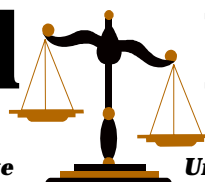




# CJI Legal Briefs



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## CIVIL LIABILITY - ABSOLUTE IMMUNITY OF PROSECUTOR AND WITNESSES BEFORE A GRAND JURY; QUALIFIED IMMUNITY OF INVESTIGATORS

In *Perez v. Gaffey*, CA8, No. 98-1250, 12/10/98, [Unpublished] David Perez and Pauline McBride brought this § 1983 civil rights claim, alleging the constitutional tort of malicious prosecution, in violation of Perez' right to be free from unlawful arrest and of McBride's rights to a personal (marriage) relationship with Perez. The complaint named as defendants Matthew F. Gaffey, a deputy states' attorney for Charles Mix County in South Dakota, who instituted prosecution of Perez; Roy King, a social worker in South Dakota; and Sally Winter, a banker who testified as a witness before a grand jury for Charles Mix County. Determining that absolute immunity extended to all defendants, the district court dismissed the case on summary judgment. The Eighth Circuit Court of Appeals affirmed on the grounds that absolute immunity applies to prosecutor Gaffey and grand jury witness Winter. With respect to King, the record establishes qualified immunity as a matter of law, although not absolute immunity.

Magistrate Judge Mark Marshall, before whom the case was heard, properly granted summary judgment in favor of Gaffey and Winter. The record shows that Gaffey acted solely as a prosecutor in this case and, as such, properly received absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (holding that absolute immunity is available to prosecutors defending against § 1983 actions). Similarly, the record shows that Winters, whose participation in the case related to her testimony before the grand jury, properly received absolute immunity. See *Strength v. Hubert*, 854 F.2d 421, 424 (11th Cir. 1988) (holding that, because witness testimony at a grand jury hearing is a function that is intimately associated with a judicial phase of the criminal process, absolute immunity should

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be granted to grand jury witnesses); *San Filippo v. U.S. Trust Co. of NY, Inc.*, 737 F.2d 246, 254 (2d Cir. 1984) (noting that, although the United States Supreme Court left this question open, "it must follow that grand jury witnesses should be similarly protected"); *Kincaid v. Eberle*, 712 F.2d 1023, 1023-24 (7th Cir. 1983) (finding that common law gave absolute immunity to grand jury witnesses, and that the same policy considerations that are significant in trial witness testimony exist in grand jury witness testimony); see also, *Myers v. Bull*, 599 F.2d 863, 866 (8th Cir. 1979) (holding that absolute immunity applies to witnesses who testify at a deposition).

The magistrate judge granted King absolute immunity as a grand jury witness. The Eighth Circuit Court of Appeals noted that the ruling did not take into account King's investigatory activities. Nonetheless, the record supports a finding that King, as a social worker investigator, is clothed with the same qualified immunity as a police officer. See *Manzano v. South Dakota Dep't of Soc. Serv.*, 60 F.3d 505 (8th Cir. 1995) (holding that various state officials, including social workers, were entitled to qualified immunity for child abuse investigations); *Lux by Lux v. Hansen*, 866 F.2d 1064 (8th Cir. 1989) (concluding that a social worker who investigated into child abuse reports was entitled to qualified immunity).



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#### CIVIL LIABILITY - FALSE ARREST

In *Lane v. Sarpy County*, CA8, No. 98-2048, 1/13/99, Gary M. Lane appeals from a final judgment entered in the United States District Court, District of Nebraska, dismissing his constitutional claims brought pursuant to 42 U.S.C. § 1983 against Sarpy County and various law enforcement officials and employees of Sarpy County. Lane argues that the district court erred in holding that qualified immunity protects defendants from § 1983 liability for errors made in the preparation and execution of an arrest warrant intended for another "Gary M. Lane."

This is a case of mistaken identity. It is undisputed that the defendants mistakenly arrested and detained Lane for approximately six hours, believing him to be a different individual with the same name. The Eighth Circuit Court of Appeals, in affirming the dismissal of the district court, noted that the conduct of the defendants was at most negligent and did not rise to the level of recklessness. The Eighth Circuit noted that negligent conduct does not give rise to a due process claim pursuant to § 1983.

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#### CIVIL LIABILITY - FALSE STATEMENTS IN AFFIDAVIT FOR SEARCH WARRANT

In *Mueller v. Tinkham*, CA8, No. 97-4007, 12/16/98, Patricia and Paul Mueller brought this 42 U.S.C. § 1983 action asserting that

Detective Douglas Tinkham and his supervisor, Detective Sergeant Michael Hanlen, both employed by the City of O'Fallon, Missouri, violated the Muellers' civil rights by applying for and executing a search warrant on the Muellers' home without probable cause, and conspiring to violate their civil rights. The district court denied the motions of Detectives Tinkham and Hanlen for summary judgment based on qualified immunity. The officers appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit Court of Appeals stated that clearly established Fourth Amendment law requires a warrant application to contain a truthful factual showing of probable cause—"truthful in the sense that the information put forth is 'believed or appropriately accepted' by the affiant as true." *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir. 1994) (quoting *Franks v. Delaware*, 438 U.S. 154, 165 (1978)). To preclude a grant of qualified immunity, a "warrant application must be so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *George v. City of St. Louis*, 26 F.3d 55, 57 (8th Cir. 1994) (citing *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986)). For purposes of qualified immunity, "the issue is not whether the affidavit actually establishes probable cause, but rather whether the officer had an objectively reasonable belief that it established probable cause." *Thompson v. Reuting*, 968 F.2d 756, 760 (8th Cir. 1992).

Detective Tinkham and Sergeant Hanlen claim that they had an objectively reasonable belief that informant Hoppe's affidavit

established probable cause to support issuance of the search warrant. Hoppe's statement was the sole basis for the search warrant application. When a search warrant affiant relies on the statement of an informant, the reliability of that informant is a key issue. The information provided by an informant is sufficient to support a probable cause finding if the person has provided reliable information in the past or if the information has been independently corroborated.

The district court aptly observed that "the facts concerning the reasonableness of the officers' application for the search warrant are vastly disputed." Detective Tinkham attested that Hoppe had provided reliable information in the past, but Hoppe says he had never before provided any information. Contrary to Tinkham's assertion that Hoppe was reliable, the officers had knowledge and reason to believe that Hoppe was not truthful. Hoppe admitted lying to the officers about his ability to produce an illegal firearm which he said he obtained from Vaught. Also, Hoppe's own mother told them that Hoppe was untruthful in fact, a pathological liar. This information was not included in the search warrant materials, and it raises a genuine question about whether Tinkham and Hanlen reasonably believed that Hoppe's statement supplied probable cause to support the warrant.

Tinkham and Hanlen contend that Hoppe's statement was reliable because they independently verified his description of the outside of the residence (a description available to anyone who drove by the residence), he made self-in-

criminating admissions in his statement, he provided detailed firsthand observations, and Tinkham interviewed Hoppe personally. Such factors are important in determining the reliability of an informant. See *United States v. LaMorie*, 100 F.3d 547, 553 (8th Cir. 1996) (noting personal contact with an informant can strengthen an officer's decision to rely on the information provided and statements against penal interest carry considerable weight). However, because the officers knew of the conflicting information concerning Hoppe's truthfulness, there remains a question of whether they acted in an objectively reasonable manner regarding their application for the search warrant, and they have thus failed to prove that they are entitled to qualified immunity on this claim.

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#### CIVIL LIABILITY - USE OF FORCE

In *Nelson v. County of Wright*, CA8, No. 98-2026, 12/10/98, Jeremy Nelson was injured when Deputy Sheriff James R. Hudek attempted to arrest him following his flight from the Willmar Regional Treatment Center (Willmar), and he later sued Hudek and Wright County under 42 U.S.C. § 1983. Nelson claims that Hudek used excessive force in violation of his Fourth Amendment rights. The district court granted summary judgment to the defendants and Nelson appeals. The Eighth Circuit Court of Appeals affirmed the judgment of the district court.

