STATE OF WYOMING

EIGHTH JUDICIAL DISTRICT

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July 29, 1999

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FILED
JUL 30 1999
CLERK OF DISTRICT COURT
Deputy

Re: State v. McKinney
Albany County Criminal Action No. 6381

Dear Counsel:

This matter came before the Court for hearing on July 6-8, 1999, upon the following motions:

1. D#108 Defendant's Motion to Suppress Statements Given to Law Enforcement Officers at Ivinson Memorial Hospital, filed May 27, 1999.

2. D#109 Defendant's Motion to Suppress Statements Given to Law Enforcement Officers on October 9, 1998, filed May 27, 1999.

3. D#111 Defendant's Motion to Suppress Evidence Seized from Black 1976 Ford Pickup, 751 N. 4th #C, and Mr. Aaron McKinney's Person, filed May 27, 1999.

Having seen the exhibits, having heard the testimony of witnesses and the arguments of counsel, and being fully informed in the premises, the Court finds and concludes as set forth herein.

Factual Background

Around midnight on October 6, 1998, Aaron McKinney and Russell Henderson beat Matthew Shepard unconscious with a .357 magnum pistol. During that process, they took Shepard's wallet and black patent-leather shoes. Leaving Shepard tied to a buck fence, McKinney and Henderson then drove McKinney's black 1976 Ford pickup into Laramie to burglarize Shepard's residence. They parked the pickup at 7th and Harney and went to look for the residence.

While afoot after leaving the pickup, McKinney and Henderson got into an altercation with Jeremy Herrera and Emiliano Morales. When Henderson was struck in the face by one of the men, McKinney responded by striking Morales on the head with the same pistol he had

used to beat Shepard. McKinney was then struck on the head with a bat. Herrera and Morales left the scene. McKinney and Henderson returned to their pickup.

As the above incident was unfolding at 7th and Harney, Officer Flint Waters of the Laramie Police Department was approaching the same area in response to an unrelated vandalism call. He saw Henderson enter the driver's side door of the pickup, and McKinney enter the passenger side. He also saw McKinney throw something into the back of the pickup. Waters activated his vehicle's overhead rotary and strobe lights and public address system, in addition to the headlights. Henderson and McKinney then got out and ducked down beside the pickup, "looking around as if to run away." Waters could see blood on both Henderson and McKinney. The two men then broke and ran in different directions.

Officer Waters chased down and caught Henderson, whom he then recognized. He Mirandized Henderson and asked him what happened. Henderson said that he and a friend, or two friends were out looking for a party when they were jumped by the other men. Waters then turned Henderson over to the ambulance crew that had arrived, and walked around the pickup. He saw an empty pistol case lying on the ground, and he saw a bloody cocked pistol in the bed of the pickup.

Officer Waters ran the registration on the pickup and learned that it was registered to William McKinney (Aaron's father.). He then turned the pickup over to Sgt. Mitch Cushman as a crime scene, and went to Ivinson Memorial Hospital to speak with Henderson. Henderson at first denied knowing anything about any gun, but then told Waters "you won't find anybody with a bullet hole in them." Waters then cited Henderson for interference with a peace officer and returned to 7th and Harney to try to track McKinney. That effort failed.

Meanwhile, Sgt. Cushman photographed the gun and a bloody "BOSS" coat that could be plainly seen in the bed of the pickup, as well as the pistol case lying on the ground outside the passenger door. He also took photographs through the pickup's windows of Shepard's credit card lying on the dashboard, and one of Shepard's shoes lying on the seat. He could see blood splattered on the steering wheel and on the outside of the driver's door. He also noticed grass and dirt lodged in the trailer hitch area.

Detective Jeffrey Bury, who also worked the pickup crime scene that night, testified that he could read Shepard's name on the credit card from outside the pickup, that he could see the shoe on the seat from outside the pickup, and that he could see the blood splatters from outside the pickup. Because the officers did not at that time have any knowledge of the Shepard beating, they were not then aware of the significance of the credit card or shoe, or any connection between the pickup and anything other than the 7th and Harney incident. Consequently, after the pistol and coat were seized, Bury simply locked the pickup's doors and left his business card in the door.

