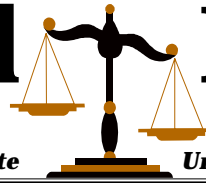




# CJI Legal Briefs



Criminal Justice Institute

University of Arkansas System

**Lee Colwell, Director**  
**Criminal Justice Institute**  
**University of Arkansas System**  
 7723 Asher Avenue, Suite B  
 Little Rock, AR 72204  
 501-570-8000  
 1-800-635-6310

**Edited by Don Kidd**

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## ADMINISTRATIVE LAW – ARKANSAS STATE POLICE'S CODE OF CONDUCT

In *Arkansas State Police Commission v. Smith*, No. 98-1096, 7/8/99, the Arkansas Supreme Court reviewed the decision of the Arkansas State Police Commission to terminate an Arkansas State Police Officer, Rhodis Smith, for violations of the Arkansas State Police Code of Conduct, which requires all employees to obey all laws and prohibits unbecoming conduct which brings the employee or the department into disrespect or otherwise brings the department into disrepute. The Commission determined that Smith's conduct in writing two hot checks and failing to make the checks good upon demand was a violation of the code, and imposed the sanction of termination from the state police.

On appeal the circuit court found that there was not substantial evidence to support the Commission's decision to terminate Mr. Smith's employment, and that the Commission's decision to terminate Smith's employment was arbitrary and capricious. The trial court reversed the Commission's decision to terminate Smith and imposed the disciplinary action of a six-month suspension without pay. The trial court directed that Smith be reinstated following the suspension.

The Commission appealed, contending that there was substantial evidence to support its decision, and that the decision was not arbitrary or capricious. The Arkansas Supreme Court agreed, reversed the trial decision, and affirmed the actions of the Arkansas State Police Commission.



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**AMERICANS WITH  
DISABILITIES ACT –  
INDIVIDUALS WHO  
COULD FULLY CORRECT  
THEIR VISUAL  
IMPAIRMENT ARE NOT  
DISABLED WITHIN THE  
MEANING OF THE ADA**

In *Sutton v. United Air Lines, Inc.*, No. 97-1943, 6/22/99, Karen Sutton and Kimberly Hinton, twin sisters both of whom have severe myopia, applied to United Air Lines, Inc., for employment as commercial airline pilots. They met United Air Lines' basic age, education, experience, and FAA certification qualifications. After submitting their applications for employment, both Sutton and Hinton were invited by United Air Lines to an interview and to flight simulator tests. Both were told during their interviews, however, that a mistake had been made in inviting them to interview because they did not meet United Air Lines minimum vision requirement, which was uncorrected visual acuity of 20/100 or better. Due to their failure to meet this requirement, Sutton and Hinton interviews were terminated, and neither was offered a pilot position.

Sutton and Hinton filed a charge of disability discrimination under the ADA with the Equal Employment Opportunity Commission (EEOC). After receiving a right to sue letter, they filed suit in the United States District Court for the District of Colorado, alleging that United Air Lines, Inc., had discriminated against them on the basis of their disability, or because United Air Lines regarded them as having a disability in violation of the

ADA. Specifically, petitioners alleged that due to their severe myopia they actually have a substantially limiting impairment or are regarded as having such impairment, and are thus disabled under the Act.

The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. Because petitioners could fully correct their visual impairments, the court held that they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA. The Court of Appeals for the Tenth Circuit affirmed the District Court's judgment. The United States Supreme Court granted certiorari and affirmed the decision of the Tenth Circuit.

The United States Supreme Court first discussed the statutory and regulatory framework of the Americans With Disabilities Act. The Court then turned to the question whether Sutton and Hinton have stated a claim under subsection 42 U.S.C. 12102(A) of the disability definition, that is, whether they have alleged that they possess a physical impairment that substantially limits them in one or more major life activities. Because they allege that with corrective measures their vision "is 20/20 or better," they are not actually disabled within the meaning of the Act if the "disability" determination is made with reference to these measures.

The Court then concluded that disability under ADA is to be determined with reference to corrective measures. Accordingly, Sutton and Hinton have not stated a claim

that they are substantially limited in any major life activity.

Sutton and Hinton also contended that United Air Lines, Inc., mistakenly believes their physical impairments substantially limit them in the major life activity of working. To support this claim, they alleged that United Air Lines, Inc., has a vision requirement, which is allegedly based on myth and stereotype. The United States Supreme Court analyzed this claim by stating that creating physical criteria for a job, without more, does not violate the ADA. The ADA allows employers to prefer some physical attributes over others, so long as those attributes do not rise to the level of substantially limiting impairments. An employer is free to decide that physical impairments or medical conditions that are not impairments are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for the job.

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**AMERICANS WITH  
DISABILITIES ACT –  
IMPAIRMENT  
EVALUATED IN ITS  
MEDICATED STATE**

In *Murphy v. United Parcel Service, Inc.*, No. 97-1992, 6/22/99, United Parcel Service, Inc. (UPS), dismissed petitioner Vaughn L. Murphy from his job as an UPS mechanic because of his high blood pressure. Murphy filed suit under Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 42 U.S.C. § 12101 et seq.,

in Federal District Court. The District Court granted summary judgment to UPS and the Court of Appeals for the Tenth Circuit affirmed. The issue before the United States Supreme Court was whether the Court of Appeals correctly considered Murphy in his medicated state when it held that his impairment does not substantially limit one or more of his major life activities and whether it correctly determined that Murphy is not regarded as disabled. The United States Supreme Court held that the Tenth Circuit resolved both issues correctly.

In August 1994, UPS hired Murphy as a mechanic, a position that required him to drive commercial motor vehicles. Murphy does not challenge the District Court's conclusion that driving a commercial motor vehicle is an essential function of the mechanic's job at UPS. To drive such vehicles, however, Murphy had to satisfy certain health requirements imposed by the Department of Transportation (DOT). One such requirement is that the driver of a commercial motor vehicle in interstate commerce have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."

At the time respondent hired him, petitioner's blood pressure was so high, measuring at 186/124, that he was not qualified for DOT health certification. Nonetheless, Murphy was erroneously granted certification, and he commenced work. In September 1994, a UPS Medical Supervisor who was reviewing petitioner's medical files discovered the error and requested that Murphy have his blood pres-

sure retested. Upon retesting, Murphy's blood pressure was measured at 160/102 and 164/104. On October 5, 1994, UPS fired petitioner on the belief that his blood pressure exceeded the DOT's requirements for drivers of commercial motor vehicles.

The first question presented in this case is whether the determination of Murphy's disability is made with reference to the mitigating measures he employs. The Court has answered that question in *Sutton v. United Air Lines, Inc.*, in the affirmative. Given that holding, the result in this case is clear. The Court of Appeals concluded that, when medicated, Murphy's high blood pressure does not substantially limit him in any major life activity. The question was limited to whether, under the ADA, the determination of whether an individual's impairment "substantially limits" one or more major life activities should be made without consideration of mitigating measures. The Court concluded that the Court of Appeals correctly affirmed the grant of summary judgment in UPS's favor on the claim that Murphy is substantially limited in one or more major life activities and thus disabled under the ADA.

The second issue presented is also largely resolved by the opinion in *Sutton v. United Air Lines, Inc.* Murphy argues that the Court of Appeals erred in holding that he is not "regarded as" disabled because of his high blood pressure. A person is "regarded as" disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life ac-

tivities. Here, Murphy alleges that his hypertension is regarded as substantially limiting him in the major life activity of working, when in fact it does not. To support this claim, he points to testimony from UPS's resource manager that UPS fired him due to his hypertension, which he claims evidences UPS's belief that his hypertension—and consequent inability to obtain DOT certification—substantially limits his ability to work. In response, UPS argues that it does not regard Murphy as substantially limited in the major life activity of working but, rather, regards him as unqualified to work as a UPS mechanic because he is unable to obtain DOT health certification.

