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## AMERICANS WITH DISABILITIES ACT

In *Pennsylvania Department of Corrections v. Yeskey*, No. 97-634, 6/15/98, Yeskey was sentenced to 18 to 36 months in a Pennsylvania correctional facility, but was recommended for placement in a Motivational Boot Camp for first-time offenders. The successful completion of the program would have led to his parole in just six months. When he was refused admission because of his medical history of hypertension, he sued the Pennsylvania Department of Corrections and several officials, alleging that the exclusion violated the Americans with Disabilities Act of 1990, Title II which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that disability. The District Court dismissed for failure to state a claim, holding that the ADA is inapplicable to state prison inmates, but the Third Circuit Reversed.

The United States Supreme Court stated that state prisons fall squarely within Title II's statutory definition of "public entity," which includes "any . . . instrumentality of a State . . . or local government. The Pennsylvania Department of Corrections argued that there was no intent to cover prisons because the statute referred to "benefits of programs" and "qualified individuals." The Court rejected this argument stating that some prison programs, such as this one, have benefits and are restricted to qualified inmates.

In *Seaborn v. Florida, Department of Corrections*, CA11, No. 97-2855, 6/16/98, Charles Seaborn and Robert Harris brought this action against the State of Florida, Department of Corrections alleging they were discriminated against in violation of the Americans With Disabilities Act (ADA) of 1990, 42 U.S.C. § § 12101-12213. The district court granted Florida's motion for summary judgment and Seaborn and Harris filed an appeal to the Court of Appeals for the Eleventh Circuit.

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Seaborn and Harris are African-American males who worked for Florida at the Tallahassee Community Correction Center (TCCC). They have a skin condition known as *pseudofolliculitis barbae* (PFB), which causes lesions to form on the surface of their skin after shaving. Seaborn and Harris allege that the appropriate treatment for PFB is simply to refrain from shaving and, therefore, they must wear beards as a matter of medical necessity.

TCCC has a "No Beard Policy" requiring male employees to be clean-shaven. This policy includes medical exceptions under which TCCC permitted Seaborn and Harris to wear beards. They allege they nevertheless were subjected to de facto workplace discrimination and were denied promotions because they wore beards. Their suit asserts that PFB is a disability.

The Eleventh Circuit affirmed the district court decision concluding that Seaborn and Harris do not have a disability within the meaning of the ADA because PFB does not substantially limit their ability to work.

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### **CAPITAL MURDER - PREMEDITATION AND DELIBERATION**

In *Lever v. State*, CR97-98(F), 5/28/98, the Arkansas Supreme Court discussed the degree of proof necessary to establish capital murder under Ark. Code Ann. § 5-10-101(a)(4). The Court stated that since intent can rarely be proved with direct evidence, a jury may infer premeditation and

deliberation from circumstantial evidence such as the type and character of the weapon used; the manner in which the weapon was used; the nature, extent and location of the wounds inflicted; and the conduct of the accused. *Lloyd v. State*, 332 Ark. 1, 962 S.W.2d 365 (1988); *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997). Moreover, the necessary premeditation and deliberation is not required to exist for a particular length of time and may be formed in an instant. *Green v. State*, supra; *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996).

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### **CARRYING A FIREARM - CONSTRUCTION OF 18 U.S.C. § 924(c)(1)**

In *Muscarello v. United States*, No. 96-1654, 6/8/98, the United States Supreme Court dealt with the phrase "carries a firearm" "during and in relation to" a "drug trafficking crime." This phrase is set forth in 18 U.S.C. § 924(c)(1) and subjects an individual to a five year mandatory sentence.

In this case, police officers found a handgun locked in the glove compartment of Muscarello's truck, which he was using to transport marijuana for sale. In a companion case, federal agents at a drug-sale point found drugs and guns in the trunk of a car. In both cases, the Courts of Appeals found that these individuals had carried firearms in violation of 18 U.S.C. § 924(c)(1).

The United States Supreme Court stated that the phrase "carries a firearm" applies to a person who knowingly possesses and con-

veys firearms in a vehicle, including in the locked glove compartment or trunk of a car.

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### **CONTROLLED SUBSTANCE DELIVERY WHILE IN POSSESSION OF A FIREARM - CONSTRUCTION OF ARK. CODE. ANN. § 5-74-106**

In *Johnson v. State*, CR 97-1447, 6/25/98, it was asserted that the evidence fell short of showing that Perry Eugene Johnson violated § 5-74-106, which prohibits, among other things, a person's unlawful possession with intent to deliver a controlled substance while in possession of a firearm. Johnson argued that to prove he violated § 5-74-106, the State was required to show some connection between his drug activity and the firearm found in his vehicle. He claims there was no evidence showing any connection between the pistol and the drugs hidden in the car. Such an assertion obviously conflicts with the proof. While most of the methamphetamine was concealed outside in the car's rear-fender well, the officers initially found in the car's front passenger seat a smaller amount of methamphetamine, which was in close proximity to the pistol located on the floorboard behind the driver's seat. Johnson was the driver and sole occupant of the car, and was clearly in possession of both an illegal drug and a firearm at the same time. This evidence alone is sufficient to support the conviction for simultaneous possession under § 5-74-106.




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**CIVIL LIABILITY -  
ENFORCING A  
GUARDIANSHIP ORDER**

In *King v. Beavers*, CA8, No. 97-3296, 7/9/98, Wayne King filed a 42 U.S.C. § 1983 action against Deputy Sheriff Charles Beavers, Johnson County, Arkansas, alleging that Beavers violated King's Fourteenth Amendment right to liberty in enforcing a guardianship order. Beavers appeals the district court's denial of summary judgment on qualified immunity grounds.

The Eighth Circuit Court of Appeals reversed stating that Beavers was duty bound to help enforce the guardianship order, and his actions in that regard were objectively reasonable. Public officials facing situations like this must take quick and decisive action to mitigate risks to health and safety. This is precisely the kind of good faith discretionary official action that qualified immunity is intended to protect.

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**CIVIL LIABILITY -  
ENTRY INTO A HOME  
WITHOUT A WARRANT  
TO MAKE A ROUTINE  
FELONY ARREST;  
EXCESSIVE FORCE**

In *Guite v. Wright*, CA8, No. 97-3864, 6/26/98, a plainclothes police officer, defendant Wright, and three uniformed officers, including defendant LaShomb, arrived on 10/27/95, at the home of the plaintiff, Guite, to question his teenage son (David) about a series of armed robberies which had oc-

curred in their city over the previous three nights. Earlier that afternoon Officer Wright positively identified David as a suspect in the robberies. Wright and LaShomb approached the door of the home as the other officers watched the premises. When Guite answered the door, Wright asked to see David. Guite told the officers to either produce an arrest warrant or leave the premises, to which Wright replied that he did not need a warrant. As this point David approached and was standing near the entrance of the house. Guite alleges that LaShomb then took hold of his wrist, pushed him inside the house, and held him up against the open door to prevent him from interfering with the arrest of his son. Concurrently, he alleges, Wright entered the home, grabbed David, pulled him outside and arrested him.

Guite brought an action pursuant to 42 U.S.C. § 1983 alleging violations of his Fourth Amendment right against warrantless entry into his home and against the use of excessive force upon his person. The defendants filed a motion for summary judgment asserting qualified immunity. The district court denied the defendants' motion finding that the officers' entry into Guite's home violated clearly established law which a reasonable officer should have known. The court further held that the use of force could be found unconstitutional under all the facts and circumstances, and that there was a genuine issue of whether or not force was needed under the circumstances.

