



# CJI Legal Briefs

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## AMERICANS WITH DISABILITIES ACT

In *Francis v. City of Meriden*, CA2, No. 96-9610, 11/17/97, John Francis, a fireman, alleges that he was discriminated against in violation of the Americans With Disabilities Act because his employer, the City of Meriden, disciplined him for exceeding fire department weight guidelines. The City of Meriden's agreement with its firefighters union included a weight/fitness requirement as well as a height/weight chart establishing acceptable maximum weights for all firefighters. A firefighter whose weight exceeded the limits had to demonstrate his fitness by passing either a body fat test or a physical fitness test. If the firefighter exceeded the maximum weight and failed to pass the body fat test or alternative fitness test, the firefighter was subject to discipline, up to and including termination. Francis was suspended by the fire department for being overweight and refusing to take the body fat or fitness test.

The Second Circuit agreed with the recent decision of the United States Court of Appeals for the Sixth Circuit in *Andrews v. State of Ohio*, 104 F.3d 803 (6th Cir. 1997). As the Sixth Circuit reasoned in *Andrews*, considering allegations of discrimination asserted by police officers who exceeded a weight standard—a mere physical characteristic such as moderate obesity does not, without more, equal a physiological disorder, where an employee's failure to meet the employer's job criteria is based solely on the possession of such a physical characteristic—the employee does not sufficiently allege a cause of action under these statutes. The Court noted that several complaining police officers had not alleged anything more about a perceived impairment than that they exceeded the highway patrol weight limit and that they failed to meet the highway patrol fitness criteria. The Court noted the absence of any allegation that the state regarded the officers as having physiological weight disorders and discriminated against them based on that perception.

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The Second Circuit agreed with the holding in *Andrews* that physical characteristics that are not the result of physiological disorders are not considered impairments for the purpose of determining either actual or perceived disability. Generally, weight is not such an impairment. The decision of the lower court upholding the suspension of Francis was affirmed.

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### CAPITAL MURDER - JURY INSTRUCTIONS ON MITIGATION

In *Buchanan v. Angelone*, No. 96-8400, 1/21/98, Buchanan, convicted of capital murder and sentenced to death, contended that the Virginia trial court violated his Eighth and Fourteenth Amendment right to be free from arbitrary and capricious imposition of the death penalty when it failed to provide the jury with express guidance on the concept of mitigation, and to instruct the jury on particular statutorily defined mitigating factors.

The United States Supreme Court noted that the Virginia trial jury instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on all the evidence, the instruction afforded jurors an opportunity to consider mitigating evidence. The Virginia trial jury instruction informed the jurors that if they found the aggravating factors proved beyond a reasonable doubt then they may fix the penalty at death, but directed that if they believed that all the evidence justified a lesser

sentence then they shall impose a life sentence.

The United States Supreme Court concluded that the absence of an instruction on the concept of mitigation and of instructions on statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments to the United States Constitution.

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### CIVIL SERVICE COMMISSION

In *Burcham v. City of Van Buren*, No. 96-1379, 11/6/97, Michael Burcham, a patrolman in the Van Buren Police Department, was passed over for promotion to corporal during the one-year span from March 1995 to March 1996. He filed a complaint against the City of Van Buren, the Civil Service Commission for the City (Commission), and Chief of Police Mason Childers. Burcham alleged that he was entitled to be promoted in 1995 and 1996 because he was on the three-person eligibility list for promotion certified by the Commission to the Police Chief for this period. He further alleged that he ranked second on the three-person eligibility list during this time frame and that three patrolmen other than himself were promoted to corporal. Burcham also asserts, as a separate count, that there was a failure to advertise the competitive examination for promotion to corporal in August 1996. The 1996 competitive examination determined the eligibility list for the next year which ultimately was the list used for promotions. He contended that state law requires publication, in a local newspaper, that the examination relating to

promotions is to take place. Because of the Department's failure to advertise, he contended that he was foreclosed from taking the examination. Thus, he contended that the 1996 eligibility list should be declared invalid which presumably would invalidate all promotions made based on that eligibility list.

The trial court granted summary judgment in favor of the City of Van Buren, the Commission, and Chief Mason Childers. The Arkansas Supreme Court affirmed the ruling of the trial court.

Arkansas Code Annotated §14-51-301 (Supp. 1995) statute requires that cities adopt rules governing the departments and continues in pertinent part as follows:

(b) These rules shall provide for:

(4)(A)(i) The creation and maintenance of current eligibles lists for each rank of employment in the departments, in which shall be entered the names of the successful candidates in the order of their standing in the examination. However, for ranks in each department where there may not be openings during an annual period, the board may establish rules to create the eligibles list on an as-needed basis.

(B)(i) All lists for appointments or promotions as certified by the board shall be and remain in force and effect for the period of one (1) year from date thereof.



(6) Certification to the department head of the three (3) standing highest on the eligibility list for that rank of service, and for the department head to select for appointment or promotion one (1) of the three (3) certified to him and notify the commission thereof;

Ark. Code Ann. § 14-51-301(b)(4)(A)(i), (B)(i), (6) (Supp. 1995).

Burcham argues that it is a mathematical impossibility for three promotions to be made in one year without all three people who were originally named as the three standing highest being selected. He claims that the one-year duration for “lists” in § 14-51-301(b)(4)(B)(i) also applies to the certified names by the Commission of the three standing highest. Under his interpretation, the second time a position became available, only two names would be submitted, and the third time, only the third name would be submitted. This would assure that the third person would be selected for the position. As a consequence, he concludes that he should be selected for one of the three positions that became available between March of 1995 and March of 1996.

The City of Van Buren, the Commission, and Chief Mason Childers on the other hand, read § 14-51-301 to require the Commission to adopt the following procedure. The Commission creates and maintains a list of eligible applicants for promotion for each rank of employment within the Department. The eligibility lists remain in effect for one year from the time

the Commission certifies them. Each time a position becomes available within a Police Department, for example, the Commission certifies and submits to the Department head (here, the police chief) the three most qualified applicants based on their examination scores. This short list is referred to as the “three standing highest.” The Police Chief then selects one of the three for promotion. If another position for promotion becomes available within that same year, the eligibility list is examined and the Commission certifies the names of the three standing highest at that time and submits those names to the Police Chief. This second time, the three names would include the two that were on the previous list of three standing highest as well as one new name from the eligibility list based on examination scores. If a third position comes open in that year, the same procedure for selection from the names of the three standing highest is followed. We subscribe to the City of Van Buren, the Civil Service Commission for the City and Chief of Police Mason Childers’ reading of the statute.

In support of his interpretation, Burcham cited the Arkansas Supreme Court to three cases. *Cross v. Bruce*, 284 Ark. 230, 681 S.W.2d 339 (1984); *Orrell & Abernathy v. City of Hot Springs*, 265 Ark. 267, 578 S.W.2d 18 (1979); *Smith v. Little Rock Civil Serv. Comm.*, 214 Ark. 765, 218 S.W.2d 366 (1949). Prior to 1987, the civil service statute contained language suggesting that promotion be afforded to the one standing highest on the eligibility list. Ark. Code Ann. § 19-1603 (1980).

That language was amended in 1987 to provide that the department head would select for appointment or promotion from the certified list of the three standing highest. See Act 657 of 1987, now codified as Ark. Code Ann. § 14-51-301(b)(6) (Supp. 1995). These cases decided prior to the change in the statute have little or no value as precedent.

It is clear from the structure of § 14-51-301 that the one-year requirement concerning the list certified by the Commission applies to the eligibility list in toto and not just to the names of the three standing highest which are certified by the Commission to the department head. The Court concluded that the statute states as much. But, in addition, the process for promotions would not work under Burcham’s reading. Subsection (b)(6) makes it clear that when the names of the three standing highest are submitted, the department head is to choose one of the three. To limit the Police Chief to one name in making his selection would run counter to the express language of the statute. In fact, in 1987, the General Assembly deleted language in § 14-51-301(b)(6), requiring promotion of the one standing highest on the eligibility list. See Act 657 of 1987. The Court held that the City of Van Buren, the Commission, and Chief of Police Mason Childers have correctly interpreted the statute. Each time a position becomes available within the Van Buren Police Department, the Commission is required to submit the names of the three applicants with the highest examination scores to the Police Chief. Because one of the three will be selected, it stands



to reason that the next time a position becomes available the three names submitted will have changed. To read the statute otherwise would eventually deprive department heads of any discretion in choosing the best candidate. This is clearly not what the General Assembly intended.

Burcham next contends that the Commission violated Ark. Code Ann. § 14-51-301(b)(3)(A), by not advertising in the local paper the next promotional examination held on August 12, 1996, and, thus, the resulting eligibility list, and presumably all promotions, are invalid. The statute provides as follows:

(b) These rules shall provide for:

(1)(A) The qualifications of each applicant for appointment to any position on the police or fire department;

(B)(i) No person shall be eligible for appointment to any position on the fire department who has not arrived at the age of twenty-one (21) years;

(ii) No person shall be eligible for appointment on the police department affected by this chapter who has not arrived at the age of twenty-one (21) years;

(2) Open competitive examination to test the relative fitness of applicants for the positions;

(3)(A) Public advertisement of all examinations by pub-

lication of notice in some newspaper having a bona fide circulation in the city and by posting of notice at the city hall at least ten (10) days before the date of the examinations.

(3)(B) The examinations may be held on the first Monday in April or the first Monday in October, or both, and more often, if necessary, under such rules and regulations as may be prescribed by the board; Ark. Code Ann. § 14-51-301(b)(1), (2), and (3) (Supp. 1995) (emphasis added).

City of Van Buren Ordinance No. 28 of 1995 specifies that newspaper notice of examinations will be done for appointments for police and firefighter positions, but the ordinance does not include advertisement for promotions within the ranks. In granting summary judgment in favor of the City, the trial judge found that the publication requirements as set out in subsection (b)(3)(A) only apply to appointments and not to promotions. The Arkansas Supreme Court agreed with this interpretation.