The only issue remaining is whether the evidence that Murphy is regarded as unable to obtain DOT certification is sufficient to create a genuine issue of material fact as to whether Murphy is regarded as substantially limited in one or more major life activities. The evidence that Murphy is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether petitioner is regarded as unable to perform a class of jobs utilizing his skills. At most, Murphy has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce. In light of Murphy's skills and the array of jobs available to him utilizing those skills, he has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that Murphy is, at most, regarded as

unable to perform only a particular job. This is insufficient, as a matter of law, to prove that Murphy is regarded as substantially limited in the major life activity of working.

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**ADA – OTHER ISSUES**

In *Albertsons, Inc., v. Kirkingburg*, No. 98-591, 6/22/99, the issue posed to the United States Supreme Court is whether, under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case. The Supreme Court answered this by simply stating “no” on the issue.

In *Omstead v. L.C.*, No. 98-536, 6/22/99, the case before the United States Supreme Court concerned the proper interpretation of the anti-discrimination provisions contained in the public services portion (Title II) of the Americans With Disabilities Act, 42 U.S.C. §12132. Specifically, the Court confronted the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The Court answered with a qualified yes. Such action is in order when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking

into account the resources available to the State and the needs of others with mental disabilities. The Court did remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.

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**ARREST – PROTECTIVE SWEEP; DISCOVERY OF EVIDENCE IN PLAIN VIEW**

In *United States v. Boyd*, CA8, No. 98-3583, 6/21/99, the Eighth Circuit Court of Appeals reiterated that under *Maryland v. Buie*, 494 U.S. 325 (1990) a “protective sweep” is justified in connection with an in-home arrest if an officer reasonably believes that the area to be swept harbors an individual posing a danger to those at the arrest scene. The officer’s belief must be based on specific and articulable facts. If physical evidence is discovered in plain view during the course of a valid protective sweep, it is admissible at trial. See also *United States v. Evans*, 966 F.2d 398 (8<sup>th</sup> Cir. 1992) holding the plain view doctrine permits seizure of items if police are lawfully in position to observe item and if its incriminating character is immediately apparent.)




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**CIVIL LIABILITY – MEDIA REPRESENTATIVES INVITED TO ACCOMPANY LAW ENFORCEMENT IN EXECUTION OF A WARRANT IS A VIOLATION OF FOURTH AMENDMENT RIGHTS**

In *Wilson v. Lane*, No. 98-83, 5/24/99, while executing an arrest warrant in a private home, police officers invited representatives of the media to accompany them. The United States Supreme Court held that the presence of the media inside the premises violated the Fourth Amendment.

In early 1992, the Attorney General of the United States approved “Operation Gunsmoke,” a special national fugitive apprehension program in which United States Marshals worked with state and local police to apprehend dangerous criminals. One of the dangerous fugitives identified, as a target of “Operation Gunsmoke” was Dominic Wilson, the son of Charles and Geraldine Wilson. Dominic Wilson had violated his probation on previous felony charges of robbery, theft, and assault with intent to rob, and the police computer listed “caution indicators” that he was likely to be armed, to resist arrest, and to “assault police.” The computer also listed his address as 909 North StoneStreet Avenue in Rockville, Maryland. Unknown to the police, this was actually the home of Dominic Wilson’s parents.

In April 1992, the Circuit Court for Montgomery County issued three arrest warrants for Dominic Wilson, one for each of his probation violations. The warrants were each addressed to “any

duly authorized peace officer,” and commanded such officers to arrest him and bring him “immediately” before the Circuit Court to answer an indictment as to his probation violation. The warrants made no mention of media presence or assistance.

In the early morning hours of April 16, 1992, a Gunsmoke team of Deputy United States Marshals and Montgomery County Sheriffs Department Officers assembled to execute the Dominic Wilson warrants. The team was accompanied by a reporter and a photographer from *The Washington Post*, who had been invited by the Marshals to accompany them on their mission as part of a Marshal’s Service ride-along policy.

At around 6:45 a.m., the officers, with media representatives in tow, entered the dwelling at 909 North StoneStreet Avenue in the Lincoln Park neighborhood of Rockville. Charles and Geraldine Wilson were still in bed when they heard the officers enter the home. Charles Wilson, dressed only in a pair of briefs, ran into the living room to investigate. Discovering at least five men in street clothes with guns in his living room, he angrily demanded that they state their business, and repeatedly cursed the officers. Believing him to be an angry Dominic Wilson, the officers quickly subdued him on the floor. Geraldine Wilson next entered the living room to investigate, wearing only a nightgown. She observed her husband being restrained by the armed officers.

When their protective sweep was completed, the officers learned that Dominic Wilson was not in the house, and they departed. During the time that the officers were in

the home, *The Washington Post* photographer took numerous pictures. The print reporter was also apparently in the living room observing the confrontation between the police and Charles Wilson. At no time, however, were the reporters involved in the execution of the arrest warrant. *The Washington Post* never published its photographs of the incident.

Charles and Geraldine Wilson sued the law enforcement officials in their personal capacities for money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (the U.S. Marshals Service) and under 42 U.S.C. § 1983 (the Montgomery County Sheriff’s Department officers). They contended that the officers’ actions in bringing members of the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights. The District Court denied the officer’s motion for summary judgment on the basis of qualified immunity.

The Court of Appeals, a divided panel reversed and held the officers were entitled to qualified immunity. The case was twice reheard en banc, where a divided Court of Appeals again upheld the defense of qualified immunity. The Court of Appeals declined to decide whether the actions of the police violated the Fourth Amendment. It concluded instead that because no court had held (at the time of the search) that media presence during a police entry into a residence violated the Fourth Amendment, the right of Charles and Geraldine Wilson allegedly violated was not “clearly established” and thus qualified immunity was proper. 141 F.3d 111 (CA4 1998).

Five judges dissented, arguing that the officers’ actions did violate the Fourth Amendment, and that the clearly established protections of the Fourth Amendment were violated in this case. Recognizing a split among the Circuits on this issue, the United States Supreme Court granted certiorari in this case.

The Court stated that government officials performing discretionary functions generally are granted a qualified immunity and are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Although this case involves suits under both §1983 and *Bivens*, the qualified immunity analysis is identical under either cause of action. See, e.g., *Graham v. Connor*, 490 U.S. 386, 394, (1989); *Malley v. Briggs*, 475 U.S. 335, 340, (1986). A court evaluating a claim of qualified immunity “must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.” *Conn v. Gabbert*, 526 U.S. \_\_\_, (1999). This order of procedure is designed to “spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit.” *Siebert v. Gilley*, 500 U.S. 226, 232 (1991). Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to

the benefit of both the officers and the general public. See *County of Sacramento v. Lewis*, 523 U.S. 833, 840-842, (1998). The Court then turned to the Fourth Amendment question.

In 1604, an English court made the now-famous observation that “the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.” *Semayne’s Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K. B.). In his Commentaries on the Laws of England, William Blackstone noted that “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private.” William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769).

The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *U.S. Const. Amd. IV* (Emphasis added.) See also *United States v. United States District Court* 407 U.S. 297, 313 (1972) (“Physical entry of the home is the chief evil

against which the wording of the Fourth Amendment is directed”).