Nelson was committed to

Willmar as chemically dependent and mentally ill in October 1994. Later that month he left the center without permission and returned to his mother's house in Monticello. When he was found missing, a pickup order was issued and his mother was notified. Nelson's mother, nevertheless, allowed him to stay with her while he was waiting to meet with his attorney. After three days, they got into an argument. Nelson became agitated and his mother called 911 to request assistance. She reported that Nelson was screaming at her and threatening suicide. She also told the operator about the treatment center pickup order. While his mother was on the phone, Nelson ingested approximately 18 white cross tablets and a half bottle of aspirin. The record indicates that at the time Nelson was 18 years old, 6'3" in height and 140 pounds.

The county dispatcher identified the call as a domestic disturbance, and Deputy Hudek was the first officer to respond. The dispatcher indicated that Nelson had been acting violently, that he was believed to be suicidal and that he had fled from a regional treatment center for mental illness and chemical dependency. When Hudek arrived at the house, he spoke with Nelson's mother and learned that her son had just taken the pills, that he was in his bedroom and that he did not have any weapons.

Hudek went into the bedroom and found Nelson lying on the bed. The deputy explained to Nelson that he needed to arrest and handcuff him, but Nelson resisted when he tried to cuff his hands behind his back. Nelson struggled with Hudek as the deputy attempted to

gain control over his arms and Hudek applied his expandable baton as an arm bar. At some point in the continuing struggle, Hudek hit Nelson on the head with the baton and Nelson reached for the deputy's gun. The parties disagree about which happened first, but Nelson admits that he reached for Hudek's gun early in the struggle and that he also hit the deputy repeatedly, kicked him in the chest and knocked him down twice, finally pushing him onto the floor of a closet. Hudek admits striking Nelson on the head with his baton several times in an attempt to control him. Nelson admits that he went down after Hudek while the deputy was on the closet floor but he says he lost his balance. Hudek fired two shots while on the closet floor; the second hit Nelson in the chest.

The entire incident lasted less than three minutes and was over by the time other officers arrived. Nelson was taken to the hospital where seven staples were used to close a head wound; the bullet remains in his back. Nelson was charged with assaulting an officer and pled guilty.

Nelson subsequently brought this civil action against Hudek and the county, and the district court granted summary judgment for the defendants. The § 1983 claim was dismissed for insufficient evidence that Hudek's actions were objectively unreasonable.

The Eighth Circuit Court of Appeals stated that government officials performing discretionary tasks are entitled to qualified immunity unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have

known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("Whether an official protected by qualified immunity may be held personally liable . . . generally turns on the 'objective' legal reasonableness of the action . . . assessed in light of legal rules that were clearly established at the time it was taken."); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). The applicability of qualified immunity is a question of law, *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992), which should be decided at the "earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Excessive force claims arising from arrests are analyzed under the Fourth Amendment, *Graham v. Connor*, 490 U.S. 386, 394 (1989), and the use of force is not constitutionally excessive if the "officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." In applying this objective reasonableness standard, a court must pay close attention to the particular facts. It should consider such factors as the severity of a suspected crime, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting or evading arrest. *Graham*, 490 U.S. at 396. It may also be appropriate to consider the extent of any injury sustained by the suspect, *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) and standard police procedures, *Ludwig v. Anderson*, 54

F.3d 465, 472 (8th Cir. 1995). As the Supreme Court has noted, "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. Critical decisions regarding the use of force often must be made without much time for reflection. The issue of reasonableness must be examined from the perspective of the facts known to the officer at the time of the incident. *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). Deadly force is justified if the totality of the circumstances gives the officer "probable cause to believe that the arrestee poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The parties agree that either shooting someone or striking him on the head with a baton can be an application of deadly force, but they disagree on whether Hudek's actions were objectively reasonable. A reasonable police officer would have known in October 1994 that no greater force should be used in making an arrest than was reasonable under the circumstances and that deadly force would not be justified unless there was probable cause to believe he was faced with a threat of serious physical harm. The standard was clearly established. Whether Hudek is entitled to qualified immunity must be examined from the perspective of the situation as he understood it at the time. *Anderson v. Creighton*, 483 U.S. 635,

640-41 (1987).

It is undisputed that the entire encounter between Hudek and Nelson lasted less than three minutes and that it escalated rapidly. Hudek could have reasonably believed his safety was threatened as the situation spun out of control. When Hudek went into Nelson's room, he knew that Nelson had previously been committed to Willmar, had been acting violent and suicidal and had taken a number of pills. Hudek initially attempted to arrest and cuff Nelson without using force. Nelson actively resisted. A reasonable officer would have known that force may be used to overcome resistance to arrest, *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1081 (8th Cir. 1990), and that an officer may use deadly force when threatened with serious physical harm. *Garner*, 471 U.S. at 11. Nelson's hostility and increasingly violent reaction gave Hudek reason to fear grave personal injury. It is not disputed that during the struggle, Nelson reached for Hudek's gun and shoved Hudek onto the floor and into the closet. Even when the facts are viewed in the light most favorable to Nelson, it is clear that the physical fight was intense and that there would have been little time for the officer to reflect as the situation quickly escalated. Nelson now tries to analyze the brief struggle as if the incident were composed of distinct and separate segments. At the time, however, it was uncertain what would happen next. The situation was tense and "rapidly evolving." *Graham*, 490 U.S. at 397. An "officer's actions are not to be assessed with 20/20 hindsight" when he was

faced with the need to make instantaneous decisions. *Salim v. Proulx*, 93 F.3d 86, 91 (2nd Cir. 1996).

The Eighth Circuit Court of Appeals stated that after carefully reviewing the record, they had concluded that under the circumstances encountered by Hudek, a reasonable officer could have believed that the use of potentially deadly force was not excessive or in violation of the clearly established law requiring an objectively reasonable response. Hudek is thus entitled to qualified immunity.

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#### EMPLOYMENT LAW - FIRST AMENDMENT RIGHTS

In *Kauffman v. McVay*, CA8, No. 98-1923EA, [Unpublished] 11/27/98, Jane Kauffman served as a parole officer for the Arkansas Department of Correction (ADC). Following several sub-par reviews, Kauffman's ADC supervisors terminated Kauffman's employment. Claiming she was terminated because she commented on the ADC's discriminatory hiring practices, Kauffman brought this 42 U.S.C. § 1983 action, contending the supervisors violated her First Amendment rights. The district court denied the supervisors' motion for summary judgment based on qualified immunity, and the supervisors appealed. See *Allison v. Department of Corrections*, 94 F.3d 494, 496 (8th Cir. 1996). The Eighth Circuit Court of Appeals affirmed the judgment of the United States District Court for the Eastern District of Arkansas.

The Eighth Circuit Court of

Appeals stated that they review the district court's denial of qualified immunity anew and like the district court view all the facts in a light most favorable to Kauffman and give her all reasonable inferences from the evidence. See *Burnham v. Ianni*, 119 F.3d 668, 673 (8th Cir. 1997) (en banc). Summary judgment is inappropriate if genuine issues of material fact are in dispute. See *Engle v. Townsley*, 49.3d 1321, 1323 (8th Cir. 1995). The supervisors are entitled to qualified immunity unless their conduct violated a clearly established constitutional right of which a reasonable person would have known. See *id.* at 1322-23. It is clearly established that a public employer cannot discharge an employee if the discharge infringes on the employee's constitutionally protected right to free speech. See *Kincade v. City of Blue Springs*, 64 F.3d 389, 395 (8th Cir. 1995). For the purposes of this appeal, the supervisors assume Kauffman made protected statements, but nevertheless, the supervisors claim they did not violate Kauffman's interest in freedom of speech because any reasonable decisionmaker would have terminated Kauffman's employment based on her performance record. Kauffman presented conflicting evidence, however, that other ADC employees with similar performance records remained employed with the ADC. The district court concluded a genuine issue of material fact existed about whether Kauffman's termination was lawful under clearly established First Amendment law and denied the supervisors' summary judgment motion. See *Engle*, 49 F.3d at 1324.

The Eighth Circuit Court of Appeals concluded the district court's ruling was correct and affirmed.

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**EYEWITNESS  
IDENTIFICATION - SINGLE  
PHOTOGRAPH DISPLAYED  
TO POLICE UNDERCOVER  
OFFICER**

In *United States v. Bissonette*, CA8, No. 98-1870, 1/8/98, Bissonette appeals his conviction for distributing marijuana in violation of 21 U.S.C. § 841(a)(1). He claims that the district court erred by permitting Thunder Horse to identify him at trial. The Eighth Circuit Court of Appeals affirmed the conviction.