From the fact that the pickup was registered to McKinney's father, from a conversation with Henderson's girlfriend (Chasity Pasley) in which she related talking to McKinney's girlfriend (Kristen Price), and from further conversations with Henderson, Officer Waters learned that the second occupant of the pickup at 7th and Harney was McKinney. Despite not yet knowing that Shepard lay dying tied to a fence out on the prairie, the police still wanted to speak with McKinney about 7th and Harney. For that reason, Sgt. Kirk Kreiling, the Laramie Police Department evening shift supervisor, went to Ivinson Memorial Hospital when Price called dispatch at about 5:30 p.m. on October 7, 1998, to say that she was taking McKinney to the hospital. Upon arrival at the hospital, Kreiling located McKinney and Price, and told McKinney the police wanted to talk to him. McKinney indicated his willingness to speak with the police. Kreiling noticed dried blood on one of McKinney's ears, but nothing else significant. He could understand what McKinney said when he spoke. He and McKinney did not discuss anything substantive.

Around 6:00 p.m., a passerby chanced upon Matthew Shepard. Albany County Sheriff's Deputy Reggie Fluty was dispatched to the scene in response to the 911 call. She cut the rope binding Shepard to the fence and moved him to relieve his labored breathing. Once Shepard was removed by ambulance, Fluty and other officers took photographs and collected evidence at the scene. Included were very clear and distinctive tire tracks, a mark in the dirt and grass where the suspect vehicle appeared to have backed into a dirt bank, a watch, and Shepard's University of Wyoming photo ID card.

Detective Bury heard the radio traffic from the Shepard scene. Upon hearing the name "Matthew Shepard," he remembered the credit card on the dashboard of the pickup, and realized there was a connection between the Shepard case and the 7th and Harney incident. The fact that Shepard's shoes were missing also brought to mind the shoe seen on the seat of the pickup. In addition, the dirt and grass on the pickup's hitch gained importance given the mark in the dirt bank.

Robert DeBree is the Sergeant of Investigations for the Albany County Sheriff's Office. He was informed of the Shepard case at about 6:40 p.m. on October 7, 1998. After an initial investigation, he drove to the hospital to try to meet with Shepard, not knowing that Shepard was already being transported to Poudre Valley Hospital in Fort Collins, Colorado. Upon arrival at the hospital, DeBree saw McKinney's black Ford pickup in the parking lot. He noticed the dirt and weeds on the hitch area. Shepard's credit card was still on the dashboard. Fearing a loss of evidence if the pickup was not immediately seized, he called to have it impounded, later obtaining a warrant to search it.

In the hospital, DeBree learned from the attending physicians that Shepard was not expected to live. DeBree then went into the emergency room to speak to McKinney. McKinney was lying on a bed, talking to Kristen Price. McKinney seemed upset and nervous, and was bleeding from his left ear. DeBree asked McKinney if he knew the date and time, and McKinney responded correctly. DeBree then told McKinney he wanted to talk to him, and

Mirandized him. McKinney started the discussion by asking DeBree, "did you catch who did this to me?" In response, DeBree told McKinney he was not there to discuss that incident, but that they needed to talk about something else. DeBree asked McKinney where he had been that night, and whether he knew Matthew Shepard. McKinney then proceeded to tell DeBree a story about the preceding evening, with considerable detail. His version of events was that he and Henderson had been at a bar and had laid the pickup keys on the bar. Some unidentified third person--some "guy"--had taken the keys, left the bar, and had not returned for some time. When he returned, the three of them left together to look for a party in the Harney Street area, which is when he was assaulted.

McKinney was not under arrest during this interview, and he was not immediately thereafter placed under arrest. He did not sign a written waiver of his constitutional rights, because DeBree did not have one available at the hospital. McKinney did, however, indicate that he understood his rights and agreed to talk. Due to his head injury, he, like Shepard, was transported to Poudre Valley Hospital later that night.