The purpose of the statutory requirement for publication of examination dates is to ensure that all potential applicants are notified. If the only pool of potential applicants are those already on the police force, it is entirely reasonable to post test dates on the troop bulletin board at the Department. There is little need to advertise to the public at large through a local newspaper when the

purpose of the examination is only to decide promotion of current police officers to a higher rank. Indeed, it would be wasteful to do so. The Court will not give a statute an interpretation which is at odds with common sense. *Stephens v. State*, 328 Ark. 570, 944 S.W.2d 836 (1997); *Sanders v. State*, 310 Ark. 630, 839 S.W.2d 518 (1992). Affirmed.

**CIVIL LIABILITY;  
BROADCAST MEDIA  
PRESENT TO  
DOCUMENT THE  
RESULTS OF A SEARCH**

In *Berger v. Hanlon*, CA9, No. 96-35251, 11/13/97, when federal agents searched the ranch of Paul and Erma Berger in March of 1993, they acted not only pursuant to a search warrant, but also pursuant to a written contract with the Cable News Network and Turner Broadcasting System, authorizing the filming and recording of the search for broadcast on their environmental television shows "Earth Matters" and "Network Earth." The media wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity.

After Mr. Berger was convicted of one misdemeanor count for using a pesticide in a manner inconsistent with its labeling and acquitted of three felony counts of the killing of at least one eagle, the Bergers sued both the media and the federal agents under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the violation



of their constitutional rights. The Bergers' principal contentions under federal law are that (1) the federal agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the media in their search for dramatic material, and (2) the media acted sufficiently in concert with the federal agents to be held accountable for that violation as government actors.

The Ninth Circuit Court of Appeals held that the search violated the Fourth Amendment rights of the Bergers and that the federal officers conducting the search were not entitled to qualified immunity. The Court stated that this was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses. We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

The federal agents contend that even if the search was unconstitutional, they could have reason-

ably believed their conduct was lawful. The Second Circuit has held that qualified immunity does not protect federal officers in a case where a Secret Service agent invited a TV news magazine into a private home to videotape a search. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). *Ayeni* affirmed District Judge Weinstein's decision in *Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994). The Second Circuit held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible.

The Ninth Circuit observed that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant. The Ninth Circuit cited the Second Circuit's decision in *Ayeni*, that squarely held a residential search videotaped by commercial television cameras was unreasonable, and the officers unprotected by qualified immunity. The Ninth Circuit reached the same legal conclusions in this case.

The Ninth Circuit stated that the "open fields doctrine" and "the invited informer doctrine" were not applicable to this case.

On the issue of whether the media may be held liable even though they were not agents or employees of the federal government, the Ninth Circuit stated that the appropriate test in this case is the joint action test. The Court stated:

In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute — the execution of a search warrant — for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

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#### CIVIL LIABILITY - COLOR OF LAW

In *Roe v. Humke*, CA8, No. 96-3952, 10/30/97, the sole issue on appeal is whether defendant Jack Humke was acting under color of state law at the time he sexually assaulted Jane Doe. The Eighth Circuit Court of Appeals concluded that he was not and affirmed the judgment of the district



court.

At the time of the assault, Jack Humke was employed as a police officer for the city of Lonoke, Arkansas. As part of his duties as a police officer, he worked with the local school, providing security and conducting other programs. Humke met eleven-year-old Jane Doe in 1994 while sitting outside the school in his patrol car and in uniform. Humke was regularly at the school as part of his duties, and he would see Doe and talk to her after school three or four times a week. He occasionally gave her rides home. He bought her candy and sodas and gave her a pen set for Christmas. While he was driving around town in his patrol car, he would drive to Doe's house and talk to Doe from the car. Humke hugged and kissed Doe through the window of the patrol car, explaining that he did it "like a grandfather hugging a granddaughter," and saying that he "didn't pay no attention" when Doe hugged his neck and kissed his cheek. Humke once said that he wished he "were 20 years younger so (he) could get some of" Doe.

While at the school, in his police car and in uniform, Humke several times suggested to Doe and some of her friends that they go to Humke's farm to ride all-terrain vehicles. Doe finally agreed. On Saturday, February 4, 1995, Humke picked up Doe and another minor female at Doe's home. Humke was off-duty at the time, was driving his personal vehicle, was not wearing his uniform or badge, and was not carrying a gun. Humke met with Doe's mother and stepfather, whom he had met before and who knew that he was

a police officer. He told them where he was taking Doe and what they would be doing and said his purpose was to reassure them that Doe would be safe with him. Doe's parents agreed that she could go with Humke. Humke then took Doe and the other young girl to his farm, where he hugged, kissed, and fondled Doe while riding behind her on the all-terrain vehicle.

Humke did not see Doe again until after school the following Tuesday, when he drove up to her in his patrol car, gave her what she described as a "scary" look, and asked if she had had a good time. Doe stated that she felt Humke was pressuring her not to say anything. Doe's parents eventually learned from Doe what had happened and complained to the Arkansas State Police about Humke's actions. Following an investigation, Humke was terminated from the police department. He subsequently pleaded nolo contendere to a charge of first-degree sexual abuse and was incarcerated.

Roe's lawsuit sought damages under § 1983 based on alleged violations of Doe's Fourteenth Amendment substantive due process rights to liberty and privacy and of her Fourth Amendment right to be free from unreasonable searches and seizures. Roe also sought declaratory and injunctive relief and asserted state law claims.

Humke acknowledged that he was a "goodwill ambassador" for the department with children, that when he talks to children he is trying to get them to trust him, and that it is important for children to learn to trust the police. Humke also acknowledged that he was subject at all times to the Lonoke

police department's code of ethics, which meant that he was on duty twenty-four hours a day and subject to discipline for incidents in his private life. The district court concluded that Humke was not acting under color of state law at the time he assaulted Doe. The court noted that Humke was not on duty at the time, was not in uniform, was not wearing a badge, and was not carrying a weapon. The court concluded that Humke was not engaged in or pretending to engage in acts required of him as part of his official duties as a police officer. The court rejected Doe's argument that Humke had used his position of trust and authority as a police officer to create the situation whereby he could assault her, concluding that "while Officer Humke may certainly have been revered as a police officer" by Doe and her parents, nothing in the record suggested that his actions "were related in a meaningful way either to his governmental status or to the performance of his duties." After granting summary judgment to defendants on the section 1983 claim, the district court declined to exercise supplemental jurisdiction over the state law claims.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). The Eighth Circuit was concerned only with "the second essential element"—whether Humke was acting under color of state law.

Viewing the events of Febru-



ary 4 solely in isolation, Humke was not acting under color of state law because he was neither actually acting in his official capacity or exercising his responsibilities pursuant to state law, nor purporting to so act. Humke took Doe to his farm for his own personal pursuits, not for any purpose legitimately or purportedly related to the exercise of his responsibilities as a police officer. As the district court pointed out, Humke was off-duty, was not wearing his uniform or badge or carrying a gun, and was driving his personal vehicle. Cf. *Haberthur v. City of Raymore, Mo.*, 119 F.3d 720 (8th Cir. 1997) plaintiff sufficiently alleged officer was acting under color of law where officer once followed her home in his police cruiser and threatened to give her a speeding ticket, and later, while he was on duty and in uniform, sexually assaulted her at her place of work. Nor does Humke's admission that he was subject to the code of ethics transform into action under color of law any of his off-duty actions that were not related to the lawful or purported exercise of his responsibilities as a police officer.

The Court concluded that Humke was not acting under color of law because there was no nexus between his position as a police officer and his abuse of Doe on the day in question. As the district court aptly stated, "The sexual abuse of plaintiff, while reprehensible and to be condemned in the strongest possible terms, was a private tort committed by a person acting in a purely private capacity."

Roe also sued Floyd Van Horn in his individual capacity and his official capacity as the chief of

police for the City of Lonoke at the time the events occurred. Roe alleged that Van Horn's acts, customs, and policies as chief of police in ignoring previous incidents of sexual misconduct by Humke and other officers, and his failure to adequately train, supervise, and discipline Humke and other officers, constituted deliberate indifference to Doe's constitutional rights and resulted in the injuries she suffered. Because there was no underlying violation of Doe's constitutional rights by a state actor, however, her claim against Van Horn necessarily fails.

#### CIVIL LIABILITY - CIVIL DISPUTE

In *Thornton v. City of Macon*, CA11, No. 95-8672, 1/13/98, Marjorie Mullis called the Macon Police Department on June 5, 1990. She explained to the dispatcher that she wanted the assistance of a police officer in resolving a dispute between Thornton and herself. Mullis and Thornton had lived together in Thornton's apartment, but had parted ways over two years earlier. Mullis explained that she had a set of keys to Thornton's car, which car she used periodically, and that Thornton wanted her to return those keys. She had told Thornton that if she had to return the keys, then he would have to return a mattress that she had left in his apartment. Mullis explained that she wanted an officer to assist her in exchanging the keys for the mattress.

Officer Coleman was dispatched to Mullis' residence. Mullis explained the situation to

Coleman and asked him to take the keys to Thornton. Coleman agreed to do so and proceeded to Thornton's apartment, which was located across the street in the same block as Mullis' apartment. When Coleman arrived, Thornton was standing on the front porch of his apartment, which was on the ground floor of the apartment house. Thornton managed the property for his father. Coleman explained to Thornton that he was there to return the keys and to pick up Mullis' mattress. Thornton responded by telling Coleman that he had done nothing wrong and that he wanted Coleman to leave the premises. At some point during this initial exchange, Mullis arrived on the scene. Thornton became upset and entered his apartment, closing a screen door behind him. Once inside, Thornton stood at the screen door and repeatedly told Coleman and Mullis to leave.

Instead of leaving, Coleman called for backup. Less than a minute later, Officers Lodge and Beddingfield arrived on the scene. Coleman briefed them on the situation. Thornton repeated his desire that the officers leave. The officers tried unsuccessfully to get Thornton to come out on the porch and talk to them. Finally, they told him that if he opened the screen door, they would give him his car keys.