The Eighth Circuit Court of Appeals stated that it was clearly established that the Fourth

Amendment prohibits a warrantless entry into a suspect's home to make a routine felony arrest absent consent or exigent circumstances. *Rogers v. Carter*, 133 F.3d 1114 (8<sup>th</sup> Circ. 1998). See also, *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) (In the absence of consent or exigent circumstances, an officer may not search for a suspect in a third party's home without first obtaining a search warrant); and *Payton v. New York*, 445 U.S. 573, 588-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed. 2d 639 (1980) (Absent emergency circumstances, the threshold of a home may not reasonably be crossed without a warrant). Under well-established law, therefore, the type of intrusion alleged by Guite would violate his Fourth Amendment rights, unless the officers can show exigent circumstances requiring a warrantless entry.

The Eighth Circuit agreed with the district court that the evidence of exigent circumstances was not sufficient to support summary judgment. The officers were not in hot pursuit of David. Officer Wright testified that they had no reason to believe David might be carrying a weapon, and they were not concerned for the safety of other occupants of the house. Wright also testified that there was a sufficient number of officers accompanying him such that they could have surrounded the house to prevent escape. The defendants argue that exigent circumstances existed because it was late in the afternoon, there was no time to obtain a warrant before the close of business, and they were concerned that the robbery spree might continue if they did not stop



David immediately. These “exigencies” are vitiated, however, by the fact that the officers knew David was in the house, and had enough personnel to cover the house and prevent his escape while a warrant was obtained. Despite the defendants’ claims that there was not enough time to obtain a warrant, after they arrested David, they were able to obtain a search warrant for Guite’s premises. As the district court noted, there is at least a genuine issue whether the officers could have surrounded the home pending the issuance of an arrest warrant. Under these circumstances, summary judgment was properly denied.

Similarly, we conclude that summary judgment was properly denied on the excessive force issue. The right to be free from excessive force is a clearly established right under the Fourth Amendment’s prohibition against unreasonable seizures of the person. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989); *Greiner v. City of Champlin*, 27 F.3d 1346 (8<sup>th</sup> Cir. 1994). However, not every push or shove violates the Fourth Amendment. Rather, the test is whether the force used to effect a particular seizure is “reasonable.” The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Here, Guite alleges that after he told the officers to leave his property, LaShomb grabbed his wrist, pushed him backwards, and held him up against the open door

inside the house. Guite further alleges that LaShomb acted concurrently with Wright’s entry and seizure of David to prevent Guite’s interference therewith. Moreover, at the time, Guite was recovering from surgery on his left shoulder and was wearing a sling on his left arm when he answered the door. Under these circumstances, the Eighth Circuit agreed that there is a genuine issue of whether force was needed, and whether such force was excessive under the circumstances. See, *Walton v. City of Southfield*, 995 F.2d 1331 (6<sup>th</sup> Cir. 1993) (summary judgment on qualified immunity properly denied because excessive use of force claim could be premised on officer handcuffing plaintiff if he knew that she had an injured arm and if he believed that she posed no threat to him.).

#### CIVIL LIABILITY - HIGH SPEED PURSUITS

In *County of Sacramento, Et Al v. Lewis*, No. 96-1337, 5/26/98, James Smith, a Sacramento County Sheriff’s Deputy, along with another officer, Murray Stapp, responded to a call to break up a fight. Upon returning to his patrol car, Stapp saw a motorcycle approaching at high speed. It was operated by 18-year-old Brian Willard and carried Philip Lewis, a 16-year-old, as a passenger. Neither the motorcycle operator nor the passenger had anything to do with the fight that prompted the call to the police.

Stapp turned on his overhead rotating lights, yelled to the boys to stop, and pulled his patrol car closer to Smith’s, attempting to

pen the motorcycle in. Instead of pulling over in response to Stapp’s warning lights and commands, Willard slowly maneuvered the cycle between the two police cars and sped off. Smith immediately switched on his own emergency lights and siren, made a quick turn and began pursuit at high speed. For 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming traffic, forcing two cars and a bicycle to swerve off the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with Smith following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop.

The chase ended after the motorcycle tipped over as Willard tried a sharp left turn. By the time Smith slammed on his brakes, Willard was out of the way, but Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. Lewis was pronounced dead at the scene.

Lewis’s parents brought this action under 42 U.S.C. § 1983 against Sacramento County, the Sacramento County Sheriff’s Department and Deputy James Everett Smith, alleging a deprivation of Philip Lewis’s Fourteenth Amendment substantive due process right in the context of high speed police pursuits.

The Federal District Court granted summary judgment for the Deputy Sheriff Smith reasoning that he was entitled to qualified immunity since there were no state or federal decisions published before May 1990, when the alleged misconduct took place, that sup-



ported the view that the deceased had a *Fourteenth Amendment* substantive due process right in the context of high-speed pursuits.

The Court of Appeals for the Ninth Circuit reversed, holding that “the appropriate degree of fault to be applied to high-speed pursuits is deliberate indifference to, or reckless disregard for, a person’s right to life and personal security,” and concluded that “the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established at the time of Philip Lewis’s death. The Sacramento County Sheriff’s Department had a restrictive policy on high-speed pursuits that Deputy Sheriff Smith apparently disregarded. The Ninth Circuit found a genuine issue of material fact that might be resolved by a finding that Smith’s conduct amounted to deliberate indifference.

The United States Supreme Court granted certiorari to resolve the conflict over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case. After a review of the facts, the United States Supreme Court reversed the Ninth Circuit.

The United States Supreme Court stated that the issue in this case is whether a police officer violates the *Fourteenth Amendment’s* guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected violator. The Court answered no and held that in such circumstances only a purpose to cause harm unrelated

to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience that is necessary for a due process violation.

The Court first noted that in *Graham v. Conner*, 490 U.S. 386 (1989), all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop or other seizure of a free citizen, should be analyzed under the *Fourth Amendment* and its reasonableness standard rather than under a substantive due process approach.

The Court stated that the *Fourth Amendment* covers only searches and seizures, neither of which took place here. The Court cited *California v. Hodari D.*, 499 U.S. 621 (1991), for the proposition that a police pursuit in attempting to seize a person does not amount to a seizure within the meaning of the *Fourth Amendment*. And in *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court explained “that a *Fourth Amendment* seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual’s freedom of movement (the fleeing felon), but only where there is a governmental termination of freedom of movement through means intentionally applied.” This was illustrated by stating that no *Fourth Amendment* seizure would take place where a “pursuing police car sought to stop the suspect only by the show of authority represented by flashing

lights and continuing pursuit,” but accidentally stopped the suspect by crashing into him. The Court felt this statement represented the case presently before them.

The Court next conducted an analysis of the *Fourteenth Amendment* due process argument stating that the touchstone of due process is protection of the individual against arbitrary action of government. The cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. The Court stated that the cognizable level of executive abuse of power is that which shocks the conscience. See *Rochin v. California*, 342 U.S. 165 (1952), where the Court found that the forced pumping of a suspect’s stomach, enough to offend due process was conduct “that shocks the conscience” and violates the “decencies of civilized conduct.”

The Court concluded that Deputy Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard’s high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard’s outrageous behavior was practically instantaneous, and so was Smith’s instinctive response. While prudence would have repressed the reaction, the officer’s instinct was to do his job as a law enforcement officer, not to induce



Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.

Regardless of whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and Sacramento County, the Sacramento County Sheriff's Department and Deputy Smith are not called upon to answer for it under § 1983.