The evidence at trial indicated that Bissonette had sold 5.44 grams of marijuana at his home to Thunder Horse, who was acting in an undercover capacity. Details of the purchase were recorded immediately after the transaction in Thunder Horse's own statement and in summary reports of debriefing officers. The transaction took place on February 22, 1997, and it was part of an extended sting operation by the Bureau of Indian Affairs and the Oglala Sioux Tribe's Department of Public Safety. During the operation Thunder Horse made approximately 15 controlled buys and between 50 and 60 contacts which did not result in controlled purchases. In the course of debriefing Thunder Horse, investigators from the tribal police and the Bureau of Indian Affairs showed him a photograph of Bissonette and

asked him if he could identify the individual pictured. He replied affirmatively and said that it was Mike Bissonette, one of the people from whom he had made a controlled buy. Thunder Horse's trial testimony indicated that he had also seen Bissonette on another occasion four years earlier when he had gone to his house with a friend.

At trial, Thunder Horse identified Bissonette as the person who had sold him marijuana on February 22, 1997. He was the only witness who testified to being present at the sale. Bissonette says that the pretrial identification procedure was impermissibly suggestive because Thunder Horse was only shown one photograph and that he, therefore, should not have been permitted to identify Bissonette at trial.

There is no evidence that there was anything in the debriefing interview to prompt Thunder Horse to connect the photo he was shown to a particular individual or incident. Thunder Horse had been involved in numerous controlled buys, but he named Bissonette and reported on the drug transaction with him as soon as he saw the photograph. This situation is not like procedures where there is a suggested connection between displayed evidence and a particular crime, as when a witness is asked whether this specific individual was responsible for robbing the bank. See *United States v. Henderson*, 719 F.2d 934, 937 (8th Cir. 1983). Although there was an almost nine month gap between Thunder Horse's last encounter with Bissonette and the photo identification, Thunder Horse had ample opportunity to observe

Bissonette during the course of the face to face transaction at Bissonette's house and on his previous visit. Because he was part of an undercover sting operation at the time of the transaction, Thunder Horse knew he needed to observe the seller carefully. He had previously been trained as a police officer and specifically in identification procedures.

The totality of circumstances here indicates that the single photo identification was not impermissibly suggestive or likely to result in "irreparable misidentification." *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1265 (8th Cir. 1996); see also *Pratt v. Parratt*, 615 F.2d 486, 488 (8th Cir. 1980). There was ample reason for the trial court to find Thunder Horse capable of making a reliable identification. See *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Brodnicki*, 75 F.3d at 1265. The trial court, therefore, did not abuse its discretion in allowing Thunder Horse to identify Bissonette at trial. Defense counsel was able to protect Bissonette's rights by attacking the reliability and accuracy of the identification through cross examination. See *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

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**FEDERAL ANTI-GRATUITY  
STATUTE; PROSECUTORS'  
OFFER OF LENIENCY FOR  
TRUTHFUL TESTIMONY**

In *United States v. Singleton*, 144 F.3d 1343 (CA 10, 1998), the United States Court of Appeals for the Tenth Circuit held that it was a violation of 18 USC § 201(c)(2),

which forbids promising a thing of value to a witness for testimony, for a federal prosecutor to enter into an agreement with an accomplice to the defendant on trial whereby the accomplice agreed to testify truthfully in return for leniency. The decision was vacated on July 10, 1998, by the 10th Circuit and set for en banc hearing.

The Tenth Circuit Court of Appeals sitting en banc reheard the appeal in *United States v. Singleton*, CA10, No. 97-3178, 1/8/99, and held that 18 U.S.C. § 201(c) (2) does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office.

In *United States v. Ware*, CA6, No. 97-5771, 12/3/98, the Sixth Circuit Court of Appeals rejected the *Singleton* decision stating that depriving prosecutors of all accomplice or co-defendant testimony except that which is voluntarily provided without hope of benefit to the volunteer, would be to seriously undermine the ability of prosecutors to prosecute.

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**FREEDOM OF INFORMATION ACT**

In *Bryant v. Weiss*, No. 98-564, 12/21/98, Governor Mike Huckabee established in October of 1997 a "hotline" to receive allegations of wrongdoing in connection with state contracts. The hotline was originally housed in and staffed by the Department of Finance and Administration but was ultimately moved to the Governor's offices. Following the Governor's denial of media requests to inspect hotline-generated

documents pursuant to the Freedom of Information Act, Attorney General Winston Bryant presented a Freedom of Information Act request to the Governor and Richard Weiss, Director of the Department of Finance and Administration, seeking to examine and photocopy all documents generated by the hotline. The Governor denied the request, citing the "working papers" exemption to the Freedom of Information Act.

On December 11, 1997, the Attorney General filed a Complaint for Declaratory Relief and Relief Pursuant to the Arkansas Freedom of Information Act, seeking, among other things, an in camera inspection of the records to determine whether any were exempt and release of documents not subject to exemption. On December 12, 1997, the Governor filed a Motion to Dismiss the Appeal or, in the alternative, to Disqualify the Attorney General, arguing that the Attorney General lacked standing to bring the action.

On February 5, 1998, without reaching such issues as whether the records are exempt from disclosure under the Freedom of Information Act, the circuit court granted the motion to dismiss on the basis that the Attorney General did not have standing to bring an action under the Freedom of Information Act. Specifically, the trial court found that the Attorney General constitutes an "office" or "entity," as opposed to an individual, and that as a consequence of that status, is not a "citizen" for purposes of acquiring standing under the Freedom of Information Act. The Attorney General appealed.

The Arkansas Supreme Court first stated that Winston Bryant

was not deprived of standing to bring this action because of the public office he holds. The Court then held that the Attorney General, acting in his official capacity, does possess standing to appeal the denial of his request pursuant to the Arkansas Freedom of Information Act. The Court reversed and remanded to the trial court to address the issues raised in the pending litigation concerning the release of hotline-generated documents and for further proceedings.

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**JAILS AND PRISONS**

In *Lager v. Kemna*, CA8, No. 97-2440, 12/15/97, [Unpublished] Kraig Lager, a Missouri inmate at the Western Missouri Correctional Center, alleged that the superintendent of the correction center and an unnamed mailroom supervisor violated his First and Fourteenth Amendment rights by confiscating mail sent to him from another inmate. The mail consisted of two documents related to the other inmate's lawsuits and was sent so that Lager could assist the other inmate in preparing court filings.

The Eighth Circuit Court of Appeals stated that, as a matter of law, the prison regulation was reasonably related to prison security concerns and was not an exaggerated response to those concerns. See *Turner v. Safley*, 482 U.S. 78 (1987).



**JUVENILES - INSANITY  
DEFENSE AT  
ADJUDICATION PHASE  
OF A JUVENILE-  
DELINQUENCY  
PROCEEDING**

In *K.M. v. State*, No. 97-1116, 11/12/98, the Arkansas Supreme Court stated that the insanity defense is a statutory right that can only be conferred by the General Assembly, and not by the court. The Court could find nothing in either the Criminal Code or the Juvenile Code that suggests that the General Assembly intended to confer this statutory right to juveniles under the age of 14 during the adjudication phase of a delinquency proceeding. Accordingly, they affirmed the trial court's ruling that Appellant did not have a right to assert the insanity defense during the adjudication phase of his juvenile-delinquency proceeding.

**MIRANDA -  
INTERROGATION  
AFTER A REQUEST TO  
REMAIN SILENT**

In *Wright v. State*, No. CR 98-509, 12/17/98, Dheaslee Wright argues that the trial court erred in refusing to suppress his statement on the ground that the officers had not respected his exercise of his right to remain silent under *Miranda*, 384 U.S. 436. He argues further that the statement was taken in violation of the Supreme Court's holding in *Michigan v. Mosley*, 423 U.S. 96 (1975), be-

cause the officers failed to "scrupulously honor" his request to remain silent and not make a statement. The Arkansas Supreme Court disagreed.

In *Mosley*, 423 U.S. 96, 104, the Supreme Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored." The Court explained:

A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt fully effective means to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored. 384 U.S., at 479. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.

Under *Mosley*, there are three factors for determining whether the police scrupulously honored the defendant's right of silence: (1) whether the police immediately ceased the interrogation upon defendant's request; (2) whether they resumed questioning only after the passage of a significant period of time and provided a fresh set of *Miranda* warnings; and (3) whether they restricted the later interrogation to a crime that had

not been the subject of the first interrogation. *Hatley v. Lockhart*, 990 F.2d 1070 (8th Cir. 1993).