As Thornton opened the door to get the keys, the officers charged into his apartment. One of the officers grabbed Thornton's arms, and another grabbed Thornton around the neck. The officers threw Thornton to the floor, cuffed his hands behind his back, picked him up by his arms, dragged him



outside and shoved him into a police car.

Cravey, an acquaintance of Thornton's was doing repair work on the apartment house. As the officers took Thornton to the car, Thornton yelled to Cravey; he wanted Cravey to call his mother and his lawyer and to lock his apartment. Cravey approached the officers to ask if he could enter the apartment to use the phone. One of the officers responded by patting Cravey down; he found a pocket knife on Cravey's person. The officer charged Cravey with "obstruction," slammed him down on the hood of a police car, and cuffed his hands behind his back. The officer placed Cravey in the back seat of the police car with Thornton.

With Thornton and Cravey in the car, the officers directed Mullis to go into the apartment and get her mattress. When Mullis hesitated, one of the officers told her that if she refused, she would be arrested. Mullis explained that she had a bad back and could not lift the mattress. The officers then helped her carry the mattress to the front porch, where they left it. Thornton and Cravey were taken to jail and charged with felony obstruction of a law enforcement officer in violation of a Georgia statute. The charges were later dismissed.

Thornton and Cravey filed a complaint in United States District Court in the Middle District of Alabama alleging that the City of Macon and the Macon police officers had violated their rights under the Fourth and Fourteenth Amendments by arresting them without probable cause and using excessive force to carry out those

arrests. The police officers moved the district court for summary judgment claiming they were entitled to qualified immunity. The Federal district court denied the motion and the officers appealed.

The Eleventh Circuit Court of Appeals stated that Officer Coleman was dispatched to Mullis' house to address a civil dispute and had the general duty—and the authority—to enforce the law and maintain the peace. Coleman and the other officers' actions here far exceeded that authority. Coleman lawfully could peaceably approach the front door of Thornton's apartment and attempt to deliver the keys and retrieve the mattress; in so doing he would merely be attempting to mediate and defuse a contentious situation. He and the other officers could not force Thornton to make such an exchange, however, and they could not remain on Thornton's property after Thornton had refused to make the exchange. Thornton had committed no crime and had not threatened anyone; once he had asked the officers to leave, their continued presence—and their attempt to retrieve Mullis' mattress by force—was not pursuant to their official duties and was outside of their authority. No reasonable police officer would have believed that the officers had probable cause to arrest Thornton for "obstruction" of such unauthorized actions.

Similarly, the officers did not have "arguable probable cause" to arrest Cravey. Cravey was charged with obstruction, and none of the officers suggests that Cravey committed any other crime. Even if it was concluded that Cravey

"obstructed the officers, it could not be concluded that they were engaged in the lawful discharge of their official duties. No reasonable officer could believe that probable cause existed to arrest Cravey for "obstruction" of that endeavor.

Thornton and Cravey also claim that the officers used excessive force in carrying out their arrests. The Eleventh Circuit Court of Appeals stated that neither Thornton nor Cravey was suspected of having committed a serious crime, neither posed an immediate threat to anyone, and neither actively resisted arrest. Under the circumstances, the officers were not justified in using any force, and a reasonable officer thus would have recognized that the force used was excessive.

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#### **CIVIL LIABILITY - ENTRY TO ARREST**

In *Rogers v. Carter*, CA8, No. 96-1916, 2/20/98, On September 23, 1994, Janice Rogers was living in an apartment in an apartment complex in Forrest City, Arkansas. Her brother, David Rogers, a sergeant in the United States Army, was visiting her. Janice Rogers and David Rogers are African-American. On the date in question, David Rogers and a friend were at Janice Rogers' apartment, and Janice Rogers was not at home. The apartment door was open and music was playing inside the apartment. Sarah Carter, the apartment complex manager, asked them to lower the volume of the music or close the apartment door. An altercation between Sa-



rah Carter and David Rogers ensued, after which Sarah Carter called the police. Moments later, Sarah Carter's husband, Bobby Carter, arrived. After talking with his wife, Bobby Carter approached David Rogers, who at that time was standing outside the door to Janice Rogers' apartment. Bobby Carter, a lieutenant with the Forrest City Police Department, verbally identified himself as a police officer and began questioning David Rogers. Bobby Carter was dressed in plain clothes. David Rogers requested to see Bobby Carter's police identification. Bobby Carter did not produce a badge or any other indicia of authority as a police officer, but again verbally stated that he was a police officer. David Rogers refused to answer Bobby Carter's questions and turned to go back into the apartment.

Bobby Carter grabbed David Rogers by the shirt, at which point Rogers "body-slammed" Carter to the ground, walked into the apartment, and locked the door. Bobby Carter got up from the ground, pulled out his revolver, and kicked open the apartment door. David Rogers surrendered upon seeing the firearm. Bobby Carter held the cocked revolver to David Rogers' head and ordered Rogers to exit the apartment. As David Rogers exited the apartment, Bobby Carter pushed him to the ground, sat on his back, and pulled Rogers' hands up behind his back. While Bobby Carter was on David Rogers' back, still holding the gun to David Rogers' head, Janice Rogers arrived on the scene. She observed Bobby Carter on her brother's back, holding a gun to her brother's head. She began yelling

at Bobby Carter to get off of her brother and to get the gun away from him. Police officers arrived at the scene almost simultaneously with Janice Rogers and placed David Rogers and Janice Rogers under arrest. They were each arrested on charges of disorderly conduct, and David Rogers was additionally charged with resisting arrest, fleeing, and battery.

On September 26, 1994, a state circuit court judge found probable cause to arrest David Rogers on the offense of disorderly conduct and issued a warrant for his arrest. On October 3, 1994, David Rogers was convicted of disorderly conduct in municipal court. His conviction was later overturned in state circuit court.

Appellants filed the present action in federal district court asserting federal claims pursuant to 42 U.S.C. § 1983. The federal district court held that Bobby Carter and the City were entitled to qualified immunity on the Roger's Fourth Amendment claims. This appeal followed.

The Eighth Circuit first rejected the argument that the conviction of David Rogers in municipal court is a complete defense to Rogers' Fourth Amendment unlawful arrest claim. *Malady v. Crunk*, 902 F.2d 10, 11 (8th Cir. 1990), was cited for the proposition that "where law enforcement officers have made an arrest, the resulting conviction is a defense to a § 1983 action. However, David Rogers' municipal court conviction was later overturned in state circuit court following a trial on the merits. *Malady v. Crunk* does not apply in the present case where the initial "conviction" was subsequently overturned upon a find-

ing of innocence following a trial on the merits in a court of competent jurisdiction.

The Eighth Circuit Court of Appeals also disagreed with the argument that there was arguable probable cause for Bobby Carter to arrest David Rogers for disorderly conduct, resisting arrest, battery, or fleeing. Bobby Carter, the husband of the apartment complex manager with whom David Rogers had just argued, appeared at David Roger's doorstep dressed in plain clothes. He neither wore nor produced a badge or any other indicia of authority as a police officer, even after Rogers specifically asked to see identification. Bobby Carter did nothing more than declare himself a police officer. Under these circumstances, David Rogers would have no reason to know that Bobby Carter was a police officer. David Rogers' decision to retreat into the apartment was prudent and lawful. By contrast, Bobby Carter's initiation of physical contact was unjustified. We reject Bobby Carter's arguments that David Rogers' forceful, yet limited, response to Bobby Carter's initial act of aggression could constitute disorderly conduct, resisting arrest, or battery upon a law enforcement officer, or that Rogers' subsequent retreat into the apartment could constitute fleeing under Arkansas state law.

The Eighth Circuit Court of Appeals stated that even if Bobby Carter did have probable cause to arrest David Rogers (which the Eighth Circuit stated he did not), it still would have been erroneous for the district court to grant summary judgment in favor of Bobby Carter and the City because Bobby Carter's purported arrest of David



Rogers was an unlawful warrantless home arrest. In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that probable cause is not an adequate basis to permit a warrantless arrest in the home in the absence of exigent circumstances. Quoting from a decision of the Second Circuit, the Supreme Court explained:

“To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.”

The Eighth Circuit found this reasoning to be persuasive and in accord with their own Fourth Amendment decisions stating:

The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home—a zone that finds its roots in clear and specific constitutional terms: “The right of the people to be secure in their . . . houses . . . shall not be violated.” That language unequivocally establishes the proposition that “at the very core of the Fourth

Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Five years later, in 1985, the Eighth Circuit court stated “it is now 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.” *Schlothauer v. Robinson*, 757 F.2d 196, 197 (8th Cir. 1985) (citing *Steagald v. United States*, 451 U.S. 204, 211-12 (1981); *Payton v. New York*, 445 U.S. at 586-90); see also *United States v. Duchi*, 906 F.2d 1278, 1282 (8th Cir. 1990) (“the exigent-circumstances requirement applies even when, as in this case, probable cause for the arrests clearly exists”). Clearly, there was no consent in this case because the arrest was conducted by means of a forced entry, with gun drawn. Moreover, under the Fourth Amendment, Bobby Carter’s arrest of David Rogers in Janice Rogers’ apartment is treated in the same manner as if it had occurred in David Rogers’ own home. See *Haley v. Armontrout*, 924 F.2d 735, 736 (8th Cir.) (“it is, of course, well-settled that, absent exigent circumstances, an arrest warrant is required in order to arrest a suspect in his home or in any

private place in which the suspect has a legitimate expectation of privacy as a guest or otherwise”), *cert. denied*, 502 U.S. 842 (1991). Under well-established law, therefore, Bobby Carter’s actions violated David Rogers’ Fourth Amendment rights unless it can be shown that there were exigent circumstances in the present case requiring a warrantless home arrest.

