



CJI Legal Briefs

Criminal Justice Institute



University of Arkansas System

Volume 3 Issue 4

December 1998

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AMERICANS WITH DISABILITIES ACT

In *Gorman v. Bartch*, CA8, No. 97-4323, 8/20/98, Jeffrey Gorman, a paraplegic who uses a wheelchair, was injured while being transported after his arrest by Kansas City police officers. He brought this action claiming discrimination based on his disability in violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).(1) The district court granted summary judgment to the defendants, and Gorman appeals from the judgment. The Eighth Circuit Court of Appeals affirmed in part and reversed in part.

Each side characterized the facts quite differently. Gorman alleges that, after his arrest, a patrol wagon that was not equipped with a wheelchair lift or wheelchair restraints arrived. Gorman alleges that he told the police that the van was not properly equipped for him to ride in it, and that due to his use of a urine bag it would be necessary for him to go to the bathroom before he was transported. The officers lifted Gorman from his chair and placed him on a bench inside the van.

Gorman states that they complied with his instructions on how to lift him from his chair, but not with his requests that he be allowed to go to the bathroom prior to transport or that they place the seat cushion from his wheelchair underneath him to help support his legs. Because of his paraplegia Gorman was not independently able to maintain himself upright on the bench, and the police tied him with his belt to a mesh wall behind the bench and also fastened a seat-belt around him. During the drive to the station the belts came loose, and Gorman fell to the floor. The fall injured his shoulders and back severely enough to require surgery and also broke his urine bag, leaving him soaked in his own urine.

The issue before the Eighth Circuit Court of Appeals was to determine whether Gorman has presented claims capable of being tried

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under the ADA and the Rehabilitation Act.

The Eighth Circuit stated that their task in considering whether Gorman's allegations come under the ambit of the federal statutes has been made easier by the Supreme Court's unanimous decision on June 15 in *Pennsylvania Department of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998). In applying Title II of the ADA to state prisons and prison services, Justice Scalia emphasized the broad language used by Congress and its choice not to include exceptions. State prisons "fall squarely within the statutory definition of 'public entity'" since § 12131(1)(B) defines public entity as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." The Supreme Court categorically rejected the argument that the statutory prohibition against excluding a qualified individual with a disability from participating in or receiving the "benefits of the services, programs, or activities of a public entity" does not apply to prison services because they do not fit the common understanding of "benefits" or "services," and "the text of the ADA provides no basis for distinguishing these programs, services, and activities."

Application of *Yeskey* to the claims in this case shows that they also fit under the ADA. A local police department falls squarely within the statutory definition of public entity, just like a state prison. The fact that Gorman may not have "volunteered" to be arrested does not mean he was not eligible to receive transportation service to the police station. Cov-

ered programs or services do not need to be voluntary, for the words of the statute do not connote voluntariness. A qualified individual may participate in a service on either a voluntary or a mandatory basis, as illustrated by Justice Scalia's example of a drug addict required to participate in a treatment program. Transportation of an arrestee to the station house is thus a service of the police within the meaning of the ADA. The fact that the statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. It was therefore error to conclude that Gorman was not a "qualified individual with a disability" who meets the essential eligibility requirements for the receipt of services.

The stated purpose of the ADA also demonstrates its applicability to transportation of arrestees. In the statement of findings and purpose at the beginning of the statute, Congress noted that "discrimination against individuals with disabilities persists in such critical areas as . . . transportation . . . institutionalization . . . and access to public services" and that disabled individuals face the discriminatory effects of "failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101(a). Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b).

Because Gorman's allegations pass the threshold required to bring a case under the ADA and the Rehabilitation Act, the district court's ruling to the contrary must

be reversed and the case remanded for further proceedings. It remains to be determined whether Gorman can prove he was discriminated against or denied a benefit or service because of his disability or whether the defendants can show they made "reasonable accommodations of his disability or if further accommodation would have been an undue burden." 29 U.S.C. § 794a(a)(1); 42 U.S.C. § 12133. The facts of what actually occurred on the night of the arrest are contested. The Kansas City police dispute Gorman's version. They have produced evidence that he was intoxicated, that he repeatedly wheeled his chair into the street and yelled profanities, that he did not tell the police how to transport him safely, and that he fell to the floor of the van because he released his seatbelt.

The Eighth Circuit Court of Appeals stated that they were resolving only the threshold issue at this time, and were not in a position to assess what the evidence shows about relevant details of Gorman's condition or about the information and options available to the police. The factual record will need to be further developed on remand before the remaining issues of potential liability and possible relief are determined.

Gorman's complaint passes the statutory threshold under *Yeskey* and the claims against the defendants in their official capacities must be remanded for further development. It remains to be seen whether he can show he was discriminated against or denied a benefit because of his disability or that the defendants had a policy or custom that violated his rights under the ADA or the Rehabilitation Act.



The defendants can also raise issues of reasonable accommodation and undue burden.

The judgment dismissing all claims is vacated, and the conclusion of the district court that the ADA and the Rehabilitation Act do not cover Gorman's allegations is reversed. The Eighth Circuit affirmed the dismissal of the claims against the defendants in their individual capacities on the basis of qualified immunity and remand the official capacity claims for further proceedings not inconsistent with this opinion.

CIVIL LIABILITY - EXCULPATORY EVIDENCE

In *Jean v. Collins*, CA4, No. 95-7694, 9/17/98, a 42 U.S.C. § 1983 action was filed by Lesley Jean against Captain of Detectives Delma Collins and Officer James Shingleton of the Jacksonville, North Carolina, Police Department. The complaint alleged that Collins and Shingleton failed to disclose exculpatory evidence during Jean's criminal trial for rape and first degree sexual offenses.

During the criminal trial, the prosecution disclosed to the defense that the rape victim and a police officer, who attempted to arrest Jean shortly after the rape, had been hypnotized to enhance their memories. The prosecutor also did not disclose the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request for such recordings by defense attorneys at trial. Jean was convicted

of all counts and sentenced to two consecutive life terms. The Fourth Circuit vacated Jean's conviction holding that the government's failure to disclose the audio recordings and the accompanying reports of the hypnotic sessions was a violation of the principles announced in *Brady v. Maryland*, 373 U.S. 83 (1963). The state declined to retry Jean, and he was released from prison.

The Fourth Circuit Court of Appeals stated that the police officers were entitled to qualified immunity to the extent that they failed to disclose evidence directly to defense counsel and to the extent that they failed to turn over evidence to the prosecutor. The Fourth Circuit noted that prosecutors enjoy absolute immunity from claims alleging a failure to disclose exculpatory evidence. The same considerations underlying absolute immunity for prosecutors also support granting police officers absolute immunity from suits alleging failure to disclose exculpatory evidence to the defense. The court noted that since police uncover most evidence in criminal investigations, suits alleging suppression of exculpatory evidence could be leveled against them in almost every case. Further, officers fearing personal liability would likely turn over much more evidence than necessary transforming the combination of § 1983 and *Brady* into more absolute rights of discovery for criminal defendants.



CIVIL LIABILITY - OFFICIAL CONDUCT THAT SHOCKS THE CONSCIENCE

In *Rogers v. City of Little Rock*, CA8, No. 97-2286, 8/10/98, Vivian Ann Rogers brought this action under 42 U.S.C. § 1983 against former Little Rock Police Officer Vincent Morgan, the City of Little Rock, and Chief of Police Louie C. Caudell, alleging that her constitutional rights were violated when Morgan raped her while he was on duty. After a bench trial the district court found Morgan liable in his individual capacity and awarded Rogers \$100,000 in damages. The court had previously dismissed the claims against the city, Caudell, and Morgan in his official capacity. Rogers now challenges these dismissals and Morgan appeals the judgment entered against him. The Eighth Circuit Court of Appeals, in affirming the judgment of the district court, discussed the issues raised on appeal.

The first question raised was whether the district court was correct to analyze the case under the due process clause. The Eighth Circuit Court of Appeals stated the threshold question in a due process challenge to abusive conduct by a state actor is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. The evidence in this case supports the district court's conclusion that Rogers suffered a violation of her right to intimate bodily integrity that was conscience shocking. This case involves an egregious,



nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective. It therefore violated Rogers' substantive due process right. Morgan's rape was an intentional act that produced constitutional injury and that was an arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. The rape falls at the extreme end of the scale of egregious conduct by a state actor and was unjustifiable by any government interest.

Morgan argues that the district court erred in finding that he was acting under color of state law. He contends that not towing Rogers' car when she did not have proof of insurance, going to her home, and then having sex with her were all substantial departures from his duties as a Little Rock police officer which means he was not acting under color of law, citing *Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996). An official acts under color of state law even if he "abuses the position given him by the State . . . while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988). The issue depends on "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997) (quoting *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995)). There were facts produced to show that Morgan relied on his authority as a police officer to facilitate the assault. He stopped Rogers for a broken tail light, raised the pros-

pect of towing her car when she did not have the insurance papers, and later after going to her home said that she owed him a favor in exchange for letting her go. He remained in uniform, and Rogers testified that she felt she had to cooperate with his demands because he was a police officer. Morgan thus abused his power while carrying out the official duties entrusted to him by the state, and the district court did not err in finding that he acted under color of state law.