Based upon the particular facts of this case, the Court concluded that there was no violation of Wright's rights under *Miranda*. After Wright initially requested to remain silent, the police officers immediately ceased interrogation and no further inquiry was made by them. Approximately one hour passed before Wright was approached by different officers wishing to inquire of Wright about a separate crime. These officers provided a fresh set of *Miranda* warnings. Appellant signed the rights form, agreeing to waive his right to remain silent. When they asked Wright if he wanted to answer some questions, Wright replied by asking them what they wanted to know. Wright was then allowed to hand-pick the officer with whom he wished to speak with, one that he already knew would not be mean.

The fact that during their inquiry the subject of this crime arose is unimportant. The Arkansas Supreme Court concluded there was no violation of Wright's constitutional rights because the police officers scrupulously honored his initial request to remain silent.

**SEARCH AND SEIZURE -  
ABANDONMENT**

In *United States v. Sanders*, CA8, No. 97-1178, 12/12/97, Larry Andre Sanders argues that evidence discovered during a baggage search should be suppressed.

Sanders, who was approached by members of a Drug Task Force at the Waterloo, Iowa, Bus Depot, disclaimed ownership of a brown leather bag and denied bringing any luggage on his bus trip. In affirming Sanders conviction, the Eighth Circuit Court of Appeals stated in-part:

The Fourth Amendment's protection extends only to those who have a legitimate expectation of privacy in the property at the time it is searched. See *California v. Greenwood*, 486 U.S. 35, 39 (1988). It is, therefore, firmly established that a warrantless search of abandoned property is not unreasonable and does not violate the Constitution. See *Abel v. United States*, 362 U.S. 217, 241 (1960).

Sanders' statements to the officers that he did not own the bag were sufficient to constitute abandonment. See, e.g., *United States v. Porter*, 107 F.3d 582, 583-84 (8th Cir. 1997) (finding abandonment where defendant told officer to "go ahead and search the bag" because "it was not his and he had never seen it before"); *United States v. Thompkins*, 998 F.2d 629, 632 (8th Cir. 1993) (finding abandonment where defendant maintained that the bag was not his and told officers they could search it). Sanders argues that because officers knew he was lying when he claimed not to own the brown bag, the finding of abandonment is clearly erroneous. We have previously rejected this argument. See *United States v. Ruiz*, 935 F.2d 982 (8th Cir. 1991). In *Ruiz*, the court found that police reasonably could have believed that Ruiz's disclaimer meant he was relinquishing any privacy interest he

might have had in the suitcases. The same reasoning applies in this case.

The Eighth Circuit Court of Appeals stated that when Sanders disclaimed ownership, he surrendered any legitimate expectation of privacy he had in the bag. The fact that he forfeited his Fourth Amendment guarantee of privacy was enough to discharge the officers' Fourth Amendment obligation to obtain a search warrant. The Fourth Amendment only protects privacy. It does not immunize people who, finding themselves in a compromising situation, voluntarily trade their interest in privacy for a chance to escape incrimination, no matter how unwise the decision may seem in retrospect.

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#### SEARCH AND SEIZURE - CITIZEN-POLICE ENCOUNTERS; STOP AND FRISK

In *United States v. Pena-Saiz*, CA8, No. 98-1972, 12/8/98, the United States appeals the district court's grant of Virginia Pena-Saiz' motion to suppress evidence that was obtained in a pat-down search during an investigatory stop. The government asserts that Pena-Saiz consented to the search. The district court rejected that contention. The Eighth Circuit Court of Appeals agreed and affirmed the dismissal.

On June 13, 1997, after deplaning from a flight from El Paso, Texas, Virginia Pena-Saiz was stopped by three narcotics officers at Omaha's Eppley Airfield. During the twenty-one minute en-

counter, which began in the baggage claim area and concluded in the airport's drug interdiction office, the officers questioned Pena-Saiz, reviewed her driver's license and plane ticket, searched her duffel bag, found within the bag a wrapped gift, and asked to take the gift to the interdiction office so that the officers could open it and review its contents. Pena-Saiz followed the officers to the interdiction office, traveling to the escalator, which was 200 feet from the baggage claim area, upstairs, behind a pair of doors and down a hallway. During the trip to, and within, the interdiction office and, in fact, throughout the entire encounter, the officers never informed Pena-Saiz either that she was free to leave or that she did not have to answer their questions.

The officers neither found any drugs in Pena-Saiz' bag and gift nor observed any odd bulges in Pena-Saiz' clothing. Nonetheless, the officers persisted. They twice asked Pena-Saiz for her consent to a pat-down search. When she did not accede, the officers told her "This is our job. This is what we do. We talk to people, we search people's bags, we pat search people. This is what we do everyday." Upon Pena-Saiz' third refusal, the officers allegedly told Pena-Saiz that she was under arrest. Believing that she had no choice, Pena-Saiz told the officers to "do what you have to do." One of the officers proceeded with the pat-down search and discovered on Pena-Saiz' breast area an elastic bandage covering a bundle of white powder, which later tested positive for cocaine. Pena-Saiz was arrested and charged with possession of cocaine with intent to

distribute, in violation of 21 U.S.C. § 841(a)(1).

Pena-Saiz successfully moved for suppression of the drug evidence. The District Judge for the District of Nebraska, found that, by the time that the officers finished searching Pena-Saiz' gift, the encounter had become an investigatory stop that required any further searches to be supported either by Pena-Saiz' consent or by reasonable articulable suspicion. The district court found that Pena-Saiz had not given her consent. Additionally, the court found that the officers had no reasonable articulable suspicion to continue pressing Pena-Saiz for a pat-down search because their earlier questioning and searches had not uncovered any drugs or contraband. The United States appeals, arguing that the entire encounter, including the pat-down search, was consensual.

The Eighth Circuit Court of Appeals began by evaluating the issue of seizure. A seizure occurs when, in the totality of the circumstances surrounding the encounter, a reasonable person would believe that she is not free to leave. *United States v. Thompkins*, 998 F.2d 629 (8th Cir. 1993). Seizing luggage without asking consent, or, because of a suspect's refusal to consent, or compelling a suspect to go to an interdiction room constitutes a show of authority and creates a reasonable belief that the suspect is not free to leave. See, e.g., *Florida v. Royer*, 460 U.S. 491, 501 (1983) (finding that an encounter became an arrest when the police asked the suspect to go to an interdiction room while retaining his ticket and identification); *United States v. Dixon*, 51 F.3d

1376, 1380 (8th Cir. 1995) (holding that a consensual encounter became a seizure when police informed the suspect that he and his duffel bag would be detained until a police dog arrived to sniff the bag); *United States v. Green*, 52 F.3d 194, 197-98 (8th Cir. 1995) (concluding that a consensual encounter became a seizure when, despite the suspect's refusal to consent to a bag search, the police informed the suspect that his bag would be detained until a police dog arrived). Here, by the time the parties arrived in the interdiction room, the seizure of Pena-Saiz had occurred. Although, according to her testimony, Pena-Saiz had given permission only to x-ray the contents of her gift, the officers took the gift to the interdiction room for unwrapping and rewrapping. Pena-Saiz had no choice but to follow the officers to the room a significant distance away. Once inside the interdiction room, Pena-Saiz felt "very intimidated," as the officers did nothing to assure Pena-Saiz that she was free to leave or to refuse to respond to their questions, and instead essentially told her that the officers had a right to conduct the pat-down search because it was their daily duty. Under the totality of those circumstances, a reasonable person would have believed that she was not free to leave. For this reason, we determine that Pena-Saiz was subject to a seizure protected by the Fourth Amendment.

The Eighth Circuit Court of Appeals turned to the constitutionality of the pat-down search. To come within the bounds of a permissible Fourth Amendment search, the officers in this case needed either reasonable

articulable suspicion or Pena-Saiz' consent. *United States v. Green*, 52 F.3d 194, 197-98 (8th Cir. 1995). The government does not claim any reasonable articulable suspicion as a basis for the search, and the court determined that the officers possessed no such basis. Reasonable articulable suspicion must be more than a hunch. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). In this case, the officers' searches and questioning had turned up nothing. There were no strange bulges in Pena-Saiz' clothing or anything to indicate that she was engaged in drug activity. Thus, the officers possessed no reasonable articulable suspicion to continue harassing Pena-Saiz for consent to a pat-down search.