In *United States v. Duchi*, the Eighth Circuit explained that “the warrant requirement is suspended when—in the press of circumstances beyond a police officer’s control—lives are threatened, a suspect’s escape looms, or evidence is about to be destroyed.” 906 F.2d at 1282. The Court held, as a matter of law, that no such exigent circumstances existed in the present case. First, David Rogers’ decision to retreat into the apartment and lock the door was both prudent and lawful under the facts of this case because, objectively-speaking, Bobby Carter appeared under the circumstances to be no more than a friend or relative of the apartment complex manager. There is no basis for finding that David Rogers was or reasonably appeared to be a suspect whose escape was imminent. Nor is there any basis whatsoever for finding that David Rogers was or appeared to be a threat to anyone at the time Bobby Carter kicked in the locked door to arrest him. At that point, David Rogers had already retreated into the apartment. Clearly, there was no issue in this case concerning destruction of evidence. Finally, even assuming that David Rogers had committed the offense of disorderly conduct because he had allegedly played loud music, that



violation itself does not establish exigent circumstances to justify a warrantless home arrest because it was an extremely minor offense, and any reasonable officer would have known that to be true. See *Welsh v. Wisconsin*, 466 U.S. 740, 752-54 (1984) (“it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor”).

The Eighth Circuit Court of Appeals held that the district court erred in granting summary judgment for Bobby Carter and the City on the merits of David Rogers’ Fourth Amendment unlawful arrest claim.

The Eighth Circuit Court of Appeals was also of the firm conviction that, under the specific facts of this case, no officer in Bobby Carter’s position — possessing the same information he possessed — could have reasonably believed that exigent circumstances existed to justify the warrantless home arrest of David Rogers, as that arrest was effectuated by means of a forced entry with gun drawn. In fact, it was the court’s opinion that no officer in Bobby Carter’s position could have reasonably believed that probable cause existed to arrest David Rogers at all. Accordingly, the Eighth Circuit stated that the district court was in error in concluding that Bobby Carter and the City of Forrest City are entitled to qualified immunity on David Rogers’ Fourth Amendment unlawful arrest claim.



### CIVIL LIABILITY - USE OF FORCE

In *Pannell v. Miller*, CA8, No. 97-2174, 11/19/97 [*Unpublished*], Blytheville, Arkansas, Police Officer Barry Miller appealed the district court’s denial of summary judgment based on qualified immunity in Pannell’s 42 U.S.C. § 1983 action. The Eighth Circuit Court of Appeals affirmed.

Pat Pannell alleges that in arresting her for disorderly conduct and harassment, Miller shoved Pannell inside the police car with her hands cuffed behind her back and transported her to the police department. When the two arrived at the station and Miller removed the handcuffs, Pannell struck Miller on his chest with her right hand. It is alleged that Miller then hit Pannell in the face, causing redness and swelling, for which Pannell was treated by a doctor.

The Eighth Circuit stated that under Pannell’s version of the facts, she was arrested for a minor offense, posed no immediate safety threat to Miller, and was already detained at the police station. Thus, it was objectively unreasonable for Miller to hit her in the face with enough force to cause injury.

### CONSTABLES

In *Reed v. State*, CR 97-661, 12/4/97, the Arkansas Supreme Court stated that a constable is a “peace officer” within the meaning of Arkansas Code Annotated § 16-19-301 and a constable’s authority to engage in the fresh pursuit of criminal suspects, whether

suspected of committing felonies or misdemeanors, is derived from Arkansas Code Annotated § 16-81-301.

### DOUBLE JEOPARDY

In *State v. Johnson*, CR 97-593, 12/4/97, the Arkansas Supreme Court stated that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not prohibit state prosecution of an offense where the offense was considered, for sentencing enhancement purposes, in the calculation of punishment for a separate, but related, federal conviction.

In *Hudson et al v. United States*, No. 96-976, 12/10/97, the United States Supreme Court modified the standard it set forth in *United States v. Halper*, 490 U.S. 435 (1989), to review double jeopardy cases. The *Hudson* case involved bankers who suffered occupational debarment and monetary penalties for making unlawful illegal loans that contributed to the failure of two banks. Subsequently, the bankers were prosecuted criminally for essentially the same conduct.

The United States Supreme Court in *Hudson, supra*, in approving both the civil penalties and the criminal prosecution, stated that a violation of the double jeopardy clause will be found only when there is the clearest proof that civil penalties are so punitive in form and effect as to render them criminal.






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**EMPLOYMENT  
RELATED MISCONDUCT  
- FALSE STATEMENTS**

In *LaChance v. Erickson*, No. 96-1395, 1/21/98, the question presented to the United States Court was whether either the Due Process Clause or the Federal Civil Service Reform Act precluded a federal agency from sanctioning a federal employee for making false statements to the agency regarding employment related misconduct on the part of the employee. The United States Supreme Court, reversing the Fifth Circuit Court of Appeals, held that a federal government agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct.

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**EVIDENCE - ADMITTING  
AND EXCLUDING  
EXPERT TESTIMONY AT  
THE TRIAL COURT  
LEVEL**

In *General Electric Company v. Joiner*, No. 96-188, 12/15/97, the United States Supreme Court granted certiorari in this case to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court held that abuse of discretion is the appropriate standard. The United States Supreme Court applied this standard and concluded that the District Court in this case did not abuse its discretion when it ex-

cluded certain proffered expert testimony.

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**EVIDENCE - CROSS-  
EXAMINATION FOR  
BIAS**

In *United States v. McCoy*, CA8, No. 97-2883EM, 12/17/97, McCoy contends the district court improperly allowed the Government to ask a defense witness whose credibility was crucial to the resolution of the case if the witness and McCoy were affiliated with the same street gang. Evidence of common gang membership was admissible to show bias on the witness's part toward McCoy and the evidence was not unfairly prejudicial under Rule 403 of the Federal Rules of Evidence. The Eighth Circuit Court of Appeals stated the district court did not abuse its discretion in permitting the Government's limited inquiry about a shared membership in a street gang.

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**EVIDENCE - PROOF OF  
OTHER CRIMES**

In *Hernandez v. State*, CR 97-1191, 2/5/98, the Arkansas Supreme Court stated that evidence of a subsequent act of sexual misconduct with a child other than the victim of the alleged rape was properly admitted into evidence under Arkansas Rules of Evidence, Rule 404(b) and the so-called pedophile exception. In *Regalado v. State*, CR 95-33-2, 2/5/98, the Arkansas Supreme Court also allowed under Rule 404(b) evidence of Regalado's incarceration and

escape from a half-way house stating this evidence was probative of his motive, plan, and intent to murder his wife.

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**INFORMANT -  
IDENTIFIED CITIZEN  
INFORMANT**

In *Frette v. City of Springdale*, No. CR 97-712, 1/16/98, the Arkansas Supreme Court reversed the Arkansas Court of Appeals decision in *Frette v. State*, 58 Ark. App. 81, 947 S.W.2d 15 (1997). In this case on June 15, 1995, at 6:51 p.m., Jerry Smith, a truck driver from Jonesboro, Georgia, phoned in a tip to the Springdale Police Department. Smith provided the radio dispatcher with his name, address, and occupation. He stated that he had observed an elderly male in a red Volvo tractor-trailer drinking beer in the cab of his vehicle in the commercial truck parking behind the McDonald's restaurant located on West Sunset in Springdale. The lot had nine spaces designated for commercial vehicles. The police department had no prior dealing with Smith. At 7:02 p.m., Officer Kwano responded to the dispatch and discovered that Frette was behind the wheel inside a red tractor-trailer parked immediately behind McDonald's in the designated parking area.

Officer Kwano approached the vehicle and ordered Frette to step out of the vehicle. When Frette exited, Officer Kwano noticed the strong smell of intoxicants on Frette, who swayed as he spoke. Frette failed various field-sobriety tests and was arrested at



7:49 p.m. A test performed at the police station revealed that Frette had a .07% blood-alcohol content.

Frette was found guilty in municipal court of driving while intoxicated as a holder of a commercial driver's license. On appeal to the circuit court, Frette filed a motion to suppress his statements, blood alcohol analysis, physical description of Frette, and statements of an informant on the ground that this evidence was obtained as a result of an illegal seizure. The trial court denied the motion to suppress, and accepted Frette's conditional guilty plea to one count of driving while intoxicated while holding a commercial driver's license. Frette's plea was conditioned on an appeal of the trial court's adverse ruling on his pretrial motion to suppress.

The Arkansas Court of Appeals reversed holding the trial court erroneously denied the motion to suppress. The Arkansas Supreme Court granted the State's petition for review. The Court characterized the primary issue in this case as whether a police officer acted lawfully in ordering Paul Frette, the occupant of a parked tractor-trailer rig out of his vehicle. The officer, who suspected that Frette was intoxicated, acted solely on the basis of a tip phoned in by an identified citizen informant. The Court concluded that the tip carried with it sufficient indicia of reliability to give the officer reasonable suspicion to justify an investigatory stop.

The Court stated that Smith, a citizen informant, identified himself by name, address, and occupation, exposing himself to potential prosecution for making a false report. See Ark. Code Ann. § 5-

54-122 (Repl. 1993). As such, Smith's tip ranks high on the reliability scale—more than an anonymous caller or a confidential informant from the "criminal milieu." Second, it is undisputed that Smith personally observed the alleged criminal activity, providing a basis of knowledge for his tip. Finally, Officer Kwano's own observation substantially corroborated Smith's report. He arrived at the exact location specified by Smith, only minutes after the tip was phoned in. While there, he discovered the described vehicle with an older man sitting in the cab. Accordingly, the Court concluded that under the totality of the circumstances, Smith's tip carried with it sufficient indicia of reliability to justify an investigatory stop under Rule 3.1.