The Court’s decisions have applied these basic principles of the Fourth Amendment to situations, like those in this case, in which police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant. In *Payton v. New York*, 445 U.S. 573, 602 (1980), it was noted that although clear in its protection of the home, the common-law tradition at the time of the drafting of the Fourth Amendment was ambivalent on the question of whether police could enter a home without a warrant. The Court was ultimately persuaded that the “overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic” meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest. The Court decided that “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”

Here, of course, the officers had such a warrant, and they were undoubtedly entitled to enter the Wilson home in order to execute the arrest warrant for Dominic Wilson. But it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them. In *Horton v. California*, 496 U.S. 128, 140 (1990), the Court held that “if the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the

subsequent seizure is unconstitutional without more.” While this does not mean that every police action while inside a home must be explicitly authorized by the text of the warrant, the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion, see *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). See also *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (“The purposes justifying a police search strictly limit the permissible extent of the search”).

Certainly the presence of reporters inside the home was not related to the objectives of the authorized intrusion. The officers concede that the reporters did not engage in the execution of the warrant, and did not assist the police in their task. The reporters, therefore, were not present for any reason related to the justification for police entry into the home—the apprehension of Dominic Wilson.

This is not a case in which the presence of the third parties directly aided in the execution of the warrant. Where the police enter a home under the authority of a warrant to search for stolen property, the presence of third parties for the purpose of identifying the stolen property has long been approved by this Court and our common-law tradition. See, e. g., *Entick v. Carrington*, 19 How. St. Tr. 1029, 1067 (K. B. 1765) (in search for stolen goods case, “the owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description”) (quoted with approval in *Boyd v. United States*, 116 U.S.

616, 628 (1886)).

The officers argue that the presence of *The Washington Post* reporters in the Wilsons' home nonetheless served a number of legitimate law enforcement purposes. They first assert that officers should be able to exercise reasonable discretion about when it would "further their law enforcement mission to permit members of the news media to accompany them in executing a warrant." But this claim ignores the importance of the right of residential privacy at the core of the Fourth Amendment. It may well be that media ride-alongs further the law enforcement objectives of the police in a general sense, but that is not the same as furthering the purposes of the search. Were such generalized "law enforcement objectives" themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down.

The officers next argue that the presence of third parties could serve the law enforcement purpose of publicizing the government's efforts to combat crime, and facilitate accurate reporting on law enforcement activities. There is certainly language in Court opinions interpreting the First Amendment which points to the importance of "the press" in informing the general public about the administration of criminal justice. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975), for example, the Court said "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring

to him in convenient form the facts of those operations." See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). No one could gainsay the truth of these observations, or the importance of the First Amendment in protecting press freedom from abridgement by the government. But the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged.

Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.

Finally, the officers argue that the presence of third parties could serve in some situations to minimize police abuses and protect suspects, and also to protect the safety of the officers. While it might be reasonable for police officers to themselves videotape home entries as part of a "quality control" effort to ensure that the rights of homeowners are being respected, or even to preserve evidence, cf. *Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (noting the use of a "mounted video camera" to record the details of a routine traffic stop), such a situation is significantly different from the media presence in this case. *The Washington Post* reporters in the Wilsons' home were working on a story for their own purposes. They were not present for the purpose of protecting the officers, much less the

Wilson. A private photographer was acting for private purposes, as evidenced in part by the fact that the newspaper and not the police retained the photographs. Thus, although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible, the presence of these third parties was not.

The reasons advanced by the officers, taken in their entirety, fall short of justifying the presence of media inside a home. The United States Supreme Court then held that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.

Since the police action in this case violated the Fourth Amendment rights of Charles and Geraldine Wilson, the Court now must decide whether this right was clearly established at the time of the search. See *Siegert*, 500 U.S., at 232-233.

The United States Supreme Court stated that before this decision the law on third-party entry into homes was not clearly established. Given such an undeveloped state of the law, the officers in this case cannot have been "expected to predict the future course of constitutional law." A split had developed between the Federal Circuits on the question of whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject the police to money damages for picking the losing side of

the controversy.

In *Hanlon v. Berger*, in a per curiam decision also decided on 5/24/99, Paul and Erma Berger sued special agents of the United States Fish and Wildlife Service and an assistant United States attorney for damages under *Bivens v. Six Unknown Fed. Narcotics Agents* 403 U.S. 388 (1971). They alleged that the conduct of the law enforcement officers and the assistant United States attorney had violated their rights under the Fourth Amendment to the United States Constitution. The United States Supreme court granted certiorari.

The Berger's live on a 75,000-acre ranch near Jordan, Montana. In 1993, a Magistrate Judge issued a warrant authorizing the search of "The Paul W. Berger ranch with appurtenant structures, excluding the residence" for evidence of "the taking of wildlife in violation of Federal laws." About a week later, a multiple-vehicle caravan consisting of Government agents and a crew of photographers and reporters from Cable News Network, Inc. (CNN), proceeded to a point near the ranch. The agents executed the warrant and explain that "Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew ... accompanied and observed the officers, and the media crew recorded the officers' conduct in executing the warrant."

A review of the complaint's much more detailed allegations to the same effect satisfied the United States Supreme Court that the Berger's alleged a Fourth Amendment violation under the Court's

decision in *Wilson v. Layne*. There the Court held that police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home. The Court also held that because the law on this question before the May 24, 1999 decision was not clearly established, the police in that case were entitled to the defense of qualified immunity.

Even though the officers may have violated the Fourth Amendment rights of the Bergers, they are entitled to the defense of qualified immunity. The holding in *Wilson* makes clear that this right was not clearly established in 1992. The United States Supreme Court vacated the judgment of the Court of Appeals for the Ninth Circuit and remanded the case for further proceedings consistent with their decision.

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**CIVIL LIABILITY –  
QUALIFIED IMMUNITY**

In *Lyles v. City of Barling*, CA8, No. 98-2788, 6/28/99, certain law enforcement officers of the City of Barling sought summary judgment on the basis of qualified immunity. The Eighth Circuit Court of Appeals stated that a law enforcement officer is entitled to qualified immunity from suit for actions that are objectively reasonable in light of clearly established law and the facts known by the officer at the time of his actions. When material issues of fact exist concerning the officer's knowledge and the reasonableness of their actions in light of the facts, this pre-

cludes a grant of summary judgment on the basis of qualified immunity.

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**DAMAGES – PUNITIVE  
DAMAGES IN TITLE VII  
LITIGATION**

In *Kolstad v. American Dental Association*, No. 98-208, 6/22/99, the United States Supreme Court to resolve a conflict among the Federal Courts of Appeals concerning the circumstances under which a jury may consider a request for punitive damages in cases under Title VII of the Civil Rights Act. In the discussion of the issue the United States Supreme Court stated that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII."

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**DUE PROCESS –  
CHICAGO'S GANG  
CONGREGATION  
ORDINANCE VIOLATES  
THE DUE PROCESS  
CLAUSE OF THE  
FOURTEENTH  
AMENDMENT TO THE  
UNITED STATES  
CONSTITUTION**

In *Chicago v. Morales*, No. 97-1121, 6/10/99, the United States Supreme Court was presented with the question whether the Supreme Court of Illinois correctly

held that the Gang Congregation Ordinance violates the Due Process clause of the Fourteenth Amendment to the Federal Constitution. In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place.

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, the burgeoning presence of street gang members in public places has intimidated many law-abiding citizens. Furthermore, the council stated that gang members establish control over identifiable areas by loitering in those areas and intimidating others from entering those areas; and members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present. It further found that loitering in public places by crimi-

nal street gang members creates a justifiable fear for the safety of persons and property in the area and that aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear. Moreover, the council concluded that the city has an interest in discouraging all persons from loitering in public places with criminal gang members.

The ordinance creates a criminal offense punishable by a fine of up to \$500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member." Second, the persons must be "loitering," which the ordinance defines as remaining in any one place with no apparent purpose. Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern its enforcement. That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." Chicago Police Department,

General Order 92-4. The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, and establish detailed criteria for defining street gangs and membership in such gangs. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated areas." The city, however, does not release the locations of these "designated areas" to the public.