The Eighth Circuit Court of Appeals then turned to the alleged consent. The voluntariness of consent raises a fact question, to be determined from the totality of the circumstances, and subject to review for clear error. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *Hathcock*, 103 F.3d at 720. Consent is not voluntary when it is the product of duress or coercion, either express or implied. *Schneckloth*, 412 U.S. at 227. The record shows that Pena-Saiz believed that she was under arrest and that she had to submit to the pat-down search. The officers did nothing to allay her fears but, rather, told her the opposite, informing Pena-Saiz that "This is what we do. We talk to people, we search people's bags, we pat search people. This is what we do everyday." The officers persisted in their requests and did not tell Pena-Saiz that she was free to leave. Thus, the record supports the district court's finding that,

under the totality of the circumstances, Pena-Saiz did not voluntarily consent to the pat-down search and that the search resulted from an unlawful investigatory stop. See *Green*, 52 F.3d at 197-98.

Having determined that the officers violated the Fourth Amendment rights of Pena-Saiz with respect to the pat-down search, the Eighth Circuit Court affirmed the district court's grant of Pena-Saiz' motion to suppress the evidence unlawfully seized.

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#### SEARCH AND SEIZURE - EXPECTATION OF PRIVACY

In *Minnesota v. Carver*, No. 97-1147, 12/1/98, Wayne Thomas Carter, Melvin Johns, and the lessee of an apartment were sitting in one of its rooms bagging cocaine. While so engaged they were observed by a police officer, who looked through a drawn window blind. The Supreme Court of Minnesota held that the officer's viewing was a search which violated Carter and Jones' Fourth Amendment rights. The United States Supreme Court held that no such violation occurred.

James Thielen, a police officer in the Twin Cities' suburb of Eagan, Minnesota, went to an apartment building to investigate a tip from a confidential informant. The informant said that he had walked by the window of a ground-floor apartment and had seen people putting a white powder into bags. The officer looked in the same window through a gap in the closed blind and observed

the bagging operation for several minutes. He then notified headquarters, which began preparing affidavits for a search warrant while he returned to the apartment building. When two men left the building in a previously identified Cadillac, the police stopped the car. Inside were Carter and Johns. As the police opened the door of the car to let Johns out, they observed a black zippered pouch and a handgun, later determined to be loaded, on the vehicle's floor. Carter and Johns were arrested, and a later police search of the vehicle the next day discovered pagers, a scale and 47 grams of cocaine in plastic sandwich bags.

After seizing the car, the police returned to Apartment 103 and arrested the occupant, Kimberly Thompson, who is not a party to this appeal. A search of the apartment pursuant to a warrant revealed cocaine residue on the kitchen table and plastic baggies similar to those found in the Cadillac. Thielen identified Carter, Johns and Thompson as the three people he had observed placing the powder into baggies. The police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine. Carter and Johns had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. In return for the use of the apartment, Carter and Johns had given Thompson one-eighth of an ounce of the cocaine.

Carter and Johns were charged with conspiracy to commit controlled substance crime in the first degree and aiding and

abetting in a controlled substance crime in the first degree, in violation of Minn. Stat. § 152.021, subd. 1(1), subd. 3(a) (1996); §609.05. They moved to suppress all evidence obtained from the apartment and the Cadillac, as well as to suppress several post-arrest incriminating statements they had made. They argued that Thielen's initial observation of their drug packaging activities was an unreasonable search in violation of the Fourth Amendment and that all evidence obtained as a result of this unreasonable search was inadmissible as fruit of the poisonous tree. The Minnesota trial court held that since, unlike the defendant in *Minnesota v. Olson*, 495 U.S. 91 (1990), Carter and Johns were not overnight social guests but temporary out-of-state visitors, they were not entitled to claim the protection of the Fourth Amendment against the government intrusion into the apartment. The trial court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment. After a trial, Carter and Johns were each convicted of both offenses. The Minnesota Court of Appeals held that Wayne Thomas Carter did not have "standing" to object to Thielen's actions because his claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose-to package drugs." *State v. Carter*, 545 N. W. 2d 695, 698 (1996). In a separate appeal, the Court of Appeals also affirmed Johns' conviction, without addressing what it termed the "standing" issue. *State v. Johns*, No. C9-95-1765 (Minn. Ct. App., June 11,

1996), App. D-1, D-3 (unpublished).

A divided Minnesota Supreme Court reversed, holding that respondents had “standing” to claim the protection of the Fourth Amendment because they had “a legitimate expectation of privacy in the invaded place.” 569 N. W. 2d 169, 174 (1997) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). The court noted that even though society does not recognize as valuable the task of bagging cocaine, they concluded that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. They, therefore, held that Carter and Johns had standing to bring their motion to suppress the evidence gathered as a result of Thielen’s observations. 569 N. W. 2d, at 176; see also 569 N. W.2d 180, 181. Based upon its conclusion that the respondents had “standing” to raise their Fourth Amendment claims, the court went on to hold that Thielen’s observation constituted a search of the apartment under the Fourth Amendment, and that the search was unreasonable. *Id.*, at 176-179. The United States Supreme Court granted certiorari, 523 U.S. \_\_\_ (1998), and reversed the decision of the Minnesota Supreme Court.

The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of “standing” doctrine, an analysis which the United States Supreme Court expressly rejected 20 years ago in *Rakas*, 439 U.S., at 139-140. In that case, the Supreme Court held that automobile passengers could not assert the

protection of the Fourth Amendment against the seizure of incriminating evidence from a vehicle where they owned neither the vehicle nor the evidence. *Ibid.* Central to the analysis was the idea that in determining whether a defendant is able to show the violation of his (and not someone else’s) Fourth Amendment rights, the “definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.” 439 U.S., at 140. Thus, the Court held that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one which has “a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Id.*, at 143-144, and n. 12. See also *Smith v. Maryland*, 442 U.S. 735, 740-741 (1979).

The Fourth Amendment guarantees: “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.” The Amendment protects persons against unreasonable searches of their persons and houses, and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual. See *Katz v. United*

*States*, 389 U.S. 347, 351 (1967) (The Fourth Amendment protects people, not places). But the extent to which the Fourth Amendment protects people may depend upon where those people are. The United States Supreme Court has held that “capacity to claim the protection of the Fourth

Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” *Rakas*, supra, at 143. See also *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980).

The text of the Amendment suggests that its protections extend only to people in “their” houses. But the Court has held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else. In *Minnesota v. Olson*, 495 U.S. 91 (1990), for example, the Court decided that an overnight guest in a house had the sort of expectation of privacy that the Fourth Amendment protects. The Court said:

“To hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the every day expectations of privacy that we all share. Staying overnight in another’s home is a long-standing social custom that serves functions recognized as valuable by society. We stay in others’ homes when we travel to a strange city for business or pleasure, we visit our parents, children or more distant relatives out of town, when we are in between jobs or homes or when we house-sit for a friend... .”

“From the overnight guest’s perspective, he seeks shelter in another’s home precisely because it provides him with privacy, a

place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend." *Id.*, at 98-99.

In *Jones v. United States*, 362 U.S. 257, 259 (1960), the defendant seeking to exclude evidence resulting from a search of an apartment had been given the use of the apartment by a friend. He had clothing in the apartment, had slept there "maybe a night," and at the time was the sole occupant of the apartment. But while the holding of *Jones*-that a search of the apartment violated the defendant's Fourth Amendment rights-is still valid, its statement that "anyone legitimately on the premises where a search occurs may challenge its legality," *id.*, at 267, was expressly repudiated in *Rakas v. Illinois*, 439 U.S. 128 (1978). Thus an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.

Carter and Johns here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson*

to suggest a degree of acceptance into the household. While the apartment was a dwelling place for Thompson, it was for Carter and Johns simply a place to do business.

Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700 (1987). And while it was a "home" in which respondents were present, it was not their home. Similarly, the Court has held that in some circumstances a worker can claim Fourth Amendment protection over his own workplace. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709 (1987). But there is no indication that respondents in this case had nearly as significant a connection to Thompson's apartment as the worker in *O'Connor* had to his own private office. See *id.*, at 716-17.

If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between Carter, Johns and the householder, all led the Court to conclude that Carter and John's situation is closer to that of one simply permitted on the premises. The Court,

therefore, held that any search which may have occurred did not violate their Fourth Amendment rights.