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#### DOMESTIC VIOLENCE CONVICTION OF A LAW ENFORCEMENT OFFICER

In *Gillespie v. Indianapolis, Ind.*, No. IP 98-266-C, 6/5/98 (DC SInd), the Indianapolis Police Department's policy requires all officers to be able to handle firearms. The plaintiff, a 25-year veteran police officer with a prior conviction for domestic violence, sought an injunction to prohibit the Indianapolis Police Department from firing him alleging that 18 U.S.C. § 922(g)(9), which makes it a crime for a person convicted of a misdemeanor domestic violence offense to possess a firearm, was unconstitutional.

The Federal District Court rejected challenges to the statute based on the Commerce Clause, the Tenth Amendment, the Second Amendment, and the Due Process and Equal Protection Clauses of

the Fourteenth Amendment.

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#### EXTRADITION

In *New Mexico, Ex Rel. Manuel Ortiz v. Reed*, No. 97-1217, 6/8/98, the respondent, who was convicted of armed robbery and theft of drugs, was paroled from the Ohio correctional system in 1992. In the following year, Ohio prison officials told respondent that they planned to revoke his parole status. Before the scheduled date of his meeting with his parole officer, respondent fled from Ohio to New Mexico.

Ohio sought extradition and the Governor of New Mexico issued a warrant directing the extradition of respondent. He was arrested in October 1994, and later that year he sought a writ of habeas corpus from the New Mexico State District Court. He claimed he was not a "fugitive" for purposes of extradition because he fled under duress believing that Ohio authorities intended to revoke his parole without due process and cause him physical harm if he were returned to an Ohio prison. In January 1995, the New Mexico trial court ruled in favor of respondent and directed his release from custody. The State appealed this order, and in September 1997, the Supreme Court of New Mexico affirmed the grant of habeas corpus. The State of New Mexico petitioned for certiorari from that decision.

The United States Supreme Court stated that Article IV of the United States Constitution provides that:

A person charged in any State with Treason, Felony, or other

Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

The United States Supreme Court stated that in *Kentucky v. Dennison*, 24 How. 66 (1861), it was held that the duty imposed by the Extradition Clause on the asylum State was mandatory. In *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987), the Court reaffirmed the conclusion that the commands of the Extradition Clause are mandatory and afford no discretion to the executive officers or courts of the asylum State. And *California v. Superior Court of Cal., San Bernardino Cty.*, 482 U.S. 400, 405-406 (1987), stated:

The Federal Constitution places certain limits on the sovereign powers of the States, limits that are an essential part of the Framers' conception of national identity and Union. One such limit is found in Article IV, § 2, cl. 2, The Extradition Clause. The obvious objective of the Extradition Clause is that no State should become a safe haven for the fugitives from a sister State's criminal justice system.

The Supreme Court of New Mexico went beyond the permissible inquiry in an extradition case and permitted the litigation of issues not open in the asylum state. The State's petition for certiorari was granted, the judgment of the New Mexico Supreme Court was reversed and the case was remanded for proceedings not inconsistent with the opinion.



### FEDERAL SENTENCING GUIDELINES

In *Edwards Et Al v. United States*, No. 96-8732, 4/28/98, petitioners were convicted of violation of 21 U.S.C. §§841 and 846 for conspiring to possess with intent to . . . distribute controlled substances, namely, cocaine and cocaine base (i.e., “crack”). The jury was instructed that the Government must prove that the conspiracy involved measurable amounts of “cocaine or cocaine base.” The jury returned a general verdict of guilty and the District Judge imposed sentences based on his finding that each petitioner’s illegal conduct involved both cocaine and crack. Petitioners argued (for the first time) in the Seventh Circuit that their sentences were unlawful insofar as they were based upon crack, because the word “or” in the jury instruction meant that the judge must assume that the conspiracy involved only cocaine, which is treated more leniently than crack by United States Sentencing Guidelines §2D1.1(c). The Seventh Circuit held that the judge need not assume that only cocaine was involved, pointing out that, because the Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy, the jury’s belief about which drugs were involved—cocaine, crack, or both—was beside the point.

The United States Supreme Court affirmed since the Guidelines instruct the judge in a case like this to determine both the

amount and kind of controlled substances for which a defendant should be held accountable, and then to impose a sentence that varies depending upon those determinations. *Witte v. United States*, 515 U.S. 389 (1995). It is the judge who is required to determine whether the “controlled substances” at issue—and how much of them—consisted of cocaine, crack or both. That is what the judge did in this case, and the jury’s beliefs about the conspiracy are irrelevant.

### FELON’S FIREARM RIGHTS

In *Caron v. United States*, No. 97-6270, 6/22/98, the United States Supreme Court had to decide the meaning of 18 U.S.C. § 921(20) which was enacted by Congress as part of the 1986 Firearm Owner’s Protection Act. A person convicted of a felony is prohibited by 18 U.S.C. § 922(g) from possessing “any firearm.” In addition, 18 U.S.C. § 924(e) provides a 15-year mandatory minimum sentence for a person convicted of violating Section 922(g) who has three prior convictions of violent felonies. Section 921(a)(20), however, provides:

What constitutes a conviction of such crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which the person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of

civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The United States Supreme Court felt that Congress, believing that existing state laws provided less than positive assurance that a repeat violent offender no longer poses an unacceptable risk of dangerousness, intended to keep guns away from all offenders who might cause harm, even if they were not deemed dangerous by the States. While state law may determine the restoration of civil rights, as to weapons possession, the Federal Government has an interest in a single, national, protective policy, broader than required by state law.

### FORFEITURE

In *United States v. Bajakian*, No. 96-1487, 6/22/98, Bajakian and his family were preparing to board an international flight when custom inspectors determined that he was carrying \$ 357,144.00. Bajakian was charged with attempting to leave the United States without reporting, as required by 31 U.S.C. § 5316(a)(1)(A), that he was transporting more than \$ 10,000.00 in currency. Utilizing 18 U.S.C. § 982(a)(1), the government also sought forfeiture of the \$ 357,144.00. Bajakian plead guilty to the failure to report but had a bench trial on the forfeiture. The District Court ruled that the entire \$ 357,144.00 could be subject to forfeiture because it was involved in the offense, that the funds were not connected to any criminal activity, and that Bajakian was transporting the money to re-



pay a lawful debt. The Court concluded, however, that full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment, the court ordered forfeiture of \$ 15,000.00 in addition to three years probation and the maximum fine of \$ 5,000.00. The Ninth Circuit affirmed.

The United States Supreme Court affirmed stating that the forfeiture at issue is a "fine" within the meaning of the Eighth Amendment Clause which provides that excessive fines shall not be imposed. The Court also stated that the forfeiture of the entire \$ 357,144.00 would be grossly disproportional to the gravity of Bajakian's offense. He does not fit into the class of persons for whom the statute was principally designed: money launderers, drug traffickers, and tax evaders. The harm that Bajakian caused was minimal. The failure to report affected only the government, and in a relatively minor way. There was no fraud to the government and no loss to the public. Had his crime gone undetected, the government would have been deprived only of the information that \$ 357,144.00 had left the country. Thus, there is no articulable correlation between the \$ 357,144.00 and any government injury.

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### JAILS AND PRISONS

In *Christiansen v. Clarke*, CA8, No. 97-1511, 5/29/88, Larry L. Christiansen, a former inmate of the Community Corrections Cen-

ter in Lincoln, Nebraska, was placed on work release approximately nine months prior to the completion of his sentence. Nebraska Revised Statutes § 83-184(3) gives the director of correctional services the authority to collect from work-release inmates "such costs incident to the person's confinement as the Director of Correctional Services deems appropriate and reasonable." Before Mr. Christiansen was placed in the work release program, the director required him to sign a statement acknowledging that costs for room and board would be deducted from his inmate account for the duration of the work-release period. Upon completion of Mr. Christiansen's sentence and his release from the program, the prison withdrew \$ 2,790.00 from his account.

