2008
CASE LAW
UPDATE

Summaries of Recent Court Decisions
of Interest to Law Enforcement Officers

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

SEPTEMBER 2007 – AUGUST 2008

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

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This publication and the 2008 New Law Update constitute the training outline of the Maine Criminal Justice Academy for recertification training in law updates for the year 2008.

Preparer's Note

The preparer 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 2007 through August 2008, and chose cases for inclusion in the document believed to be of general interest to Maine law enforcement officers. The document is not a listing of all decisions of the three appellate courts.

In the interest of clarity and brevity, the selected decisions have been summarized. The summaries are those of the preparer and do not represent legal opinions or interpretations of the Office of the Attorney General.

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.

If the reader has questions, suggestions, or other comments, the preparer may be contacted at:

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United States Supreme Court

Fourth Amendment – Probable Cause – Arrest

Probable Cause Only Relevant Test for Lawfulness of Arrest

Police did not violate the Fourth Amendment when they arrested respondent based on probable cause and searched him incident to the arrest, even though state law prohibited arrest for the particular offense (driving on a suspended license). State law is not relevant to determining the constitutionality of a warrantless arrest; all that matters is whether an officer has probable cause to believe a person committed even a minor crime in his presence. So long as the arrest was lawful as a federal constitutional matter, the search of respondent incident to his arrest was constitutional.

Rather than issuing the summons required by Virginia law, police arrested respondent Moore for the misdemeanor of driving on a suspended license. A search incident to the arrest yielded crack cocaine, and Moore was tried on drug charges. The trial court declined to suppress the evidence on Fourth Amendment grounds. Moore was convicted. Ultimately, the Virginia Supreme Court reversed, reasoning that the search violated the Fourth Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation.

HELD: The police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest. It was not intended that the Fourth Amendment incorporate state statutes. When an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. While States are free to require their officers to engage in nuanced determinations of the need for arrest as a matter of their own law, the Fourth Amendment should reflect workable bright-line rules. Incorporating state arrest rules into the Constitution would make Fourth Amendment protections as complex as the underlying state law, and variable from place to place and time to time. Also rejected was Moore's argument that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. Officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. While officers issuing citations do not face the same danger, and thus do not have the same authority to search, the officers *arrested* Moore.

Virginia v. Moore
April 23, 2008
http://www.law.cornell.edu/supct/html/06-1082.ZS.html

First Circuit Court of Appeals

Fourth Amendment – Terry Stop – Maine Case

STOP SUPPORTED BY REASONABLE SUSPICION

Terry stop was proper under the Fourth Amendment because the facts supported reasonable suspicion. Defendant was in a car bearing Massachusetts plates, oddly parked near an alleged crime associated with a Massachusetts suspect at a very early morning hour, and defendant, wearing a leather coat in July, left the car as an officer approached, ignoring directions to stop.

Just after 5 a.m., on July 15, 2003, police in Lewiston, Maine, received a call informing them that two black men wearing t-shirts were attempting to break down the front door of an apartment building at 287 Bates Street, near the high-crime neighborhood of Kennedy Park. The caller indicated that one of the two men was named BJ, which the officers took as a reference to BJ Almeida, a repeat offender for whom an arrest warrant was outstanding. At the scene, police found a single black man (later determined to be BJ's brother Jose Almeida) standing on the porch at 287 Bates Street, but he refused to answer their questions, indicating only that he was from Massachusetts. Officers who had prior experience with BJ Almeida confirmed that this was not BJ, and so the police split up to continue the search.

Knox Street runs parallel to Bates Street just one block over. There, about three hundred feet from the 287 Bates Street apartment building, Lt. Donald Mailhot saw a car with Massachusetts plates, oddly parked near the back stairway to another Bates Street apartment building. Stroman (who is black) and a woman were sitting in the back seat of the car. At approximately the same time as Mailhot left his police cruiser to approach the vehicle, a radio dispatch announced that another officer had BJ Almeida in custody. As Mailhot approached the parked car, Stroman got out and began to walk in the opposite direction. He was told to stop, but did not. Mailhot then sought to restrain Stroman, who broke free and fled, leaving his leather coat in the officer's hands. Mailhot radioed the other officers with Stroman's description, and he was discovered shortly after, hiding on the fourth floor of a building on Knox Street. Stroman was handcuffed and frisked, and after finding a knife the police arrested him. He was taken to a nearby jail, where a more complete search revealed crack cocaine inside his sweatshirt. Learning from Massachusetts police that Stroman was known to carry a gun, one of the officers then returned to the spot where Stroman had been found and discovered, inside a partially ajar ceiling tile directly above, a loaded handgun wrapped in a bandanna. Because a fingerprint on the gun did not match Stroman's, Stroman was at the outset charged only with offenses related to the drugs and knife; but some five months later in a prison interview with agents Stroman confessed (after Miranda warnings) that he had been holding the gun for BJ Almeida. According to the confession, Stroman had traveled from Massachusetts with BJ, who had left the car to confront his girlfriend living at 287 Bates Street over a personal matter.

Stroman was then charged in federal court with being a felon in possession of a firearm. He sought to suppress both the gun and the confession on Fourth Amendment grounds, arguing that both constituted fruits of a poisonous tree (the tree being his initial stop and attempted frisk by Mailhot outside the car). The trial court denied the suppression motion, and an appeal followed. Stroman argued in his appeal that Mailhot lacked reasonable suspicion to stop and attempt to frisk him outside the car on the morning of his arrest. It was only as a result of that claimed illegal stop that the gun was ultimately discovered, and similarly, the confession would never have been extracted in the absence of the allegedly unconstitutional frisk and subsequent arrest and imprisonment.

The Appeals Court found that the seizure of Stroman by Lt. Mailhot constituted a Terry stop for which there was ample justification. Unlike an arrest, for which probable cause is required, a Terry stop – which is less intrusive – requires only reasonable suspicion of an individual's involvement in wrongdoing. Mailhot was entitled to halt and briefly question Stroman, and the attempt to frisk him would itself be justified as a self-protection measure: an officer approaching a suspect in connection with a break-in is entitled to ensure that no weapons are hidden underneath a heavy leather coat.

Stroman maintained that when Lt. Mailhot approached the car, BJ Almeida and another man were already in custody (only two men had been allegedly involved in the break-in). However, Mailhot did not know this. Still, Stroman argued that he and Almeida looked nothing alike; that he was not wearing a t-shirt (as reported of the break-in suspects); and that he was accompanied by a woman (the report of the break-in had not mentioned a woman). Yet the car, oddly parked near the location of the alleged crime, bore Massachusetts plates (the reported break-in was associated with a Massachusetts suspect); two individuals were in the back seat at a very early hour of the morning; and one of them (Stroman) left the car as the officer approached, walking in the opposite direction and ignoring directions to stop. Further, Stroman was wearing a leather coat in July, a fact that the officer reasonably considered curious and perhaps suggestive of hidden weapons. The Court noted that common sense alone would make these factors relevant to determining the justification for a temporary seizure of an individual in the particular circumstances. The Court also noted that the high-crime nature of the neighborhood was a relevant factor in the determination, although the officer would have justified in his actions if this factor was absent.

U.S. v. Stroman
August 22, 2007
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=062133

Fourth Amendment – Search, Arrest – Maine Case

Vehicle Stop, Warrantless Searches & Arrest Upheld

The fact of the matter is that those who possess information about the inner workings of the drug trade are unlikely to be persons of impeccable moral integrity. While the source's general credibility must be considered, all that the law requires is that, when all the pertinent considerations are weighed, the information reasonably appears to be reliable. The information provided by the CI was of sufficient reliability to support stopping the truck, the defendant lacked standing to challenge the search of either the truck or the duffel bags, and the police had probable cause to make a warrantless arrest.