Judge Robert L. Brown of the Arkansas Supreme Court wrote a concurring opinion in which he agreed with the decision but not the reasoning. Justice Brown was of the opinion that Officer Kwano was operating under Rule 2.2(a) of the Arkansas Rules of Criminal Procedure when he approached the vehicle. Once Frette was out of the cab and face-to-face, Officer Kwano detected the smell of alcohol and noticed that Frette was unsteady on his feet. With this added information, Officer Kwano had reasonable suspicion to stop and detain Frette under Arkansas Rules of Criminal Procedure, Rule 3.1. Field sobriety tests were administered which Frette failed, and he was arrested.

Justice Brown stated that this case was a progression from a tip, to a Rule 2.2 investigation, to a Rule 3.1 stop-and-detention, to an arrest.

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### INFORMANT PRIVILEGE - "TIPSTER"

In *United States v. Moore*, CA8, No. 97-1351, 11/4/97, Officer Liz Holland on cross-examination testified that she had received information from a confidential informant that Moore had a connection with a pager company, which Officer Holland characterized as an untrustworthy organization currently under investigation. The district court rejected defense counsel's efforts to identify the confidential informant in order to impeach the credibility of the informant's tip.

The Eight Circuit Court of Appeals stated that the court did not abuse its discretion in failing to order disclosure of the informant's identity. The informant in this case was merely a tipster who conveyed information to the government; there was no evidence that he or she witnessed or participated in the actual offense. In cases such as this, disclosure is generally not material to the outcome of the case and is, therefore, not required.

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### JAILS AND PRISONS - EQUAL PROTECTION

In *Howard v. Collins*, CA8, No. 97-1642, 11/17/97, [*Unpublished*], the Eighth Circuit Court of Appeals again stated that a policy or practice of deliberate racial segregation of prisoners could constitute an equal protection violation.

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**JAILS AND PRISONS -  
LEGISLATIVE  
IMMUNITY FOR  
UNDERFUNDING OF  
JAIL FOR COUNTY  
COMMISSIONERS**

In *Woods v. Gamel*, CA11, No. 96-7171, 1/14/98, current and former inmates at the Marshall County, Alabama, jail filed suit under 42 U.S.C. § 1983 against the commissioners of Marshall County, Alabama. They alleged that jail overcrowding, poor health care and health care facilities in the county jail, inadequate supervision by jail officials, and other deficiencies in the county jail's administration and supplies was the result of lack of funding. According to the inmates, the claim against the county commissioners stems from the commissioners' responsibility under Alabama law to pass an adequate budget for county expenses including adequate funding for jail expenses.

The Eleventh Circuit Court of Appeals concluded that the county commissioners were entitled to absolute immunity from suit because the budgetary decisions made for funding the county—including the jail—are legislative acts protected by legislative immunity.

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**JAILS AND PRISONS -  
SEX CHANGE  
OPERATION**

In *Maggart v. Hanks*, CA7, No. 97-1651, 12/9/97, the Seventh Circuit Court of Appeals stated that the Eighth Amendment does

not entitle a prison inmate to a sex change operation. The inmate is entitled to be protected, by assignment to protective custody or otherwise, from harassment by prisoners who wish to use him as a sexual plaything, provided that the danger is both acute and known to the authorities.

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**MARITAL PRIVILEGE;  
WIFE'S COOPERATION  
WITH DETECTIVES**

In *Kidd v. State*, CR 97-586, 11/6/97, Larry Joe Kidd was convicted of raping a fourteen-year-old girl and sentenced to 40 years in prison. One of his grounds for appeal was that the trial court erred by allowing into evidence privileged communication between himself and his wife. The Arkansas Supreme Court affirmed the conviction stating the marital privilege did not apply to statements made by the wife to the investigating officers.

During the investigation which led to Kidd's arrest and subsequent prosecution, his then wife, Paula Kidd, cooperated extensively with the sheriff's detectives. All told, she gave five statements to the detectives that included communications between her husband and her, such as his revelation that he had been having dreams about doing "bad things" to women. Paula Kidd provided the detectives with a significant amount of evidence, including the black ski mask and his dark pants and work boots, that tended to prove her former husband's guilt. In the words of Detective Goodrich, the assistance provided by Paula Kidd was "instrumental."

On appeal, Kidd's argument does not focus on Paula Kidd's testimony at trial because she did not testify as to any confidential communications with him. Rather, his argument is premised on the fact that Detective Goodrich succeeded in having him admit to having had thoughts of rape and killing because Paula Kidd told Detective Goodrich that he had been having these disturbing dreams. Otherwise, the detective would not have known to broach this subject to him, according to Kidd's theory. In sum, Kidd contends that Detective Goodrich testified that Kidd told him certain things due to information gleaned from Paula Kidd when she herself could not have testified at trial.

This issue is resolved by Rule 504(b) of the Arkansas Rules of Evidence, which provides that an "accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse." As the Arkansas Supreme Court stated in *Halfacre v. State*, 292 Ark. 331, 334, 731 S.W.2d 179, 180 (1987), "Rule 504 is a rule of evidence providing a testimonial privilege to an accused in a criminal proceeding." In *Halfacre*, which involved the subject's conviction for aggravated robbery, we held that the marital privilege did not render the subject's arrest illegal, when his wife contacted police officers and told them that the subject had just stated to her that he robbed a local hotel. This court noted that the protections of Rule 504 did not attach because the criminal proceedings had not begun when the wife reported her husband's statement to police of-



ficers and because she did not testify at trial regarding the confidential communication.

In the instant case, as in *Halfacre*, Paula Kidd did not testify at trial about any confidential communications made by Kidd. Thus, Rule 504(b), on its face, does not apply.

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**PROSECUTOR'S  
ABSOLUTE AND  
QUALIFIED IMMUNITY  
IN 42 U.S.C. 1983**

In *Hart v. O'Brien*, CA5, No. 96-40151, 11/6/97, the Fifth Circuit Court of Appeals discussed at length a prosecutor's absolute immunity for initiating and pursuing criminal prosecutions. In this case, Peggy Hart filed suit pursuant to 42 U.S.C. 1983 against several law enforcement officers and Jeff Starnes, an assistant county attorney in Lamar County, Texas. Hart premises her claims against Starnes on four arguments. First, she alleges that Starnes knowingly or recklessly provided false information in a search warrant affidavit that she was married to Stanley Hart, a known drug cultivator. Second, she asserts that Starnes allowed the search and arrest to continue when he knew the affidavit described the wrong Peggy Hart. Third, she states that Starnes participated in the decision to place a federal hold on her. Fourth, she claims that Starnes went with a law enforcement officer to visit her in jail to coerce her into providing information for the case against another defendant.

The Fifth Circuit Court of Appeals stated that the United States Supreme Court has adopted

a functional approach to the question of absolute immunity, one that looks to the nature of the function performed, not the identity of the actor who performed it. *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). A prosecutor is absolutely immune for initiating and pursuing a criminal prosecution. Specifically, a prosecutor is absolutely immune when he acts in his role as advocate for the State, *Burns v. Reed*, 500 U.S. 478, 491, 111 S.Ct. 1934, 1942, 114 L.Ed.2d 547 (1991), or when his conduct is intimately associated with the judicial phase of the criminal process. However, a prosecutor does not enjoy absolute immunity for acts of investigation or administration. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993).

A prosecutor has the burden of establishing that he was an "advocate" for each function at issue. See *Burns*, 500 U.S. at 486, 111 S.Ct. at 1939; see also *Buckley*, 509 U.S. at 274, 113 S.Ct. at 2616 ("The question ... is whether the prosecutors have carried their burden of establishing that they were functioning as advocates when they were endeavoring to determine whether the boot print at the scene of the crime had been made by petitioner's foot."). Even if a prosecutor fails to show absolute immunity for a given activity, he may still show qualified immunity. *Buckley*, 509 U.S. at 273, 113 S.Ct. at 2615-16.

Hart's first argument pertains to Starnes' function of providing information for inclusion in an affidavit supporting a warrant. With this function, Starnes acted as a legal adviser to the officers and,

much like the officers who participated in the surveillance, an investigator. A prosecutor is not absolutely immune for giving legal advice to the police, *Burns*, 500 U.S. at 496, 111 S.Ct. at 1945, and a prosecutor who acts in the role of a policeman is liable like a policeman if, in so acting, he deprives a plaintiff of rights under the Constitution or federal laws. *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir.1986), cert. denied, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 516 (1987). Moreover, a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested. *Buckley*, 509 U.S. at 274, 113 S.Ct. at 2616. In short, until charges have been filed against an individual, a prosecutor is not absolutely immune for cooperating with law enforcement officers in obtaining a search warrant against that person based on false information. See *Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (1st Cir.1974) (ruling that prosecutor did not have absolute immunity where defendant alleged that prosecutor had cooperated with police defendants in obtaining a search warrant based on perjured testimony); see also *Barr v. Abrams*, 810 F.2d 358, 361-62 (2d Cir.1987) (ruling that prosecutors were absolutely immune for filing a criminal information charging plaintiff with contempt and then applying to the court for an arrest warrant on that charge); *McSurely v. McClellan*, 697 F.2d 309, 320 (D.C.Cir.1982) (holding that prosecutor was only protected by qualified immunity for preparing pre-indictment search and arrest warrants). Therefore, Starnes does not enjoy absolute immunity from li-



ability arising out of the inaccurate information in the affidavit.

Hart's second argument deals with the "function" of preventing an arrest during the execution of a warrant after realizing that information in the affidavit supporting the warrant was inaccurate. A prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court, and is thus only entitled to qualified immunity. *Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir.1980), cert. denied, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981); see also *Buckley*, 509 U.S. at 274, 113 S.Ct. at 2616 (noting that a prosecutor is not absolutely immune for planning and executing a raid on a suspected weapons cache).