During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid. In *Youkhana's* case, the trial judge held that the "ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police."

The Illinois Appellate Court affirmed one the trial court's ruling in these cases, consolidated and affirmed other pending appeals, and reversed the convictions of Gutierrez, Morales, and others. The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of non-gang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it im-

properly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment. The United States Supreme Court granted certiorari and affirmed. Like the Illinois Supreme Court, the Court concluded that the ordinance enacted by the city of Chicago is unconstitutionally vague.

The United States Supreme Court first considered whether the ordinance provides fair notice to the citizen and then discussed its potential for arbitrary enforcement.

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966). The Illinois Supreme Court recognized that the term “loiter” may have a common and accepted meaning but the definition of that term in this ordinance—“to remain in any one place with no apparent purpose”—does not. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an “apparent purpose.” If he/she were talking to another person, would he/she have an apparent purpose? If he/she were frequently checking his/her watch and looking expectantly down the street, would he/she have an apparent purpose?

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of “loitering,” but rather about what loitering is

covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law’s failure to distinguish between innocent conduct and conduct threatening harm. Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term “loitering” with a second specific element of the crime.

The city’s principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer’s order to disperse. Whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do. The United States Supreme Court found this response unpersuasive for at least two reasons.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the pub-

lic they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965). Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse.

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer “shall order all such persons to disperse and remove themselves from the area.” This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they

subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of “neighborhood” and “locality.” *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). In *Connally* it was stated that both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles.

Lack of clarity in the description of the loiterer’s duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear, but it does buttress the conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted.

The Constitution does not permit a legislature to “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” *United States v. Reese*, 92 U.S. 214, 221 (1876). This ordinance is therefore vague “not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

The broad sweep of the ordinance also violates the requirement that a legislature establish

minimal guidelines to govern law enforcement. There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, he may—indeed, he “shall”—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, The Court then turned to the ordinance language to determine if it “necessarily entrusts lawmaking to the moment-to-moment judgment of

the policeman on his beat.” *Kolender v. Lawson*, 461 U.S., at 359. The principal source of the vast discretion conferred on the police in this case is the definition of loitering as “to remain in any one place with no apparent purpose.”

The city argues that the text of the ordinance limits the officer’s discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can be issued unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang. The Court found each of these limitations insufficient. That the ordinance does not apply to people who are moving—that is, to activity that would not constitute loitering under any possible definition of the term—does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance. Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The “no apparent purpose” standard for making that decision is inherently subjective because its application depends on whether some purpose is “apparent” to the officer on the scene.

Presumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a differ-

ent ulterior motive. Moreover, an officer conscious of the city council’s reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to non-gang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council’s findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang’s dominance of certain territory, thereby intimidating nonmembers, or by an

equally apparent purpose to conceal ongoing commerce in illegal drugs. The Court must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

That the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

The Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." The Court recognizes the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. The preservation of liberty depends in part on the maintenance of social order. *Houston v. Hill*, 482 U.S. 451, 471-472 (1987). However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets. The judgment of the Supreme Court of Illinois is affirmed.

### EMPLOYMENT DISCRIMINATION – RETALIATION

In *Scott v. County of Ramsey*, CA8, No. 98-2550, 6/1/99, Gregory Scott (Scott), a former deputy, was terminated shortly after he participated in an internal sexual harassment investigation. He sued his employer, the Ramsey County Minnesota Sheriff's Department for discriminatory retaliation in violation of Title VII of the Civil Rights Act of 1964. The jury returned a verdict for Scott. The County then appealed to the Eighth Circuit Court of Appeals who affirmed.

Scott began working as a deputy sheriff for Ramsey County in July 1990. As is the case with all new deputies, Scott was subject to a one-year probationary period, during which time he was an at-will employee and could be fired for any reason. Scott was assigned to work in the Ramsey County Adult Detention Center. In his six-month performance evaluation (completed March 12, 1991), Scott was warned that he should be more careful about his use of sick time. On June 22, Scott received his performance review for the end of the probationary period. He was rated as "meets standards" in all relevant categories of performance, including attendance. In the area for comments, his supervisor wrote "Deputy Scott knows and does his job well. In his 6 mo Eval (sic) it was noted he had an extended sick leave usage. I believe this was just bad luck. Deputy Scott has not used any sick time since."

On the same day that he received his second performance

evaluation, Scott was ordered to give a statement in an internal investigation regarding a sexual harassment claim that had been filed by another probationary deputy, Mark Kolasa. The deputy complained of inappropriate and offensive sexual behavior and comments by two female deputies, and named Scott as a person with first-hand knowledge of the problem. Kolasa further alleged that his supervisor, Sergeant Biehn, was aware of the behavior and had failed to take any remedial action. Biehn supervised both Scott and Kolasa. Scott gave a recorded statement on June 26 that confirmed the inappropriate comments by the female deputies. Scott also stated that he was sure that Biehn was aware of the behavior, and that he was not aware that Biehn had taken any corrective action. During the first week of July, three to five days after receiving the report of the completed internal affairs investigation, the County's undersheriff ordered a subordinate to assemble negative information regarding Scott for the purpose of documenting his termination, despite the fact that he had seen the favorable end-of-probation performance review. On July 25, Scott was terminated. At this time, Scott was given his "Report of Permanent Appointment of Probationary Appointee" form, which stated that his attendance and observance of work hours were unacceptable, his personal conduct was marginal, and his job performance was satisfactory. Scott filed this action, alleging that he was terminated in retaliation for participating in a protected activity. At trial, the County advanced abuse of sick leave and missed training as the reasons Scott was terminated,

pointing out that shortly after his final favorable review, Scott missed a training class and used another sick day. Scott presented evidence that other probationary deputies had used more sick leave than he and were not terminated. He also showed that he was the only individual, who, in spite of receiving a favorable end-of-probation review, was not retained.

The jury awarded Scott approximately \$174,000 in back pay, and \$126,000 in compensatory damages. Ramsey County appeals, arguing that the evidence fails to establish that there was a causal connection between Scott's participation in the investigation and his termination.

To establish a prima facie case of retaliation, the plaintiff must show that he engaged in a protected activity, that the defendant took adverse action against him, and that there is a connection between the two. See, e.g., *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997). After this initial showing is made, a presumption of retaliation arises, and the burden of production shifts to the defendant to advance a legitimate reason for the employment action, in this case, termination. Once the defendant succeeds in advancing a legitimate reason for the adverse action, the presumption drops out and the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven that the defendant intentionally discriminated against the plaintiff. In some situations, this can be shown indirectly by establishing that the defendant's proffered reason is merely a pretext for retaliation. However, the ultimate burden of persuasion remains

with the plaintiff to show that the termination was motivated by intentional retaliation.

Scott's evidence showed essentially three things: that his termination and the stated reasons for it were inconsistent with his performance evaluation; the close temporal proximity of his participation in the investigation and his termination; and disparate treatment. Additionally, the County's witnesses gave conflicting testimony. Given the evidence presented, a reasonable jury could disbelieve the County's proffered legitimate reason and infer the causal connection between Scott's protected activity and his termination.

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**EVIDENCE – RELEVANCY  
OF AUTOPSY  
PHOTOGRAPHS**

In *Stewart v. State*, CA CR 98-1118, 6/2/99, one of the issues raised was two autopsy photographs showing metal rods that were inserted through the gunshot wounds. Stewart argued that these photographs were inflammatory and prejudicial and that the photographs depicted the victim as if pinned to a styrofoam board as part of an insect collection.