The investigation continued. Kristen Price eventually abandoned the alibi that Henderson and McKinney had recited to her, which was the same alibi given by McKinney at the hospital, and told the officers all she knew about the incident. Her statement corroborated the physical evidence in many respects, and led to the recovery of additional physical evidence, such as Shepard's wallet, which was hidden in a garbage can in the home she shared with McKinney.

McKinney was released from Poudre Valley Hospital at about midnight on October 8, 1998, at which time he was arrested and taken to the Albany County Detention Center. Upon arrest, he was told of the existing charges involving Shepard, and that Shepard was still alive. Around 7:00 a.m., Detective Ben Fritzen of the Laramie Police Department contacted Sgt. DeBree to see if he was ready to re-interview McKinney. DeBree declined, suggesting instead that they let McKinney get some sleep before he was interviewed. At about 10:00 a.m., DeBree and Fritzen went to interview McKinney. DeBree read a Miranda waiver form to McKinney and asked him if he had any questions about it. McKinney indicated that he had no questions and that he understood, and signed the waiver, agreeing to speak with the officers.

McKinney appeared sleepy during this interview, and yawned several times. He did not, however, slur his speech or complain of dizziness. Detective Fritzen, who had twice before interviewed McKinney and who was familiar with his speech patters, noticed nothing different from his earlier interviews. McKinney told the officers that he had not taken any medications before the interview. In admitting his actions, McKinney told facts that were corroborated by the known evidence. He also showed cognizance of the seriousness of his situation by voicing concerns about the possible length of a prison sentence, and about not being able to see his son for a long time.

McKinney's Injury

When he was struck on the head during the 7th and Harney incident, McKinney received what is known as a closed head injury. Timothy C. Wirt, M.D., who is a board-certified neurosurgeon, and who was McKinney's attending physician at Poudre Valley Hospital, testified at the motion hearing. His testimony contained the following relevant observations:

1. Symptoms of a closed head injury include sleepiness, headaches and nausea.

2. The fact that McKinney was alert and oriented at the time of his hospitalization means only that he was conscious, communicative, and oriented as to time and place.

3. McKinney suffered a small linear skull fracture in the left temporal bone, with associated blood oozing from the bone marrow, resulting in an epidural hematoma.[1]

3. McKinney's injury was "significant but not serious."

4. The brain often recovers quickly from this type of injury.

5. When discharged from Poudre Valley Hospital, McKinney was doing well and had no symptoms that the doctor could detect.

6. An injury of this nature may cause cognitive dysfunction, with impaired reading, writing, and memory problems, and clouded thinking.

7. An injury of this nature potentially could impair the ability to answer questions.

8. McKinney showed no confusion during the examination.

9. Confusion and disorientation do no necessarily happen to everybody with this type of injury.

10. He cannot say that McKinney was not competent to speak with law enforcement.

Also testifying at the motion hearing was Craig W. Beaver, Ph.D., a clinical neuropsychologist. At defense counsel's request, Dr. Beaver reviewed police and jail records, Sgt. DeBree's narrative, medical records, and interview tapes and transcripts. He also conducted a neurological test and interviewed McKinney, and interviewed McKinney's father

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[1]The original diagnosis was a subdural hematoma. The significance of this distinction, if any, was not made apparent.

and maternal grandparents. Beaver concluded that:

1. The location of McKinney's injury--the left parietal lobe--is significant because the brain functions in that area include memory and cognitive thinking.

2. McKinney's symptoms immediately after the injury, while in the emergency room, and even later, including speech difficulties, sleepiness and lethargy, were sufficient to be "of concern."

3. Injuries of this sort may cause difficulties with attention focus, recall, problem solving, behavior control, and loss of inhibition.

4. McKinney was not competent knowingly and intelligently to waive his Miranda rights before either the Ivinson Memorial Hospital interview or the October 9, 1998, interview because he was not capable of thinking through the consequences.