Mr. Christiansen filed suit in federal district court, alleging that the prison had deprived him of his property without due process of law in violation of 42 U.S.C. § 1983. The Eighth Circuit Court of Appeals affirmed the district court and stated that because Mr. Christiansen's participation in the work-release program was voluntary and because he exchanged a portion of his otherwise protected salary for participation in that program, he does not have a constitutional property right to the full amount of his salary.

In *Mauro v. Arpaio*, CA9, No. 97-16021, 7/2/98, Maricopa County adopted a policy prohibiting inmates from possessing "sexually explicit" materials. Mauro, a pretrial detainee, sought to receive a subscription to Playboy while housed at one of

Maricopa's prisons and was prevented from doing so. The policy defined sexually explicit materials as "personal photographs, drawings, and magazines and pictorials that show frontal nudity." If a prisoner is found in possession of such items, they are confiscated and the prisoner is "written up" in a Disciplinary Action Report. The "mail officer" has the responsibility for determining whether a particular piece of incoming mail contains sexually explicit material.

Maricopa County adopted its policy based on three considerations: safety, rehabilitation of inmates, and reduction of sexual harassment of female prison personnel. The district court granted summary judgment in the County's favor, holding that the policy, though broad, was reasonably related to legitimate penological interests. The Ninth Circuit Court of Appeals reversed holding that Maricopa County's policy impinges upon the right of inmates to receive material protected by the First Amendment.

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### MIRANDA WARNINGS - TRAFFIC STOPS

In *Conway v. State*, CACR 97-1376, 5/13/98, Detric L. Conway moved to suppress a statement that "he owned the 1981 bronze-colored Cadillac," made during a traffic stop to Officer Paul Norris of the Hot Springs Police Department on April 2, 1997, on the grounds that he was not given Miranda warnings. The Arkansas Court of Appeals rejected this argument stating that the statement that Conway sought to have suppressed was given in the course of



a routine traffic stop, while he remained seated in his car. The Court noted that in *Berkemer v. McCarty*, 468 U.S. 420 (1984) the United States Supreme Court held that an individual in this situation is not subjected to restraints comparable to those associated with a formal arrest and, therefore, it does not constitute custodial interrogation for Miranda purposes. They also cited *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), holding that where an officer issued the offender a citation in lieu of arrest after a routine traffic stop, the accused was not in custody for purposes of Miranda warnings.

#### **PRIVILEGE AGAINST SELF-INCRIMINATION**

In *United States v. Balsys*, No. 97-873, 6/25/98, the Office of Special Investigations (OSI) of the Department of Justice's Criminal Division subpoenaed Balsys, a resident alien, to testify about his wartime activities between 1940 and 1944 and his immigration to the United States. Balsys claimed the Fifth Amendment privilege against self-incrimination, based on his fear of prosecution by a foreign nation. The Federal District Court granted OSI's petition to enforce the subpoena, but the Second Circuit vacated the order, holding that a witness with a real and substantial fear of prosecution by a foreign country may assert the privilege to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of a criminal prosecution in this country.

The United States Supreme

Court stated that, as a resident alien, Balsys is a person who, within the meaning of the Fifth Amendment, cannot be compelled in any criminal case to be a witness against himself. The question here, however, is whether a criminal prosecution by a foreign government not subject to this country's constitutional guarantees presents a criminal case for purposes of this Fifth Amendment self-incrimination privilege. In reversing and remanding the case the Court stated that it was not, because concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.

#### **PROMPT FIRST APPEARANCE - ARKANSAS RULES OF CRIMINAL PROCEDURE, RULE 8.1**

In *Britt v. State*, CR 97-200, 7/9/98, the Arkansas Supreme Court dealt with Britt's argument that he was denied a prompt first appearance as required by the Arkansas Rules of Criminal Procedure, Rule 8.1 which states:

An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay."

The first appearance must be conducted in accordance with Arkansas Rules of Criminal Procedure, Rule 8.3, which provides:

(a) Upon the first appearance of the defendant the judicial officer shall inform him of the charge. The judicial officer shall also inform the defendant that:

(i) he is not required to say anything, and that anything he says can be used against him;

(ii) he has a right to counsel; and

(iii) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so.

(b) No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the pretrial release of the defendant. In so doing, the judicial officer shall first determine by an informal, non-adversary hearing whether there is probable cause for detaining the arrested person pending further proceedings. The standard for determining probable cause at such hearing shall be the same as that which governs arrests with or without a warrant.

The Arkansas Supreme Court has specifically refused to define what an "unnecessary delay" is under Rule 8.1. See *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987). In *Duncan*, the court held that a three-and-a-half-day



delay between arrest and first appearance violated Rule 8.1 where there was no evidence in the record to suggest a reason for the delay, and the State did not offer any explanation in its brief. Rather, the record showed the delay was purposeful and that the prosecutor made a deliberate decision to hold the appellant in detention and ignore the prompt-appearance requirement. The appellant had been interrogated on the day of his arrest for two-and-a-half hours but did not divulge any inculpatory information. Three-and-a-half days later, without being able to make any phone calls, appellant gave an incriminating statement. Two days after the first incriminating statement, he gave a videotaped confession. Given that the delay violated Rule 8.1, the court was forced to decide whether the remedy for a violation would be automatic exclusion. While the State argued that the statement was otherwise voluntary under the circumstances, the *Duncan* court rejected such an approach, given that voluntariness was not the only concern under Rule 8.1:

As we have said, assurance of voluntariness is not the only concern. Of equal importance is the mechanism of the first appearance that guarantees that the accused's constitutional rights will be protected and implemented. Indeed, the rights afforded under Rule 8.1 are basic and fundamental rights which our state and federal constitutions secure to every arrestee. Furthermore, if exclusion under the rule rests on a voluntariness standard, the court is again faced with a swearing-match the rule was designed to avoid. As was stated well in *State v. Benbo*, [570

P.2d 894 (Mont. 1977)]:

“Under the voluntariness standard the statutory requirement of an initial appearance without unnecessary delay after an arrest is practically meaningless. Only when a defendant can affirmatively show statements, admissions, or confessions attributed to him were either not made at all, or were involuntarily made, would the failure to provide him with a prompt initial appearance be taken into account. This would put an almost impossible burden on a defendant. Furthermore, there would be no incentive for arresting officers to conform their procedures to statutory requirements.”

*Duncan*, supra. That being said, the *Duncan* court adopted a three-part test used in Pennsylvania: 1) the delay must be unnecessary; 2) the evidence must be prejudicial; 3) the evidence must be reasonably related to the delay. The *Duncan* court held that the statement at issue satisfied this test. It was “evident” that the delay was unnecessary and that the incriminating evidence was prejudicial. With respect to whether the incriminating statements were reasonably related to the delay, the court announced that it was sufficient “if it reasonably appears the delay contributed to obtaining the confession.” When *Duncan* was first questioned, he gave nothing but exculpatory statements. Moreover, it was only after three-and-a-half days of incommunicado detention before he incriminated himself. Thus, the statements were reasonably related to the delay, requiring their suppression under Rule 8.1.