Because the Court concluded that Carter and Johns had no legitimate expectation of privacy in the apartment, they did not decide whether the police officer's observation constituted a "search." The judgment of the Supreme Court of Minnesota was reversed, and the cause was remanded for proceedings not inconsistent with this opinion.

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#### SEARCH AND SEIZURE - GOOD FAITH EXCEPTION TO SEARCH WARRANT REQUIREMENT

In *Moya v. State*, CR 98-529, 11/19/98, the Arkansas Supreme Court dealt with a challenge to the validity of a search warrant. On September 26, 1995, a United Parcel Service (UPS) package was shipped from Bakersfield, California, to Apartment 50 at the Smith-Keys Apartments in Texarkana. Prior to that date, UPS personnel in California noticed that the package was leaking, and they opened it. Inside the package was cocaine and a gun. This information was reported to the Bakersfield Police Department, who, in turn, reported the information to the Bi-State Narcotics Task Force in Texarkana. The task force then decided to make a controlled delivery of the package to the Smith-Keys Apartments, Apartment 50, with an undercover officer posing as the UPS deliveryman. The delivery occurred at approximately

11:30 a.m. The task force also decided to prepare a search warrant and supporting affidavit for Apartment 50 ahead of time so that it could be served simultaneously with the delivery of the package. Officers were positioned around the apartment complex to observe the delivery. Investigator Rick Hawkins of the Texarkana Police Department was the officer responsible for obtaining the search warrant.

Investigator Hawkins presented Circuit Judge Jim Hudson with the affidavit for the search warrant. Hawkins swore to the truth of the facts in the affidavit before Judge Hudson. The delivery of the package to Apartment 50 occurred at the same time that Hawkins was obtaining the search warrant for Apartment 50. After Judge Hudson signed the warrant, as Hawkins was leaving the judge's office, a surveillance officer informed Hawkins via radio that the package had been moved to Apartment 51. According to Hawkins, he returned to Judge Hudson's office and explained to him that the package had been moved to Apartment 51. After hearing Hawkins's explanation, either Judge Hudson or Hawkins changed all but one of the references to Apartment "50" in the search warrant and affidavit to Apartment "51." Both Hawkins and Judge Hudson initialed the changes. No recorded testimony was taken from Hawkins nor was any additional information written on the affidavit noting the change in circumstances. Hawkins then radioed to the officers on the scene that the warrant had been signed, thus authorizing a search of Apartment 51. The officers then

searched Apartment 51, seizing the narcotics and the gun and arresting Moya and another person.

Moya filed a motion to suppress the evidence seized during the search of Apartment 51. He first argues that by changing the apartment numbers in the affidavit and warrant, the State thereby made the affidavit untrue and nullified the probable cause. He contends that when the package was moved from Apartment 50 to 51, and the number "50" in the affidavit and warrant was changed to "51," this created a false statement that the controlled delivery occurred at Apartment 51 and that Ingrid Brown was the resident of Apartment 51. The State contends that the search is valid because the executing officers acted with an objective good-faith reliance upon Judge Hudson's having issued the warrant, pursuant to the holding in *United States v. Leon*, 468 U.S. 897 (1984).

The Arkansas Supreme Court stated that unrecorded oral testimony may not be considered, by the trial court or appellate courts, when determining whether there was sufficient probable cause to issue a search warrant. Where there is neither a written affidavit nor sworn, recorded testimony in support of a search warrant, the court will not apply the good-faith exception to uphold the search warrant. Where, however, there is a written affidavit in support of the search warrant that later is ruled deficient, the court will go beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officers executing the search warrant did so in objective good-faith reliance on the judge's having

found probable cause to issue the search warrant. Moreover, the court may also consider information known to the executing officers that may or may not have been communicated to the issuing judge.

Here, several witnesses testified to the antecedent circumstances involving the removal of the package from Apartment 50, where it had been delivered, to Apartment 51. Investigator Hawkins testified that after Judge Hudson signed the warrant, just as he was leaving the judge's office, he received a radio communication from Captain Sharp informing him that there had been a change in circumstances. He stated that the lookout officer had advised that just as the UPS driver was leaving, Moya and another person had picked up the package from Apartment 50 and immediately took it upstairs to Apartment 51. He stated that he again approached Judge Hudson and explained the situation to him, and that the two of them amended the search warrant, marking through the references to Apartment 50 and inserting the number 51 in their places. Hawkins's testimony was supported by Officer Coy Murray of the Texarkana Police Department.

Officer Murray testified that he was present at the Smith-Keys Apartments on September 26, 1995, and that it was his job to watch the building where Apartment 50 was located. He stated that he observed the delivery of the package to Apartment 50, that he saw a female go to the door of Apartment 50, and that Moya was standing on the steps leading to the apartments on the upper level of the building. The female brought

the package out of Apartment 50 and set it at Moya's feet. Moya looked at the package and picked it up while he and the female looked at it, sort of investigating the package. Moya and the female then went upstairs to Apartment 51. Murray stated that when he saw them take the package to Apartment 51, he notified the other officers that the package had moved from Apartment 50 to Apartment 51. Murray stated that he notified Captain Sharp of this development.

Judge Hudson testified that Investigator Hawkins indicated to him that he had word from the police officers at the scene that the number of the apartment in the proposed affidavit was incorrect, and that it should have been Apartment 51. He stated that he was unsure whether Hawkins had actually told him that the package had moved, but that it could have happened that way. He stated that Hawkins made the changes to the affidavit and warrant in his presence and they both initialed the changes. Judge Hudson stated that at the time he signed the affidavit, whether the incidents alleged in the affidavit actually applied to Apartment 50 or Apartment 51, those facts would have led him to believe that there was probable cause to search the residence. He stated that he did not at any time tell Hawkins that he did not believe there was probable cause contained in the search warrant.

The foregoing testimony establishes that the officers had prepared a valid anticipatory search warrant for Apartment 50, but before they could execute the warrant, the circumstances changed when the package containing the

contraband was immediately moved to Apartment 51. This change of circumstances was communicated to the officer who had prepared the affidavit and warrant, and he, in turn, informed the issuing judge of the change. This is not a situation where false information was given to the issuing judge. To the contrary, once Investigator Hawkins, the affiant, became aware of the change in circumstances involving the removal of the package, he immediately informed the Judge Hudson of this change. They then acted together to make the necessary corrections in the affidavit and warrant to reflect that Apartment 51 had become the apartment to be searched because it contained the contraband. Both Hawkins and Judge Hudson initialed the changes, and Hawkins left the judge's office with what he reasonably perceived to be a valid search warrant.

To apply the exclusionary rule in this case would serve no useful purpose, as there is no police misconduct here to deter, nor is there any evidence that the judge was misled by false information. The fact that Hawkins immediately turned around and went back into the judge's office and disclosed the change in circumstances demonstrates that he attempted to fully inform the judge as to the current state of events. The Arkansas Supreme Court concluded that the trial court's denial of Moya's suppression motion was appropriate based on the officers' objective good-faith reliance on the issuance of the search warrant by Judge Hudson.



### SEARCH AND SEIZURE - NO-KNOCK ENTRY

In *Mazepink v. State*, No. CR 98-330, 1/28/99, the Arkansas Supreme Court stated that the determination of whether a search is reasonable under the Fourth Amendment depends in part on whether the officers' entry into a residence was preceded by a knock on the door and an announcement of the officers' presence and purpose. Of course, not every execution of a search warrant will require a knock and announcement prior to entry. The test is whether the police have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the officers' effective investigation of the crime, such as the destruction of evidence. Mere technical compliance with the "knock and announce" requirement is not sufficient where there is not a reasonable amount of time between the announcement and forced entry, unless exigent circumstances, including danger or harm to officers or others and the destruction of evidence, were known to the officers at the time of entry.

The search warrant here was issued upon probable cause but the executing officers violated Mazepink's Fourth Amendment rights when they forced their way into the residence without first complying with the "knock and announce" rule. The presence of an otherwise valid search warrant does not lessen the degree of the violation. The Arkansas Supreme Court then concluded that the ap-

propriate remedy for the misconduct in this case is suppression of the evidence obtained as a result of the search.