Rogers appeals the summary judgment dismissals. She claims that there are genuine issues of fact about whether the city had a policy of not sustaining complaints of physical abuse by police officers and whether such policy caused the violation of her constitutional rights. In order to subject the city to § 1983 liability Rogers must show that the city had a "policy or custom" of failing to act upon prior similar complaints of unconstitutional conduct, which caused the constitutional injury at issue." *Andrews v. Fowler*, 98 F.3d 1069, 1075 (8th Cir. 1996) (quoting *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694 (1978)). In support of her claim Rogers offered the deposition testimony of Officer John Hall of the LRPD Internal Affairs Division who stated that a complaint would not be sustained without physical evidence or other witnesses to support the accusations. She also points to two LRPD documents which indicate that the department would accept an officer's statement as true unless the complaint was corroborated. She argues that this created an environment in which officers believed

that they could violate citizens' constitutional rights with impunity, even by an act of rape, citing *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), cert denied, 117 S.Ct. 1086 (1997).

Assuming for the purposes of summary judgment that the city had a policy of ruling citizen complaints "not sustained" when there was no supporting evidence besides the complainant's account, Rogers has failed to establish a case for § 1983 liability since such policy was not shown to have caused the constitutional violation. A § 1983 plaintiff must prove that the alleged policy "was the moving force behind the constitutional violation." *Jane Doe A. v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990). Rogers has not made an adequate showing that a policy of believing the officer's word over the complainant's in the absence of other evidence led officers to believe that they could violate citizens' constitutional rights without fear of punishment.

The uncontested evidence shows that all allegations of police misconduct were investigated by the LRPD, and there was no pattern of acquiescence in the face of constitutional violations. Nor was there sufficient evidence to establish that the investigations were a facade to cover the violent behavioral patterns of police officers.

Rogers also contends that the district court erred by dismissing her claim against the police chief in his individual capacity because there is an issue of fact about whether he was deliberately indifferent to Morgan's sexual misconduct. A city employee faces § 1983 liability in his individual capacity when he fails to act ad-



equately on complaints of sexual abuse if he had notice of a pattern of unconstitutional conduct by subordinates and exhibited deliberate indifference to, or tacit authorization of, the conduct. See *Bell v. Fowler*, 99 F.3d 262, 269 (8th Cir. 1996); *Wilson v. City of North Little Rock*, 801 F. 2d 316, 322 (8th Cir 1986). Rogers cites the two incidents of sexual misconduct by Morgan with fellow cadets and asserts that the chief responded inadequately to them. Both allegations were investigated, and one resulted in Morgan's suspension for ten days and the other was not sustained because there were no witnesses. This response did not show a "reckless disregard for or deliberate indifference to" unconstitutional conduct by Morgan. *Rubek v. Barnhart*, 814 F.2d 1283, 1284 (8th Cir. 1987). The record also shows that the chief decided to terminate Morgan after an investigation into the rape of Rogers, but he resigned first.

CIVIL LIABILITY - RETALIATION CLAIM

In *Bloch v. Ribar*, CA6, No. 97-3451, 9/21/98, Cynthia Bloch was raped by an unknown assailant in Medina County, Ohio, on December 29, 1992. She promptly reported the rape to the Medina County Sheriff's Department and gave a detailed statement to the authorities. After the passage of 18 months with no apparent progress in the investigation, the Blochs agreed to be interviewed by the *Cleveland Plain Dealer*. On July 10, 1994, the newspaper published

an article concerning the case, followed by further articles in the *Akron Beacon Journal* in April and May of 1995. All of these articles were critical of the Medina County Sheriff's Department and of Sheriff Ribar personally.

In response to these articles, Ribar convened a press conference on May 3, 1995, to announce that he was requesting that a grand jury investigate Ms. Bloch's rape claim. During the same press conference, Ribar is alleged to have released "highly personal and extremely humiliating details" of the rape suffered by Ms. Bloch. She claims that Ribar's statements to the press "contained details of the acts perpetrated against her that were so embarrassing she had not even told her husband. Most important, the release of these humiliating details was unnecessary, illegal according to the prosecutor, and did absolutely nothing to advance the sheriff's defense." The Blochs claim, moreover, that there was no connection between the details of the rape released by Ribar and the Blochs' criticism of the investigation. The Blochs contend that as a result of Ribar's actions, they have suffered humiliation, embarrassment, and severe mental distress.

Cynthia Bloch and her husband Thomas Bloch brought an action against Sheriff L. John Ribar pursuant to 42 U.S.C. § 1983, claiming that he violated their constitutional rights by holding a press conference to release the confidential and highly personal details of Ms. Bloch's rape by an unknown assailant. They claim that Ribar took this action in retaliation for the Blochs' publicly criticizing the sheriff's lack

of diligence in investigating the crime. The federal district court dismissed both the retaliation claim and the privacy claim against Sheriff L. John Ribar on the basis of qualified immunity.

The Sixth Circuit Court of Appeals began its analysis by considering whether the underlying action taken by the Blochs was a constitutionally protected activity. Of this there can be no doubt. The First Amendment clearly protects the Blochs' right to criticize Ribar in his role as a public official. See *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) (The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is the central meaning of the First Amendment (quoting *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964))).

In the present case, the Blochs have alleged facts that, if proven, will support their claim. For example, they have alleged that a deputy sheriff told them to stop criticizing Ribar or risk being used for "political purposes." In addition, Ribar had remained quiet concerning the rape investigation for 18 months and chose to go public with the humiliating details only after the Blochs' criticism had been published. The Blochs also claim that the information released did not relate to their criticism of his investigation. Finally, it remains unclear how these details would assure concerned local citizens that Ribar was conducting a thorough investigation, the latter being the subject of the Blochs' criticism.

After considering the Blochs' allegations in their complaint and



the applicable legal precedents, the Sixth Circuit Court of Appeals found that the Blochs have raised a cognizable retaliation claim under § 1983. The Sixth Circuit Court of Appeals concluded that Ribar was not entitled to qualified immunity from the Blochs' retaliation claim because the right to criticize public officials is clearly established, the Blochs have alleged that they suffered embarrassment and humiliation that would chill people of ordinary firmness from continuing to exercise their constitutional rights as a result, and they claim that the release of the highly personal information was motivated at least in part as a response to the exercise of those rights. Ribar clearly had a right to respond to the criticism, but if the Blochs can prove that the intimate details of the rape were released in order to retaliate against their criticism, a reasonable officer should have known that the action violated the Blochs' rights and therefore cannot benefit from the doctrine of qualified immunity.

The Sixth Circuit Court of Appeals next discussed the privacy claim and concluded that a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penological purpose is being served.

Despite what appears to be a possible violation of the Blochs' privacy interests in this case, their claim against Ribar on this ground must fail because, as the district court held, a reasonable public official would not be on notice that the release of such intimate details of a rape constituted an actionable

violation of a rape victim's privacy interests. A reasonably prudent sheriff should have refrained from unnecessarily releasing the highly confidential and embarrassing personal information, but in light of the dearth of case law on this issue and the complexities stemming from the nature of crimes of sexual violence, it would be unfair to conclude that a reasonable official would have been aware that releasing these details violated a clearly established constitutional right to privacy. See *Daughenbaugh v. City of Tiffin*, No. 97-3200, 1998 WL 429114 (6th Cir. July 31, 1998) (holding that law enforcement officials are entitled to qualified immunity when unsettled interpretations in a particular area of the law make the law unclear).

The Sixth Circuit concluded that Ribar's defense of qualified immunity is justified with respect to the Blochs' privacy claim. The Court continued by stating that public officials in this circuit will now be on notice that such a privacy right exists. Therefore, any future violation will not allow an official such as Ribar to claim the lack of reasonable notice that is necessary to sustain a defense of qualified immunity.



CONFESSIONS - CLAIM OF INVALID WAIVER AS A RESULT OF ACUTE INTOXICATION FROM METHAMPHETAMINE INGESTION

In *Rychtarik v. State*, No CR 98-3, 10/8/98, James Earl Rychtarik appealed his conviction for second degree murder and possession of a controlled substance with intent to deliver, to the Arkansas Supreme Court. Rychtarik claims that his confession was made while he was suffering from a psychosis or other medical or mental problem and that he lacked the capacity to knowingly and intelligently waive his rights.

The Arkansas Supreme Court stated that custodial statements are presumed to be involuntary and it is the State's burden to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made. *Humphrey v. State*, 327 Ark. 753, 760, 940 S.W.2d 860, 864 (1997). The relevant inquiry in this case is whether Rychtarik waived his rights with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Sanford v. State*, 331 Ark. 334, 346, 962 S.W.2d 335, 341-342 (1998). The credibility of the witnesses who testify to the circumstances surrounding the defendant's custodial statement was for the trial court to determine. *Porchia v. State*, 306 Ark. 443, 448, 815 S.W.2d 926, 928 (1991).