A Maine federal jury convicted Gary Brown of possessing a controlled substance with intent to distribute. On appeal, Brown challenged his conviction claiming that the vehicle stop, vehicle search and his arrest were not justified under the Fourth Amendment.

On July 7, 2005, Kevin Cashman, a Lewiston police officer assigned to MDEA, received a tip about an imminent narcotics transaction. Although Cashman's confidential informant had been cooperating with the MDEA for less than a week, he already had provided Cashman with trustworthy information about sellers, transporters, and users of drugs in the Portland area. The substance of the tip was that a black male known as "Pink" traveled weekly by bus from New York City to Maine to peddle between ten and 20 ounces of crack and powdered cocaine. He further stated that Pink's usual practice was to stay in a hotel off the Maine Turnpike. The room that he used would be rented under the name of Tanguay (David or Peter). The CI explained that David Tanguay was currently incarcerated and that his brother, Peter, sometimes used David's identification. Other than skin color, the CI provided no physical description of the putative drug peddler. The CI subsequently advised Cashman that "Pink" had arrived in Portland and was staying in a hotel near the Maine Turnpike. Cashman and another officer proceeded to the Ramada Inn, off former Exit 8 of the Maine Turnpike, and learned that room 127 had been rented in the name of David Tanguay. Comparison of the signatures on the registration form and the identification used in renting the room revealed marked discrepancies. Cashman called a police dispatcher and corroborated David Tanguay's current status as a federal prison inmate. The officers then obtained access to a room diagonally across from room 127 and conducted a five-hour stake-out. While they observed a black man go in and out of room 127, limitations on their surveillance capabilities rendered them unable to identify the man.

Three weeks later, the CI told Cashman that Pink was en route to Portland on board a Vermont Transit bus from New York City. He said that the wayfarer would arrive that afternoon and would be picked up at the bus station by Peter Tanguay. Tanguay would be driving an old green pick-up truck, plate number 760-409, belonging to the CI. The CI assured Cashman that Pink would be transporting his wares. He explained that he was privy to this information because he had spoken with Peter Tanguay when the latter asked to borrow his truck. In response to this lead, Cashman called in a fellow officer, who searched both the CI and his truck to ensure the absence of any preexisting contraband. The CI drove away and the officers tailed the truck. They saw Peter Tanguay enter it. After the truck made several stops, Tanguay drove away alone. The officers continued to

follow the truck until it reached the bus terminal. At 3:30 p.m., the officers saw a Vermont Transit bus arrive from New York City. They watched a black man alight carrying two large duffel bags. The man walked to the truck, placed the duffel bags in the cab, and climbed aboard.

By prearrangement, two Portland police cruisers converged on the truck a short distance from the bus terminal. Officer Robert Bickford directed the passenger to disembark, frisked him, and asked for his name and date of birth. The passenger identified himself as Anthony Green, gave a date of birth, and claimed to be from Boston. He appeared older than the proffered date of birth suggested. Moreover, he professed to have no identification and, when asked how to spell his name, he hesitated. Bickford tried unsuccessfully to verify the passenger's stated identity using the computer in his cruiser. He eventually asked the man for his social security number, but "Green" said that he did not remember it. When Cashman showed up, he inquired as to the ownership of the duffel bags. Tanguay claimed ownership and Green, in an apparent effort to substantiate that claim, stated that the bags had been in the truck when he arrived. The surveilling officers knew that statement to be untrue. The officers asserted that throughout this exchange Green was constantly looking around, as if looking for a way to escape. When asked a second time for identification, he tried to peer into Bickford's notebook, as if trying to recollect the name that he had given.

A canine unit arrived at the scene around 30 minutes after the stop was made. A trained drug dog reacted to a scent emanating from the cab of the truck and, later, alerted to one of the duffel bags. The bag was found to contain 340 grams of crack cocaine as well as numerous small bags of marijuana. A search of the truck's glove compartment revealed additional cocaine. Both the driver (Peter Tanguay) and the passenger were arrested. Police subsequently identified the passenger as Gary Brown.

The Investigatory Stop. Brown contended that the police lacked a reasonable and articulable basis for the roadside stop because they relied exclusively on a tip provided by an unproven informant. However, the Appeals Court found that the informant was sufficiently reliable and the information provided by the informant was sufficiently reliable to justify the vehicle stop. It noted that the police knew the identity of the informant; he could have been held accountable if his information proved inaccurate or false. In addition, at the time of the tip that prompted the arrest, the CI had been cooperating with the authorities for approximately one month. During that period, Cashman had several interactions with him. Moreover, even prior to July 7, the CI had provided trustworthy information and had demonstrated his knowledge of the drug trade in the Portland area. Thus, by July 29 the CI had compiled some record of reliability.

The Court noted that factors like an informant's prior criminal record and desire to advantage himself with respect to pending criminal charges are to be considered in evaluating his reliability. But such considerations are not dispositive. The fact of the matter is that those who possess information about the inner workings of the drug trade are unlikely to be persons of impeccable moral integrity. While the source's general credibility must be considered, all that the law requires is that, when all the pertinent considerations

are weighed, the information reasonably appears to be reliable. The CI specified the type and quantity of the drugs in transit, the transporter's method of travel, what bus line he would patronize, and the name of one of his confederates (Peter Tanguay). He also specified the date, time, and place of the suspect's arrival in Portland, the identity of the person who would meet him there, the exact vehicle that would be deployed, and the suspect's intended destination. In short, the tip was sufficiently laden with details to demonstrate that the CI had inside knowledge of the events that he was describing.

The Arrest. A warrantless arrest must be based on probable cause. If a warrantless arrest is made without probable cause for the arrest, evidence obtained as a result of the arrest is normally inadmissible against the arrestee. Probable cause for an arrest "exists when the arresting officer, acting upon apparently trustworthy information, reasonably concludes that a crime has been (or is about to be) committed and that the putative arrestee likely is one of the perpetrators." The issue here was whether the police, after stopping the truck, developed probable cause for the ensuing arrest.

After stopping the truck, the police caught the suspect in several lies and inconsistencies related to his name, age, and ownership of the duffel bags. His demeanor during the stop evoked suspicion. Then, too, a police dog alerted to the presence of contraband inside the truck and a reliable canine sniff outside a vehicle can provide probable cause to search the vehicle. An interior vehicle sniff led the dog to single out one of the defendant's duffel bags. That, in turn, yielded up the cache of contraband. At that point, probable cause for the arrest was obvious.

The Search. With regard to the search of the vehicle and the duffel bags, the Appeals Court agreed with the lower court that Brown was without standing to object to the searches.

U.S. v. Brown, aka Anthony Green
August 22, 2007
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=062508

Sexual Discrimination – Punitive Damages

OFFICERS AND UNION HELD LIABLE

Both federal law and the Massachusetts antidiscrimination statute cover retaliation claims against unions which caused harm in the workplace and outside of it. Plaintiff, a female police officer and union member, presented enough evidence to establish a claim against another police office, and against the union. The Court rejected a claim that because the plaintiff was a public official, she was required to show actual malice on the part of the defendants.

This appeal stemmed from an ugly incident of verbal abuse of a female police officer by her fellow male officers during a union-sponsored bus trip in the fall of 1998, as well as from the actions of the union and its members in response to the investigations of her complaints in the years that followed. The female officer, Vanessa Dixon, eventually

brought a civil suit in federal court against the national union and its local chapter, their presidents, and two of the police officers involved in the incident, asserting claims of discrimination, retaliation, and defamation. The jury found for Dixon on some but not all of her claims, awarding her a total of $ 1,205,000 in compensatory damages and $1,027,501 in punitive damages.