The Law

Confessions

Statements are inadmissible if they are not voluntary. *State v. Evans*, 944 P.2d 1120, 1124 (Wyo. 1997). There is a related, but separate, requirement that defendants be "Mirandized" prior to custodial interrogation. *Mitchell v. State*, Wyoming Supreme Court Slip Opinion Nos. 97-241 and 97-242, June 24, 1999, at 3; *Roderick v. State*, 858 P.2d 538, 546 (Wyo. 1993). A showing that a defendant's constitutional rights were explained to him is not, however, sufficient to ensure admissibility of a confession. The State must also show a knowing, intelligent and voluntary waiver of those rights. *Roderick, supra; Black v. State*, 820 P.2d 969, 971 (Wyo. 1991).

Statements are considered to be voluntary if they are the product of a free and deliberate choice, rather than intimidation, coercion, or deception. *Mitchell, supra, quoting Madrid v. State*, 910 P.2d 1340, 1344 (Wyo. 1996); *Vena v. State*, 941 P.2d 33, 37 (Wyo. 1997). A confession may be found involuntary because of the means used to obtain it. *Simmers v. State*, 943 P.2d 1189, 1195 (Wyo. 1997). Voluntariness is determined by examining the totality of the circumstances surrounding the interrogation. *Id.* Confessions are presumed to be involuntary, and the State has the burden of proving voluntariness by a preponderance of the evidence. *Mitchell, supra; Evans, supra*, at 1125-1127.

The Wyoming Supreme Court has identified numerous factors that should be considered as part of the totality of the circumstances surrounding a confession:

> [T]he atmosphere and events surrounding the elicitation of the statement, such as the use of violence, threats, promises, improper influence or official misconduct, the conduct of the defendant before and during the interrogation and the defendant's mental condition at the time the statement is made.
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> [W]hether the defendant was in custody or was free to leave and was aware of the situation; whether *Miranda* warnings were given prior to any interrogation and whether the defendant understood and waived *Miranda* rights; whether the defendant had the opportunity to confer with counsel or anyone else prior to the interrogation; whether the challenged statement was made during the course of an interrogation or instead was volunteered; whether any overt or implied threat or promise was directed to the defendant; the method and style employed by the interrogator in questioning the defendant and the length and place of the interrogation; and the defendant's mental and physical condition immediately prior to and during the interrogation, as well as educational background, employment status, and prior experience with law enforcement and the criminal justice system.

Simmers, supra, at 1195-1196, *quoting Evans, supra,* at 1125. In determining whether a defendant, in fact and not just in form, knowingly and voluntarily waived his constitutional rights,

> [t]he totality approach * * * mandates * * * inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [defendant's] age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Rubio v. State, 939 P.2d 238, 242 (Wyo. 1997).

Clearly, there are two prongs to this analysis--voluntariness and comprehension. The focus under the first prong is upon the conduct of the interrogators--was the statement the product of coercion or other improper influence. *Garcia v. State*, 777 P.2d 603, 606 (Wyo. 1989); *[but see Evans, supra,* at 1125, where the Wyoming Supreme Court recognizes coercive government activity to be a "necessary predicate" to a finding of involuntariness

under the federal constitution, but reserves a decision whether such is true under the state constitution.] The focus under the second prong is whether a defendant "was sufficiently aware of the nature of the right being abandoned and the consequences of his decision to abandon that right." *Solis v. State*, 851 P.2d 1296, 1299 (Wyo. 1993). In that regard,

> No bright line test exists for determining when a defendant sufficiently comprehends his rights to effectuate a valid waiver. Each defendant's waiver must be analyzed in light of his particular background, experience, and conduct. [Citation omitted.] The constitution does not require that a defendant know and understand every possible consequence of a waiver of the Fifth Amendment privilege.

Id; see also, Bueno-Hernandez v. State, 72 P.2d 1132, 1137-1138 (Wyo. 1986).

Search and Seizure

The Bill of Rights was added to our federal constitution over 200 years ago to emphasize the special rights of the people that were not to be infringed by government. Part of that Bill of Rights, the Fourth Amendment, is at issue today in this case:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added.]

With nearly identical language a century later, the drafters of the Constitution of the State of Wyoming preserved the same right for the people of Wyoming.[2] The linchpin in both provisions is the word "unreasonable." Obviously, both documents recognize the fact that some governmental searches may be reasonable.