In this case Rychtarik was arrested on June 30, 1995. He gave



a statement three days later in which he confessed to the crimes. Dr. O. Wendall Hall, Psychiatrist, Arkansas State Hospital, testified that Rychtarik could have recovered from his intoxication at the time of the crime by the time he gave his statement three days later.

The two officers who took Rychtarik's confession, Jack Allen and Dennis Norton, also testified. Officer Allen said that he advised Rychtarik of his rights according to the waiver-of-rights form. In the usual way, he read aloud each right and had appellant write the word "yes" beside each statement of right if Rychtarik understood it. Rychtarik signed the waiver form at the bottom. Officer Allen testified that he made no promises or threats and that he believed that Rychtarik understood his Miranda rights. He further stated that a lot of what Rychtarik was saying was strange, but that it was not unusual for a criminal defendant to pick a "theme." Officer Allen testified that he believed that Rychtarik, at the time of the statement, was down from the drugs and was completely coherent and understood what was going on. He also testified that Rychtarik exercised his Miranda rights during his statement by saying he wanted to "shut up".

Additionally, Officer Allen testified that Rychtarik's statement contained considerable factual information that was confirmed by police and crime lab investigation. Dr. Hall testified that the main effects of acute intoxication from methamphetamine ingestion were gone by the time Rychtarik gave his statement. In addition, Officer Allen testified that Rychtarik appeared to be coherent and "com-

pletely down" from the influence of drugs. He observed that although some of the things Rychtarik related in his statement indicated delusions at the time of the criminal acts, he was specific about details that were later confirmed by other sources. Rychtarik also related significant factual detail to show that he understood what was going on. Also, Rychtarik exercised his Miranda rights when he stated, "I'm wanting to shut up." Therefore, based on the totality of the circumstances, the Arkansas Supreme Court concluded that the trial court's determination that Rychtarik made a knowing and intelligent waiver of his Miranda rights was not in error and the conviction was affirmed.

CONFESSIONS - EMOTIONAL COERCION

In *Boone v. State*, CR98-282, 10/8/98, Guy Anthony Boone contends that his second custodial statement was involuntary because of emotional coercion. Boone was being questioned about the murder of Ella Mae Robinson. Mr. Boone denied any involvement with the murder and further stated that he would not murder anyone because his own mother had been murdered. Subsequently, Detective Morrow proceeded to tell Mr. Boone that he had verified Mr. Boone's claim that his mother had been murdered and that "the man who done it, you know, was man enough to admit that he'd done wrong." Mr. Boone began to cry and a second statement was taken

from him. Although a new Miranda rights form was not filled out for the second statement, Detective Morrow turned on the tape recorder and read Mr. Boone his rights again. Mr. Boone waived his rights and gave the second taped statement in which he admitted stealing two gold chains and shooting Ms. Robinson three times in the face, with the last two shots being at close range. The second taped statement began at 5:29 p.m. and concluded at 5:53 p.m.

Statements made while in custody are presumed involuntary, and the burden is on the state to show that the statements were made voluntarily and freely, without hope of reward or fear of punishment. *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997). The issue on appeal is whether Mr. Boone's second custodial statement was "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). In making this determination, the Arkansas Supreme Court reviews the totality of the circumstances and reverses the trial court only if its decision was clearly erroneous. *Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997). In this regard, the relevant factors are the age, education and intelligence of the accused; the lack of advice of his constitutional rights; the length of detention; the repeated and prolonged nature of questioning and the use of mental or physical punishment. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998); *Davis*, supra; *Wofford*, supra; *Humphrey*, supra.



The use of psychological tactics by police officers is an acceptable means of interrogation. *Noble v. State*, 319 Ark. 407, 892 S.W.2d 477 (1995). Specifically, police officers may attempt to play on an accused's sympathies or explain to him that honesty is the best policy, provided that the accused's decision to make a custodial statement is voluntary in the sense that it is a product of the accused's own free will. *Noble*, supra. Mr. Boone claims that Detective Morrow's remark about the murderer of Mr. Boone's mother being "man enough" to confess amounted to emotional coercion, i.e., that it compelled him to confess to the murder. Mr. Boone did indeed begin to cry after Detective Morrow's remark, his mood changed, he was remorseful and apologized for having lied earlier. Mr. Boone's change in demeanor after Detective Morrow's remark is only one factor in the review of the totality of the circumstances.

Mr. Boone makes no claim that he was vulnerable due to his age, education or intelligence. Nor does he claim that the confession was given after a lengthy detention or after prolonged or repeated questioning. The entire interview process lasted less than three hours, and Detective Morrow made only one remark about the murder of Mr. Boone's mother. Mr. Boone was also advised of his constitutional rights on two separate occasions before he elected to waive those rights. Mr. Boone does not claim and the evidence does not show that the officers made any promises or that they punished him physically. Nor does Mr. Boone claim that he was under the influence of drugs alleg-

edly ingested approximately thirty minutes before his arrest. The interrogation began more than two hours after his arrest and Mr. Boone was lucid, responsive, and alert, according to the undisputed testimony of the officers. Finally, Mr. Boone was no stranger to the criminal justice system, having had several previous convictions.

Based on the totality of the circumstances surrounding Mr. Boone's confession, the Arkansas Supreme Court stated that they could not say that the trial court's conclusion that the statement was voluntary was clearly erroneous. Accordingly, the Court affirmed the trial court's denial of Mr. Boone's motion to suppress the inculpatory custodial statement.

CONFESSIONS - PROMISE OF LENIENCY IN EXCHANGE FOR COOPERATION

In *United States v. Pierce*, CA8, No. 98-1082, 8/11/98, the issue was whether Pierce's self-incriminating statements were made involuntarily because another officer had promised Pierce leniency in exchange for cooperation.

On August 8, 1998, Nebraska State Patrol (NSP) Trooper Staskiewicz arrested Phelan Johnson and Kevin L. Pierce transporting marijuana in a van on Interstate 80 near Omaha, Nebraska. While en route to NSP headquarters in the patrol car, Trooper Staskiewicz commented to the defendant about the benefits of cooperating. Trooper Staskiewicz

told Pierce that he could "get off pretty easy" if he cooperated with the police and completed the marijuana delivery. Trooper Staskiewicz told Pierce that the prospects for cooperating would be discussed at the NSP station and that he should not say anything until his rights were read to him at the station. Trooper Staskiewicz also said "it's a proven fact that cooperation helps in the long run . . . especially if they go federal." The conversation between Trooper Staskiewicz and defendant was recorded by an audio/video camera mounted in the patrol car.

Once Trooper Staskiewicz and defendant arrived at the NSP station, Pierce was left with another officer, Investigator Lutter, to be interviewed. Investigator Lutter testified that he was unaware of the prior conversation between Trooper Staskiewicz and Pierce in the patrol car. Investigator Lutter read defendant his Miranda rights from a preprinted "Advice of Rights" form. Investigator Lutter instructed defendant to answer "yes" or "no" each time he was read a right and asked if he understood it, and then to initial each right on the form if he understood it. Pierce verbally indicated that he understood each of his rights as read to him, and he wrote his initials, "K.P.," beside each right on the form. Pierce did not ask any questions about his rights, nor did he request an attorney. Investigator Lutter then read aloud to Pierce the "waiver of rights" paragraph on the form, which states the following: "I have been advised of my rights and I understand them. I am willing to answer questions at this time without an attorney present. I have not re-



ceived any threats or promises, and I will answer questions freely and voluntarily.” Investigator Lutter asked Pierce whether he understood that no promises were being made, nor was anything being offered, in exchange for his statement. Pierce indicated that he understood and signed his name directly below the waiver of rights paragraph.

Investigator Lutter then proceeded to question defendant. The interrogation lasted approximately half an hour (from 4:26 a.m. to 4:55 a.m.). First, Investigator Lutter obtained biographical information from Pierce. Then he asked Pierce about the marijuana found in the van. Pierce admitted that he and Johnson were transporting the marijuana to Detroit, to a contact named Jim Bob for whom defendant had once previously made a delivery. According to defendant, he received \$500 for the prior delivery and this time he was to receive \$2,000. Investigator Lutter suggested to defendant that he cooperate with law enforcement by attempting to complete the marijuana delivery. Pierce agreed. Afterward, Pierce talked with Johnson and Johnson also agreed to cooperate in an attempted delivery.

The federal district court judge found that the initial stop and search of the van were constitutionally permissible. However, the district court found that Pierce’s statements to Investigator Lutter were not voluntary. The district court stated that Trooper Staskiewicz’s statements were plainly inducements that rendered Pierce’s subsequent statements to Investigator Lutter involuntary.

The Eighth Circuit Court of

Appeals reversed the district court stating that Pierce was advised of his Miranda rights before his self-incriminating statements were made; he was not subjected to any physical or emotional coercion; he was not subjected to a particularly lengthy interrogation; and neither trickery nor deceit was used to extract his statements. In addition, the Court noted that Pierce had prior dealings with the criminal justice system; he made no incriminating statements to Trooper Staskiewicz in the patrol car; Investigator Lutter carefully reviewed with Pierce his Miranda rights and Pierce initialed each one on the rights form; and Pierce signed his name below the waiver of rights paragraph. The Court considered especially compelling the facts that Investigator Lutter specifically asked Pierce if he understood that no promises were being made nor was anything being offered in exchange for Pierce’s statement and Pierce signified his understanding both verbally and in writing. Therefore, the Court held that Pierce’s will was not overcome when he confessed.

