486 F.3d 1355 (C.A.D.C. 1997). For cases supporting its application, *see Hoay v. State*, 71 S.W.3d 573 (Ark. 2002) (exclusionary rule to apply if the wrongful arrest was due to law enforcement personnel as opposed to court personnel); *White v. State*, 989 S.W.2d 108 (Texas 1999) (exclusionary rule applicable where law enforcement personnel failed to remove recalled warrant).

[44] *Herring v. United States*,129 S. Ct. 695, 700-703 (2009).

[45] *Id.* at 703.

[46] *Ricci v. DeStefano*, 129 S. Ct. 2658, 2666 (2009).

[47] 42 U.S.C. §2000e-2(k).

[48] *Ricci* at 2669-2670.

[49] Intentional discrimination is addressed in 42 U.S.C. §§2000e-2(a).

[50] *Ricci* at 2671.

[51] *See Ricci v. DeStefano*, 554 F.Supp.2d 142 (D.Conn. 2006), *aff'd by Ricci v. DeStefano*, 264 Fed.Appx. 106 (2nd Cir. 2008)(unpublished), opinion withdrawn and superseded by *Ricci v. DeStefano*, 530 F.3d 87 (2nd Cir. 2008).

[52] *See* 42 U.S.C. §2000e-2(k)(1)(A)(i).

[53] The Supreme Court did not rule on the Equal Protection argument, noting that the case could be resolved on the statutory claim, *citing Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) ("[n]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

[54] *Ricci* at 2674.

[55] *Id.* at 2675.

[56] *Id*. at 2675-2676.

[57] *Id.* at 2680-2681.

[58] *Id*. at 2681.

[59] *Id*.

[60] *See Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990).

[61] 954 A.2d 1118, 1124, *citing Minnick v. Mississippi*, 498 U.S. 146 (1990) for additional support.

[62] Pub.L.No.109-248, §302, 120 Stat. 587.

[63] *See United States v. Comstock*, 551 F.3d 274 (4th Cir. 2008) (Congress exceeded its authority); *United States v. Tom*, 558 F.Supp.2d 931 (D.Minn. 2008) (exceeded Congress' authority); *United States v. Wilkinson*, _ F.Supp.2d _ , 2009 WL 1740358 (D.Mass. 2009) (exceeding Congress' authority); *United States v. Abregana*, 574 F.Supp.2d 1123 (D.Haw. 2008) (within congressional authority); *United States v. Shields*, 522 F.Supp.2d 317 (D.Mass. 2007) (within congressional authority).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.