In *Clay v. State*, 318 Ark. 122,

883 S.W.2d 822 (1994), the investigating officer was asked about the delay in bringing the appellant before a judicial officer. The officer responded that he was asked by the deputy prosecutor to continue to the next court date to gather evidence. Appellant moved to suppress his last two statements due to an unnecessary delay in bringing him before a judicial officer after his arrest. This court agreed in part and reversed. In examining the delay under the three-part *Duncan* test, there was no question that appellant could have been presented on Monday, August 27. The *Clay* court noted a delay to gather evidence as an example of unreasonable delay. The delay was also like the one in *Duncan* because it was deliberate. The statements at issue were also prejudicial given that appellant admitted to all of the elements of the crime charged and had not done so in earlier statements. With regard to the reasonable relationship prong the *Clay* court held that the August 26 statement (taken on Sunday before the first possible court appearance) bore no reasonable relationship to the delay and could be used at retrial. However, with regard to the August 28 statement, the investigating officer's statement that the delay was taken “for evidence involving the case” made it apparent that the expectation was that appellant would admit to the murder. “Short of that, however, we can say with assurance that, if [appellant] had been taken before a judicial officer on August 27, the judicial officer would have followed Ark. R. Crim. P. 8.2 which requires the judge to assure that an accused has counsel appointed if he cannot af-



ford one and does not choose to waive the right to counsel to defend him. Had counsel been appointed, it is most unlikely the statement made on August 28 would have been forthcoming.” *Clay*, supra. The *Clay* court also reiterated the discussion in *Duncan* that rejected the so-called voluntariness approach.

In other contexts, this court has refused to find a violation of Rule 8.1 where the delay has been caused in part by the initiation of contact by the defendant in the interest of negotiating a plea arrangement. See *Landrum v. State*, 326 Ark. 994, 936 S.W.2d 505 (1996) (“*Landrum I*”) (delay caused by defendant’s desire to give statement); *Johnson v. State*, 307 Ark. 525, 823 S.W.2d 440 (1992) (appellant demonstrated a willingness to talk about crimes which was analogous to situations where this court held that statements during a delay but at the initiation of the arrestee to negotiate a plea bargain were permissible). *Landrum v. State*, 328 Ark. 361, 944 S.W.2d 101 (1997) (“*Landrum II*”), similarly involved a situation where the appellant wanted to give a confession to an unsolved murder, but he wanted to discuss possible punishment first, and specifically asked to postpone the discussion because he was tired.

Thus, *Landrum II* was distinguishable from *Clay*, supra, given the appellant’s desire to confess. We emphasized that the delay was not unnecessary and that the delay bore no reasonable relationship to the statement. The court articulated the following factors in determining the reasonable-relationship

question under *Duncan*: 1) any proof that the delay was for the purpose of obtaining a confession; 2) frequency of police interrogation; 3) whether the accused was incommunicado; and 4) the passage of time. In analyzing these factors, the *Landrum II* court suggested that there was no evidence of police misconduct and adequate Miranda warnings were given to appellant.

Applying the three-factored *Duncan* test to the present case, it is clear that Britt was denied a prompt first appearance under Rule 8.1, and that suppression is warranted. First, the delay in bringing Britt before a judicial officer was unnecessary. Britt had been transported to the Mississippi County detention center on the night of April 9, a Sunday. He could have been brought before a judicial officer on Monday, April 10. A deputy prosecutor, Chris Crain, testified that he had actually been in municipal court calling the docket for bail and first appearances on the morning of April 10 before coming to the detention center to listen to portions of Britt’s interviews that day. Moreover, the officers as much as admitted that they did not take Britt before an officer on April 10 because they were collecting more evidence. Officer Crites testified that “There was further investigation to be done.” Officer Ed Guthrie stated that “I don’t know [why he was not taken in on Monday] except maybe for further investigation, further inquiries.” Other testimony was to the effect that the officers were simply too tired and unprepared to take Britt before a judicial officer on Monday. Officer Crites testified that

“Well, we got back, we had been called out at approximately 2:00 or 3:00 a.m. — early Sunday morning. We were up all day Sunday. We drive to Forrest City. We’re up down there. We’re still working on this. We drive back. It’s late. We’re tired. The information wasn’t put together to be able to get him arraigned, and then plus other people were involved. More interviews needed to be done. That would be the delay right there that would have caused that.” Officer Marshall said that “We’d had a long night and a long day before and we were exhausted. We were tired, and it [the paperwork] simply was not prepared.”

The April 10 statements were also prejudicial under *Duncan*. While it is true that in Britt’s second statement on April 9 he admitted to being at the crime scene when the victims were abducted and shot, he gave far more detailed versions of the events, with more inculpatory statements, in the two statements on April 10. Significantly, Britt admitted to possessing a gun in the first statement on April 10, and in the second April 10 statement Britt admitted that he went to the passenger side of the truck to remove the passenger. He also admitted that he actually fired a gun once in the air, and that he had lied about not shooting a gun during prior statements.

Finally, the April 10 statements are reasonably related to the delay, unlike the April 9 statements taken on Sunday. The relevant inquiry here is whether it reasonably appears that the delay contributed to obtaining the confession. See *Duncan*, supra; see also *Landrum II*, supra (factors “relevant to this determination”



are: 1) any proof that the delay was for the purpose of obtaining a confession; 2) the frequency of police interrogation; 3) whether the accused was incommunicado; and 4) the passage of time). Significantly, this is not a case where the defendant initiated contact with the police for the purpose of giving a statement or to negotiate a plea arrangement. See *Landrum I*, supra. Rather, the delay here was deliberate and the police admitted that the purpose for the delay was in part for “further investigation.” Obviously, the delay produced the intended result, more statements from the defendant. See *Clay*, supra (finding reasonable relationship between delay and statement where investigating officer admitted that delay was taken “for evidence involving the case”). Moreover, had Britt been taken before a judicial officer on Monday, April 10, and counsel been appointed, see Ark. R. Crim. P. 8.2, it is highly unlikely that the April 10 statements would have been forthcoming. See *Clay*, supra. Based on the foregoing, we hold that the two April 10 statements satisfy the three-pronged *Duncan* test and were taken in violation of Rule 8.1. Accordingly, the trial court clearly erred in denying Britt’s motion to suppress the April 10 statements. The judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

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#### RESISTING ARREST

In *Bailey v. State*, CR 97-1442, 7/9/98, one of the issues before the Arkansas Supreme Court was whether an individual could

be convicted for resisting arrest when the State failed to prove that the defendant used physical force against the officers. The resisting-arrest statute is found at Arkansas Code Annotated § 5-54-103 (Repl. 1997) and states in part that:

(a)(1) A person commits the offense of resisting arrest if he knowingly resists a person known by him to be a law enforcement officer effecting an arrest.

(2) Resists, as used in this subsection means using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.

The Arkansas Supreme Court stated that according to the plain language of subsection (a)(2), the actual use of physical force is only one way to “resist” under the statute. This subsection also provides that a person can threaten to use physical force and thus satisfy the “resist” element.

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#### SEARCH AND SEIZURE - ANTICIPATORY SEARCH WARRANTS

In *Sims v. State*, CR 97-1350, 6/4/98, Charles Sims entered a conditional plea of guilty reserving the right to challenge on appeal the trial court’s ruling denying his motion to suppress an ounce of crystal methamphetamine found as a result of a search of his residence.

The search of Sims’ house was actually initiated as a result of information provided by California authorities who had intercepted a Federal Express package ad-

dressed to Chuck Sims at 21 McArthur Street, Cabot, Arkansas. The California officers notified Arkansas State Police Officer Steve Clemmons of their discovery and forwarded the package to Clemmons, who arranged for its controlled delivery to the 21 McArthur address.