However, Starnes may also enjoy absolute immunity under *Mays v. Sudderth*, 97 F.3d 107 (5th Cir.1996), for his refusal to prevent the search of Hart's home and her arrest during the execution of the warrant. In *Mays*, we held that an official acting within the scope of his authority is absolutely immune from a suit for damages to the extent that the cause of action arises from his compliance with a facially valid judicial order issued by a court acting within its jurisdiction. In reaching this conclusion, we determined that the common law provided officials with such immunity at the time 42 U.S.C. 1983 was enacted in 1871. See *Butz v. Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2912, 57 L. Ed.2d 895 (1978) (holding that

to determine if government official is absolutely immune, court must undertake a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it). We relied heavily on a Supreme Court decision, *Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 20 L.Ed. 745 (1871), which referred to absolute immunity for "ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon...."

In the instant case, the magistrate ordered that the search and arrest warrant be carried out by "the Sheriff or any Peace Officer of Lamar County, Texas or any Peace Officer of the State of Texas." Starnes is not a sheriff or peace officer of Lamar County or the State of Texas and is not otherwise mentioned in the warrant. See Tex. Penal Code Ann. 1.07(a)(36) (defining "peace officer"); Tex.Code Crim. Proc. Ann. art. 2.12 (same); Tex.Code Crim. Proc. Ann. art. 15.01 ("A 'warrant of arrest' is a written order from a magistrate directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense...."); *Deltenre v. State*, 808 S.W.2d 97 (Tex.Crim. App.1991). While Starnes was present during the search of Hart's property and her arrest, he was not acting in obedience to the magistrate's commands in the search and arrest warrant; the warrant was not even addressed to him. Thus, since Starnes was not complying with the warrant, he

may not be clothed with the absolute judicial immunity enjoyed by the judge issuing the order." *Mays*, 97 F.3d at 108. He participated in the search and seizure at the peril of receiving only qualified immunity.

Hart's third contention deals with the function of recommending the denial of bail. This function is intimately associated with the judicial phase of the criminal process and deals with the initiation and pursuit of criminal prosecution. In carrying it out, a prosecutor is acting as an advocate, rather than as an investigator or administrator, and enjoys absolute immunity against any claims arising out of this function. See *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir.1983) (stating that "a prosecutor's advocacy of a given amount of bail" is entitled to absolute immunity).

Finally, Starnes suggests that he is absolutely immune with regard to Hart's claim that he visited her in jail to pressure her to provide information against another individual. However, there is no dispute that, at the time of the visit, ample probable cause existed to arrest and detain that individual. Therefore, assuming Hart's characterization of the visit is correct, Starnes was simply attempting to gather information relevant to his prosecution of the other subject. Accordingly, Starnes was acting as an advocate and is absolutely immune from Hart's claim here. See *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir.1995) (noting that prosecutor's interview of witness who allegedly made inculpatory statements about accused would only be investigatory function if prosecutor lacked probable



cause to arrest accused and results of interview contributed to his finding of probable cause).

The Fifth Circuit found that Starnes is not absolutely immune for allegedly providing inaccurate information for the warrant affidavit, nor for allowing the search and arrest to continue when he knew that the affidavit described a different Peggy Hart; however, the Court found that he is absolutely immune from the claims that he participated in the decision to place Hart on federal hold and that he tried to coerce Hart into providing information about another individual. As to Hart's first two arguments, Starnes argues that he is immune from suit because of qualified immunity.

Starnes's claim to qualified immunity is on slightly different footing because he is not a police officer. The Court held that Starnes was absolutely immune from Hart's claims that he participated in the decision to place her on "federal hold" and that he tried to persuade her to provide information about another individual. The Court then considered whether Starnes is qualifiedly immune from Hart's claims stemming from the fact that he provided inaccurate information for the warrant affidavit (i.e., a statement about Hart being married to Stanley Hart, a known marijuana cultivator) and from the fact that, even after realizing that this information was incorrect, he refused to stop Hart's arrest.

The Court stated they must consider at the threshold whether Hart even alleges a Fourth Amendment violation with regard to the false information claim. The Supreme Court in *Franks v. Dela-*

*ware* established that a search violates the Fourth Amendment if it was conducted pursuant to a warrant issued by a magistrate who was misled by information in an affidavit, provided that the affiant knew the information was false or would have known it was false except for his reckless disregard for the truth. 438 U.S. at 171, 98 S.Ct. at 2684. However, Starnes is not the affiant in this case, and, taken at face value, Franks applies only to officers who sign a warrant affidavit or otherwise request a warrant under oath: "the deliberate falsity or reckless disregard whose impeachment is permitted is only that of the affiant, not of any nongovernmental informant."

However, we need not take Franks only at face value. The Court left open the possibility that a search or arrest violates the Fourth Amendment where the affiant relies in good faith on deliberate or reckless misstatements by another governmental official in establishing probable cause. Police cannot insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity. Several circuits have held that a deliberate or reckless misstatement or omission by a governmental official who is not the affiant may nevertheless form the basis of a Franks claim. *United States v. Wapnick*, 60 F.3d 948, 956 (2d Cir.1995), cert. denied, — U.S. —, 116 S.Ct. 1672, 134 L.Ed.2d 776 (1996); *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir.1992); *United States v. Calisto*, 838 F.2d 711, 714 (3d Cir.1988); *United States v. Pritchard*, 745 F.2d 1112, 1118 (7th Cir.1984); cf. *Hale v. Fish*, 899 F.2d 390, 401

(5th Cir.1990) (applying Franks test to officer who did not sign or draft affidavit but whose presence at time of warrant tended to influence judge issuing warrant).

The Court agreed with the reasoning of these circuit courts that a deliberate or reckless misstatement may form the basis for a Franks claim against a government official who is not the affiant. "The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants." *DeLeon*, 979 F.2d at 764. A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a search warrant, regardless of whether he signs the affidavit.

Although Starnes did not sign the affidavit and was not present when O'Brien requested the warrant from the magistrate, Starnes helped to draft the affidavit and admits he was the exclusive source of the inaccurate information about Peggy Hart's marital status. Hart alleges that Starnes provided the false information intentionally or recklessly. Therefore, Hart has stated a claim for violation of her Fourth Amendment rights under Siegert.

The issue, then, becomes whether Starnes can demonstrate that he did not violate any of Hart's clearly established Fourth Amendment rights. Hart's arrest would violate the Fourth Amendment if Starnes intentionally or recklessly included false information in the affidavit and this information was necessary for probable cause. Starnes provided the inaccurate information in the affidavit about



Hart being married to Stanley Hart, and he realized that this information was incorrect the day of the raid. However, there is no evidence that Starnes knew the information was inaccurate before giving it to Officer O'Brien to include in the affidavit. Therefore, there is no genuine issue that he intentionally provided false information for inclusion in the affidavit.

The question remains whether Starnes exhibited a reckless disregard for the truth in providing the information. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684. To prove reckless disregard for the truth, Hart must present evidence that Starnes "in fact entertained serious doubts as to the truth" of the statement that she was the Peggy Hart married to Stanley Hart. *Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (setting forth standard for reckless disregard of truth in libel cases); see also *United States v. Williams*, 737 F.2d 594, 602 (7<sup>th</sup> Cir.1984), cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 1355, 84 L.Ed.2d 377 (1985) (adopting First Amendment standard for recklessness in *Franks* context); *United States v. Tomblin*, 46 F.3d 1369, 1388 (5<sup>th</sup> Cir.1995) (citing recklessness standard in *Williams* with approval). There is some evidence in the record that Starnes knew the other Peggy Hart, who worked at the Lamar County courthouse. However, there is no evidence that Starnes had any reason to believe that there might be two Peggy Harts within this rural community so as to raise serious doubts as to the accuracy of his statements to O'Brien.

Perhaps there are steps Starnes might have taken to verify

the information he provided; however, the record does not disclose what these might be, nor that they would actually show the information to be inaccurate. Starnes is entitled to qualified immunity on Hart's first claim.

Hart also claims that Starnes violated her constitutional rights by failing to act at the arrest scene once he had seen her and realized that some of the information supporting the warrant was inaccurate. Starnes has admitted that he knew shortly before Hart was arrested that the statement in the affidavit about Hart being married to a known marijuana cultivator was incorrect, but that he did not so inform the officers. Hart alleges that Starnes had a duty to inform the police officers that the arrest warrant was based on inaccurate information and a duty to stop execution of the warrant.

Even assuming such a duty exists, however, Starnes did not violate any of Hart's clearly established Fourth Amendment rights at the time of her arrest. Law enforcement officers may have a duty to discontinue an arrest upon discovery that information contained in a warrant is incorrect if it is material. Cf. *Maryland v. Garrison*, 480 U.S. 79, 87, 107 S.Ct. 1013, 1018, 94 L.Ed.2d 72 (1987) (once officers were on notice of a risk that apartment they were searching was erroneously included within terms of warrant, they were required to withdraw and discontinue search); *United States v. Marin-Buitrago*, 734 F.2d 889, 894 (2d Cir.1984) (when definite and material change has occurred in facts underlying magistrate's determination of probable cause, officers must re-

port new and correcting information to magistrate before acting on warrant). However, we can find no controlling case law that establishes a constitutional duty on a prosecutor tagging along on a search to inform law enforcement officers of his doubts that the warrant should be executed as written. Therefore, under *Harlow*, Starnes is qualifiedly immune against Hart's failure-to-inform allegation.

The Fifth Circuit Court of Appeals rendered summary judgment in favor of Starnes on Hart's federal claims.

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**PROSECUTOR'S  
LIABILITY UNDER 42  
U.S.C. § 1983 FOR FALSE  
STATEMENTS IN  
AFFIDAVIT  
SUPPORTING AN  
APPLICATION FOR AN  
ARREST WARRANT**

In *Kalina v. Fletcher*, No. 96-792, 12/10/97, the question presented to the United States Supreme Court was whether 42 U.S.C. § 1983 creates a damages remedy against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, or whether such conduct is protected by "the doctrine of absolute prosecutorial immunity."

Kalina is a Deputy Prosecuting Attorney for King County, Washington. Following customary practice, on December 14, 1992, she commenced a criminal proceeding against Fletcher by filing three documents in the King County Superior Court. Two of



those documents—an information charging respondent with burglary and a motion for an arrest warrant—were unsworn pleadings. The burglary charge was based on an alleged theft of computer equipment from a school.