The Arkansas Court of Appeals stated that the photographs taken by the medical examiner's office helped the witness explain the path of the bullets through the victim's body. The photographs were admitted for valid purposes, and the probative value of the evidence was substantially outweighed by any danger of unfair

prejudice that may have resulted from the introduction of the photographs.

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**FAIR LABOR STANDARDS  
ACT – CONGRESS DOES  
NOT HAVE THE POWER  
TO SUBJECT  
NONCONSENTING STATES  
TO PRIVATE SUITS FOR  
OVERTIME PAY AND  
LIQUIDATED DAMAGES  
IN STATE COURTS**

In *Alden v. Maine*, No. 98-436, 6/3/99, a group of probation officers, filed suit in 1992 against their employer, the State of Maine, in the United States District Court for the District of Maine. The officers alleged the State violated the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U.S.C. § 201 et seq., and sought compensation and liquidated damages. While the suit was pending, the United States Supreme Court decided *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), which made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts. Upon consideration of *Seminole Tribe*, the District Court dismissed petitioners' action, and the Court of Appeals affirmed. *Mills v. Maine*, 118 F.3d 37 (CA1 1997). The probation officers then filed the same action in state court. The state trial court dismissed the suit on the basis of sovereign immunity, and the Maine Supreme Judicial Court affirmed. 715 A.2d 172 (1998).

The Maine Supreme Judicial Court's decision conflicts with the decision of the Supreme Court of Arkansas, *Jacoby v. Arkansas Dept. of Ed.*, 331 Ark. 508, 962 S. W. 2d 773 (1998), and calls into question the constitutionality of the provisions of the FLSA purporting to authorize private actions against States in their own courts without regard for consent, see 29 U.S.C. § 216(b), 203(x). In light of the importance of the question presented and the conflict between the courts, the United States Supreme Court granted certiorari. The United States intervened as a petitioner to defend the FLSA statute.

The United States Supreme Court held that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. The Court also decided that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises they affirmed the judgment sustaining dismissal of the suit.

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**FORFEITURE –  
AUTOMOBILE  
EXCEPTION ALSO  
APPLIES TO SEIZURE OF  
VEHICLE PURSUANT TO  
FLORIDA CONTRABAND  
FORFEITURE ACT**

In *Florida v. White*, No. 98-223, 5/17/99, the United States Supreme Court scrutinized the Florida Contraband Forfeiture Act which provides that certain forms of contraband, including motor ve-

hicles used in violation of the Act's provisions, may be seized and potentially forfeited. In this case, the Court had to decide whether the Fourth Amendment requires the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband. The Supreme Court held that it does not.

On three occasions in July and August 1993, police officers observed Tyvessel Tyvorus White using his car to deliver cocaine, and thereby developed probable cause to believe that his car was subject to forfeiture under the Florida Contraband Forfeiture Act, Fla. Stat. §932.701 et seq. (1997). Several months later, the police arrested White at his place of employment on charges unrelated to the drug transactions observed in July and August

1993. At the same time, the arresting officers, without securing a warrant, seized White's automobile in accordance with the provisions of the Act. See §932.703(2)(a). They seized the vehicle solely because they believed that it was forfeitable under the Act. During a subsequent inventory search, the police found two pieces of crack cocaine in the ashtray. Based on the discovery of the cocaine, White was charged with possession of a controlled substance in violation of Florida law.

At his trial on the possession charge, White filed a motion to suppress the evidence discovered during the inventory search. He argued that the warrantless seizure of his car violated the Fourth Amendment, thereby making the cocaine the "fruit of the poisonous tree." The trial court initially re-

served ruling on White's motion, but later denied it after the jury returned a guilty verdict. On appeal, the Florida First District Court of Appeal affirmed. Adopting the position of a majority of state and federal courts to have considered the question, the court rejected respondent's argument that the Fourth Amendment required the police to secure a warrant prior to seizing his vehicle. Because the Florida Supreme Court and the United States Supreme Court had not directly addressed the issue, the Supreme Court certified to the Florida Supreme Court the question whether, absent exigent circumstances, the warrantless seizure of an automobile under the Act violated the Fourth Amendment.

In a divided opinion, the Florida Supreme Court answered the certified question in the affirmative, quashed the First District Court of Appeal's opinion, and remanded. The majority of the Florida Court concluded that, absent exigent circumstances, the Fourth Amendment requires the police to obtain a warrant prior to seizing property that has been used in violation of the Act. According to the court, the fact that the police develop probable cause to believe that such a violation occurred does not, standing alone, justify a warrantless seizure. The court expressly rejected the holding of the Eleventh Circuit, see *United States v. Valdes*, 876 F.2d 1554 (1989), and the majority of other Federal Circuits to have addressed the same issue in the context of the federal civil forfeiture law, 21 U.S.C. §881, which is similar to Florida's. See *United States v. Decker*, 19 F.3d 287 (CA6 1994)

(per curiam); *United States v. Pace*, 898 F.2d 1218, 1241 (CA7 1990); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297 (CA5 1983); *United States v. Kemp*, 690 F.2d 397 (CA4 1982); *United States v. Bush*, 647 F.2d 357 (CA3 1981). But see *United States v. Dixon*, 1 F.3d 1080 (CA10 1993); *United States v. Lasanta*, 978 F.2d 1300 (CA2 1992); *United States v. Linn*, 880 F.2d 209 (CA9 1989). The United States Supreme Court then granted certiorari and then reversed the Florida Court.

The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and further provides that no Warrants shall issue, but upon probable cause. U.S. Constitution, Amendment 4. In deciding whether a challenged governmental action violates the Amendment, the Court has taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed. See *Wyoming v. Houghton*, 526 U.S. \_\_\_, \_\_\_ (1999); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (“The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens”).

In *Carroll*, the Court held that when federal officers have probable cause to believe that an automobile contains contraband, the Fourth Amendment does not require them to obtain a warrant prior to searching the car for and seizing the contraband. The holding

was rooted in federal law enforcement practice at the time of the adoption of the Fourth Amendment. Specifically, the Court looked to laws of the First, Second, and Fourth Congresses that authorized federal officers to conduct warrantless searches of ships and to seize concealed goods subject to duties. These enactments led the Court to conclude that contemporaneously with the adoption of the Fourth Amendment, Congress distinguished “the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.

The Florida Supreme Court recognized that under *Carroll*, the police could search White’s car, without obtaining a warrant, if they had probable cause to believe that it contained contraband. The court, however, rejected the argument that the warrantless seizure of White’s vehicle itself also was appropriate under *Carroll* and its progeny. It reasoned that there is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and the discretionary seizure of a citizen’s automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The United States Supreme Court disagreed.

The principles underlying the rule in *Carroll* and the founding-era statutes upon which they are based fully support the conclusion that the warrantless seizure of White’s car

did not violate the Fourth Amendment. Although, as the Florida Supreme Court observed, the police lacked probable cause to believe that White’s car contained contraband, they certainly had probable cause to believe that the vehicle itself was contraband under Florida law. Recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*. See 267 U.S., at 150-152; see also *California v. Carney*, 471 U.S. 386, 390 (1985); *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). This need is equally weighty when the automobile, as opposed to its contents, is the contraband that the police seek to secure. Furthermore, the early federal statutes that the Court looked to in *Carroll*, like the Florida Contraband Forfeiture Act, authorized the warrantless seizure of both goods subject to duties and the ships upon which those goods were concealed.