In *United States v. Cooper*, CA8, No. 98-2410, 2/4/99, the Eighth Circuit Court of Appeals stated the common law requirement that officers must knock and announce their presence before entering is part of the Fourth Amendment reasonableness inquiry. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law has found no knock entries reasonable "in situations involving threats of physical violence, prisoner escapes and likely destruction of evidence." *United States v. Murphy*, 69 F.3d 237, 243 (8th Cir. 1995). The proper inquiry is whether given the facts and circumstances known to the officers, they reasonably decide there was an urgent need to force entry. *United States v. Lucht*, 18 F.3d 541, 543 (8th Cir. 1994).

In this case, Little Rock police officer Todd Spafford testified that a SWAT team had been called in to execute the warrant because officers believed the entry would involve high risk to those serving the warrant. They knew the house likely contained weapons, that it was barricaded and that Cooper had a violent criminal history. The police executing the warrant were aware that Cooper was outside the house, but they did not know the whereabouts of Michael Butler, the other person believed to be living there. They possessed a valid search warrant, and the court issuing the warrant had determined that the officers would be justified in approaching speedily and under cover of darkness. Under these circumstances, it was not unrea-

sonable to believe there was an urgent need to force entry. The entry and search did not violate the Fourth Amendment.

In *United States v. Weeks*, CA8, No. 98-1933, 11/24/98, Officer Adam Kyle of the Omaha, Nebraska, Police Department applied for a warrant to search a residence at 4531 Spencer Street in Omaha, Nebraska. Kyle's affidavit for a search warrant alleged that a confidential informant had advised him that crack cocaine had been sold from the house within the past 72 hours, that "Slim" had \$1400 worth of crack cocaine in his possession, and that the residents usually carried guns when they answered the door. Kyle also stated that he had verified that Mike Clark was a felon and resided at the address. Kyle requested a no-knock entry in order to prevent the destruction of evidence.

The Eighth Circuit Court of Appeals stated that Weeks's argument that the no-knock entry was unreasonable under the Fourth Amendment is without merit. It is true that in *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), the Supreme Court refused to permit a blanket exception for felony drug cases to the common-law rule requiring officers to knock and announce their presence before entering a residence. However, the showing needed to justify a no-knock entry "is not high." *Id.* at 1422. "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, allowing the destruction of

evidence." *Id.* at 1421; see also *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998); *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). In addition, a judge may issue "no-knock warrants . . . when sufficient cause to do so can be demonstrated ahead of time." *Richards*, 117 S. Ct. at 1422 n.7.

Weeks argues that Kyle's request for a no-knock warrant based on his assertion that evidence would be destroyed was insufficient because Kyle used boilerplate language applicable to many drug cases and did not set forth specific facts showing why evidence would be destroyed in this case if officers announced their presence. Weeks notes in *Richards*, the Court held that "in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Id.* at 1421.

We need not decide whether Kyle's affidavit included sufficient particularized facts to support his destruction-of-evidence allegation. Even if the officers had not had a no-knock warrant, considering all of the facts known to the officers at the time of this particular search, sufficient exigencies existed to excuse the knock and announce requirement. *United States v. Murphy*, 69 F.3d 237, 244 (8th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996). Although this court has held that "a reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient to justify excusing the knock and announce requirement," *Murphy*, 69 F.3d at 243 (quoting *United States*

*v. Marts*, 986 F.2d 1216, 1218 (8th Cir. 1993)), officers were aware of more than the presence of firearms in the house. Kyle had briefed the officers that the residents answered the door with guns in their hands, Clark had been convicted of a firearm offense, and that the front door was braced—circumstances we believe created a reasonable suspicion that knocking and announcing would be dangerous. See *United States v. Hawkins*, 102 F.3d 973, 976 (8th Cir. 1996) (no-knock entry reasonable where windows and doors barred), cert. denied, 117 S. Ct. 1456 (1997); *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996) (“criminal record reflecting violent tendencies, or a verified reputation of a suspect’s violent nature can be enough to provide law enforcement officers with justification to forego the necessity of knocking and announcing their presence”); *Murphy*, 69 F.3d at 243 (information that defendant sometimes carried weapon coupled with officers’ awareness of his violent past justified no-knock entry).

**SEARCH AND SEIZURE -  
RETURN OF PROPERTY  
LAWFULLY SEIZED BUT  
NO LONGER NEEDED FOR  
INVESTIGATION OR  
PROSECUTION**

In *City of West Covina v. Perkins*, No. 97-1230, 1/13/99, the United States Supreme Court considered whether the Constitution requires a state or its local entities to give detailed and specific instructions or advice to owners who seek return of property lawfully

seized but no longer needed for police investigation or criminal prosecution. Interpreting the Due Process Clause of the Fourteenth Amendment, the Court of Appeals for the Ninth Circuit imposed a series of specific notice requirements on the city responsible for the seizure. The United States Supreme Court concluded these requirements are not mandated by the Due Process Clause, and reversed the Ninth Circuit Court of Appeals.

The case began when police officers of the City of West Covina, California, acting in accordance with law and pursuant to a valid search warrant, seized personal property. The property belonged to the owner of the searched home, Lawrence Perkins, and his family. The suspect in the crime was neither Perkins nor anyone in his family, but one Marcus Marsh. Marsh had been a boarder in the Perkins’ home. After leaving their home, and unknown to them, he became the subject of a homicide investigation.

During the search of Perkins’ home for evidence incriminating Marsh, the police seized a number of items, including photos of Marsh, an address book, a 12-gauge shotgun, a starter pistol, ammunition and \$2,629 in cash. At the conclusion of the search, the officers left Perkins a form entitled “Search Warrant: Notice of Service,” which stated:

**“TO WHOM IT MAY  
CONCERN:”**

**“1. THESE PREMISES HAVE BEEN SEARCHED BY PEACE OFFICERS OF THE** (name of searching agency) *West Covina*

**Police DEPARTMENT PURSUANT TO A SEARCH WARRANT ISSUED ON** (date) *5/20/93*, **BY THE HONORABLE** (name of magistrate) *Dan Oki*, **JUDGE OF THE SUPERIOR/MUNICIPAL COURT, Citrus JUDICIAL DISTRICT.”**

**“2. THE SEARCH WAS CONDUCTED ON** (date) *5/21/93*. **A LIST OF THE PROPERTY SEIZED PURSUANT TO THE SEARCH WARRANT IS ATTACHED.”**

**“3. IF YOU WISH FURTHER INFORMATION, YOU MAY CONTACT:”** “(name of investigator) *Det. Ferrari or Det. Melnyk* **AT** [telephone number].”

(Italicized characters represent those portions of the original document which were handwritten on the form.)

In accordance with the Notice, the officers also left Perkins an itemized list of the property seized. The officers did not leave the search warrant number because the warrant was under seal to avoid compromising the ongoing investigation. In a public index maintained by the court clerk, however, the issuance of the warrant was recorded by the address of the home searched and the search warrant number.

Not long after the search, Perkins called Ferrari, one of the detectives listed on the Notice and inquired about return of the seized property. One of the detectives told Perkins he needed to obtain a court order authorizing the property’s return.

About a month after the

search, Perkins went to the Citrus Municipal Court to see Judge Oki, who had issued the warrant. He learned Judge Oki was on vacation. He tried to have another judge release his property but was told the court had nothing under Perkins' name.

Rather than continuing to pursue a court order releasing the property by filing a written motion with the court, making other inquiries, or returning to the courthouse at some later date, Perkins filed suit in United States District Court against the City and the officers who conducted the search. He alleged the officers had violated his Fourth Amendment rights by conducting a search without probable cause and exceeding the scope of the warrant. He further alleges that the City had a policy of permitting unlawful searches.

The District Court granted summary judgment for the City and its officers. The court, however, invited supplemental briefing on an issue Perkins had not raised: whether available remedies for the return of seized property were adequate to satisfy due process. The parties submitted briefs on the issue, but the court did not rule on it. Perkins appealed the District Court's holding on his Fourth Amendment claims, but the Court of Appeals remanded the case to the District Court for resolution of the due process question.

The District Court held on remand that the remedies provided by California law for return of the seized property satisfied due process and it granted summary judgment for the City. In particular, the court rejected Perkins' claim that the procedure for return of their property was unavailable to

them because the City did not give them adequate notice of the remedy and the information needed to invoke it.