Officer Clemmons prepared an affidavit for a search warrant and presented it to Municipal Judge Joe O’Bryan. In the affidavit, Clemmons described the information concerning the package he had received from California authorities, but he further inaccurately averred, “The package was delivered to Chuck Sims, the owner of the vehicles parked in the driveway at 21 McArthur, Cabot, Arkansas.” In fact, the package had not yet been delivered to Sim’s residence, which Judge O’Bryan knew, since the package containing the illegal substance was on his desk when he reviewed the paperwork Clemmons had submitted for the search warrant. In addition, this error was perpetuated in the printed boiler-plate form of the search warrant issued by Judge O’Bryan wherein the warrant reflected, “I, Officer Clemmons, am satisfied that there is probable cause to believe that the property so described is being concealed on or in the described premises.” Parts of the form were appropriately stricken, but Clemmons failed to delete this “being concealed” statement in the form so as to conform to an anticipatory search.

Subsequently a controlled delivery was made to the Sims’ residence, the search warrant was executed on the residence and the Federal Express package located.



Sims was arrested and charged with the unlawful possession with intent to deliver methamphetamine.

The Arkansas Supreme Court noted that courts have upheld the validity of anticipatory warrants, and while Arkansas has not yet been confronted with the issue, the Eighth Circuit Court of Appeals, as well as other circuit courts, have upheld such practice. See *U.S. v. Bieri*, 21 F.3d 811 (8<sup>th</sup> Cir. 1994); *U.S. v. Tagbering*, 985 F.2d 946 (8<sup>th</sup> Cir. 1993) [citing *Rivera v. United States*, 928 F.2d 592 (2<sup>nd</sup> Cir. 1991)]; *United States v. Dornhofer*, 859 F.2d 1195 (4<sup>th</sup> Cir. 1988); *United States v. Wylie*, 919 F.2d 969 (5<sup>th</sup> Cir. 1990); *United States v. Lowe*, 575 F.2d 1193 (6<sup>th</sup> Cir.), cert. denied, 439 U.S. 869 (1978); *United States v. Odland*, 502 F.2d 148 (7<sup>th</sup> Cir.), cert. denied, 479 U.S. 829 (1986)].

The Arkansas Supreme Court held that the search warrant was not a valid anticipatory warrant. However, the officer requested and executed the warrant objectively and reasonably relied on the judge's probable cause determination, especially since he knew the judge was aware that the package containing the contraband would be delivered and that the warrant would not be executed until delivery was accepted. See: *United States v. Leon*, 468 U.S. 897 (1984) (Good Faith Exception). The Arkansas Supreme Court then affirmed the trial court's denial of Sim's motion to suppress.



### SEARCH AND SEIZURE - CANINE SNIFF

In *United States v. Reed*, CA6, No. 96-4174, 4/15/98, police officers responded to the scene of an apparent burglary at Reed's home. Reed gave permission for the police to use a trained dog, "Cheedy," to sweep the home in case the intruder remained inside. "Cheedy," however, was trained not only as an attack dog but also as a narcotics detection dog. He was conditioned to bark when he found intruders and to scratch or dig when he found drugs.

Although "Cheedy" was commanded to search for an intruder, he alerted for drugs several times during the sweep. When an officer entered a bedroom where "Cheedy" had alerted, he observed a bag of cocaine lying inside a dresser drawer which was partially open. On the basis of this and other information obtained during the sweep, the officers obtained a search warrant to search the residence. The search revealed 76.77 grams of crack in three different locations, 3.807 grams of marijuana, a pistol, rolling papers, an Ohaus triple-beam scale and a bottle of Inositol, a drug-cutting agent.

Reed was convicted by a jury of possession of a firearm by a convicted felon and of possession with intent to distribute crack cocaine. On appeal, Reed argued that the seized evidence should be suppressed.

The Sixth Circuit Court of Appeals stated that the canine team was lawfully present in Reed's residence, either due to the pursuit

of a burglar, or by Reed's consent. Any contraband seen by the officer, or sniffed by "Cheedy," therefore, fell within the plain-view doctrine or the canine sniff rule. Thus, there was no illegal search in this instance. "Cheedy's" alerts provided sufficient probable cause for the search warrant to issue.

### SEARCH AND SEIZURE - SEARCH INCIDENT TO CITATION

In *State v. Earl, Jr.*, CR 97-1310, 6/11/98, the Arkansas Supreme Court discussed the Arkansas Rules of Criminal Procedure, Rule 5.5, which provides:

The issuance of a citation in lieu of arrest or continued custody does not affect the authority of a law enforcement officer to conduct an otherwise lawful search or any other investigative procedure incident to an arrest.

The Arkansas Supreme Court stated that Rule 4.1 of the Arkansas Rules of Criminal Procedure gives law enforcement officers the authority to arrest without a warrant. Under Rule 4.1, a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed any violation of law in the officer's presence. Ark. R. Crim. P. 4.1 (a) (iii) 1997. In essence, Rule 4.1 tracks the holdings of *Delaware v. Prouse*, 440 U.S. 648 (1979) and *Whren v. United States*, U.S., 135 L.Ed.2d 89 (1996), recognizing that officers have probable cause to stop and arrest in such situations. Therefore, construing the authority conveyed in Rule 4.1



with the discretionary power to search in Rule 5.5, the Arkansas Supreme Court held that where an officer has the probable cause to arrest pursuant to Rule 4.1, he may validly conduct a search incident to arrest of either the person or the area within his immediate control under Rule 5.5.

The Court further stated that simply because a police officer's decision is to issue a citation in lieu of a custodial arrest, that does not affect the officer's right to conduct a search of the same scope as a search incident to arrest, as a citation is equivalent to a custodial arrest for authority to search purposes under Arkansas Rules of Criminal Procedure, Rule 5.5.

*Editors Note:* In *United States v. Robinson*, 414 U.S. 218 (1973), the United States Supreme Court held that a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification. The preferred course of action would be for a law enforcement officer to make the arrest, search incidental to arrest, and transport the individual to a facility to be fingerprinted and photographed. Thereafter, the arrested individual could be released on a citation pursuant to Rule 5.2.

The issue whether Rule 5.5 was constitutional was not addressed by the Arkansas Supreme Court. The Iowa Supreme Court held a nearly identical statutory provision to Rule 5.5 constitutional in a 5-4 decision, but the United States Supreme Court granted a petition for writ of cer-

tiorari to review this case. See *State v. Knowles*, 569 N.W.2d 601 (Iowa 1997), cert. granted 118 S.Ct. 1298 (1998).

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**SEARCH AND SEIZURE -  
PLAIN VIEW;  
DISCOVERY OF THE  
ITEM NEED NOT BE  
INADVERTENT**

The primary effect of *Horton v. California*, 496 U.S. 128 (1990), was to dispose of any inadvertence requirement to the plain view exception to the search warrant requirement. The question of whether the discovery of evidence in plain view must be inadvertent had been litigated with differing results in federal and state courts.

In *Fultz v. State*, CR 98-41, 6/18/98, the Arkansas Supreme Court stated:

(T)he Arkansas Constitution provides the same constitutional safeguards as the Fourth Amendment. Assuming that the police do not violate the Fourth Amendment in arriving at the place where the object can be plainly viewed, to justify a warrantless seizure, first, the object must be in plain view and its incriminating character must be "immediately apparent." Second, the officer must be lawfully located in a place to plainly view the object and must have a lawful right of access to the object. See *Horton*, 496 U.S. at 136-37. In short, inadvertent discovery is not a requirement of a warrantless seizure of evidence in plain view, and Article 2, section 15, of the Arkansas Constitution, is not violated merely because the discovery was not inadvertent.