On October 26, 1998, Dixon joined seven of her fellow officers and six corrections officers on a hired bus to travel to Boston to participate with the local union in a gubernatorial campaign rally. She was the only woman on the trip, other than the bus driver. From the moment she walked into the union hall that afternoon, she was subjected to gender-based criticisms by the other officers regarding what she was wearing and her presence on an all-male trip. Once in Boston, the group participated briefly in the rally at Faneuil Hall, and then reboarded their bus for Anthony's Pier 4, where the IBPO hosted a dinner and open bar. After dinner, the group moved to the restaurant's bar, where they befriended a group in town for a convention. Gerald Flynn, the president of the Local and the organizer of the Boston trip, invited these out-of-towners to join the Lowell group on their bus as they continued on to J.J. Foley's, a bar in the South End frequented by police officers. Dixon spent time at J.J. Foley's with some of the conventioneers, including a man named Jason Kumm. When the bar closed at 2 a.m., Kumm did not know how to get back to his hotel, so Dixon persuaded the bus driver to drop Kumm off before heading back to Lowell.

As the bus left the bar, John Leary – a police officer whom Dixon had once dated and who was sitting directly across the aisle from her - started yelling at Dixon for creating a delay-causing detour so late at night. The shouting escalated as other people at the back of the bus joined in. The comments, directed at Dixon and Kumm, turned sexual: "Why don't you fuck her. We all have." "She gives great blowjobs." "She will do you, she's done all of us." The bus driver, who testified that she had spent seven years trying to forget that night, explained that "the word fuck was used so often that I was turning my mind off to it." Kumm described the barrage as "totally inappropriate conversation, verbally abusive, threatening." Flynn, sitting at the front of the bus, encouraged Kumm to get off before a fight broke out; the situation, he thought, "had the potential to explode."

Kumm did get off the bus before it reached his hotel, but the verbal abuse of Dixon did not end. Leary kept shouting in Dixon's face such comments as, "Get off the bus with your boyfriend. Go fuck him at the Sheraton if you want to bring him with you." Similar comments continued from the back of the bus. When Dixon looked behind her, she saw another officer, David Pender, standing with his hands down his pants and saying, "Why don't you come and fucking blow me." Terrified, Dixon demanded the bus driver let her off the bus near Boston Common, even though the driver and Ed McMahon, another officer, tried to dissuade her. Throughout all of this, Flynn remained at the front of the bus; although the president of the Local, he did not intervene to stop the abuse or to try to reassure Dixon when she wanted to flee.

During her efforts to make her way home, Dixon was subjected to an attempted sexual assault by a stranger. Distraught, Dixon called in sick to work the next two days, and when she did return to work, she avoided speaking about the bus incident. A few weeks later, however, the Chief of the Lowell Police Department, Edward Davis III, caught wind of the incident and started an internal investigation, in which Dixon cooperated. On November 19, 1998, the Chief sent letters to the male officers on the bus trip, including Leary, ordering them to have no contact with Dixon.

On November 20, the very next day, Leary sought and received an ex parte temporary restraining order ("TRO") against Dixon. Leary's cursory affidavit, which the jury did not see, evidently alleged that Dixon had made threatening comments to him the evening of the bus incident. He did not explain why he had waited a month to seek protection from Dixon in the form of a TRO. Leary knew the TRO would have the result, under department policy and Massachusetts law, of forcing the police department to put Dixon on administrative leave and confiscate her weapon while the TRO was in effect. Although Dixon hired a lawyer and went to court to deny the allegations, Leary never returned to court to support his TRO or seek continued protection, allowing the TRO to expire after its initial fifteen-day coverage. Dixon testified she was humiliated when she had to explain her month-long absence, caused by the TRO, to the teachers, students, and parents with whom she worked at Rogers Middle School. Because of the TRO, she had to get special permission to renew her firearms permit, and she avoided participating in outreach programs that required a background check.

The Lowell Sun reported that Leary had obtained a TRO against Dixon. This marked the beginning of extensive local publicity about the bus incident and its aftermath. Flynn was quoted frequently in the paper and appeared on local television stations and radio shows talking about his version of events. The president of the IBPO, Kenneth Lyons, hosted a local television show produced and paid for by the union; he used this show over the following year to defend the male officers and disparage Dixon, the police chief, and the city manager for pursuing their investigation. His comments grew increasingly vicious and were the basis for Dixon's defamation claim against Lyons and the IBPO, as well as part of the basis for her retaliation claims.

At the conclusion of the internal investigation in the spring of 1999, the city fired Leary and suspended Flynn, Pender, and some of the other officers. The officers appealed to the Civil Service Commission, which held additional hearings that fall. In the interim, Jose Rivera, one of the disciplined officers, filed an internal sexual harassment claim against Dixon. So did another officer who co-taught DARE summer camps with Dixon, further disrupting her work at the school. Both claims were later determined to be unfounded.

In January 2000, the Civil Service Commission dismissed the charges against Flynn and a few of the other officers, finding insufficient evidence to sustain the charges against them. It also determined that Dixon's testimony regarding Pender's alleged indecent exposure, Flynn's allegedly inappropriate comments to the bus driver, and various other details of events the night of the bus incident was inconsistent and thus not credible. The

Commission's final decision, issued in January 2001, sustained Leary's termination, though it decreased the length of Pender's and Rivera's suspensions. It again concluded that Dixon's testimony was not entirely truthful. Within a month, Leary, Pender, and Rivera all filed complaints against Dixon with the police department's internal affairs office, accusing her of perjury and launching another internal investigation. This investigation concluded in the spring of 2002 that Dixon had perjured herself in statements made to the department's investigators and in testimony before the Civil Service Commission, and the city sent Dixon a notice of contemplated discipline in August 2002. She had, however, already quit the force on June 12, 2002.

Dixon brought suit in October 2001 in the District of Massachusetts against Leary, Flynn, Pender, Lyons, Local 382, and the IBPO, alleging discrimination and retaliation under both state and federal statutes, as well as assault, intentional infliction of emotional distress, and defamation. After an eleven-day jury trial in the fall of 2005, the jury found against Leary on the intentional infliction of emotional distress claim. It also found for Dixon and against Flynn and the Local on the discrimination claims and against Leary and the IBPO on the retaliation claims. Dixon lost her assault and defamation claims. In addition to compensatory damage awards totaling $1,205,000, the jury awarded punitive damages of $25,000 against the Local, $1,000,000 against the IBPO, and $ 2,500 against Leary for retaliation.

Dixon v. International Brotherhood of Police Officers, et al.
September 28, 2007
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=061210&exact=1

Fourth Amendment – Deadly Force – Maine Case

OFFICERS JUSTIFIED IN USING DEADLY FORCE

The conduct of the three officers was not egregious enough to submit the matter to a jury. The first officer was confronted by a much larger man charging her with what he has conceded was a dangerous weapon in his hand. After he was shot, he refused to stop moving and show his hands, as ordered by the other officers. Because the conduct of the officers was reasonable and not excessive, they were also entitled to summary judgment on the claims under the Maine Tort Claims Act.

Three Lewiston police officers appealed the denial by the federal district court in Portland of their motion for summary judgment in an action alleging excessive force in violation of 42 U.S.C. § 1983 and Maine law. The district court denied summary judgment. The court reasoned that the affidavit of a third-party witness who observed the shooting from a nearby apartment and stated that the plaintiff did not have a hammer in his hand created a material issue of fact as to whether the officers used excessive force by shooting the plaintiff when he was on the ground.

On the evening of December 17, 2003, Vincent Berube set out to commit suicide. He parked his truck in a vacant lot in Lewiston, Maine, and began to slit his wrists and stab himself in the chest. He was interrupted when a car pulled up behind him. Assuming it

was a police car, Berube left the lot and drove to the fenced-in parking area behind the Lewiston police station to, in his words, "raise a little hell." As Berube drove his truck into the compound, Officer Carly Conley walked out of the back door of the police station toward her cruiser in the compound. She heard the truck door open, which was followed by yelling and screaming and the sound of windows being smashed. Conley approached the truck, and believing the driver to be highly agitated, she radioed for backup. As she rounded the back of the truck and came within ten feet of Berube, she saw him raise a shining object, which appeared to her to be a large hammer. Officer Conley is five feet, three inches tall and weighs 125 pounds, while Berube appeared to be about six feet tall and weigh 200 pounds. Conley yelled to Berube to stop and put his weapon down. Believing Berube would strike her, Conley fired at him until he fell to the ground.