In sum, upon carefully reviewing the totality of the factual circumstances of this case, the Eighth Circuit Court of Appeals held that Pierce’s self-incriminating statements to Investigator Lutter were made knowingly and voluntarily.



CONFESSIONS - TAPE RECORDED INCRIMINATING STATEMENTS TO OTHER INMATES

In *United States v. Ingle*, CA8, No. 97-3443, 10/8/98, the body of 82-year-old Sherman Williams was found in Hot Springs National Park in June of 1995. Ingle became a suspect in the murder. In January 1996, FBI agent Thomas Ross obtained palm prints and hair samples from Ingle at an Arkansas correctional facility in West Memphis, where he was being held on an unrelated state charge. Ingle declined Ross’s invitation to give a statement about the murder. Later that month, Ross visited again, and Ingle agreed to be transported to the Western District of Arkansas to speak with FBI agents and, if called, to appear before the federal grand jury investigating the murder. After Ingle arrived in Fort Smith, he was detained at the nearby Crawford County jail. A magistrate judge appointed the Federal Public Defender to represent Ingle in all further proceedings therein. Ingle conferred with counsel and then refused to talk with the FBI or to testify before the grand jury.

While at the Crawford County jail, Ingle confided to a cellmate, Derrick Bell, that he had participated in a Hot Springs murder. Bell or Ingle also told another inmate, Jonah Jones, who had previously assisted the FBI. Jones informed a local agent of Ingle’s admissions and agreed to try to get a tape-recorded statement from Ingle about the Sherman Williams



murder. On April 3, 1996, Jones and Bell discussed the murder with Ingle in a Crawford County jail cell, with Jones wearing a recording device provided by the FBI. Ingle made incriminating admissions and was subsequently charged with aiding and abetting the murder. The district court denied his motion to suppress the tape-recorded conversation.

Ingle's first argument on appeal was that the tape-recorded admissions should be suppressed as involuntary because Jones and Bell were acting as government agents and Ingle's will was overborne by their coercive and manipulative tactics at a time when Ingle was under the influence of methamphetamine. The Eighth Circuit Court of Appeals agreed with the magistrate judge's finding that Ingle was not threatened or intimidated and that he was not under the influence of drugs when he made the subject statements. The Court further stated that Ingle was unaware that Jones was cooperating with the FBI and the transcript of the conversation with Jones and Bell gives no indication Ingle felt intimidated by them or by his surroundings. The fact that the government encouraged the conversation and Ingle's attempt to pass off his incriminating statements as "jailhouse bluster," does not establish the kind of coercive police activity that renders a confession involuntary. See *Colorado v. Connelly*, 479 U.S. 157, 163-67 (1986).

Ingle next argued that his tape-recorded statement was inadmissible because Jones and Bell subjected him to custodial interrogation without giving the warnings required by *Miranda v. Ari-*

zona, 384 U.S. 436 (1966). The Eighth Circuit Court of Appeals stated that in *Illinois v. Perkins*, 496 U.S. 292, 300 (1990), the United States Supreme Court held that an incarcerated suspect is not entitled to Miranda warnings prior to questioning by an undercover agent posing as an inmate. Miranda does not apply to a conversation between Ingle and two fellow inmates who had been encouraged by the government to elicit incriminating admissions. See *Salkil v. Delo*, 990 F.2d 386, 387 (8th Cir. 1993).

Ingle next argued that his Sixth Amendment right to the assistance of counsel was violated when Jones and Bell questioned him outside the presence of his court-appointed attorney. This clause of the Sixth Amendment provides: In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. This Sixth Amendment right requires the existence of both a criminal prosecution and an accused. *United States v. Gouveia*, 467 U.S. 180, 188 (1984). Thus, the right does not attach until after the initiation of formal charges. *Moran v. Burbine*, 475 U.S. 412, 431 (1986). More specifically, it attaches at or after the initiation of adversary judicial proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Gouveia*, 467 U.S. at 188, quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

Applying this principle, it seems clear that if Ingle had been formally charged with Sherman Williams's murder prior to April 3, 1996, the government would

have violated his Sixth Amendment right to counsel by deliberately arranging to have Jones and Bell elicit incriminating admissions in the absence of Ingle's court-appointed attorney. (Emphasis added by CJI Editor) See Maine v. Moulton, 474 U.S. 159, 170 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964). Ingle was not initially charged with first degree murder until May 14, 1996. Ingle argues the right to counsel may attach before the filing of a formal charge. However, looking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel. *Moran*, 475 U.S. at 431.

In *Illinois v. Perkins*, 496 U.S. at 299, the Court held that the Sixth Amendment right to counsel did not attach when an undercover agent questioned defendant in his cell because no charges had been filed on the subject of the interrogation. Likewise, in *Salkil*, 990 F.2d at 387, the Eighth Circuit Court of Appeals held that the Sixth Amendment was not violated when an uncharged suspect made incriminating statements to a cellmate who was cooperating with the police. Ingle attempts to distinguish these cases because here the court appointed him an attorney for "all further proceedings herein" some five weeks before the taped conversation. Given the purposes for which Ingle had consented to be brought to Fort Smith—custodial interrogation and possible testimony before the grand jury—appointed counsel was needed to protect the Fifth



Amendment ban on compelled self-incrimination. But neither custodial interrogation nor a grand jury appearance triggers the Sixth Amendment right to counsel absent the initiation of formal charges, even if the target of those investigative actions is represented by counsel. Nor do such formal investigative actions preclude government investigators from thereafter using informants and undercover agents to elicit incriminating admissions from the suspect. See *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983); *United States v. Dobbs*, 711 F.2d 84, 85 (8th Cir. 1983); accord *United States v. Myers*, 123 F.3d 350, 359 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982).

The existence of a suspect's attorney-client relationship does not, by itself, trigger the Sixth Amendment right to counsel. *Moran*, 475 U.S. at 430. In this case, neither the fact that counsel was appointed for Ingle nor the standard form of appointment order used by the court establishes that the murder investigation had proceeded to the point where the Sixth Amendment right to counsel must attach because the government has committed itself to prosecute, and the defendant finds himself faced with the prosecutorial forces of an organized society, and immersed in the intricacies of substantive and procedural criminal law.



CONTINUING CRIMINAL ENTERPRISE - PREDICATE CRIMINAL OFFENSES

In *Garling v. State*, CR 97-1385 9/24/98, Jessie and Vincent Garling appeal their convictions and sentences for one count of engaging in a continuing criminal enterprise and one count of Medicaid fraud. The Garlings raise the issue whether the term "predicate criminal offense" as used in Ark. Code Ann. § 5-74-104 (Repl. 1997) and the criminal information requires proof of the commission of a felonious act or proof of an actual conviction for a felonious act. Ark. Code Ann. § 5-74-104 (Repl. 1997) provides in part:

(a)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the first degree if he:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses which are undertaken by that person in concert with two (2) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.

The Arkansas Supreme Court stated that by its plain meaning, the term "predicate criminal offense"

does not incorporate a requirement for a conviction. An "offense" is defined in *Black's Law Dictionary* as "a felony or misdemeanor; a breach of the criminal laws; violation of law for which penalty is prescribed." See *Black's Law Dictionary*, p. 1081 (6th Ed. 1990). A "conviction," on the other hand, is "the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged." *Id.* at p. 333. Clearly, one can commit an offense without being convicted of the crime.

The Arkansas Supreme Court noted that the Arkansas statute is modeled on the federal "kingpin" statute. See 21 U.S.C. § 848. See also *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992). Two federal courts of appeal have interpreted this statute as not requiring a conviction for the predicate criminal offenses but have held that proof of the commission of an offense is sufficient. See *U.S. v. Apodaca*, 843 F.2d 421 (10th Cir. 1988); *U.S. v. Markowski*, 772 F.2d 358 (7th Cir. 1985).

The Arkansas Supreme Court stated that a committed offense for purposes of the continuing-criminal-enterprise statute need not be proved by a conviction or even a formal charge.

DWI - ACTUAL PHYSICAL CONTROL OF A VEHICLE

In *Diehl v. State*, CACR 98-304, 10/14/98, at approximately 9:00 p.m. on November 14, 1996, Officer Larry Behnke of the Pulaski County Sheriff's Office



was patrolling the parking lot of Ton's Place, a sports bar. The night was cold, and Officer Behnke saw exhaust coming from the tailpipe of a 1987 Chevrolet pickup. Officer Behnke's investigation of said vehicle resulted in his finding Diehl on the driver's side behind the steering wheel slumped over in the seat apparently unconscious. The doors of the vehicle were locked and the keys were in the ignition with the engine running. Officer Behnke assisted Sergeant Brawly in helping Diehl out of the vehicle. As the officers moved appellant away from the vehicle, Diehl stated that he had a designated driver. Diehl was then taken to Sherwood intake where he was administered a breathalyzer test. The result of the BAC test was .23%.