In addition to the special considerations recognized in the context of movable items, Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places. For example, although a warrant presumptively is required for a felony arrest in a suspect’s home, the Fourth Amendment permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred. See *United States v. Watson*, 423 U.S. 411, 416-424 (1976). In explaining this rule, the Court has drawn upon the established distinction between a warrantless seizure in an open area

and such a seizure on private premises. *Payton v. New York*, 445 U.S. 573, 587 (1980) (“It is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant”). The principle that underlies *Watson* extends to the seizure at issue in this case. Indeed, the facts of this case are nearly indistinguishable from those in *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). There, the Court considered whether federal agents violated the Fourth Amendment by failing to secure a warrant prior to seizing automobiles in partial satisfaction of income tax assessments. The Court concluded that they did not, reasoning that the seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy. Here, because the police seized White’s vehicle from a public area—White’s employer’s parking lot—the warrantless seizure also did not involve any invasion of White’s privacy. Based on the relevant history and prior precedent, the Court therefore concluded that the Fourth Amendment did not require a warrant to seize White’s automobile in these circumstances.

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**JAILS AND PRISONS –  
ANTIPSYCHOTIC  
MEDICATION**

In *Singleton v. Norris*, No. CR 98-218, 6/17/99, the Arkansas Supreme Court held that the state may administer antipsychotic medication to a condemned prisoner, in

order to keep him from being a danger to himself and others, when a collateral effect of that medication is to render him competent to understand the nature and reason for his execution.

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**JAILS AND PRISONS –  
PRISON DISCIPLINARY  
PROCEEDINGS**

In *Bridgeman v. Ault*, CA8, No. 98-3681SI, 6/14/99, Danny Bridgeman, an Iowa prison inmate, alleged that prison officials denied his constitutional right to present a defense during a disciplinary action. Bridgeman, who lost 16 days of good-time credits, had offered to submit to a urine test or to pay for and submit to a polygraph examination, while preparing for his defense. He also asked that a container of marijuana be tested for fingerprints, but this was not done.

The Eighth Circuit Court of Appeals stated that an inmate must be afforded procedural protections before being deprived of a protected liberty interest in good-time credits. *Wolff v. McDonnell*, 418 U.S. 539 (1974). Specifically, in prison disciplinary proceedings, an inmate is entitled to (1) advance written notice of charges, (2) an opportunity to call witnesses and present documentary evidence when doing so will not be unduly hazardous to institutional safety or correctional goals, and (3) a written statement of the reasons for any disciplinary action taken. While an inmate may call witnesses and present documentary evidence, prison officials have the discretion to keep the hearing within reason-

able limits and to limit access to compile documentary evidence. Bridgeman was not constitutionally entitled to administration of a drug or polygraph test, or to the performance of a fingerprint analysis.

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**MIRANDA – ARMED AND  
BARRICADED SUSPECT  
DIDN’T REQUIRE THE  
MIRANDA WARNINGS**

In *State v. Finch*, Wash., No. 62938-2, 5/6/99, the Washington Supreme Court held that statements a defendant made during telephonic discussions with SWAT negotiators while he was barricaded in a home after shooting two people are admissible even though the negotiators did not give him an advisement under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Washington Supreme Court felt that the public safety exception to *Miranda* announced in *New York v. Quarles*, 467 U.S. 649 (1984), applied to this case. The Court offered the opinion that giving the *Miranda* warnings in this situation could have further upset the defendant and eroded the atmosphere of trust necessary to convince him to surrender peacefully.

In this case, one of the negotiators tried to calm the defendant by telling him that perhaps he had shot his wife’s friend in self-defense. The defendant replied, “Hell, it wasn’t no self-defense. It was premeditated. I shot him.” The incriminating statements the defendant made at the barricaded situation were introduced into evidence against him at his murder trial.

**MIRANDA – JUVENILES**

In *Matthews v. State*, CA 98-1110, 6/9/99, Matthews was found to have committed capital murder of her father and attempted capital murder of her mother, was adjudicated delinquent, and was committed to the custody of the Division of Youth Services.

The Arkansas Court of Appeals stated that Arkansas Code Annotated § 9-27-317(g)(2) deals specifically with waiver of counsel in the context of interactions between law enforcement officers and juveniles. This section provides that:

(g)(2)(A) 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:

- (i) Does not wish to be questioned;
- (ii) Wishes to speak with a parent or guardian or to have a parent or guardian present; or
- (iii) Wishes to consult counsel before submitting to any questioning.

(B) Any waiver of the right to counsel by a juvenile shall conform to subsection (f) of this section.

The Arkansas Court of Appeals noted that in *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996), the Arkansas Supreme Court held that, under subsection (g), the burden is on the

juvenile to ask to consult with his parent. Consequently, the trial court correctly ruled that the police officer was not required to inform Matthews of her right to have

a parent or guardian present prior to questioning. The Court of Appeals held that it was unnecessary under current Arkansas law for Matthews's parent, guardian, or custodian, to consent to her waiver of the right to counsel in connection with her custodial statement.

In *Miller v. State*, No. 99-277, 7/15/99, the Arkansas Supreme Court addressed the issue of whether or not officers are required to inform juveniles of their right, under § 9-27-17(g)(2)(A)(ii), to speak to their parent or guardian, or to have one present during questioning.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that during a custodial interrogation officers must inform the accused of certain constitutional rights, including the privilege against self-incrimination and the right to an attorney. These rights were extended to juveniles in *In re Gault*, 387 U.S. 1 (1967). There is not, however, a constitutional right for a juvenile to speak to a parent or guardian or to have one present during questioning. In fact, in *Fare v. Michael C.*, 442 U.S. 707 (1979), the United States Supreme Court held that a juvenile did not have a constitutional right to speak to his probation officer even though the juvenile trusted the probation officer who had a statutory duty to act in the juvenile's best interest. In reaching this result, the United States Supreme Court explained that the Constitution gives juveniles, as well as adults, only the right to speak to an attorney.

Although it is not required by the Constitution, the Arkansas General Assembly has given juveniles the statutory right to speak to a

parent or guardian or to have one present during questioning. Ark. Code Ann. § 9-27-317(g)(2)(A)(ii). The Arkansas Supreme Court emphasized that without this statutory provision, the police would not be required to allow a juvenile to speak to his parent or guardian even if the juvenile repeatedly made such a request. Because the right is statutory instead of constitutional, Miranda does not require the police to inform juveniles of that right. Hence, the Arkansas Supreme Court turned to the plain language of the act to determine if the legislature intended to impose such an obligation on the police. After a thorough review, the Arkansas Court could find no such requirement in the clear language of the statute.

In sum, the legislature has given a juvenile the statutory right to speak to a parent or guardian or to have one present upon the condition that the juvenile makes such a request. The legislature has not, however, imposed upon the police the duty to inform the juvenile of that right, and the Court would not do so where the statute is silent.

**MIRANDA – PUBLIC SAFETY EXCEPTION**

In *United States v. Williams*, CA8, No. 98-4322, 6/22/99, police officers obtained a search warrant to search Williams' apartment for drugs. The officers made a forced entry into the apartment and quickly handcuffed the defendant from behind as he lay in bed. An officer asked Williams if there was anything they needed to be aware

of? Williams responded by telling the officer the location of a loaded handgun in a closet.

The Eighth Circuit Court of Appeals found that Williams' statement was admissible under the public safety exception to Miranda set forth by the Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984). Under that exception, a suspect's answers to questions from a police officer are admissible in the absence of a Miranda warning so long as the questions asked of the suspect are "reasonably prompted by a concern for the public safety." *United States v. Lawrence*, 952 F.2d 1034, 1036 (8th Cir. 1992)(quoting *Quarles*, 467 U.S. at 656). The Court believes public safety concerns were an issue in this case. Although Williams' hands were cuffed behind his back when the officers asked him if they needed to be aware of anything else, the officers could not have known if any armed individuals were present in the apartment or preparing to enter the apartment within a short period of time. Similarly, the officers could not have known whether other hazardous weapons were present in the apartment that could cause them harm if they happened upon them unexpectedly or mishandled them in some way. Therefore, the district court did not commit error by admitting Williams' statement identifying the location of the gun.