Meanwhile, Officers Eric Syphers and Matthew Vierling arrived at the scene with their weapons drawn. They had heard shots but did not know who had fired. They saw Berube lying on his right side with his back toward them, his hands not visible. Syphers ordered Berube to stay down and show his hands. Berube began to roll over toward them, and as Berube's right hand became visible, Syphers saw a silver-colored object in his hand. Vierling and Syphers, having heard the shots and seeing a metallic object, believed that Berube was armed and was positioning himself to fire. Syphers ordered Berube to stop moving and show his hands. When Berube did not respond, Vierling and Syphers fired until Berube stopped trying to get up. According to the dispatch recording of Conley's call for backup, *ten seconds elapsed between Conley's call and the end of the incident, which took place on a dark and rainy night.*

Berube was arrested and later hospitalized. He was indicted by the Androscoggin County grand jury for criminal threatening with the use of a dangerous weapon (a hammer) by intentionally or knowingly placing Officer Conley in fear of imminent bodily injury. Berube pleaded guilty to the charge on September 23, 2004. On November 17, 2005, Berube filed suit against Officers Conley, Syphers and Vierling, alleging the use of excessive force in violation of 42 U.S.C. § 1983 and state law. The officers moved for summary judgment on the ground of qualified immunity. The district court denied summary judgment to the extent that the three officers shot Berube while he was on the ground, finding that there was a dispute of material fact created by the witness' affidavit about whether Berube had a hammer and presented a threat to the officers, and thus whether a reasonable officer would have known that shooting Berube while he was on the ground and posed no threat to the officers was a constitutional violation.

The Appeals Court noted that it may well have been true that Conley continued to fire as Berube fell to or lay on the ground. But it is clear from the very brief time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. Conley's actions cannot be found unreasonable on the basis that she may have failed to perfectly calibrate the amount of force required to protect herself. When Syphers and Vierling arrived Berube was already on the ground, and the officers believed that he was disobeying orders to stay down and show his hands and that, according to one officer, he had a metal object that appeared to be a gun. The

reasonableness of their decision to fire, based on the circumstances they observed in a matter of seconds, is clear.

Berube claimed that there was no evidence the officers were not lying about their versions of the events. The Court answered that claim by stating there was no evidence that they were lying. The Court noted that the three officers' accounts were consistent with each other and with the physical evidence. Berube also argued that the officers had other means available to subdue him, but the Court said that even if that was so it does not establish that the actions of the officers in shooting Berube were unreasonable. The Court concluded that undisputed facts demonstrated that the circumstances in which the officers found themselves were "tense, uncertain, and rapidly evolving." Conley was confronted by a much larger man charging her with what he has conceded was a dangerous weapon in his hand. It cannot be said that any reasonable officer, confronted with the necessity to subdue an apparent attacker, would not have made the same choice. Syphers and Vierling also faced a tense and uncertain situation when they rushed from the station to assist a fellow officer calling for help. They had heard firing from unidentified weapons and saw Berube rolling on the ground, refusing to obey their orders and potentially preparing to fire at them. There was no dispute Berube did not obey the officers' commands to show his hands. Faced with the necessity of making a split-second judgment on a rainy night about how to neutralize the threat they perceived from Berube, the officers' actions cannot be said to have been "plainly incompetent."

Berube v. Conley, Syphers & Vierling
October 31, 2007
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=062644

Fourth Amendment – Curtilage

Not All the Driveway is Curtilage

When the defendant was placed under arrest, he was not within an area that came under his home's umbrella of Fourth Amendment protection since he had no reasonable expectation of privacy in a public outdoor area, and as a consequence, the police did not need a warrant to arrest him.

The defendant, Brown, appealed the denial of his motion to suppress. While conceding that the police had probable cause to arrest him, he claimed that he was in the curtilage of his home and that the police lacked exigent circumstances to arrest him without a warrant.

When determining whether a given location falls within the home's curtilage, the Court looks to whether it is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." The Supreme Court has identified four specific criteria to guide the analysis: [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.

The Court noted that the first factor would seem to favor a finding that Brown was in the curtilage when arrested: he was arrested at the top of his driveway, adjacent to the garage. The record is unclear on precisely how far this location was from the trailer in which Brown resided. Yet even assuming the two were close together, proximity to the dwelling house is not dispositive. Application of the second factor is unhelpful in the circumstances: there appears to be no evidence on record as to whether there was an enclosure surrounding all or part of Brown's property, or internal enclosures around individual buildings or groups of buildings. However, the third and fourth factors lead to a conclusion that Brown was not within the curtilage of his home when he was arrested.

Specifically, relying on past cases, the Court found that when the relevant part of the driveway is freely exposed to public view, it does not fall within the curtilage. This holds true even where the relevant part of the driveway is somewhat removed from a public road or street, and its viewing by passersby is only occasional. In order for a part of a driveway to be considered within the home's curtilage, public viewing of it must be, at most, very infrequent. The remoteness of the relevant part of the driveway and steps taken by the resident to discourage public entry or observation militate toward a finding that it falls within the curtilage. Moreover, although there were also no signs directing visitors to the motor-repair business located in Brown's garage, Brown admitted that he allowed patrons onto the property to drop off and pick up motors; Brown could have no reasonable expectation of privacy in an outdoor area to which members of the public were given ready access.

U.S. v. Brown
December 7, 2007
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=052830

Fourth Amendment – Terry Detention

INVESTIGATIVE DETENTION JUSTIFIED

There was sufficient reasonable suspicion to justify the officer's decision to order defendant to step out of his car where: (1) the officers, having pulled into the parking lot to investigate suspected drug activity, were already alert to the possibility of criminal activity in the lot; (2) the officer had interacted with defendant on prior occasions and testified that defendant had not exhibited comparable nervousness on those occasions; and (3) defendant did more than merely reach towards the center console but rather appeared to be actively attempting to conceal something from the officers' view. Once defendant exited the car, the butt of the firearm was in plain view; thus, it was fruitless to argue that the officer's subsequent retrieval of the firearm implicated any additional Fourth Amendment concerns.

In the afternoon of March 19, 2005, three Providence police officers were conducting a routine patrol in a high-crime area when they observed a group of people loitering in the rear corner of a parking lot. The officers noticed that one of the men in the crowd was Miriour Perkins, a suspected drug dealer with a prior arrest record. Concerned about

possible drug-related activity, the officers pulled into the parking lot with the intention of dispersing the crowd. They parked their unmarked car behind a black SUV stopped in front of a building along the right edge of the lot and exited their vehicle, passing the SUV as they proceeded towards the crowd at the back of the lot. One of the officers, Thomas Zincone, recognized Taylor, whom he had encountered previously on five to seven occasions, sitting in the driver's seat of the black SUV. According to the testimony of Officer Zincone, which the district court credited, Taylor appeared far more nervous than he had been during their prior encounters and began to make quick movements with the right side of his body, as if attempting to hide something from Zincone's view. Zincone greeted Taylor and approached the driver's side window, at which point Taylor grabbed the steering wheel and leaned forward, moving so as to conceal his right side. Taylor responded nervously to Zincone's greeting and, "his hand . . . shaking, frantically pulled his ID from the window" and offered it to Zincone, unasked. Zincone then saw Taylor's right hand moving around on top of a beige towel, as though Taylor was endeavoring to conceal something beneath it. His suspicions aroused by Taylor's uncharacteristically nervous demeanor and furtive movements, Zincone asked Taylor to exit the vehicle. When Taylor stepped out of the vehicle, Zincone discerned the butt of a firearm protruding from underneath the beige towel. Zincone reached into the vehicle and pushed back the towel to confirm that there was in fact a firearm concealed beneath it. Just as Zincone leaned into the SUV, Taylor attempted to flee but was tackled by the officers. At that point, Taylor blurted out, "That ain't my gun!" and was then placed under arrest.