The Arkansas Court of Appeals stated that Diehl was slumped over in the driver's seat of the car with his legs under the steering wheel, at which time the keys were in the ignition with the motor running. The Court had no hesitancy in holding that Diehl was in actual physical control of the vehicle.

**EXPERT WITNESSES -
CONTAMINATION OF
UNITED STATES
CURRENCY WITH DRUG
RESIDUE**

In *United States v. Moreno-Pena*, CA8, No. 97-2393, 10/5/98, Moreno sought to introduce into evidence the testimony of William Ihm, a forensic chemist, who believes that 99 percent of United States currency is contaminated

with some amount of drug residue. The district court granted the government's motion to exclude Mr. Ihm's testimony. Moreno claims that the exclusion of such evidence constituted reversible error.

The Eighth Circuit Court of Appeals reviewed Federal Rule of Evidence 702 in the context of whether the methodology underlying the testimony is scientifically valid and whether the methodology can be applied to the facts. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The Eighth Circuit Court of Appeals was of the opinion that Ihm's methodology fails both prongs of the *Daubert* test. The Court was of the opinion that Ihm's methodology is incapable of producing the conclusion to which he was prepared to testify, that his methodology does not bear any of the indicia of reliability articulated in *Daubert* and that the testimony also flunks the relevancy prong of *Daubert*.

**EXPERT WITNESSES -
SPECIALIZED
KNOWLEDGE OF DRUG
ACTIVITIES**

In *United States v. Ortega*, CA8, No. 97-2012, 8/4/98, Ortega contends that the district court abused its discretion in allowing the government to present the testimony of undisclosed expert witnesses which he contends surprised him and denied him a fair trial.

Special Agent Dillow and Trooper Banasik were listed on the government's witness list, not on

its expert witness list, but they were allowed to testify both as fact witnesses and, over the defendant's objection, as experts with specialized knowledge of drug-related activities and paraphernalia. Special Agent Dillow gave expert testimony concerning substances commonly used by drug traffickers as a cutting agent to increase the volume of drugs available for sale. He testified that a common food additive found in Ortega's residence is one such substance. He also gave expert testimony to the effect that other innocent appearing items found at Ortega's residence are commonly used in drug trafficking, such as freezer bags for packaging the drugs and gram scales and digital scales for weighing the drug. Trooper Banasik provided expert testimony when he interpreted notations found in a notebook at Ortega's residence. He testified that in his opinion, the notes indicate amounts of drugs sold, the purchase price and customer's names, though the notes do not specifically reference drugs.

The Eighth Circuit Court of Appeals stated that this type of expert evidence has become almost routine in drug cases and has been approved on previous occasions. See, *United States v. Brown*, 110 F.3d at 611 (8th Cir. 1997) (noting district court has discretion to allow law enforcement officers to testify as experts concerning drug-related activities likely to be unfamiliar to most jurors); *United States v. Newton*, 31 F.3d 611, 613 (8th Cir. 1994) (same); *United States v. Boykin*, 986 F.2d 270, 275 (8th Cir.) (same), cert. denied, 510 U.S. 888 (1993). Additionally, although Ortega's counsel ob-



jected to the expert testimony on the basis of a lack of proper disclosure, he did not object to the qualifications of the witnesses or the reliability of the substance of their testimony.

JAILS AND PRISONS - JAIL SUICIDE

In *Liebe v. Nortron*, CA8, No. 98-1163, 10/1/98, Robert W. Liebe committed suicide on October 12, 1993, while incarcerated at the Fall River County Jail. Mary Ellen Liebe, Robert's wife, sought damages against Lyle Nortron, Sheriff Gene Linehan and Fall River County, South Dakota under 42 U.S.C. § 1983. The district court dismissed the claims against Lyle Norton based on qualified immunity, and granted summary judgment as to the remaining Defendants because Liebe was unable to show that Fall River County failed to train Lyle Norton. The Eighth Circuit Court of Appeals affirmed the judgment of the district court.

On October 12, 1993, Robert Liebe was arrested and taken to the Fall River County Jail. Liebe was intoxicated at the time of his booking. In accordance with County policy, Lyle Norton processed Liebe into the jail, and after questioning Liebe, classified him as a "SUICIDE RISK." Liebe had admitted to previously attempting suicide and was on both clonazepam and valium. Although Liebe had previously been a prisoner at the jail, Norton did not research the prior file to learn additional information about Liebe. After removing Liebe's shoes and belt, Norton placed Liebe in a tem-

porary holding cell designed to minimize the risk of harm to the inmate. The Fall River County Manual of Policies, Procedures and Operations (the "MPPO") recommends checking on inmates such as Liebe every fifteen (15) minutes. Thus, from 4:30 p.m. until 8:50 p.m. on October 12, 1993, Norton checked on Liebe approximately seventeen (17) times. The time lapse between these checks varied from seven (7) minutes to twenty-one (21) minutes. However, Norton did not turn on the audio system to the temporary holding cell.

At 8:50 p.m., twenty (20) minutes after the last check on Liebe, Norton found Liebe hanging in his cell. Liebe had used his long-sleeved shirt to hang himself on a metal-framed electrical conduit in the temporary holding cell. Despite the fact that Norton had the keys to Liebe's cell in his pocket, Norton ran back to the dispatch area to trip an electronic switch to open the cell door. While at the dispatch area, Norton told the dispatcher to call an ambulance. The dispatcher also dispatched other deputies to Liebe's cell. According to the dispatch log, Liebe was discovered hanging at 8:57 p.m. and CPR was not initiated until 9:12 p.m., a period of fifteen (15) minutes.

Norton returned to Liebe's cell and assisted an officer in cutting Liebe down and lowering his body to the floor. Norton could feel that Liebe's hands were cold and see that his lips were blue. The other officer could not find a pulse on Liebe. When the ambulance arrived, Liebe failed to respond to resuscitation efforts and he was pronounced dead upon his arrival

at the hospital. Prior to this incident, there had never been a suicide at the Fall River County Jail.

Norton began working part-time at the Fall River County Jail on August 17, 1993. Before beginning duties as a solo jailer, he was given on-the-job training for two and one-half weeks by another jailer. Norton was also scheduled to attend a jailer training course, but the course was not being held until November 1993. However, Norton had begun a Jail Officers Training Correspondence Course. Norton had received CPR training in 1992 and was recertified twice as a reserve officer. Thus, prior to Liebe's suicide, Norton had worked as a full-time jailer for approximately two months. Norton was also given the MPPO to read, but Sheriff Bray, Norton's superior, never told Norton that he was required to know or understand the MPPO's contents.

The Eighth Circuit Court of Appeals stated that the jailer, Norton, was entitled to qualified immunity unless he was deliberately indifferent. Norton cannot be found guilty of deliberate indifference unless it is shown that he "knew of and disregarded an excessive risk to [Liebe's] health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). By classifying Liebe as a suicide risk on the prison intake form, Norton demonstrated that he was aware of a potential risk to Liebe's health or safety. However, Norton may still escape liability if he responded reasonably to the risk, even if the harm ultimately was not averted.

Mary Ellen Liebe points to all of the actions which Norton should have taken. Unfortunately, Norton did not have the benefit of twenty-



twenty hindsight. The Eighth Circuit Court of Appeals then examined those precautionary actions which were undertaken. Mary Ellen Liebe seems to ignore the fact that Norton did classify her husband as a suicide risk, and he did take the preventive measures of placing him in the temporary holding cell and removing his shoes and belt. Additionally, Norton periodically checked on Liebe. While Norton may have been negligent in not checking on Liebe more often, or in failing to notice the exposed electrical conduit in the temporary holding cell, the Court could not say as a matter of law that his actions were indifferent. To the contrary, Norton's actions constituted affirmative, deliberate steps to prevent Liebe's suicide. Despite Norton's ultimate failure to prevent that suicide, Norton did not act with deliberate indifference.

The Eighth Circuit Court of Appeals stated that the claims against the Sheriff and the County were based on a failure to train and supervise. Under *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), a failure to train claim may only serve as a basis for § 1983 liability when the failure to train can be said to constitute deliberate indifference to the rights of others. Mary Ellen Liebe contends that the County was deliberately indifferent when it left Norton, an inexperienced jailer, in charge of its jail facility. The County did have policies in place which were intended to prevent inmate suicides. These policies included completing a questionnaire for new inmates to determine if they posed a suicide risk, placing those inmates who are deemed suicide

risks in a temporary holding cell, removing clothing and accessories from such inmates which could be used to aid in a suicide, and checking the temporary holding cell every fifteen (15) minutes. The existence of these policies indicate that the County was interested in preventing inmate suicides and, in fact, took affirmative steps to prevent such suicides. The County's policy cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicides.

Moreover, the fact that Norton was not led, step by step, through the policies contained in the MPPO does not necessarily amount to a failure to train. Norton was given the MPPO, and he was scheduled to attend a jailer training course. Considering the fact that the above policies were in place, and that no inmate suicides had ever occurred at the jail, the Eighth Circuit Court of Appeals could not say that the need for more or different training was so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the County can reasonably be said to have been deliberately indifferent."