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**MIRANDA – STATEMENT  
INDUCED BY FALSE  
PROMISE**

In *Williams v. State*, CR 97-949, 6/10/99, Marcel Williams ap-

pealed his death sentence in connection with charges of capital murder, kidnapping, rape and aggravated murder which arose out of his abduction and murder of Stacy Errickson on November 20, 1994. The Arkansas Supreme Court was required to deal with numerous issues raised by Williams in his appeal.

Among the issues raised by Mr. Williams was his contention that his statement was not voluntary because he was enticed by promises. He alleges the officers promised to go to the prosecutor and tell him Mr. Williams had cooperated and knew he'd made a mistake. "A statement induced by a false promise of reward or leniency is not a voluntary statement." *Knight v. State*, 62 Ark. App. 230, 233, 971 S.W.2d 272 (1998), quoting *Clark v. State*, 328 Ark. 501, 944 S.W.2d 533 (1997). As with other aspects of voluntariness, we look at the totality of the circumstances. *Conner v. State*, 334 Ark. 457, 469-70, 982 S.W.2d 655 (1998). During the interview, Williams, not the police, raised the prospect of police discussions with the prosecutors. Although the officer mentioned he would relate Williams's cooperation to the prosecutor, no assurance of any benefit to Williams was conveyed. The Arkansas Supreme Court found no false promise of leniency.

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**MIRANDA – VOLUNTARY  
WAIVER**

In *Rushing v. State*, CR 97-321-4, 6/24/99, Kenneth Joel Rushing appealed his conviction of mur-

der in the first degree for stabbing William Jack Allen to death in rural Miller County, Arkansas. Rushing was arrested at his residence. Captain Toby Giles, of the Miller County Sheriff's Office, told investigator Nicholas to read Rushing his Miranda rights. The reading of Rushing's rights and his response that he understood those rights was witnessed by Sheriff Phillips, Captain Giles, Deputy Thomas Clay, and Officer McWhirter. All of the officers testified that they witnessed investigator Nicholas reading Rushing his Miranda rights, that he said that he understood the rights, and that he appeared to understand his rights. Rushing was then transported to the sheriff's department.

After arriving at the department, Captain Giles explained the nature of the charges, asked Rushing if he had any questions, and whether he wanted an attorney. The reading of his Miranda rights was not repeated. Rushing replied that he did not want an attorney, and again acknowledged that he understood his rights. Rushing declined to have his statement recorded but agreed to give a written statement. Officer McWhirter wrote down the statement, read it to Rushing, and allowed him to look over the statement. Rushing then signed the statement, which was witnessed by Captain Giles and Officer McWhirter.

The Arkansas Supreme Court stated that the issue of whether or not Rushing knowingly and intelligently waived his rights must be determined by the totality of the circumstances. The burden is on the State to show that a defendant's confession was made after a voluntary, knowing, and intelligent waiver of the right to re-

main silent. *Cagle v. State*, 267 Ark. 1145, 594 S.W.2d 573 (1980). Rushing's confession was given without counsel. The test is whether Rushing was effectively warned of his rights and knowingly and willingly decided to waive them. *United States v. Harden*, 480 F.2d 649 (8th Cir. 1973). While obtaining a written waiver of rights is desirable, the failure to do so does not invalidate a voluntary confession where there is no contention that the rights were not explained or understood. Rushing does not claim that he did not understand his rights, but argues that the State did not prove that he waived them. The Court noted that a signed waiver form is not required to have a voluntary confession.

There is indeed a difference between the contention that a statement was made involuntarily and the contention that an accused did not knowingly and voluntarily waive his right to remain silent. Rushing does not argue that his statement was involuntary. Rather, he argues that he did not waive his right to remain silent. This argument focuses upon whether the waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it, as well as whether the accused made the choice, uncoerced by police, to waive his rights.

Rushing is 37 years old, has a ninth-grade education, and an I.Q. of 80. Rushing argued that a head injury received several years earlier had reduced his mental capacity. The Court stated that while mental capacity is a factor to be considered, it alone is not sufficient to suppress a confession. *Misskelley v. State*, 323 Ark. 449,

915 S.W.2d 702 (1996). Likewise, a low score on an intelligence-quotient test does not mean that a suspect is incapable of voluntarily making a confession or waiving his right. *Oliver v. State* 322 Ark. 8, 907 S.W.2d 706 (1995); *Hart v. State*, 312 Ark. 600, 852 S.W.2d 312 (1993); *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990). Appellant was questioned three hours after receiving the Miranda warnings and gave his statement in 45 minutes.

The Arkansas Supreme Court noted that Rushing was familiar with criminal procedures, having previously received three D.W.I. convictions. He was coherent while giving his statement and there was no allegation that he was coerced, threatened, or promised anything for giving a statement. Officer McWhirter stated that he had participated in several hundred interviews and that it appeared Rushing was making his statement voluntarily. He further testified that Rushing said he understood his rights.

The Arkansas Supreme Court, applying the totality of the circumstances test, concluded that the trial court's finding that Rushing voluntarily waived his right to remain silent was not clearly against the preponderance of the evidence.

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**SEARCH AND SEIZURE –  
CANINE SNIFF**

In *United States v. \$404,905.00 in U.S. Currency*, CA8, No. 98-2770, 6/29/99, the Eighth Circuit Court of Appeals

stated that a canine sniff of the exterior of personal property in a public location is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure that it does not constitute a search within the meaning of the Fourth Amendment. *United States v. Place*, 462 U.S. 696 (1983) (luggage at an airport). That principles is applied to the canine sniff of the exterior of this U-Haul trailer stopped along an interstate highway. In general, the exterior of a car is thrust into the public eye, and thus to examine it does not constitute a search. *New York v. Class*, 475U.S. 106 (1986). This Court has held that a dog sniff of a car parked on a public street or alley does not amount to a search for Fourth Amendment purposes. *United States v. Friend*, 50 F.3d 548 (8th Cir. 1995). Similarly, other circuits have concluded that a dog sniff of the exterior of a car waiting at a roadblock established to check licenses and vehicle registrations is not a Fourth Amendment search. See *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990). Neither *Merrett* or *Morales-Zamora* required the police to have reasonable suspicion that a vehicle was transporting contraband before subjecting it to a canine sniff.

This was a valid stop where Fanta, the canine, alerted on the exterior of the trailer. The officer



then had probable cause to search the trailer's interior without a warrant.

**SEARCH AND SEIZURE – FALSE STATEMENTS IN AFFIDAVITS**

In *State v. Rufus*, No. CR 98-1360, 7/1/99, Officer Bob Andrews of the Jonesboro Police Department on January 7, 1998, arranged for a confidential informant ("CI") to make a drug purchase from Mr. Harold Rufus. After the purchase, Officer Andrews returned to the Drug Task Force Office where he relayed the details of the buy to Officer Greg Baugh. Based on what Officer Andrews told him, Officer Baugh prepared an affidavit for a search warrant, which provided in relevant part that:

THE UNDERSIGNED BEING DULY SWORN DEPOSES AND SAYS THAT HE HAS REASON TO BELIEVE THAT: [crack cocaine, drug paraphernalia, records of drug transactions, and other drug-related evidence could be found at Harold Rufus's residence.]

AND THAT THE FACTS TENDING TO ESTABLISH THE FOREGOING GROUNDS FOR ISSUANCE OF A SEARCH WARRANT ARE AS FOLLOWS:

Within the past 48 hours, a CI was met, searched, and given DTF buy money. The CI stated crack cocaine could be purchased from Harold Rufus at his residence at 216 Easy. The CI was followed to 216 Easy and the CI was observed entering the residence. A short time later, the CI was observed

exiting the residence. The CI was followed to a predetermined location and met again. The CI handed officers a quantity of crack cocaine the CI said was purchased while inside the residence. The CI has been proved to be reliable several times in the past by providing accurate information to officers of the Second Judicial Drug Task Force.