Washington Criminal Rules require that an arrest warrant be supported by an affidavit or sworn testimony establishing the grounds for issuing the warrant. To satisfy that requirement, Kalina supported her motion with a third document—a Certification for Determination of Probable Cause—that summarized the evidence supporting the charge. Kalina personally vouched for the truth of the facts set forth in the certification under penalty of perjury.

Based on Kalina's certification, the trial court found probable cause and ordered that an arrest warrant be issued. Kalina's certification contained two inaccurate factual statements. After noting that Fletcher's fingerprints had been found on a glass partition in the school, Kalina stated that respondent had "never been associated with the school in any manner and did not have permission to enter the school or to take any property.

In fact, Fletcher had installed partitions on the premises and was authorized to enter the school. She also stated that an employee of an electronics store had identified Fletcher "from a photo montage" as the person who had asked for an appraisal of a computer stolen from the school. The employee did not identify Fletcher.

Fletcher was arrested and spent a day in jail. About a month later, the charges against him were dismissed on the prosecutor's mo-

tion.

Fletcher brought suit under 42 U.S.C. § 1983 seeking damages from Kalina based on her alleged violation of his constitutional right to be free from unreasonable seizures. In determining immunity, we accept the allegations of Fletcher's complaint as true. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993). Fletcher's complaint focuses on the false statements made by Kalina in the certification.

Kalina moved for summary judgment on the ground that the three documents that she filed to commence the criminal proceedings and to procure the arrest warrant were protected by the doctrine of absolute prosecutorial immunity. The District Court denied the motion, holding that she was not entitled to absolute immunity and that whether qualified immunity would apply was a question of fact. The Court of Appeals for the Ninth Circuit affirmed. The United States Supreme Court affirmed the decision of the Ninth Circuit.

The United States Supreme Court held in *Imbler v. Pachtman*, 424 U.S. 409 (1976), that a former prisoner whose conviction had been set aside in collateral proceedings could not maintain a §1983 action against the prosecutor who had litigated the charges against him. Relying in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent, we concluded that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution was not amenable to suit under §1983.

Subsequent cases have con-

firmed the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings. Thus, in *Burns v. Reed*, 500 U.S. 478 (1991), the Court held that the prosecutor's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing were protected by absolute immunity. And in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) it was categorically stated that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.

The defense may be unavailable when the prosecutor is performing a different function. In *Burns v. Reed*, 500 U.S. 478 (1991), the provision of legal advice to the police during their pre-trial investigation of the facts was protected only by qualified, rather than absolute, immunity. 500 U.S., at 492-496. Similarly, in *Buckley*, the prosecutor was not acting as an advocate either when he held a press conference or when he allegedly fabricated evidence concerning an unsolved crime.

In determining immunity, the Court examines "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). This point is perhaps best illustrated by the determination that the senior law enforcement official in the Nation—the Attorney General of the United States—is protected only by qualified rather than absolute immunity when engaged in the performance



of national defense functions rather than prosecutorial functions. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Fourth Amendment requires that arrest warrants be based “upon probable cause, supported by Oath or affirmation,” a requirement that may be satisfied by an indictment returned by a grand jury, but not by the mere filing of criminal charges in an unsworn information signed by the prosecutor. *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975); see also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Accordingly, since most prosecutions in Washington are commenced by information, Washington law requires, in compliance with the constitutional command, that an arrest warrant be supported by either an “affidavit or sworn testimony establishing the grounds for issuing the warrant.”

The “Certification for Determination of Probable Cause” executed by Kalina was designed to satisfy those requirements. Although the law required that document to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, Kalina performed an act that any competent witness might have performed. Even if she may have been following a practice that was routinely employed by her colleagues and predecessors in King County, Washington, that practice is surely not prevalent in other parts of the country and is not even mandated by law in King County. Neither Kalina nor *amici* argue that prosecutors routinely follow the King County practice.

Indeed, tradition, as well as the ethics of the legal profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.

Nevertheless, Kalina argues that the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution. That characterization is appropriate for her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment; indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate. But that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required “Oath or affirmation” is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

Finally, Kalina argues that denying her absolute immunity will have a “chilling effect” on prosecutors in the administration

of justice. The Court was not persuaded.

It may well be true that prosecutors in King County may abandon the practice of routinely attesting to the facts recited in a “Certification for Determination of Probable Cause” and pattern their procedures after those employed in other parts of the Nation. Kalina presents no evidence that the administration of justice is harmed where the King County practice is not followed. In other respects, however, her argument addresses concerns that are not affected by this decision because the Court merely held that §1983 may provide a remedy for Fletcher insofar as Kalina performed the function of a complaining witness. The Court did not depart from prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate.

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#### SEARCH AND SEIZURE - CONDITION OF PROBATION

In *Rowe v. Lamb*, CA8, No. 96-1879, 11/28/97, Anthony Rowe entered a plea of guilty to various offenses and was placed on probation. One condition of his probation was that he “submit to a search of his person or property at any time, by any Probation Officer or law enforcement officer, with or without probable cause, for controlled substances or contraband.” While on probation, he was arrested in South Sioux City, Nebraska, for violating his parole for an Iowa burglary conviction.



Dakota County Jail Supervisor Brian Lamb and Dakota County Corrections Officer Brian Ellinger searched Rowe incident to his admission to the jail and found a small quantity of drugs and the keys to Rowe's apartment. Jail regulations required that personal possessions be inventoried and stored and that only individuals with legal authority be allowed access to the property. Rowe's probation officer, Mike Carlson, who had been present at the search, asked for Rowe's consent to search the apartment, but Rowe refused. After showing the jailers a copy of Rowe's probation order, Carlson requested the keys from Ellinger, who gave them to him. Ellinger's supervisor, Lamb, was also present and had no objection. Carlson later searched the apartment.

Rowe filed this action in district court alleging, among other things, that Lamb and Ellinger violated his Fourth Amendment right to be free from unreasonable searches and seizures by providing the keys to Carlson to enable him to search Rowe's residence. Lamb and Ellinger filed a motion for summary judgment based on qualified immunity. The district court denied the motion. The Eighth Circuit reversed the district court and remanded the case for entry of an order granting Lamb's and Ellinger's motion for summary judgment.

The Eighth Circuit stated that probation, like incarceration, is a form of criminal sanction imposed by a court on an offender after a guilty verdict or plea. See *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). Probationers do not enjoy the absolute liberty to which ev-

ery citizen is entitled, but only conditional liberty properly dependent on observance of special probation restrictions. With probationers, there is a heightened need for close supervision of the convicted person's activities to protect society and the probationer himself. See *United States v. Kills Enemy*, 3 F.3d 1201, 1203 (8th Cir. 1993). In particular, in cases involving drugs, authorities supervising the convict must be able to act upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before the person does damage to himself or society. Thus, a probationer can be subject to a warrantless search under a statutory scheme or pursuant to the findings of a sentencing court. See *United States v. Schoenrock*, 868 F.2d 289, (8th Cir. 1989).

Although the permissible degree of impingement is not unlimited, probation search schemes similar to that at issue here have been upheld as reasonable. See, e.g., *Griffin*, 483 U.S. at 880 (search of probationer's residence was reasonable pursuant to a valid state regulation governing probationers); *Kills Enemy*, 3 F.3d at 1203 (search was reasonable under a federal statute); *Schoenrock*, 868 F.2d at 292-93 (search of probationer's residence was reasonable under conditions imposed by a sentencing judge).

Because the terms of his probation order provided that he was subject to a warrantless search of his home at any time by any law enforcement officer, and because that term was reasonable, Rowe had no Fourth Amendment right to be free from such a search. The Court, therefore, found that he has

not alleged the violation of a constitutional right. The act of giving Rowe's probation officer the keys to Rowe's apartment merely facilitated that valid search.

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**SEARCH AND SEIZURE -  
FAILURE TO PROVIDE A  
COPY OF THE  
WARRANT AT THE  
TIME OF THE SEARCH**

In *United States v. Schroeder*, CA8, No. 97-2014, 11/4/97, Jason Young was one of the individuals charged Federally with the manufacture of methamphetamine based on a search warrant executed by the Van Buren County Sheriff's Department.

Young complains that the officers failure to provide him with a copy of the warrant at the time of the search constituted a violation of Arkansas Rules of Criminal Procedure, Rule 13.3(b), which provides that an executing officer shall, in the course of any search and seizure give a copy of the relevant warrant to the person in control of the premises being searched. It also requires that the copy be provided before undertaking the search or seizure unless doing so would endanger the successful execution of the warrant with all practicable safety. A deputy sheriff testified at the suppression hearing, without explanation, that he did not provide a copy of the warrant to the defendants during the search. No one testified that there was any danger that might have necessitated withholding the warrant. Arkansas Rules of Criminal Procedure, Rule 13.3(b) was therefore clearly vio-



lated.

A violation of the rule, however, will not necessarily lead to suppression of evidence. Although the Eighth Circuit Court of Appeals has never determined what the proper remedy should be when no warrant is presented during a search, other courts have held that such a failure warrants suppression only upon a showing of prejudice or deliberate disregard of the rule. See, e.g. *United States v. Kelly*, 14 F.3d 1173 (7<sup>th</sup> Cir. 1994), and *United States v. Marx*, 635 F.2d 436, 441 (5<sup>th</sup> Cir. 1981). While these cases deal with suppression under Federal Rules of Criminal Procedure, Rule 41(d), the purpose of Rule 41(d) and Arkansas Rules of Criminal Procedure, Rule 13.3(b) are substantially similar. The Court believed, therefore, that in determining whether suppression is warranted under the Arkansas rule, they should apply the same standard that the sister circuits have applied under the federal rule. The inquiry, in other words, in this case, is whether the violation of the rule was deliberate.