The failure to supervise claim is distinct and separate from the failure to train claim. However, both claims ultimately require the same analysis. First, a supervisor cannot be held vicariously liable under § 1983 for an employee's actions. See *White v. Holmes*, 21 F.3d 277, 280 (8th Cir. 1994). Second, in *White*, it was held that a failure to supervise claim may be maintained only if a defendant demonstrated deliberate indifference or tacit authorization of the

offensive acts. Thus, as with the failure to train claim, this claim is governed by the deliberate indifference standard. If these actions do not constitute deliberate indifference for a failure to train claim, they cannot constitute deliberate indifference in the present failure to supervise claim.

Mary Ellen Liebe has not presented any material issues of fact regarding the County's deliberate indifference. Rather, the facts show the opposite: that the County had policies and procedures in place to prevent inmate suicides. These deliberate steps taken to prevent inmate suicides necessitate that the Eighth Circuit Court of Appeals affirm the district court's grant of summary judgment in favor of the County and Sheriff Linehan. The claims against Norton are dismissed because he is entitled to qualified immunity.

PARENTAL CONSENT AND PRESENCE - INTERVIEWS WITH JUVENILES

In *Conner v. State*, CR 97-1426, 10/8/98, Corey Jermo Conner, age 17, was sentenced to life imprisonment without parole for the capital murder of Darrell Robinson. One of Conner's arguments on appeal was that the trial court should have suppressed his statements because his mother did not consent to his waiver of his right to counsel, nor was she present during the questioning. Arkansas Code Annotated § 9-27-317(a)(3) (Repl. 1998), provides that during "a delinquency or fam-



ily in need of services hearing” a parent or guardian must consent to the juvenile’s waiver of his or her right to counsel. The Arkansas Supreme Court stated, however, that they have clarified that this statutory provision applies only when the individual is charged in juvenile court and not when he or she is charged as an adult in circuit court. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 117 S.Ct. 246 (1996); *Sims v. State*, 320 Ark. 528, 900 S.W.2d 508 (1995). Because Conner was charged as an adult in circuit court, the police were not required to obtain parental consent to the waiver of his right to counsel.

In contrast, Ark. Code Ann. § 9-27-317 (g)(2) provides that, no law enforcement officer shall question a juvenile who has been taken into custody for a delinquent act or criminal offense if the juvenile has indicated in any manner that he . . . wishes to speak with a parent or guardian or to have a parent or guardian present. Thus, unlike the right to parental consent to a waiver, a juvenile has the right to speak to a parent or have a parent present during questioning in juvenile and criminal proceedings. See *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996). The juvenile, however, and not the parent or guardian must invoke this statutory right. Although there is evidence in the record that Conner’s mother requested to speak to her son, there is no evidence that Conner himself invoked his statutory right to have a parent or guardian present during questioning. Accordingly, the Arkansas Supreme Court found no merit to this point on appeal.

PROBABLE CAUSE

In *United States v. Oakley*, CA8, No. 98-1619, 8/18/98, Oakley contends that police lacked probable cause to arrest him. On August 29, 1997, at approximately 2:10 p.m., an African American male robbed a Des Moines, Iowa, bank of \$11,766. During the robbery, he carried a gun and wore blue jeans and a dark baseball cap. At approximately 3:00 p.m., Des Moines Police Lieutenant Kelly Willis heard on his car radio that the robbery suspect was seen in the area of the Iowa Historical Building, approximately twelve blocks from where the bank robbery occurred.

Willis drove toward the area around the Historical Building to help with the search. The initial radio dispatch described the bank robber as an African American male, about 6’1”, 180 pounds, and wearing dark jeans and a baseball hat. As Willis approached the Historical Building, the radio dispatcher updated the suspect’s description because a person fitting that description had been seen changing clothing across the street from the Historical Building at the Bargain Buddies store. According to the dispatcher, the person had put on shorts and a gold-colored T-shirt and had been seen placing a handgun in a black backpack.

After searching the Historical Building and visiting nearby establishments, including Bargain Buddies, Willis saw Oakley, who was wearing a gold shirt, khaki shorts, and carrying a black backpack. Oakley crossed the street away

from Willis, who followed him. When the two men were approximately 35 to 40 yards apart, Willis showed the police badge at his hip and said to Oakley, “police officer, I would like to talk to you.” Rather than stopping, Oakley turned away and kept walking. According to Willis, he was no longer able to see the front of Oakley’s backpack when Oakley started walking away from Willis. Having received information that the backpack contained a gun, Willis pulled his gun, ran after Oakley, and when he was about ten to fifteen feet away, warned Oakley to stop or he would shoot. Oakley turned around with his hands out and Willis took Oakley to the ground. Willis arrested Oakley. As part of a search incident to Oakley’s arrest, police officers found \$46, a billfold and a key ring in Oakley’s pockets. When searching his backpack, officers found a pellet gun, clothing and \$11,760 in cash.

The Eighth Circuit Court of Appeals stated that a police officer may lawfully arrest an individual for a felony without a warrant if the officer has probable cause. *Olinger v. Larson*, 134 F.3d 1362 (8th Cir. 1998). Probable cause exists if the facts and circumstances within the arresting officers knowledge were sufficient to warrant a prudent person’s belief that the suspect had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89 (1964).

The Eighth Circuit Court of Appeals stated that Willis had probable cause to arrest Oakley. Less than one hour after the robbery, a suspect was seen within twelve blocks of the Mercantile Bank. Shortly after hearing the dispatch, Willis saw a man fitting the



suspect's description. In addition to having similar physical characteristics, Oakley carried a black backpack, was across the street from the Historical Building and wore shorts and a gold colored T-shirt. In short, the facts and circumstances within Willis's knowledge were more than sufficient to warrant the belief that Oakley had just committed a felony. Therefore, Willis had probable cause to arrest Oakley without a warrant.

**PROBABLE CAUSE -
RULE 2.3 NOT
APPLICABLE WHEN
POLICE HAVE
PROBABLE CAUSE TO
ARREST**

In *Efurd v. State*, No. CR97-1208, 10/29/98, James Randall Efurd and his wife Alisa were charged with first-degree murder for causing the death of their nine-month-old infant daughter, Ollie. Alisa's case was severed, and this appeal involves the State's case against Randall. Randall was seventeen years old at the time of the crime, and was tried and found guilty by a jury which then sentenced him to life imprisonment.

The Efurds took Ollie to St. Edward's Hospital emergency room because Ollie was experiencing nausea, vomiting, and fever. The attending physician, Dr. James Word, observed various bruises around the head, so he had a skull x-ray taken. The x-ray showed Ollie's skull was fractured, so Dr. Word ordered a CAT scan of her brain, which indicated subdural hematoma. Alisa told

hospital personnel that Ollie had fallen in her crib. Dr. Word reported the injuries to the police, and told the officers that Alisa's story was not consistent with the bruises he saw on the child.

Ft. Smith Police Officer Tony Bowers responded to the report first, and he called Barling Police Officer Tracy Powell and asked Powell to come to St. Edward's to investigate a possible child-abuse case. When Powell arrived at the hospital, a nurse informed him that the medical personnel suspected child abuse. A doctor told Powell he felt it was definitely child abuse, so Powell reported the matter to his supervisor, Lt. James Hamilton. When Powell told Hamilton the Efurds claimed the baby fell over in the baby bed and hit her head, Hamilton asked Powell "to get some pictures of the baby and the baby bed." The Efurds agreed to go to city hall to give a written statement, but Randall first agreed to go with Powell to the Efurds' apartment so Powell could view and photograph the bed. At about 3:00 a.m. on February 9, 1996, Ollie was air lifted to Arkansas Children's Hospital, and the Efurds separated. Powell and Randall went to the Efurds' apartment and Alisa rode with Hamilton to city hall. Hamilton said the reason Randall went in Powell's car to the apartment was because Randall had no car. Randall was never informed that he was not required to accompany Powell. Powell later testified at a pretrial hearing that, at this point in their investigation, the Efurds were not suspects and were free to leave at any time.

Randall permitted Powell to enter the Efurds' apartment, and

upon entry, Powell quickly observed drugs and drug paraphernalia. Randall then gave his consent for Powell to search the premises further. Powell took pictures of the baby bed, gathered the drugs and drug paraphernalia, and arrested Randall for possession of drugs and drug paraphernalia. Randall was then taken to city hall at about 4:00 a.m. on February 9. After Officer Powell told Lt. Hamilton about the drugs and arrest of Randall, Hamilton read Randall his rights and obtained his first taped statement. Randall gave several other statements between February 9th and 12th, which included a statement indicating that Ollie's injuries had been caused in an incident involving the pushing of the baby's "walker" so that her head bumped against a metal door, causing the skull fracture.

Arkansas Rules of Criminal Procedure, Rule 2.3 provides as follows: "If a law enforcement officer acting pursuant to this rule requests any person to come to or remain at a police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request."