Inquiring minds might want to know why both constitutional provisions, in the same sentence forbidding unreasonable searches and seizures, require warrants [search warrants, presumably] to be based upon probable cause, but do not specifically require a warrant before a search or seizure may take place. Understandably, this language has been interpreted to

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[2]Wyoming's constitution reads "probable cause, supported by *affidavit*," rather than "probable cause, supported by *Oath or affirmation*." [Emphasis added.] The Wyoming Supreme court has determined that this requirement for a writing creates a "stronger" right. *Davis v. State*, 859 P.2d 89, 93 (Wyo. 1993).

mean that some reasonable searches may take place without a warrant, so long as there is probable cause for the search. In that regard, however, it has repeatedly been held that, subject to certain exceptions, warrantless searches are unreasonable *per se*. *Gehnert v. State*, 956 P.2d 359, 362 (Wyo. 1998); *Gronski v. State*, 910 P.2d 561, 564 (Wyo. 1996).

Two exceptions to the search warrant requirement deserve attention at this point--the automobile exception and the plain view doctrine. Special rules for searching automobiles have developed because of their mobility and the resultant threat that evidence will be lost. The automobile exception rests in the proposition that it is just as reasonable, if probable cause exists, to search a vehicle immediately, as it is to seize the vehicle while a warrant is obtained. *Gronski, supra*, at 563-565. The plain view doctrine, on the other hand, is based on the premise that there is no unconstitutional search when an officer, lawfully occupying a particular location, observes possible evidence in plain view. *Pendelton v. State*, 966 P.2d 951, 954 (Wyo. 1998); *Callaway v. State*, 954 P.2d 1365, 1370 (Wyo. 1998). For a plain view seizure, the probable cause test is whether the item seized appeared to the officer to be possible evidence of a crime. *Id.* The discovery need not be inadvertent, nor must exigent circumstances be shown. *Id.*

Quite recently, the Wyoming Supreme Court has held that the question of whether an exception to the warrant requirement exists in a particular case "may be properly resolved by a preponderance of the evidence standard in the light of all attendant circumstances." *Gehnert, supra; Houghton v. State*, 956 P.2d 363, 365 (Wyo. 1998), [reversed on other grounds, 143 L Ed 2d 408 (1999)]. The determination of which party has the burden of meeting this standard is not so clear. In *Gehnert*, which was published on April 2, 1998, the Supreme Court stated:

> The burden of proving that the circumstances of a particular case fit within an exception is with the State.

In *Houghton*, which was published on April 3, 1998, the following burden of proof was described:

> On a motion to suppress evidence, the moving party must establish by a preponderance of the evidence that her rights were violated.

Perhaps these statements may be reconciled by concluding that the State must first prove by a preponderance of the evidence that the facts of the case fit into one of the recognized exceptions to the requirement for a warrant, and the Defendant must then prove by a preponderance of the evidence that those facts still did not justify a warrantless search.

As suggested above, search and seizure issues are greatly complicated when an automobile is involved. A body of not-always-consistent law has been developing in this

area for decades. Particular issues have included 1) when a car may be searched without a warrant; 2) the scope of the search (trunk, boxes, purses, etc.); and 3) who may be searched (driver, passengers). Several of the cases already cited herein exemplify these controversies. In *Gronski*, for instance, the warrantless search of a duffel bag in a vehicle was approved because the officer had probable cause to search, even though there were no special exigent circumstances proven. The result in *Houghton*, however, was quite different. There, the Wyoming Supreme Court reversed the drug possession conviction of a passenger whose purse had been searched, despite the fact that the officer had probable cause to search the vehicle. As mentioned above, that holding was then reversed by the U.S. Supreme Court.