On February 1, 2006, a federal grand jury indicted Taylor on one count of possession of a firearm by a convicted felon in violation. Taylor moved to suppress all evidence seized and statements taken from him during the March 19th encounter with the police, arguing that the investigatory stop was unconstitutional because the police officers did not possess any articulable facts showing [he] was engaged in any criminal activity. The district court denied Taylor's motion to suppress, considering the high-crime location, the officers' initial suspicions regarding the crowd amassed in the parking lot, the presence of known drug-dealer Miriour Perkins, Taylor's unusually nervous behavior, and Taylor's apparent attempts to conceal something from Officer Zincone's view, and concluding that "while none of the factors . . . alone [was] sufficient to have supported this stop and search, all of the factors considered together, when you look at the totality of the circumstances, [were] sufficient."

U.S. v. Taylor
December 21, 2007
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=062687

Fourth Amendment – Entry into Premises – Civil Liability

LIABILITY FOR WARRANTLESS ENTRY

Qualified immunity is denied where plaintiff established that federal agents unconstitutionally entered his home, and that an objectively reasonable official in the same circumstances would have known that the entry violated plaintiff's clearly established rights.

On May 6, 2004, at around 8:00 a.m., a United Parcel Service (UPS) employee notified the Massachusetts State Police that a suspicious package had arrived at UPS's Lynnfield facility. The package was addressed to an individual named "Debbie Moore," was entrusted to the care of "Chris DeMayo," and was sent by "Susan Kelty." Shortly thereafter, Nugent, in his capacity as a member of the DEA Task Force Group #3, traveled to the UPS facility to investigate the report. There he was joined by other officers. Nugent indicated that his suspicions were raised by the box's heavy taping, its California return address, and the lack of a requirement for a signature. At approximately 9:15 a.m., a drug-sniffing dog under the supervision of the State Police signaled the presence of narcotics in the box. Later, at 9:55 a.m., DEA Special Agent Robert Donovan, acting in an undercover capacity, called Kelty to confirm that she wished UPS to deliver the package. Kelty responded that it was a "very important package" for her terminally ill sister, whose condition necessitated delivery rather than pickup.

At approximately 11:20 a.m., Donovan, disguised as a UPS employee and accompanied by a number of other task force officers, conducted a controlled delivery to DeMayo's residence. Gary DeMayo, the plaintiff's father, opened the door, remaining in the threshold. While Gary DeMayo was still in the process of signing for the package, Donovan gave a "prearranged" signal for the arrest team to advance to the home. At this point, Gary DeMayo had only signed his first name. Nugent and Lugas brushed by Gary DeMayo, entered the residence, and then proceeded to conduct a brief protective sweep of the house lasting approximately 15 to 20 seconds. During this sweep, Lugas encountered a "frail looking woman," later identified as Debbie Moore, DeMayo's mother and the intended recipient of the package, exiting a bathroom on the second floor of the house.

When confronted by the agents, Gary DeMayo refused to identify himself. He informed the officers that he had no identification on-hand. He refused to accept the package and stated that he would not now sign for it. Nugent's report indicates that, after the officers' entry into the home, Gary DeMayo became belligerent and uncooperative. Ultimately, the officers issued Gary DeMayo a criminal summons and seized the package after indicating their intent to obtain a search warrant for it. According to Nugent and Lugas, Nugent subsequently obtained a warrant to search the package, which was then revealed to be conspicuously devoid of narcotics, containing only sandals, two packages of underwear, two boxes of cold compresses for injuries, a figurine, a white visor, and women's shirts wrapped in a towel.

Plaintiff brought suit against the agents and the State Police in federal court alleging the violation of his constitutional rights as well as various state law claims. Eventually, all

parties other than Nugent and Lugas were dismissed from the case. The Appeals Court found that the officers violated the Fourth Amendment in making the warrantless entry where was neither consent nor a demonstrated exigency.

DeMayo v. Nugent
February 22, 2008
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=071623

Fourth Amendment – Stop & Frisk

Reasonable Belief of Armed & Dangerous

In determining whether a pat-down search is an appropriate step following a valid Terry stop, the key is whether, under the circumstances, the officer is justified in believing that the person is armed and dangerous to the officer or others. The underlying facts considered together as a whole justified the officers' belief that the defendant was armed and dangerous to the officer or others, and they were therefore justified in frisking the defendant for weapons.

On December 6, 2005, at approximately 1:15 a.m., Boston police officers Linwood Jenkins and Jason Reid, dressed in plain clothes and in an unmarked car, observed a green Lexus take off from a curb without headlights and with malfunctioning break lights. The Lexus was in a high-crime area. The officers decided to stop the car based on the driver's failure to illuminate his headlights. Before the Lexus stopped, the police noticed the passengers in the car make movements down and to their left. The driver motioned towards his door, and the front-seat passenger motioned towards the console. No movement was observed in the back seat. Reid testified that the movement in the car concerned him, and he wanted "to keep a good eye on everyone's movement from that point on." The officers called dispatch before approaching the car. Reid called out "furtive movements" when he observed the passengers moving around in the car. He approached the car on the passenger's side with his gun unholstered in a "low ready" position, making his weapon clearly visible to Soares who was sitting in the front seat. Jenkins approached the car on the driver's side with his hand on his gun in an unsnapped holster. Reid repeatedly ordered the passengers in the car to keep their hands where he could see them and remain still. Soares, Allen Lee, the driver, and Rasheed Marsman, the backseat passenger, complied with the orders at first. Almost immediately, Soares became agitated, began to rock back and forth, was verbally abusive, and kept moving his hands around. He accused the officers of stopping them for "driving while Black."

Meanwhile, Lee gave his license and registration to Jenkins, and Jenkins returned to his car to check them. Reid remained at the Lexus with his flashlight. Jenkins then returned from the police car to read Lee a citation for the malfunctioning lights. After Lee complained that there was no justification for the stop, Jenkins offered to show Lee the malfunctioning light. Lee stepped out of the car to view the malfunctioning light and consented to a pat-frisk. At about this time, two other policemen, Jeff Lapolis and Paul Brooks arrived at the scene in separate cars; these officers happened to be in the area.

One officer parked in front of the Lexus; the second officer parked behind Reid and Jenkins, who were directly behind the Lexus.

As this was going on, Reid went to the driver's side of the car. Soares became verbally abusive to Reid, and he continued moving his hands despite Reid's orders to keep still. Although Reid repeatedly asked Soares to stay still, he persisted in his agitation. Reid testified that Soares was "rocking back and forth" and "flailing" and "flipping" his hands around -- all the while using profane language directed at the officers. Reid testified that at that point he "got a little uneasy." In response to Soares's erratic behavior, Reid asked the back-up officers to remove Soares from the car because he "felt really uneasy about . . . the way **[**Soares**]** was behaving." Lapolis and Brooks were standing at the passenger side of the car. After Lapolis removed Soares from the car, he attempted to pat-frisk Soares, but Soares swatted Lapolis's hand away from his waist. Lapolis and Brooks then moved Soares to a nearby wall where Lapolis frisked him after a scuffle. Lapolis felt a hard object through Soares's clothes and yelled "gun." Lapolis and Brooks subdued Soares and removed a loaded .9mm gun from Soares's pants. Soares was arrested, along with Marsman and Lee. A federal grand jury returned a one-count indictment charging Soares with being a felon in possession of a firearm and ammunition.