Randall's first argument is that, because the officers violated Arkansas Rules of Criminal Procedure, Rule 2.3 by failing to inform him that he was under no obligation to accompany them to the police station to give a statement, the trial court should have suppressed the evidence seized at the Efurds' apartment and the statements given by Randall at city hall. In making his argument, Randall recognizes that, if a po-



lice officer has probable cause to arrest, failure to give a rule 2.3 warning is irrelevant. See *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997). He submits, however, that no probable cause was shown here because no evidence existed to suggest he had committed a battery on his child. The Arkansas Supreme Court disagreed.

Probable cause exists when there is reasonably trustworthy information within a law enforcement officer's knowledge that would lead a person of reasonable caution to believe that a felony was committed by the person detained. The Arkansas Supreme Court has held that the test for determining probable cause rests on the collective information of the officers, and the fact an officer was contradictory about whether he had probable cause to arrest is not determinative of the issue. The law is well settled that the degree of proof required to sustain a conviction is not required for probable cause to arrest, and it is equally well settled that all presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden of demonstrating error rests on the appellant. *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 753 (1997).

At the conclusion of the State's testimony at the suppression hearing, the deputy prosecutor asserted Randall had been arrested for a drug felony before he was taken to the city hall and questioned. The prosecutor further contended that the officers had the opinions of the doctor and other medical personnel that Ollie's injuries resulted from child abuse. To reiterate, the attending physician told the officers that Ollie's

injuries were definitely the result of child abuse. The officers at this stage of their investigation also knew that the Efurds' story of what happened to Ollie was inconsistent with the type head injuries Ollie sustained. Yet, the Efurds, by their own rendition of what happened to Ollie, were the only ones who had been with Ollie at the time she sustained the injuries. The Court could not say the trial court erred in denying Randall's suppression motion, since under the State's evidence, the officers had strong medical evidence that reasonably led them to believe the Efurds had physically abused their infant, then conjured a false story in an attempt to explain away the baby's injuries. Because the officers possessed probable cause to arrest Randall for child abuse, The Arkansas Supreme Court would not consider James Randall Efurd's Rule 2.3 argument.

**SEARCH AND SEIZURE -
AFFIDAVIT FOR
SEARCH WARRANT
CONTAINING
INFORMATION FROM A
CONFIDENTIAL
INFORMANT**

In *United States v. Martin*, CA8, No. 98-2664, 11/3/98 [Unpublished] Martin had moved to suppress evidence seized pursuant to state search warrants for premises at 1804 and 1812 West 10th Street in Pine Bluff, Arkansas. In an affidavit supporting the warrants, a police detective attested that a confidential informant (CI) told him the following: Martin had returned from Los Angeles on

May 19 with a large quantity of cocaine; Martin lived at 1804 West 10th Street; the drugs were being kept in that house or a vacant house next door at 1812 West 10th Street, where Martin often kept his "supply"; and both houses were owned by Martin's family. The officer further attested that the CI had proven to be "very reliable" in the past by making controlled drug purchases from four dealers and assisting police in six felony drug cases; that in each of those cases, "the information from the CI proved to be true and valuable to the case"; and that the officer had confirmed Martin's mother owned both properties. Martin argues the affidavit did not establish probable cause, in that it failed to set forth sufficient facts bearing upon the reliability of the CI.

The Eighth Circuit Court of Appeals stated that the "core question" in assessing whether information provided by a CI establishes probable cause is whether the information is reliable. See *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993). Reliability can be established if the CI has a history of providing law enforcement officials with truthful information. See *United States v. Formaro*, 152 F.3d 768, 770 (8th Cir. 1998); *Wright*, 145 F.3d at 975. "The statements of a reliable [CI] are themselves sufficient to support probable cause for a search warrant." *Wright*, 145 F.3d at 975 (citations omitted). Because the officer's attestations regarding the CI's past assistance sufficiently established the reliability of the CI, the Court conclude the district court did not clearly err in denying Martin's motion to suppress.



**SEARCH AND SEIZURE -
INEVITABLE
DISCOVERY DOCTRINE
INAPPLICABLE WHERE
LAW ENFORCEMENT
OFFICERS EXPLOIT
THEIR PRESENCE AT A
RESIDENCE**

In *United States v. Madrid*, CA8, No. 97-3959, 8/26/98, the Eighth Circuit Court of Appeals declined to extend the inevitable discovery doctrine to the facts of this case. On August 9, 1996, the Drug Enforcement Agency, the Federal Bureau of Investigation, the Mid-Iowa Drug Task Force and local law enforcement agencies prepared for the delivery of a kilogram each of methamphetamine and cocaine by Arturo Martinez to Special Agent Greg Brugman. Several agents and officers maintained surveillance of the operation. Just before the delivery, agents observed Martinez stopping at Madrid's home at 505 Harmon Street in Tama, Iowa. Madrid accompanied Martinez to a convenience store, the site of the planned drug transaction. Upon their arrival, Brugman told Madrid to go to the front of the store. Martinez then delivered two pounds of methamphetamine and twenty-two ounces of cocaine to Agent Brugman.

After the drug delivery, agents and officers arrested both Madrid and Martinez at approximately 12:42 p.m. Brugman transported Martinez back to Martinez's residence, where Brugman executed a search warrant at approximately 1:15 p.m. Brugman, Martinez, and several agents and officers were at the resi-

dence until 2:30 p.m. At some point after the arrest, but before the issuance of a search warrant for Madrid's house, Martinez agreed to cooperate with the police. Martinez told police that he obtained some of the methamphetamine earlier in the day from Madrid's home, he purchased controlled substances from Madrid's home on previous occasions, and he observed two more pounds of methamphetamine at Madrid's home.

At some point, Brugman anticipated obtaining a search warrant for Madrid's home. Rather than wait for the warrant, however, Brugman decided to secure Madrid's home. Captain Bill Yount of the Linn County Sheriff's office was in charge of the search at Madrid's home. Without a warrant, approximately five to seven agents and officers entered the house at 2:15 p.m. They knocked on the door and a 15-year-old female overnight guest answered the door. At the suppression hearing, the guest testified that she did not believe that she had the authority to refuse their entry into the house. Police then entered Madrid's home and performed a "security sweep" to determine whether other individuals were present. In all, two young women, and two men were at Madrid's home. The other young woman was Madrid's fifteen year-old stepdaughter. The men were Madrid's brother and cousin, both of whom were Hispanic and neither of whom spoke English. When the agents and officers entered the home, the four occupants were not free to leave. After searching the cushions of a sofa in the living room, police officers searched the men, took their

pictures, emptied their pockets into plastic bags marked "evidence," required them to sit in the living room and did not permit them to talk to one another. Officers ordered the young women to sit in the dining room and did not permit them to answer the phone, make phone calls, talk to one another or go to the restroom without an escort. At no time did any of the occupants give consent for the search of the house.

Before police officers obtained the search warrant, they went upstairs and to the basement two or three times, seeing two scales in "plain view," which the government later offered as evidence of drug transactions; they searched through mail and personal documents in the kitchen; and they looked through a notebook, which the government later offered as evidence of drug transactions. Sometime between 3:15 and 3:30 p.m. and before the warrant arrived, Robin Oaxaca, Madrid's wife, returned home from work and refused to consent to the search of the house. According to her testimony at the suppression hearing, Oaxaca said "You wait for your warrant." "I'm a United States citizen, . . . you just can't come in here and search my home and hold my children hostage."

Scott French, a Cedar Rapids FBI agent who did not participate in the drug investigation, took information concerning the investigation over the telephone and prepared a search warrant for Madrid's house with the assistance of an Assistant United States Attorney. The magistrate received the warrant shortly after 4:00 p.m. and signed it at 4:20 p.m. The "of-



ficial” search pursuant to the warrant commenced at 4:50 p.m.

The inevitable discovery doctrine is based on the concept that illegally obtained evidence that is sufficiently purged of its original taint is not subject to the exclusionary rule. See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The precarious balance struck by the Fourth Amendment’s warrant requirement and the inevitable discovery doctrine recognizes that, while the exclusion of illegally obtained evidence both deters police officers from violating constitutional protections and prevents prosecutors from benefiting from the illegality, evidence that would have been inevitably discovered through independent, lawful means should be admitted so that the prosecutor is put in the same, not worse, position as though the original illegality had not occurred. See *Nix v. Williams*, 467 U.S. 431, 442-43 (1984).

The Eighth Circuit Court of Appeals stated that in this case, Madrid was nowhere near his home when agents arrested him and no finding of exigent circumstances justified the warrantless entry, seizure and search of his home. Prior to receiving the warrant, officers and agents detained five occupants, searched mail and a notebook and wandered through Madrid’s house. Because they simultaneously applied for a warrant, the Court concluded that the decision to seek the warrant was unaffected by what officers observed at Madrid’s house.

The Eighth Circuit Court of

Appeals stated that absent exigent circumstances, the inevitable discovery doctrine is inapplicable to a warrantless search when police officers exploit their presence in the home as they did in this case. This holding ensures that the balance achieved by the inevitable discovery doctrine preserves the warrant requirement’s deterrent function. If the Court were to extend the doctrine to the facts of this case, the warrant requirement would become the warrant application requirement, thereby enabling police officers to take shortcuts clearly prohibited by the Fourth Amendment. The warrant requirement must mean something, and the Eighth Circuit Court of Appeals would not allow the exception to swallow the rule.