Discussion

D#108 Defendant's Motion to Suppress Statements Given to Law Enforcement Officers at Ivinson Memorial Hospital

D#109 Defendant's Motion to Suppress Statements Given to Law Enforcement Officers on October 9, 1998

These motions will be addressed jointly because they are nearly identical, because the facts underlying the motions are the same, and because the applicable law is the same. Succinctly stated, McKinney's position is as follows:

1. Custodial interrogation occurred at both locations.

2. The statements were not voluntarily made.

3. Neither waiver of Miranda rights was voluntary.

4. Neither waiver of Miranda rights was knowing and intelligent.

McKinney's factual argument in support of his position is reflected in the following statements from his memorandum filed in support of the motions:

1. McKinney was struck in the head with a bat and received *serious head injuries*. [Emphasis added.]

2. McKinney was diagnosed with *a potentially life threatening subdural hematoma*. [Emphasis added.]

3. McKinney was interrogated shortly after being released from the hospital from *a serious, life threatening blow to the head*. [Emphasis added.]

4. Due to the *severe nature of his head injury*, McKinney was not capable of making a knowing and intelligent decision whether or not to speak with law enforcement personnel. [Emphasis added.]

From this memorandum, from the evidence presented at the hearing, and from counsels' arguments, it appears that McKinney has placed all of his suppression eggs in one basket--the head injury.[3] The evidence presented at the hearing--the totality of the circumstances--did not, however, reveal an involuntary, unknowing, or unintelligent waiver of Miranda, or an involuntary statement at either the hospital or the detention center. Rather, the preponderance of the evidence proves just the opposite:

1. Dr. Wirt testified that McKinney's injury was "significant, but not serious," in contrast to the memorandum's characterization of the injury as "serious and life threatening."

2. Dr. Wirt testified that, while an injury such as that suffered by McKinney may cause cognitive dysfunction, it does not always have such consequences, and he cannot say that McKinney was incompetent.

3. Dr. Wirt testified that McKinney showed no confusion when he spoke with him, and that McKinney "had no symptoms I could detect" upon release from the hospital.

4. Although his speech was "scrambled", McKinney was able to relate the events of the evening to Kristen Price when he arrived home shortly after the 7th and Harney incident.

5. McKinney was able, with Henderson, to craft a detailed alibi for the evening.

6. In the emergency room, McKinney was conversing with Kristen Price. Although he appeared upset and nervous, he asked Debree whether he had caught the person who injured him. Further, upon being questioned, he remembered and told the story concocted earlier with Henderson.

7. Neither Sgt. Debree nor Office Kreiling had any difficulty understanding McKinney in the hospital.

8. Although McKinney's speech was slurred and confused in the period just after the injury occurred, Henderson could understand him fine by the next afternoon.

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[3]He did, perhaps, hint that Sgt. Debree did not clearly distinguish between the 7th and Harney incident and the Shepard case in asking to speak with him, but he has made no real attempt to allege intimidation, or coercion or other law enforcement impropriety.

9. Detective Fritzen, who participated in the October 9, 1998, interview, and who had interviewed McKinney twice in the past, noticed nothing unusual about McKinney's speech patterns or behavior.

10. McKinney had considerable prior experience with law enforcement, and had been Mirandized at least twice in earlier unrelated incidents.

11. Before the second interview, Debree read the Miranda waiver form to McKinney, then gave it to McKinney to sign when he said he understood it.

12. Before the second interview, Price called McKinney to inform him that she had told the police the truth and that she had been arrested, and she asked him to tell the truth.

13. During the second interview, McKinney asked about the possible penalty for what he had done, and was concerned that he would not be able to see his son if he went to prison, both of which imply an ability to consider the consequences of speaking with law enforcement.

14. Dr. Beaver's opinion that McKinney was not competent to waive his Miranda rights must be discounted because:

a. He "has an agenda"--to rewrite all informed consent waivers.

b. He did not produce, or at least provide, a written report of his findings.

c. He did not see or treat McKinney at the time of the injury.

d. The actual facts of the incident and its aftermath, plus the observations of those actually involved, are contrary to his opinion.

From the totality of the circumstances, the Court finds that both statements by McKinney to law enforcement officers were voluntary and that prior to both interviews, McKinney voluntarily, knowingly and intelligently waived his constitutional right not to speak. There is no evidence of police overreaching; in fact, both interviews were quiet and low-key. McKinney was allowed to sleep before the second interview, and the officers ascertained that he was not under the influence of any medication. D#108 and D#109 are denied.