In determining whether a pat-down search is an appropriate step following a valid Terry stop, the key is whether, under the circumstances, the officer is justified in believing that the person is armed and dangerous to the officer or others. The facts demonstrate that the officers believed that their safety was at risk. Several additional facts became known as the stop progressed, which, taken together, created reasonable suspicion that Soares might be armed and dangerous. The record reflects that Reid and Jenkins made several other observations that alerted them to the potential for danger: the traffic stop occurred in the middle of the night; it occurred in an area "plagued with numerous drug arrests, assaults by handgun, assaults by stabbing, robbery, fighting . . . illicit narcotics . . . barroom fights and nuisances like that"; the officers saw Lee and Soares bend over toward their left, as if putting something on the floor, which the officers testified were "furtive movements" and were "not ordinary."

After Reid approached Soares, Soares gave Reid even more reason to fear for his safety. Once the car was stopped Soares refused repeated orders to remain still and keep his hands in Reid's view. Soares continually used abusive and profane language, and he became increasingly agitated as the stop progressed. Reid testified that Soares's erratic and uncooperative behavior made him "extremely nervous." Reid observed him move his hands out of the officers' sight towards the area that he first saw him motion towards at the start of the stop. Reid could reasonably have thought that Soares was reaching for a weapon. Reid only asked Lapolis to remove and frisk Soares after his continued erratic movements and disconcerting behavior. Under the circumstances, Reid's judgment that Soares posed a threat was an objectively reasonable and a justified reaction to the situation.

U.S. v. Soares
March 28, 2008
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=071479

Maine Supreme Judicial Court

Fourth Amendment – Probable Cause

REASONABLE INFERENCES IN AFFIDAVIT

The affidavit stated that the confidential source told the affiant that defendant "has" 15 to 20 pounds of marijuana in a shack behind his house. The use of the present tense and the large quantity allowed an inference that marijuana could have been found currently in the shack. The affidavit went on to state how the confidential source came to have this information and how he knew it was marijuana. Given that the source's reliability was not an issue, the affidavit was sufficient because of the favorable inferences that could and should have been drawn from it.

William J. Estabrook appealed from a judgment entered in the Aroostook County Superior convicting him of unlawful trafficking in scheduled drugs and unlawful possession of scheduled drugs. He argued on appeal that the trial court was wrong in relying on the Good Faith Exception to deny his motion to suppress evidence. The Law Court concurred with the decision to suppress, but reached its conclusion on the grounds that the affidavit established probable cause for the issuance of the warrant.

On November 15, 2005, an officer from MDEA obtained a search warrant to search Estabrook's residence in Ludlow. Estabrook moved to suppress the evidence obtained from the search of the residence, as well as a subsequent search of a safe. He alleged that the affidavit for the initial warrant "failed to state a date and time of the occurrences referred to by the confidential source." The Superior Court agreed with Estabrook that the MDEA officer's affidavit lacked probable cause because of the absence of information about when the confidential source acquired his information or made his observations, but denied the motion in that the officer submitted the affidavit in good faith, and therefore, suppression was not required. Estabrook appealed.

The Law Court noted that when it reviews a denial of a motion to suppress, it is required to afford great deference to the issuing magistrate. It also noted its obligation to draw all reasonable inferences from the affidavit to support the finding of probable cause, and to limit its inquiry to whether there is a substantial basis for the finding of probable cause under the totality of the circumstances. The issue at stake in such cases is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place at a particular time. This determination includes judging the veracity and basis of knowledge of persons supplying information.

The affidavit signed by the MDEA officer contained numerous paragraphs, most of them detailing Estabrook's history of drugs and encounters with police from 2001 to January 2005. However, the second numbered paragraph of the affidavit sets forth the recent information. Quoting from the paragraph:

> I talked to a Confidential Source (CS) on November 15, 2005. This source is on probation for trafficking in scheduled drugs, and has a violation pending. CS provided information on others involved in drug trafficking hoping for a benefit from the judicial system on the probation violation. CS was released from jail and issued a summons to appear in court after he provided this information, in addition to other information on criminal activity not relevant to this investigation. . . . CS advised that Willie Estabrook in Ludlow has 15-20 pounds of marijuana in an ice shack behind his house. CS advised he had accompanied Travis McNinch to Estabrook's house. At this time McNinch received about 1 pound of marijuana from Estabrook, which was fronted to him. CS stated he did not leave the vehicle with McNinch. CS saw both McNinch and Estabrook walk out of site (sic) behind Estabrook's residence. McNinch later advised CS that Estabrook has what he estimated to be 15-20 pounds of marijuana in an ice shack out back of his residence. CS indicated that Estabrook has motion-sensing cameras in that area. CS said he smoked some of the marijuana and knew it was marijuana. A recent arrest report shows that CS was with Travis McNinch when McNinch was caught with drugs and a gun. CS said Scott Totten lives in the trailer next to Estabrook's house, and sells marijuana from there. CS said he has bought marijuana directly from Estabrook in the past.

The Law Court said that although the affidavit at issue in this case contained several pages about Estabrook's history, that history in and of itself, would not provide probable cause for the issuance of the warrant. The historical paragraphs provide background and are part of the totality of the circumstances. However, paragraph two of the affidavit, when read as it must be by a reviewing court with all reasonable inferences to be drawn in support of the finding of probable cause, is sufficient for a finding or probable cause. It states that the affiant talked to the confidential source on November 15, the same day that the affidavit was signed. The confidential source told the affiant that Estabrook has 15-20 pounds of marijuana in a shack behind his house. The affidavit uses the present tense of the possessory verb "to have." The present tense and the large quantity allow an inference that marijuana can be found currently in the shack. The affidavit goes on to state how the confidential source came to have this information and how he knew it was marijuana.

The Law Court noted that the affidavit failed to state when the confidential source learned his information, and that it is better practice for an affidavit to expressly provide the timeliness of the information upon which it relies. Still, given that the source's reliability is not an issue in this case, this particular affidavit is sufficient because of the favorable inferences that can and should be drawn from paragraph two.

State v. Estabrook [2007 ME 130]
September 13, 2007
http://www.courts.state.me.us/court_info/opinions/2007_documents/07me130es.pdf

Uninsured Motorist Coverage – Personal Auto Insurance Policy

DEPUTY INJURED ON JOB WINS CLAIM

The insured, a Sheriff's detective, was dispatched to a domestic disturbance. On arrival, he got out of his patrol car, leaving the engine running. The man causing the disturbance got into the patrol car, drove over the insured's leg, and dragged him several feet, causing him to sustain severe injuries. As the county did not carry uninsured motorist coverage for its employees injured on the job, the detective made a claim on his own policy. The insurer denied coverage on grounds that under the policy, an "uninsured motor vehicle" did not include a vehicle furnished for the insured's regular use. The Law Court held that, when the man stole the vehicle, it stopped being a vehicle furnished for the insured's use and was simply a stolen vehicle. Therefore, the "regular use" policy exclusion was inapplicable

Jason Pease, a Lincoln County Sheriff's detective, appealed a Superior Court decision that granted State Farm Mutual Automobile Insurance Company summary judgment on Pease's complaint for uninsured motorist (UM) coverage under his State Farm personal insurance policy. Pease, on appeal, contended that the court was wrong it is determination that State Farm's UM policy exclusion for vehicles furnished for the insured's regular use was valid pursuant to state law. The Law Court decided that the policy exclusion did not apply to the vehicle stolen from Pease, and vacated the judgment of the Superior Court.