**SEARCH AND SEIZURE -
SEARCH OF DUFFLE
BAG ON COMMON
CARRIER**

In *Green v. State*, CR97-1515, 10/8/98, Robert Green, was charged with one count of possession of a controlled substance with intent to deliver, as a result of a search of his duffel bag while he was a passenger on a Greyhound bus. The search revealed eighteen pounds of marijuana. On appeal to the Arkansas Supreme Court Mr. Green challenges the denial of his motion to suppress evidence on the grounds that the search of his duffel bag violated the Fourth Amendment to the United States Constitution. The Arkansas Supreme Court found no error and affirmed the decision of the trial court.

The Arkansas Supreme Court

stated that they have previously held that the odor of marijuana coming from a vehicle is sufficient to arouse suspicion and provide probable cause for the search of that vehicle. *Gordon v. State*, 259 Ark. 134 (1976); *Lopez v. State*, 29 Ark. App. 145 (1989); see also, 3 *Wayne R. LaFave, Search and Seizure* § 3.6 (6)(3d ed. 1996). Similarly, the Court now holds that the odor of marijuana emanating from a particular bag located on a bus is sufficient to provide probable cause to conduct a search of that bag. The issue then is whether the agents were required to obtain a warrant prior to searching Mr. Green’s duffel bag, or whether they were permitted to conduct a warrantless search of the bag on the bus under the doctrine of exigent circumstances.

In *California v. Acevedo*, 500 U.S. 565 (1991), the Supreme Court held that under the doctrine of exigent circumstances a container located in a vehicle may be searched without a warrant where the police have probable cause to believe that container contains contraband or evidence. The District of Columbia Court of Appeals applied *Acevedo* to the warrantless search of containers on trains using the automobile exception rationale of inherent mobility. *United States v. Symes*, 633 A.2d 51 (D.C. App. 1993); see also *Dyson v. State*, 712 A.2d 573 (Md. App. 1998). The Arkansas Supreme Court concluded that a bus possesses this same characteristic. Specifically, the mobility of a bus and its impending departure after each scheduled stop properly place it within the exigent circumstances exception to the warrant requirement. The Court then held that the



agents here were permitted to conduct a warrantless search of Mr. Green's duffel bag.

SEARCH AND SEIZURE – STOP OF A PERSON

In *United States v. Tuley*, CA8, No. 98-2224, 11/12/98, Officer Kirk Rust of the Franklin, Nebraska, Police Department observed Mark Tuley as he returned with a can of pop to his pickup truck, which was parked at a closed gas station at 3:00 a.m. across the diagonal lines of the parking lot. He also observed that his truck had an in-transit sticker but no license plates and was parked over the station's gasoline storage tanks. A coil of garden hose was tied to the side of the truck near its gas tank. There had been recent attempted robberies of gas stations in the area. Suspicious that Tuley may be attempting to steal gas out of the storage tanks, Rust pulled his patrol car behind Tuley's truck, which was blocked in the front by an awning. He approached Tuley in his truck and requested identification. Tuley had no identification but gave Rust his name and birth date. Rust noticed Tuley's eyes were bloodshot and he slurred his speech. Rust radioed his dispatcher to verify that Tuley had a valid driver's license and was informed Nebraska had a warrant for Tuley's arrest. Rust then requested a verification that the warrant was still outstanding, which was received twenty minutes after Rust first pulled behind Tuley's truck. Rust arrested Tuley and obtained controlled substances and drug paraphernalia during a search of

his person and his truck incident to the arrest.

The district court found that the circumstances supported a reasonable suspicion, justifying the investigatory stop. Tuley claims he was seized as soon as Rust blocked his truck and that Rust did not have reasonable suspicion for doing so.

An officer may constitutionally "seize" a person under the Fourth Amendment for a brief, investigatory stop if he has a reasonably articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1 (1968). The officer's actions must be both "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the initial interference." *Id.* at 19-20.

Officer Rust observed a truck, with a garden hose attached to its side near the gas tank, parked directly over a gas station's gasoline storage tanks in the middle of the night. There had been recent attempted robberies of gas stations in the area. Though Rust observed Tuley returning to his truck with a can of pop, Rust knew criminals often hid their actions with innocent activities. The truck had an in-transit sticker and no license plates. Though there was nothing illegal about this, Rust knew criminals often hid their identity by removing license plates from their vehicle. A reasonable suspicion may be justified even if there are innocent explanations for a defendant's behavior when the circumstances are considered in the totality. See *United States v. Bloomfield*, 40 F.3d 910, 918 (8th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1113 (1995); *United States v. Weaver*, 966 F.2d 391,

394 (8th Cir.), *cert. denied*, 506 U.S. 1040 (1992); *United States v. Jones*, 759 F.2d 633, 642-43 (8th Cir.), *cert. denied*, 474 U.S. 837 (1985). Blocking a vehicle so its occupant is unable to leave during the course of an investigatory stop is reasonable to maintain the status quo while completing the purpose of the stop. See *United States v. Doffin*, 791 F.2d 118, 120 (8th Cir.), *cert. denied*, 479 U.S. 861 (1986); *Jones*, 759 F.2d at 638-39 (noting factors such as the lateness of the hour, a deserted area, and a lone officer). The Eighth Circuit Court of Appeals concluded that blocking Tuley's truck with the squad car resulted in a Fourth Amendment seizure. The seizure, however, was based on a reasonably articulable suspicion and satisfies the first prong of *Terry* that the initial stop be justified.

Rust proceeded to ask for identification, a proper action in investigating suspicious activity. See *Adams v. Williams*, 407 U.S. 143, 146 (1972). All of Rust's actions were in furtherance of determining Tuley's identification and purpose for being at the closed station; Officer Rust ran a check on the name given and verified an outstanding warrant. Thus, the whole of the investigatory stop, which lasted the twenty minutes it took to confirm that the warrant was still outstanding, complied with *Terry's* mandate to stay within the scope of the circumstances justifying the initial stop.

The Eighth Circuit Court of Appeals found Officer Rust's original detention to be an investigatory stop based on a reasonably articulable suspicion and his actions during the stop to be within the scope of the original detention.



As such, the Court affirmed the district court's denial of Tuley's motion to suppress evidence obtained subsequent to the investigatory stop.

**SEARCH AND SEIZURE -
VEHICLE SEARCH;
PASSENGER IN A
VEHICLE HAS
STANDING TO
CHALLENGE AN
ILLEGAL STOP**

In *State v. Bowers*, CR 98-555, 10/8/98, the Arkansas Supreme Court stated that Salena Bowers, a passenger in a vehicle who was charged with possession of controlled substances, had standing to assert her own Fourth Amendment rights in challenging the search of the vehicle in which she was riding because the vehicle was illegally stopped. The Arkansas Court cited *United States v. Kimball*, 25 F.3d 1 (1st Cir. 1994), for the proposition that a passenger in a car has standing to contest a search *after an illegal stop*.

**SEXUAL OFFENDER
NOTIFICATION LAWS**

In *Noble v. Board of Parole and Post-Prison Supervision*, No. S43922, 9/11/98, the Oregon Supreme Court was faced with a challenge to the Oregon sexual predator statute. Noble sought a review of an order of the Board of Parole and Post-Prison Supervision that designated him as a "predatory sex offender" pursuant to Oregon Statute 181.585 *et seq.* Noble chal-

lenged the predatory sex offender statutes on various substantive constitutional grounds. He also contends that the Board's designation decision was defective procedurally—in particular, he asserts that the Board violated the Oregon Administrative Procedures Act and the Due Process Clause of the United States Constitution by designating him as a predatory sex offender without providing him with prior notice and a hearing. The Oregon Supreme Court concluded that Noble was not afforded the process to which he was entitled under the Due Process Clause and, consequently, that his designation as a predatory sex offender was invalid.

In *State v. Cook*, No. 97-1985, 9/30/98, the Ohio Supreme Court found that the Ohio Sexual Predator and Habitual Sex Offenders Act, containing provisions on classification, registration, and community notification, as applied to conduct prior to the effective date of the statute, does not violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution or the Ex Post Facto Clause of Section 10, Article I of the United States Constitution.

In *Commonwealth v. Hayle*, No. 2183, 10/6/98, the Pennsylvania Superior Court dealt with a challenge to Pennsylvania's sex offender registration scheme in which a board of experts evaluates the risk posed by a defendant found guilty of a sex offense and makes a risk classification recommendation. After a hearing, the court makes a classification determination. One part of the Pennsylvania statutory scheme established a presumption that defendants convicted of certain violent

sex offenses are sexually violent predators but which presumption can be rebutted at the classification hearing by clear and convincing evidence.

The Pennsylvania Superior Court stated that allocating the burden of persuasion to the defendant creates too great a risk of erroneous classification and public notification. The Court was of the opinion that this part of the statutory scheme violates the Fourteenth Amendment's Due Process Clause. The Court also struck down all the remaining sections of the Act which referred to the designation of a sexually violent predator.



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