D#111 Defendant's Motion to Suppress Evidence Seized from Black 1976 Ford Pickup, 751 N. 4th #C, and Mr. Aaron McKinney's Person

A quick review of the "searches and seizures" in this case is appropriate. As Officer Waters comes upon the scene at 7th and Harney, where there had just been a report of

vandalism, he also comes upon the bloodied Henderson and McKinney, who break from the pickup and run in opposite directions. Waters catches Henderson after a foot chase, whereupon Henderson says that he and his friend or friends have just been "jumped" and beaten. After placing Henderson in an ambulance, Waters sees in the bed of the pickup--in plain view--a bloody cocked pistol. Waters leaves to go interview Henderson at the hospital, and turns the pickup over to Sgt. Cushman. Sgt. Cushman and Detective Bury seize the pistol, a bloody coat also lying in the bed of the pickup, and a pistol case lying on the ground.

The next seizure takes place at the hospital parking lot, where Sgt. Debree orders the pickup seized. He has no warrant, but he knows of the 7th and Harney incident, he knows about Matthew Shepard, he knows about the grass and dirt on the bumper hitch, and he knows about the credit card connection between the two cases. He has the pickup impounded while a search warrant is sought.

Finally, after speaking with Kristen Price and learning the details of McKinney's and Henderson's involvement in the Shepard beating, including the hiding or destruction of evidence, the officers obtain a search warrant for the residence shared by Price and McKinney, and a personal body search warrant for McKinney. They find numerous articles connecting McKinney to the Shepard beating.

McKinney's suppression theory is simple: (1) the officers had neither a warrant nor probable cause to seize the pistol, coat and pickup; (2) therefore, the seizure of those items was unreasonable and unconstitutional; and (3) since these items were part of the basis for obtaining the warrant to search McKinney's person and residence, the fruit of the poisonous tree doctrine renders the latter-obtained evidence inadmissible as well.

The Court finds and concludes that none of these items were seized unreasonably or unconstitutionally. When the pistol, coat, and pistol case were seized, they were lying in the plain view of officers who had probable cause to believe that a crime had been committed, and the items were evidence of that crime. The officers were aware of the battery, they had seen blood on Henderson and McKinney, both of whom fled from the scene upon the officer's approach, and they could see blood on the gun and coat. Officer Waters had seen McKinney toss something into the bed of the pickup. Given the fact that the gun and coat were bloody, given the fact that the gun and coat were in a motor vehicle that could easily have been removed from the scene, and given the fact that one of the vehicle's occupants was still at large, it would have been remiss for the officers not to seize the items.

The same generally is true of the seizure of the pickup. When Sgt. Debree noticed it in the hospital parking lot, he knew of both the 7th and Harney incident and the Shepard

beating. He also knew of the credit card connection between the two cases.[4] He was aware of the indentation in the dirt bank and the grass and dirt on the pickup's hitch. He noted the apparent match between the pickup tires' tread and the tire tracks left at the Shepard scene. Debree had probable cause to seize the pickup, and would have been remiss in not doing so. The situation facing him makes evident the need for the automobile exception to the warrant requirement. Debree had four choices: ignore the pickup, leave the pickup unguarded while attempting to obtain a warrant, seize the pickup without a warrant, or detain the pickup until a warrant could be obtained. Under the circumstances, taking either of the first two options would have been ludicrous; all of the evidence could have been lost. There is no practical difference between the last two options; since both deprive the pickup's owner of its use, both are seizures. Debree took the appropriate action; he had the pickup impounded while he obtained a warrant to search it.

Finally, since none of the items seized without a warrant was seized in violation of McKinney's constitutional rights; and since neither of his interviews took place in violation of his constitutional rights, the fruit of the poisonous tree doctrine does not make inadmissible the evidence seized via the search warrant.

Conclusions

McKinney's statements to law enforcement were given voluntarily after knowing and intelligent waivers of his constitutional rights. Further, no unconstitutional search or seizure took place. The motions to suppress are denied. The Court will prepare the order.

Sincerely,

Barton R. Voigt
District Judge

xc: Court File

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[4]In fact, Shepard's credit card was still on the dashboard of the pickup, with the name readable from the outside.