While it is conceded that none of the officers present at the scene of the search ever presented the warrant to Mr. Young, the court was not inclined to hold that this omission by itself is sufficient to support a finding that the officers deliberately violated the applicable Arkansas rule. Such an omission is just as likely to have been inadvertent or merely negligent, and, therefore, not deliberate. The Court did, however, believe that a failure to show the warrant to Mr. Young after he asked for it would be a deliberate violation of the rule, and, indeed, Mr. Young testified

at the suppression hearing that he repeatedly demanded to see the warrant, but to no avail. The magistrate judge made no finding, though, as to whether Mr. Young in fact asked the officers to show him the warrant, and no one ever asked the deputy sheriff at the suppression hearing whether Mr. Young asked to see it. The Court, therefore, believed that a remand is necessary so that the district court can determine whether the officers' omission was a deliberate one.

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#### SEARCH AND SEIZURE - STANDING

In *Stanley v. State*, CR 97-639, 12/4/97, Charles R. Stanley appealed a denial of his motion to suppress evidence. Charles Stanley was the passenger in an automobile stopped by Officer Bob Paxton of the DeWitt Police Department. The Arkansas Supreme Court stated that Stanley had no standing to challenge the vehicle's search by search warrant because he had no property or possessory interest in the vehicle. An individual must have standing to challenge a search on Fourth Amendment grounds because the rights secured by the Fourth Amendment are personal in nature. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997) [citing *Rakas v. Illinois*, 439 U.S. 128 (1978)].

A defendant has no standing to question the search of a vehicle owned by another person. *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992). In order to establish a legitimate expectation of privacy in an automobile owned by another

person, a defendant must show that he gained possession of the vehicle from the owner or from someone who had authority to grant possession. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993).

In this case, Stanley had neither a property interest nor a possessory one in the vehicle and no legitimate expectation of privacy in the vehicle. *Koonce v. State*, 269 Ark. 96, 598 S.W.2d 741 (1980). Accordingly, he failed to establish that he had standing to object to the vehicle search.

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#### SEARCH AND SEIZURE - VEHICLE STOPS

In *Travis v. State*, No. CR97-1166, 1/8/98, the Arkansas Supreme Court reversed the Arkansas Court of Appeals decision in *Travis v. State*, 58 Ark. App. 320, 954 S.W.2d 277 (1977). In this case, Travis contended his arrest was unlawful and that a firearm seized as a result of this arrest should have been suppressed. The Lawrence County Circuit Court denied the motion to suppress, but the Arkansas Court of Appeals reversed. After a review of the State's petition, the Arkansas Supreme Court affirmed the trial court's decision.

Lawrence County Deputy Sheriff Glen Smith had testified that he was on duty on the afternoon of February 24, 1996, when he observed Mr. Travis's truck heading northward on U.S. Highway 67. The Texas license plate on the truck did not display expiration-date stickers. Believing that the license plate was required to display a sticker, Deputy Smith stopped the truck and approached



it. Deputy Smith discovered that James Travis had been driving on a suspended driver's license and that Mark Travis had a Texas felony record and had his driver's license suspended as well.

Deputy Smith took James Travis into custody for driving on a suspended license. Deputy Smith called for a tow truck to transport the truck from the scene. While securing the truck for towing, Deputy Smith opened the door to roll up the window and observed a .22 rifle sticking out from behind the seat. Deputy Smith then arrested Mr. Travis for being a felon in possession of a firearm.

The Arkansas Court of Appeals concluded that since Deputy Smith's understanding of the Texas licensing requirement was erroneous, there was no probable cause or even reasonable suspicion to make a stop of the vehicle.

The Arkansas Supreme Court stated that Deputy Smith believed that the law of Texas, like the law of Arkansas, required license plates to display expiration stickers. Although the deputy was erroneous, the question of whether an officer has probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of the violation that was the basis for the stop. As the Court said in the *Burris v. State*, 330 Ark. 66 (1977), all that is required is that the officer had probable cause to believe that a traffic violation had occurred. Whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide and not an officer on the scene.

The facts of this case are unlike those found in *Delaware v. Prouse*, 440 U.S. 648 (1979),

which formed the foundation of the Court of Appeals decision in this case. There was no issue of reasonable or probable cause in the *Prouse* decision because that case involved a "random" traffic stop. The Arkansas Supreme Court could not say that Deputy Smith lacked reasonable cause to stop Mr. Travis's truck simply because the truck ultimately was found to have been operated in compliance with Texas law. At the time of the stop, Deputy Smith reasonably, albeit erroneously, believed the license plate was required to display expiration stickers. That the license plate was later found to have been in compliance with Texas law does not mean that the deputy lacked probable cause to make the stop. See *People v. Glick*, 250 Cal.Rptr. 315, 319, 203 Cal.App.3d 796 (Cal.App. 1 Dist. 1988) (holding officer's stop of New Jersey vehicle was reasonable even though based on officer's erroneous understanding of New Jersey registration laws and stating "An officer cannot reasonably be expected to know the different vehicle registration laws of all the sister states.").

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**SEXUAL HARASSMENT -  
SUPERVISION OF AN  
EMPLOYEE WHEN THE  
INDIVIDUAL IS NOT THE  
ACTUAL SUPERVISOR**

In *Bonenberger v. Plymouth Township*, CA3, No. 97-1047, 12/17/97, Cheryl Bonenberger brought a sexual harassment suit against her former employer, Plymouth Township, Pennsylvania, Police Department and against Sergeant La Penta, a police depart-

ment employee. This appeal required the Third Circuit Court of Appeals to determine whether a police officer acts under "color of law" for purposes of 42 U.S.C. § 1983 when he sexually harasses a co-employee whose work shift he supervises, even if he is not her official supervisor and lacks authority to hire or fire her.

Bonenberger worked as a dispatcher for the Plymouth Township Police Department from about February 1993 until April 11, 1994. She alleges that during her employment, Sergeant Joseph La Penta regularly accosted her at work with obscene remarks and unwelcome sexual advances. She also claims that La Penta frequently fondled her breasts or pinched her buttocks while she attempted to complete her work assignments. She contends that this ongoing harassment occurred in the presence of police employees and that management-level personnel became aware of La Penta's conduct in January 1994, but for nearly three months did nothing to curtail it. Bonenberger adds that although she consistently rejected La Penta's advances, the harassment persisted, driving her to resign her position as dispatcher on April 11, 1994.

Although La Penta did not hire Bonenberger and was not her official supervisor, he supervised all of the dispatchers, including Bonenberger, when no higher-ranking officer was on duty. At such times he had sole control over Bonenberger's work environment, determining when she and other dispatchers might take a break and which tasks they would perform. Bonenberger testified that on one such occasion, he grabbed her but-



tocks in the presence of three other law enforcement officials. The police department's own independent investigation confirmed that this incident occurred.

The Third District Court of Appeals stated that a state employee may, under certain circumstances, wield considerable control over a subordinate whose work he regularly supervises, even if he does not hire, fire, or issue regular evaluations of her work. There is simply no plausible justification for distinguishing between abuse of state authority by one who holds the formal title of supervisor on one hand and abuse of state authority by one who bears no such title but whose regular duties nonetheless include a virtually identical supervisory role, on the other.

Sergeant La Penta had direct power to give Bonenberger orders when supervising her work load. He could alter her workload whenever he supervised the shift. If Bonenberger failed to follow his orders, the police department would view that failure as insubordination for which La Penta could properly begin a disciplinary process that might result in her discharge. Under these circumstances, La Penta's role within the departmental structure afforded him sufficient authority over Bonenberger to satisfy the color of law requirement of section 1983.

To conclude otherwise would be to create a perverse incentive for government employers to avoid labeling workers as supervisors, so as to insulate them from section 1983 liability. Clearly, an employer should not be permitted to evade so easily the statutory protections against discrimination.

The Third Circuit Court of

Appeals also stated that while the township is not liable under section 1983 since it has a policy against sexual harassment, it may be liable under Title VII for a hostile work environment. While the township acted promptly after the Bonenberger made a formal complaint, other law enforcement officers and supervisors allegedly knew of La Penta's conduct and failed to take prompt and adequate remedial action. In addition, the Plymouth Township Police Department's sexual harassment policy did not specify a grievance procedure. The Third Circuit noted that only an effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile work environment.

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**STATUTORY  
CONSTRUCTION -  
"READILY ACCESSIBLE  
FOR USE"**

In *Manning v. State*, CR 97-102, 12/4/97, Clarence Manning appealed his simultaneous possession of drugs and a firearm conviction to the Arkansas Supreme Court. Under the Arkansas Criminal Gang, Organization, or Enterprise Act, no person shall unlawfully commit a felony violation of § 5-64-401 [Uniform Controlled Substance Act] while in possession of a firearm. Ark. Code Ann. § 5-74-106(a) (Repl. 1993). At the trial, Manning raised the statutory defense that the "defendant was in his home and the firearm was not readily accessible for use." In this case Manning was arrested after

four Jonesboro police officers searched his home pursuant to a search warrant. When the officers entered the home, two men were seated in the living room, and four men, including Manning, were in the kitchen. The police searched the house and found two guns wrapped in a black ski mask on the top shelf of the closet in the only bedroom. One gun was a Lorcin 9-millimeter pistol, which was loaded, and the other was an unloaded Smith & Wesson .38-caliber revolver. While in the bedroom, the police also found seventeen grams of rock cocaine in the pocket of a jacket hung in the closet, three grams of cocaine powder in the pocket of a pair of jeans in a dresser drawer, and, in addition, drug paraphernalia was found in the kitchen.

The Arkansas Supreme Court stated that in this case, there was evidence showing more than a mere possession of a firearm in Manning's home. Manning had a loaded handgun, wrapped in a ski mask, near an abundant supply of illegal drugs, all within his easy reach. Given the intent of the legislature, the Court concluded that the factual circumstances are such that the trial judge did not err when he determined the Lorcin handgun was readily accessible for use.

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