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**SEARCH AND SEIZURE -  
SEARCH OF PAROLEE'S  
HOME**

In *Pennsylvania Board of Probation and Parole v. Scott*, No. 97-581, 6/22/98, one of the conditions of a parolee's parole was that he refrain from owning or possessing weapons. Based on evidence that he had violated this and other conditions, parole officers entered his home and found firearms. At his parole violation hearing, the parolee objected to the introduction of this evidence on the ground that the search was unreasonable under the Fourth Amendment. The hearing examiner rejected the challenge and admitted the evidence. As a result, the parole board found sufficient evidence to revoke Scott's parole.

The Commonwealth Court of Pennsylvania reversed, and the Pennsylvania Supreme Court affirmed the reversal holding that, although the exclusionary rule, which prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights, does not generally apply in parole revocation hearings, it applied in this case because the officers who conducted the search were aware of Scott's parole status. The court reasoned that, otherwise, illegal searches would be undeterred when the officers know that their subjects are parolees and that illegally obtained evidence can be introduced at parole hearings.

The United States Supreme Court stated that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in vio-



lation of parolee's Fourth Amendment rights. The exclusionary rule is a judicially created means of deterring illegal searches and seizures and, as such, it does not prohibit the introduction of illegally seized evidence in all proceedings, and against all persons, but applies only in contexts where its remedial objectives are thought most efficaciously served. It applies only where its deterrence benefits outweigh the substantial benefits inherent in precluding consideration of reliable, probative evidence. Recognizing these costs, the Court has repeatedly declined to extend the rule to proceedings other than criminal trials and again declined to do so here.

The Court stated that the social costs of allowing convicted criminals who violate their parole to remain at large are particularly high and are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future crimes than are average citizens.

The Court rejected the Pennsylvania ruling stating that it had never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence; such a piecemeal approach would add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status; and because, in any event, any additional deterrence would be minimal, whether the person conducting the search was a police officer or a parole officer.

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**SEARCH AND SEIZURE -  
STOP AND FRISK -  
"PLAIN FEEL  
DOCTRINE"**

In *United States v. Proctor*, CA1, No. 97-2420, 7/13/98, the United States Court of Appeals for the First Circuit discussed the "plain feel doctrine." In this case Proctor argued that, even if the police had reasonable suspicion to conduct a frisk, the Federal District Court erred in ruling that the officer, upon patting down Proctor, made an immediate determination that the bulge was in fact a glassine bag containing marijuana, and that it was reasonable for the officer to remove the item from Proctor's pocket. The Court stated that under the "plain-view" doctrine, during a lawful search, police may seize an object in plain view without a warrant if "its incriminating character is immediately apparent..." *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Similarly, the "plain-feel" doctrine permits an officer who "lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent" to seize the contraband.

The Court stated that the seizure of the glassine bag of marijuana from Proctor's pocket falls within the scope of the plain-feel doctrine. In *United States v. Schiavo*, 29 F.3d 6 (1<sup>st</sup> Cir. 1994), the First Circuit upheld the district court's suppression of evidence seized during a pat-down search because the state trooper conducting the search indicated that only after he had taken a paper bag from the defendant's jacket and exam-

ined its contents was he able to determine that the bulge was contraband. In this case, the district court found that Officer Campbell, upon feeling the bulge, immediately recognized it as a bag containing marijuana. The *Dickerson* court noted:

*Terry v. Ohio*, 392 U.S. 1 (1968), itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld such a seizure.

The First Circuit Court of Appeals noted that Officer Campbell testified that he was consistently able to determine the feel of marijuana from conducting numerous pat-downs of suspects and that the officer was conducting the frisk at a residence where he had just made a controlled delivery of five pounds of marijuana. Under these circumstances, the First Circuit could find no error in the seizure.

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**SEARCH WARRANT -  
SUFFICIENCY OF  
AFFIDAVIT BASED ON  
STATEMENTS OF A  
RELIABLE INFORMANT**

In *United States v. Wright*, CA8, No. 97-2689, the Eighth Circuit Court of Appeals stated that in order to determine the sufficiency of an affidavit to support probable cause, consideration is given to the totality of the circumstances. *United States v. Hyten*, 5 F.3d 1154, 1156 (8<sup>th</sup> Cir. 1993). In



this case, the affidavit explained that a reliable informant had witnessed a purchase of crack cocaine at the subject apartment and that he had heard the occupant state that he would have more crack for sale later that evening. The affidavit included the informant's physical description of the occupant, as well as the informant's knowledge of the location of the crack cocaine on top of the television set. Furthermore, the affidavit stated that the informant was not on parole or probation, that he was reliable, and that he had proved his reliability in the past by making controlled purchases under the direct supervision of Officer Adam Kyle and other members of the Omaha, Nebraska, Police Department.

The Eight Circuit Court of Appeals stated that statements of a reliable confidential informant are themselves sufficient to support probable cause for a search warrant. See *United States v. Pressley*, 978 F.2d 1026, 1027 (8<sup>th</sup> Cir. 1992) (citing *McCray v. Illinois*, 386 U.S. 300 (1967)). The reliability of a confidential informant can be established if the person has a history of providing law enforcement officials with truthful information. See *United States v. Williams*, 10 F.3d 590, 593 (8<sup>th</sup> Cir. 1993). The affidavit submitted by Kyle stated, "the confidential informant has proven his/her reliability in the past by making controlled purchases of crack cocaine under the direct supervision of affiant officers." Under the totality of the circumstances, this information adequately established the informant's track record and, hence, his reliability. The judge, therefore, had a substantial

basis to conclude that the search would uncover evidence of a crime. See *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

### SEXUAL HARASSMENT

In *Faragher v. City of Boca Raton*, No. 97-282, 6/26/98, the United States Supreme Court handed down one of two sexual harassment decisions which identified the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination.

Between 1985 and 1990, while attending college, Beth Ann Faragher worked part time and during the summers as an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton, Florida. During this period, Faragher's immediate supervisors were Bill Terry, David Silverman, and Robert Gordon. In June 1990, Faragher resigned.

In 1992, Faragher brought an action against Terry, Silver, and the City of Boca Raton asserting claims under Title VII, 42 U.S.C. § 1983, and Florida law. So far as it concerns the Title VII claim, Faragher alleged that Terry and Silverman created a "sexually hostile atmosphere" at the beach by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by

making lewd remarks, and by speaking of women in offensive terms. The complaint contained specific allegations that Terry once said that he would never promote a woman to the rank of lieutenant, and that Silverman had said to Faragher, "Date me or clean the toilets for a year." Asserting that Terry and Silverman were agents of the City, and that their conduct amounted to discrimination in the "terms, conditions, and privileges" of her employment, 42 U.S.C. § 2000e—2(a)(1), Faragher sought a judgment against the City for nominal damages, costs, and attorney's fees.

Following a bench trial, the United States District Court for the Southern District of Florida found that throughout Faragher's employment with the City, Terry served as Chief of the Marine Safety Division, with authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline. 864 F. Supp. 1552, 1563—1564 (1994). Silverman was a Marine Safety lieutenant from 1985 until June 1989, when he became a captain. Gordon began the employment period as a lieutenant and at some point was promoted to the position of training captain. In these positions, Silverman and Gordon were responsible for making the lifeguards' daily assignments and for supervising their work and fitness training.