Officer Baugh, who admittedly had no personal knowledge of the drug transaction, signed the affidavit. In contrast, Officer Andrews, the officer who actually observed the drug buy, reviewed the affidavit but did not sign it.

Later that day, Officer Baugh and Officer Andrews presented the affidavit to Judge Goodson. After administering an oath to both officers, Judge Goodson reviewed the affidavit and asked the officers if it was correct. Both officers responded in the affirmative, but they did not disclose to the judge that it was based on Officer Andrew's personal knowledge and not that of Officer Baugh. The judge signed the search warrant, which was executed on Mr. Rufus's home later that evening. Based on the evidence seized from his home, the State charged Mr. Rufus with possession of cocaine with intent to deliver, simultaneous possession of drugs and a firearm, and being a felon in possession of a firearm.

After a hearing, the trial court granted Mr. Rufus's motion to suppress the evidence seized from his home because Officer Baugh, the affiant officer, had no personal knowledge of the drug transaction. Specifically, the judge said at the conclusion of the hearing that:

The Court doesn't have any problem, and wouldn't have had

any problem in sustaining and upholding the search warrant had the officer applying for the warrant indicated the source and nature of his information or had the officer that provided the information jointly signed the search warrant, but as it stands I am bound by the four corners of the warrant and the testimony of the affiant is that he had no personal knowledge upon which to base the search warrant and therefore the motion is granted.

The Arkansas Supreme Court held that the trial court erred when it applied Rule 13.1(b) of the Arkansas Rules of Criminal Procedure to this case because the rule does not deal with misleading information or omissions in an affidavit supporting a warrant which is the issue in this case. The problem presented by this case is that Officer Baugh failed to disclose to the judge that the affidavit was based on hearsay. The failure to disclose presents a problem raised in *Franks v. State*, 398 A.2d 783 (Del. 1979).

Since *Franks* was handed down in 1978, courts have consistently held that a warrant should be invalidated if a defendant shows by a preponderance of evidence: 1) that the affiant made a false statement knowingly and intentionally, or with reckless disregard for the truth, and 2) that with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. *United States v. Clapp*, 46 F.3d 795 (8th Cir. 1995); *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). Similarly, when an officer omits facts from an affidavit, the evidence will be suppressed if the defendant establishes by a preponderance of the

evidence that: 1) the officer omitted facts knowingly and intentionally, or with reckless disregard, and 2) the affidavit, if supplemented with the omitted information, is insufficient to establish probable cause. *United States v. Buchanan*, 167 F.3d 1207 (8th Cir. 1999); *Pyle*, supra.

The Arkansas Supreme Court concluded that Officer Baugh did not mislead the judge knowingly and intentionally, or with reckless disregard. As to the second prong of *Franks*, the Court then had to decide whether the affidavit, if supplemented with the omitted information, would not have supported a finding of probable cause. Since the trial court “wouldn’t have had any problem in sustaining and upholding the search warrant had the officer applying for the warrant indicated the source and nature of his information or had the officer that provided the information jointly signed the search warrant,” The Court could not say the omission rendered the affidavit fatally defective under *Franks*. Accordingly, they reversed the order of suppression and remand the case for further proceedings.

In *United States v. Schmitz*, CA8, No. 97-4149, 6/25/99, the Eighth Circuit Court of Appeals dealt with an allegation of false or reckless statements in an affidavit for a search warrant. The Eighth Circuit Court of Appeals stated that the affidavit must contain statements that are truthful. However, this does not mean “truthful” in the sense that every fact recited in the warrant affidavit is necessarily correct. For probable cause may be founded upon hearsay and upon information received from informants, as well as upon information

within the affiant’s own knowledge that sometimes must be garnered hastily. But surely it is to be truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

If material information in the affidavit is known by the affiant to be false or if there is no reasonable basis for believing it, then it is not objectively reasonable to use it to obtain a warrant. The test for determining whether an affiant’s statements were made with reckless disregard for the truth is not simply whether the affiant acknowledged that what he reported was true, but whether, viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his information or had obvious reasons to doubt the accuracy of the information he reported.

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**SEARCH AND SEIZURE –  
VEHICLE SEARCH  
REQUIRES ONLY  
PROBABLE CAUSE;  
EXIGENT  
CIRCUMSTANCES NOT  
PART OF AUTOMOBILE  
EXCEPTION**

In *Maryland v. Dyson*, No. 98-1062, 6/21/99 (Per Curiam) the Maryland Court of Special Appeals held that the Fourth Amendment requires police to obtain a search warrant before searching a vehicle which they have probable cause to believe contains illegal drugs. Because this holding rests upon an incorrect interpretation of the automobile exception to the Fourth Amendment’s warrant require-

ment, the United States Supreme Court granted the petition for certiorari and reversed the Maryland Court of Special Appeals.

At 11 a.m. on the morning of July 2, 1996, a St. Mary’s County (Maryland) Sheriff’s Deputy received a tip from a reliable confidential informant that Dyson had gone to New York to buy drugs. He would be returning to Maryland in a rented red Toyota, license number DDY 787, later that day with a large quantity of cocaine. The deputy investigated the tip and found that the license number given to him by the informant belonged to a red Toyota Corolla that had been rented to Dyson, who was a known drug dealer in St. Mary’s County. When Dyson returned to St. Mary’s County in the rented car at 1:00 a.m. on July 3, the deputies stopped and searched the vehicle, finding 23 grams of crack cocaine in a duffel bag in the trunk. Dyson was arrested, tried, and convicted of conspiracy to possess cocaine with intent to distribute. He appealed, arguing that the trial court had erroneously denied his motion to suppress the cocaine on the alternate grounds that the police lacked probable cause. He also argued that even if there was probable cause, the warrantless search violated the Fourth Amendment because there was sufficient time after the informant’s tip to obtain a warrant.

The Maryland Court of Special Appeals reversed, 122 Md. App. 413, 712 A. 2d 573 (1998), holding that in order for the automobile exception to the warrant requirement to apply, there must not only be probable cause to believe that evidence of a crime is contained in the automobile, but

also a separate finding of exigency precluding the police from obtaining a warrant. *Id.*, at 424, 712 A.2d, at 578. Applying this rule to the facts of the case, the Court of Special Appeals concluded that although there was “abundant probable cause,” the search violated the Fourth Amendment because there was no exigency that prevented or even made it significantly difficult for the police to obtain a search warrant. The Maryland Court of Appeals denied certiorari.

The Fourth Amendment generally requires police to secure a warrant before conducting a search. *California v. Carney*, 471 U.S. 386, 390—391 (1985). As this Court recognized nearly 75 years ago in *Carroll v. United States*, 267 U.S. 132, 153 (1925), there is an exception to this requirement for searches of vehicles. And under the established precedent, the “automobile exception” has no separate exigency requirement. The Court made this clear in *United States v. Ross*, 456 U.S. 798, 809 (1982), when it was stated that in cases where there was probable cause to search a vehicle “a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.” In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (*per curiam*), the Court repeated that the automobile exception does not have a separate exigency requirement: “If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle

without more.”

In this case, the Court of Special Appeals found that there was “abundant probable cause” that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment’s warrant requirement, a conclusion correctly reached by the trial court when it denied Dyson’s motion to suppress. The holding of the Court of Special Appeals that the “automobile exception” requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to the holdings in *Ross* and *Labron*. The United States Supreme Court then reversed the judgment of the Maryland Court of Special Appeals.

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