On December 25, 2002, Jason Pease, a detective sergeant in the Lincoln County Sheriff's Office, was at home off-duty when he was dispatched to a reported disturbance at a home in Jefferson. Pease drove his unmarked patrol vehicle to the scene. Upon arrival, Pease got out of his vehicle, leaving the engine running. He approached Michael Montagna, the individual causing the disturbance. Montagna told Pease that he had been drugged and that people were out to get him. At some point during the encounter, Montagna ran away and got into the driver's seat of Pease's vehicle. Pease tried to pull Montagna out of the vehicle, but was knocked down by the car door as Montagna drove in reverse. Montagna then drove over Pease's leg and dragged him for about 50 feet. Pease sustained severe injuries to his knee and suffered lacerations and contusions to other parts of his body.

Pease was unable to recover damages under Montagna's State Farm policy because it was determined in earlier Law Court case that Montagna's policy did not cover his unlawful possession of Pease's patrol. Ordinarily, Pease would then look to the uninsured or underinsured provisions of the policy covering the car he was driving. That car was owned and insured by Lincoln County. The County, however, chose not to carry UM coverage for its employees injured on the job. Thus, Pease sought insurance coverage for his injuries through the UM coverage of his personal insurance policy issued by State Farm. State Farm, however, denied coverage, citing a provision that precluded coverage if the insured was operating a vehicle "furnished for the regular use of you, your spouse or any relative."

The Law Court noted that both parties, in interpreting the policy provision, failed to address what meaning, if any, to ascribe to the fact that Montagna stole the patrol vehicle

from Pease before injuring him with it. The Court found this fact to be dispositive. The Court found that at the moment that Montagna stole the vehicle, it stopped being a vehicle furnished for the deputy's use, and was simply a stolen vehicle. Accordingly, the "regular use" policy exclusion was determined to be inapplicable in this case.

Justice Silver, while concurring with the majority opinion, wrote individually to point out that Lincoln County did not provide uninsured motorist insurance to Pease, and that if Lincoln County provided such coverage to on-duty officers, it is unlikely that Pease's claim would ever have reached the Court. Justice Silver noted that it is important to note that many law enforcement officers do not have such coverage on their patrol vehicles. Therefore, he said, they are denied traditional personal injury protections when involved in an automobile accident with an underinsured driver. Justice Silver also opined that any policy provision that excludes uninsured motorist coverage violates that the state statute providing for such coverage.

Jason Pease v. State Farm Mutual [2007 ME 134]
September 20, 2007
http://www.courts.state.me.us/court_info/opinions/2007_documents/07me134pe.pdf

Fifth Amendment – Questioning after Invocation of Right to Remain Silent

MURDER SUSPECT STATEMENTS ADMISSIBLE

Incriminating statements were admissible despite clear invocation of right to remain silent while in custody the previous day because the police "scrupulously honored" the invocation by immediately terminating the interrogation after the invocation, waited 19 hours (overnight) to return, and gave the suspect fresh Miranda warnings (which he waived) before the subsequent interview.

David N. Grant appealed s from his conviction in Kennebec County Superior Court for murder. Grant argued that the Superior Court was wrong in declining to suppress statements that he made to a detective during a custodial interrogation. The questions presented by this appeal are: (1) whether Grant was in custody when he invoked the right to remain silent; (2) whether Grant clearly invoked that right; and (3) if so, whether Grant validly waived his right to remain silent after the right was "scrupulously honored" by law enforcement.

On November 30, 2004, Grant left his work in the mid-afternoon, purchased cocaine, and after ingesting about a half-ounce of the drug, drove to the home of his mother-in-law in Farmingdale. An argument ensued, and Grant attacked her. When she was dead or nearly dead, he tied her hands behind her back, loaded her into the back of his pick-up truck, and dumped her into an empty field. Her body was found the next day. A later autopsy showed that the cause of her death was blunt force trauma and exsanguination from stab wounds. At 11:30 P.M. on November 30, before the body was found, law enforcement officers were dispatched to the scene of a single vehicle accident on Route 2 in Palmyra. At the scene, the officers discovered Grant in the cab of his pick-up truck, which had gone off the side of the road and into a ditch. A considerable amount of blood

was observable in the bed of the truck. The police officers found Grant moving about in the cab, waving a knife, and repeatedly thrusting the knife into his own throat. The officers smashed a window of the truck and shocked Grant multiple times with a Taser to subdue him. The officers were then able to wrestle away the knife, handcuff Grant, and extract him from the truck. Once Grant was out of the truck, officers secured him, handcuffed, to a long board. Grant was placed into an ambulance that had been called to the scene. A law enforcement officer accompanied Grant to Eastern Maine Medical Center in the ambulance. At the hospital, Grant underwent emergency surgery, which was completed in the early morning of December 1.

In the hours following Grant's surgery, detectives made four attempts to interview him in the hospital at 4:26 A.M., 9:51 A.M., 11:45 A.M., and 1:42 P.M. Grant was not sufficiently conscious or coherent to make a statement during the first three interrogations. During the final interrogation on December 1, at 1:42 P.M., Grant told a detective, in response to his Miranda warnings that he did not wish to talk. The detectives immediately ceased questioning Grant and executed a previously obtained search warrant on Grant's body and clothing. Grant remained hospitalized, and the next day, December 2, a detective returned to the hospital room to question Grant again, beginning at 9:03 A.M. During that interrogation, after receiving new Miranda warnings, Grant made numerous incriminating statements, which were later used against him in trial. Grant argued at trial and later on appeal that his statements were the products of an illegal interrogation given his earlier invocation of the right to remain silent.

Detectives first attempted to interview Grant at 4:26 A.M., just after his surgery was completed when he was placed in intensive care. Grant, who was awake but sedated, was read his Miranda rights, but his interview was terminated because he was not completely coherent. Grant made a mumbling sound when the detectives asked him if he would like to talk to them later. At 9:51 A.M., a detective again attempted to interview Grant and read him his Miranda rights. Grant, who was still in a foggy state of mind, indicated that he did not want to talk and that his throat was sore. At 11:45 A.M., a detective returned to the hospital room, read Grant his Miranda rights, and attempted to interview Grant again. Grant indicated that he could not converse because his throat was sore and that he could not write because his hands were sore. Grant did not respond when the detective asked him if he should return later.

When the detective returned to Grant's room at 1:42 P.M., Grant stated that he did not want to answer questions. The transcript of the interrogation shows that the following exchange occurred after Grant was read his Miranda rights:

> Detective: Okay. Now, having all those rights which I just explained to you in mind, do you wish to answer questions at this time?
> Grant: No.
> Detective: What's that?
> Grant: No.
> Detective: No?

Grant: (inaudible) answer any questions.
Detective: What's that?
Grant: I don't want to answer any questions.
Detective: You don't want to answer any questions?
Grant: No.

The detective immediately ceased questioning Grant and, authorized by the search warrant, executed a search of Grant's body, during which the detective took hand and nail swabbings, nail clippings, pubic hair combings, a penile swab, and a blood sample. Grant remained hospitalized. The officer's questioning of Grant at that interview ceased by 1:50 P.M.

On the following morning, December 2, the detective learned from nurses that Grant had not been given pain medication since the previous afternoon and began another interrogation of Grant, approximately 19 hours after the most recent attempt. Again, the detective read Grant his Miranda rights, and Grant acknowledged them. Grant agreed to speak with the detective. During the interrogation, Grant made numerous incriminating statements regarding his relationship with the victim and the events of November 30. The interrogation was terminated at 9:47 A.M., when Grant stated, "I mean I know I've already told you enough to hang me . . . but I think I'd really like to have a lawyer present." Grant was released from the hospital later that day and formally arrested.