The lifeguards and supervisors were stationed at the city beach and worked out of the Marine Safety Headquarters, a small



one-story building containing an office, a meeting room, and a single, unisex locker room with a shower. Their work routine was structured in a “paramilitary configuration,” with a clear chain of command. Lifeguards reported to lieutenants and captains, who reported to Terry. He was supervised by the Recreation Superintendent, who in turn reported to a Director of Parks and Recreation, answerable to the City Manager. The lifeguards had no significant contact with higher city officials like the Recreation Superintendent.

In February 1986, the City adopted a sexual harassment policy, which it stated in a memorandum from the City Manager addressed to all employees. In May 1990, the City revised the policy and reissued a statement of it. Although the City may actually have circulated the memos and statements to some employees, it completely failed to disseminate its policy among employees of the Marine Safety Section, with the result that Terry, Silverman, Gordon, and many lifeguards were unaware of it.

From time to time over the course of Faragher’s tenure at the Marine Safety Section, between 4 and 6 of the 40 to 50 lifeguards were women. During that 5-year period, Terry

repeatedly touched the bodies of female employees without invitation, would put his arm around Faragher, with his hand on her buttocks, and once made contact with another female lifeguard in a motion of sexual simulation. He made crudely demeaning references to women generally, and once commented disparagingly on Faragher’s shape. During a job

interview with a woman he hired as a lifeguard, Terry said that the female lifeguards had sex with their male counterparts and asked whether she would do the same.

Silverman behaved in similar ways. He once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time, he pantomimed an act of oral sex. Within earshot of the female lifeguards, Silverman made frequent, vulgar references to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them.

Faragher did not complain to higher management about Terry or Silverman. Although she spoke of their behavior to Gordon, she did not regard these discussions as formal complaints to a supervisor but as conversations with a person she held in high esteem. Other female lifeguards had similarly informal talks with Gordon, but because Gordon did not feel that it was his place to do so, he did not report these complaints to Terry, his own supervisor, or to any other city official. Gordon responded to the complaints of one lifeguard by saying that “the City just [doesn’t] care.”

In April 1990, however, two months before Faragher’s resignation, Nancy Ewanchew, a former lifeguard, wrote to Richard Bender, the City’s Personnel Director, complaining that Terry and Silverman had harassed her and other female lifeguards. Following investigation of this complaint, the City found that Terry and Silverman had behaved improp-

erly, reprimanded them, and required them to choose between a suspension without pay or the forfeiture of annual leave.

On the basis of these findings, the District Court concluded that the conduct of Terry and Silverman was discriminatory harassment sufficiently serious to alter the conditions of Faragher’s employment and constitute an abusive working environment. The District Court then ruled that there were three justifications for holding the City liable for the harassment of its supervisory employees. First, the court noted that the harassment was pervasive enough to support an inference that the City had “knowledge, or constructive knowledge” of it. Next, it ruled that the City was liable under traditional agency principles because Terry and Silverman were acting as its agents when they committed the harassing acts. Finally, the court observed that Gordon’s knowledge of the harassment, combined with his inaction, “provides a further basis for imputing liability on the City.” The District Court then awarded Faragher one dollar in nominal damages on her Title VII claim.

A panel of the Court of Appeals for the Eleventh Circuit reversed the judgment against the City. The panel ruled that Terry and Silverman were not acting within the scope of their employment when they engaged in the harassment, that they were not aided in their actions by the agency relationship, and that the City had no constructive knowledge of the harassment by virtue of its pervasiveness or Gordon’s actual knowledge.

In a 7-to-5 decision, the full



Court of Appeals, sitting en banc, adopted the panel's conclusion. The court rejected Faragher's Title VII claim against the City of Boca Raton.

The United States Supreme Court reversed the judgment of the Court of Appeals for the Eleventh Circuit and remanded the case for reinstatement of the judgment of the District Court.

The United States Supreme Court adopted the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to

avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

In *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 6/26/98, Kimberly Ellerth, from March 1993 until May 1994, worked as a salesperson in one of Burlington's divisions in Chicago, Illinois. During her employment, she alleges, she was subjected to constant sexual harassment by her supervisor, Ted Slowik.

In the hierarchy of Burlington's management structure, Slowik was a mid-level manager. Burlington has eight divisions, employing more than 22,000 people in some 50 plants around the United States. Slowik was a vice president in one of five business units within one of the divisions. He had authority to make hiring and promotion decisions subject to the approval of his supervisor, who signed the paperwork. According to Slowik's supervisor, his position was "not considered an upper-level management position," and he was "not amongst the decision-making or policy-making hierarchy." Slowik was not Ellerth's immediate supervisor. Ellerth worked in a two-person office in Chicago, and she answered to her office colleague, who in turn answered to Slowik in New York.

Against a background of repeated boorish and offensive remarks and gestures which Slowik allegedly made, Ellerth places particular emphasis on three alleged incidents where Slowik's comments could be construed as threats to deny her tangible job benefits. In the summer of 1993, while on a business trip, Slowik invited Ellerth to the hotel lounge, an invitation Ellerth felt compelled to accept because Slowik was her boss. When Ellerth gave no encouragement to remarks Slowik made about her breasts, he told her to "loosen up" and warned, "you know, Kim, I could make your life very hard or very easy at Burlington."

In March 1994, when Ellerth was being considered for a promotion, Slowik expressed reservations during the promotion interview because she was not "loose enough." The comment was followed by his reaching over and rubbing her knee. Ellerth did receive the promotion; but when Slowik called to announce it, he told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs."

In May 1994, Ellerth called Slowik, asking permission to insert a customer's logo into a fabric sample. Slowik responded, "I don't have time for you right now, Kim—unless you want to tell me what you're wearing." Ellerth told Slowik she had to go and ended the call. A day or two later, Ellerth called Slowik to ask permission again. This time he denied her request, but added something along the lines of, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck



of a lot easier.”

A short time later, Ellerth’s immediate supervisor cautioned her about returning telephone calls to customers in a prompt fashion. In response, Ellerth quit. She faxed a letter giving reasons unrelated to the alleged sexual harassment we have described. About three weeks later, however, she sent a letter explaining she quit because of Slowik’s behavior.

During her tenure at Burlington, Ellerth did not inform anyone in authority about Slowik’s conduct, despite knowing Burlington had a policy against sexual harassment. In fact, she chose not to inform her immediate supervisor (not Slowik) because “ ‘it would be his duty as my supervisor to report any incidents of sexual harassment.’ ” On one occasion, she told Slowik a comment he made was inappropriate.

In October 1994, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), Ellerth filed suit in the United States District Court for the Northern District of Illinois, alleging Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII. The District Court granted summary judgment to Burlington. The Court found Slowik’s behavior, as described by Ellerth, severe and pervasive enough to create a hostile work environment, but found Burlington neither knew nor should have known about the conduct. There was no triable issue of fact on the latter point, and the Court noted Ellerth had not used Burlington’s internal complaint procedures. Although Ellerth’s claim was framed as a hostile work

environment complaint, the District Court observed there was a quid pro quo “component” to the hostile environment. Proceeding from the premise that an employer faces vicarious liability for quid pro quo harassment, the District Court thought it necessary to apply a negligence standard because the quid pro quo merely contributed to the hostile work environment. The District Court also dismissed Ellerth’s constructive discharge claim.

The Court of Appeals for the Seventh Circuit en banc reversed in a decision which produced eight separate opinions and no consensus for a controlling rationale. The United States Supreme Court granted certiorari. The judgment of the Seventh Circuit was affirmed and, in this case, the Court adopted the same holding that it did in *Faragher v. City of Boca Raton*.



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