The trial court concluded that Grant had been in custody from the night of November 30 to the afternoon of December 2 "only in a medical sense" because his confinement was for the purpose of medical care and not for the purpose of a criminal investigation. The court found that, although Grant had been handcuffed in the ambulance and at the hospital, this was a standard safety precaution. The court reasoned that Grant came into custody consistent with arrest only at the time the detective executed a search warrant on Grant's body during the 1:42 P.M. interrogation. The trial court also concluded that because, during all of the December 1 interviews, Grant left open the possibility that he would answer questions at a later time, he did not clearly assert his right to remain silent in a way that would require the suppression of his December 2 statements. In sum, the trial court concluded that Grant was not in custody when he said he did not wish to talk and that his statement was not an unequivocal assertion of his right to remain silent. According to the court's analysis, Grant knowingly waived his Miranda rights during the December 2 interrogation, until the point at which he refused to speak without an attorney, which resulted in the end of the interrogation. Finally, the court determined that Grant's statements were voluntary and that no evidence showed that the State had compelled Grant to speak or that Grant had been incapacitated.

Grant and the State agree that Grant was in custody on December 2, the day he made his incriminating statements. Because Grant was appropriately informed of his rights pursuant to Miranda, and waived those rights on December 2, his statements would ordinarily be admissible. The statements would be inadmissible, however if Grant's previous invocation of his right to remain silent was clear, occurred while he was in custody, and if the government failed to scrupulously honor his right after it was invoked.

Therefore, whether Grant was in custody during the preceding interview at 1:42 P.M. on December 1, the interview during which he asserts that he invoked his Miranda right to remain silent, becomes significant. Ultimately, whether a suspect was in custody at the time of an interrogation depends upon whether a reasonable person in the suspect's circumstances would have felt that he or she was subject to formal arrest or restraint on freedom of movement to the degree associated with formal arrest. This analysis is purely objective. The delivery of Miranda warnings in a noncustodial situation does not necessarily render that situation custodial, although it is a factor that is considered in determining whether custody existed. At the same time, the Law Court noted that it gives little weight to this factor in that law enforcement officers should be encouraged to provide the Miranda warnings to suspects during questioning. "Law enforcement officials should not hesitate to provide suspects with information about their constitutional rights out of concern that doing so will somehow trigger a custody determination."

In this case, the Law Court determined that Grant was in custody in that he was taken from his truck and the detectives' actions during Grant's hospital stay acted to continue his custodial status. Therefore, the Court concluded, Grant was in custody during the time he asserted his right to remain silent at the 1:42 P.M. interrogation. The Law Court, in essence disagreed with the legal conclusions of the trial court that determined that Grant was only in custody for medical and not law enforcement purposes. However, the mere fact that a suspect cannot leave the hospital as a result of injury or illness does not place that person in law enforcement "custody." In this case, it is the other circumstances surrounding the restraints on Grant's liberty that render his interrogation custodial.

The Law Court quoted from a Ninth Circuit case that "this is not to say that an individual would never be "in custody" when held for medical treatment in a hospital. If the police took a criminal suspect to the hospital from the scene of the crime, monitored the patient's stay, stationed themselves outside the door, arranged an extended treatment schedule with the doctors, or some combination of these, law enforcement restraint amounting to custody could result.

The Court also found that Grant unambiguously asserted his Miranda right to remain silent during the 1:42 P.M. interrogation, while he was in custody. Notwithstanding this determination, the Court ultimately found that Grant's later incriminating statements were admissible because the police scrupulously honored his invocation of the right to remain silent.

Scrupulously Honoring the Right to Remain Silent

When a suspect in custody has invoked his or her Miranda right to remain silent, the interrogation must cease. Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. After a suspect has invoked his right to remain silent, he cannot be

found later to have waived that right by responding to later police questioning *unless his invocation of that right has been "scrupulously honored."* However, the in-custody assertion of the right to remain silent does not act as an impenetrable bar to future in-custody questioning. A suspect's invocation of his right to remain silent is considered to have been "scrupulously honored" if the actions of law enforcement following his invocation can survive a four-factor analysis.[1] These factors are:

> (1) whether police immediately cease the interrogation when the defendant invokes the right to remain silent;
> (2) whether a significant amount of time passes before questioning is resumed;
> (3) whether fresh Miranda warnings are provided; and
> (4) whether the later "interrogation is restricted to matters distinct from the former.

In this case, the police immediately ceased their questioning of Grant when he invoked his Miranda right to remain silent during the 1:42 P.M. interrogation. They did not speak to him through the remainder of the afternoon and evening, and did not return until 9:03 A.M. the following day. It is also clear that, when questioning did resume, Grant was given fresh Miranda warnings, which he acknowledged that he understood. While the subject matter of the police questioning in the later interview was the same as it had been the previous day (when Grant invoked his right to remain silent), the Law Court found that three of the four factors weighed in favor of concluding that Grant's invocation of his Miranda right to remain silent was scrupulously honored.

State v. David Grant [2008 ME 14]
January 24, 2008
http://www.courts.state.me.us/opinions/2008%20documents/08me14gr.pdf

Fourteenth & Sixth Amendments – Due Process & Confrontation

DESTRUCTION OF EVIDENCE "SERIOUS OVERSIGHT," BUT CONVICTIONS AFFIRMED

The defendant failed to show that the vehicle contained evidence of exculpatory value that was apparent before its destruction or that the State acted in bad faith in allowing the vehicle's destruction. Therefore, the trial court's judgment was upheld despite the State's serious oversight in allowing the destruction of the accident vehicle.

[1] Not to be confused with by the rule of Edwards v. Arizona, which requires that, once an accused has invoked his right to have counsel present, so long as he remains in custody, he may not be subjected to further interrogation until either counsel has been made available to him, or he reinitiates further communication with the police. So, had Grant invoked his right to counsel at the 1:42 P.M. interview, the analysis would be substantially different.

Heath St. Louis appealed his conviction in Piscataquis County Superior Court on two counts of manslaughter resulting from the operation of a motor vehicle. He appealed, arguing that he was denied due process because of the State's failure to retain the accident vehicle, and that this also constituted a violation of his Sixth Amendment right to confrontation.

On October 20, 2004, Heath St. Louis, Drake Martell, and Elias Russell were involved in a one-car accident in Sebec. Martell, who was found seat-belted into the front passenger seat, and Russell, who was found seat-belted into the rear right passenger seat, were both killed in the crash while St. Louis, the driver, survived. Blood-alcohol tests showed Russell had a blood-alcohol content of .25%, Martell's was .17%, and St. Louis's was .15%, at the time of the accident. Additionally, swabs taken from the accident vehicle by the Maine State Police crime laboratory showed that St. Louis's DNA was present on the driver's air bag, which was deployed, that neither Martell's nor Russell's DNA matched samples from the airbag that did not match St. Louis's DNA, and blood samples from the driver's area of the car were matched to St. Louis. In November 2004, after the crime laboratory completed testing, the car was released by the Sheriff's Office to the insurance company. The car was destroyed soon thereafter.

Nearly one year later, on October 21, 2005, St. Louis was indicted on two counts of manslaughter. Before trial, St. Louis moved to suppress the forensic evidence gathered by the State and moved to dismiss the charges against him, arguing that prosecutorial delay and the destruction of the accident vehicle denied him due process and governmental fair play. The court denied these motions. During the trial, St. Louis was not permitted to refer to the destruction of the accident vehicle, but could, and did, refer to its "unavailability," based on the court's finding that the intent element of spoliation was lacking. Additionally, the court declined to give St. Louis's requested spoliation instruction to the jury.

The principal issue in this case was the effect of the State's failure to prevent the destruction of the accident vehicle by the insurer. The Law Court found agreed with the trial court that St. Louis failed to show that the vehicle contained evidence of exculpatory value that was apparent before its destruction or that the State acted in bad faith in allowing the vehicle's destruction. Accordingly, the Court affirmed the convictions "despite the State's serious oversight in allowing the destruction of the accident vehicle."

State v. St. Louis [2008 ME 101]
June 14, 2008
http://www.courts.state.me.us/court_info/opinions/2008%20documents/08me101st.pdf