On appeal, the Court of Appeals reversed the grant of summary judgment for the City. The Ninth Circuit Court of Appeals held that the City was required to give Perkins notice of the state procedures for return of seized property and the information necessary to invoke those procedures (including the search warrant number or a method for obtaining the number). While acknowledging that it was not the court's place "to specify the exact phrasing of an adequate notice," the court proceeded to explicate, in some detail, the content of the required notice:

"In cases where property is taken under California law ... the notice should include the following: as on the present notice, the fact of the search, its date and the searching agency; the date of the warrant, the issuing judge and the court in which he or she serves; and the persons to be contacted for further information. In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned."

This expansive requirement

lacks support in our case law and mandates notice not now prescribed by the Federal Government or by any one of the 50 states.

No one contests the right of the state to have seized the property in the first instance or its ultimate obligation to return it. So rules restricting the substantive power of the State to take property are not implicated by this case. What is at issue is the obligation of the State to provide fair procedures to ensure return of the property when the State no longer has a lawful right to retain it.

Perkins acknowledges, as he must, that the City notified him of the initial seizure and gave him an inventory of the property taken. Accordingly, we need not decide how detailed the notice of the seizure must be or when the notice must be given. He also raises no independent challenge to the Court of Appeals' conclusion that California law provides adequate remedies for return of their property, including a motion under Cal. Penal Code Ann. §1536 (West 1982) or a motion under §1540. Rather, he contends the City deprived him of due process by failing to provide notice of his remedies and the factual information necessary to invoke the remedies under California law. When the police seize property for a criminal investigation, however, due process does not require them to provide the owner with notice of state law remedies.

The Court of Appeals' far-reaching notice requirement not only lacks support in precedent but also conflicts with the well-established practice of the states and the federal government. The notice required by the Court of

Appeals far exceeds that which the states and the federal government have traditionally required their law enforcement agencies to provide. Indeed, neither the Federal Government nor any State requires officers to provide individualized notice of the procedures for seeking return of seized property.

Federal Rule of Criminal Procedure 41(d), for example, requires federal agents seizing property pursuant to a warrant to "give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or to leave the copy and receipt at the place from which the property was taken." The Rule makes no provision for notifying property owners of the procedures for seeking return of their property. The Court of Appeals' analysis would render the notice required by this Federal Rule-and by every analogous state statute-inadequate as a constitutional matter. In the shadow of this unwavering state and federal tradition, the Court of Appeals' holding is all the more untenable; to sustain it, the Court would be required to find that due process requires notice that not one state or the federal government has seen fit to require, in the context of law enforcement practices that have existed for centuries.

Perkins urges that if the Court cannot uphold the Court of Appeals' broad notice requirement, the Court should, at least, affirm the Court of Appeals' judgment on the narrower ground that the notice provided respondents was inadequate because it did not provide them with the factual information-specifically, the search warrant number-they needed to invoke

their judicial remedies. The District Court, however, made an explicit factual finding that Perkins failed to establish that he needed the search warrant number to file a court motion seeking return of his property:

"Perkins argues that this court procedure was not available to him because he did not know the number of the warrant pursuant to which his property was seized. Unfortunately for Perkins, there is no evidence either way about whether one must have the warrant number in order to obtain a court order releasing seized property. The City of West Covina asserts that it is not necessary, that as long as the claimant can sufficiently identify the property he seeks (i.e., by providing the date of the warrant, the name of the seizing agency and officer, and the identity of the issuing court and judge, all of which information was in Perkins' possession), the court will release it. Perkins wants the Court simply to assume that if he had filed a request with the court, it would have been denied because he did not have the warrant number. But there is no evidence to support that speculation."

The judgment of the Court of Appeals was reversed and the case was remanded for further proceedings consistent with this opinion.

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**SEARCH AND SEIZURE -  
SEIZURE BY PRIVATE  
PERSON; INTERCEPTION  
OF COMMUNICATIONS**

In *Elliott v. State*, No. CR 98-373, 12/17/98, Nathan Elliott appeals his convictions on two

counts of rape of his stepdaughter, C.Q., who was 12 and 13 years old at the time of the crimes. Elliott was sentenced to two life terms to be served consecutively. He appealed his conviction to the Arkansas Supreme Court.

Elliott first contends that the trial court erred when it denied his motion to suppress a taped recording of Elliott's long-distance telephone conversations with C.Q. His wife, Alma, had become suspicious of his relationship with C.Q. and she decided to monitor and tape telephone calls he made to the couple's home when he was working in Texas. The tape revealed Elliott had had sex with C.Q. and upon learning of this fact, Alma reported the matter to the police.

In arguing Alma's tape should have been excluded at trial, Elliott relies on the case of *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987). He also asserts that Ark. Code Ann. § 5-60-120 (Repl. 1993) precluded the tape's introduction. Section 5-60-120 makes it unlawful for a person to intercept and record a telephone conversation between two parties unless that person is a party to the communication, or one of the parties has given prior consent to such interception and recording. Elliott claims that because neither he nor C.Q. authorized Alma to record their telephone conversation, Alma's tape was inadmissible. The statute, however, does not prescribe the admissibility of an unlawful recording, and Elliott offers no authority providing that an unlawful taping by a private citizen of parties' electronic communication is inadmissible. In fact, we have stated the general rule is that the search and seizure clauses are

restraints upon the government and its agents, not upon private individuals; the corollary to this proposition is that the exclusionary rule is not intended as a restraint upon the acts of private individuals. *Hill v. State*, 315 Ark. 297, 867 S.W.2d 442 (1993); *Houston v. State*, 299 Ark. 7, 771 S.W.2d 16 (1989).

The Mock decision that Elliott cites is an unavailing defense as well. In that case, the court of appeals considered a federal statute, 18 U.S.C. § 2511(2)(c) (1982), when deciding whether police officers' recording of an informant's conversation with Mock was unlawful and therefore inadmissible. Once again, that federal law concerns the placement of restraints upon government or state actors, not private individuals. Specifically, § 2511(2)(c) in relevant part provides that it is not unlawful for a person acting under color of law to intercept an electronic communication where such person is either a party to the communication or one of the parties gave the person prior consent to intercept the communication. As previously stated, Alma was in no way a state actor, and her independent unlawful decision to intercept and record Elliott's phone call to C.Q. was not excludable under federal or state law.

The Arkansas Supreme Court reversed and remanded Elliott's conviction on other grounds.



### SEARCH AND SEIZURE - VEHICLE SEARCH; SEARCH INCIDENTAL TO TRAFFIC CITATION

In *Knowles v. Iowa*, No. 97-7697, 12/8/98, an Iowa police officer stopped Knowles for speeding, but issued him a citation rather than arresting him. The question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car. The United States Supreme Court answered the question "no."

Knowles was stopped in Newton, Iowa, after having been clocked driving 43 miles per hour on a road where the speed limit was 25 miles per hour. The police officer issued a citation to Knowles, although under Iowa law he might have arrested him. The officer then conducted a full search of the car, and under the driver's seat he found a bag of marijuana and a "pot pipe." Knowles was then arrested and charged with violation of state laws dealing with controlled substances.

Before trial, Knowles moved to suppress the evidence so obtained. He argued that the search could not be sustained under the "search incident to arrest" exception recognized in *United States v. Robinson*, 414 U.S. 218 (1973), because he had not been placed under arrest. At the hearing on the motion to suppress, the police officer conceded that he had neither Knowles' consent nor probable cause to conduct the search. He relied on Iowa law dealing with such searches.

Iowa Code Ann. §321.485(1)(a) (West 1997) provides that Iowa peace officers having cause to believe that a person has violated any traffic or motor vehicle equipment law may arrest the person and immediately take the person before a magistrate. Iowa law also authorizes the far more usual practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest. See Iowa Code Ann. §805.1(1) (West Supp. 1997). Section 805.1(4) provides that the issuance of a citation in lieu of an arrest "does not affect the officer's authority to conduct an otherwise lawful search." The Iowa Supreme Court has interpreted this provision as providing authority to officers to conduct a full-blown search of an automobile and driver in those cases where police elect not to make a custodial arrest and instead issue a citation—that is, a search incident to citation. See *State v. Meyer*, 543 N. W. 2d 876, 879 (1996); *State v. Becker*, 458 N. W. 2d 604, 607 (1990).

Based on this authority, the trial court denied the motion to suppress and found Knowles guilty. The Supreme Court of Iowa, sitting en banc, affirmed by a divided vote. 569 N. W. 2d 601 (1997). Relying on its earlier opinion in *State v. Doran*, 563 N. W. 2d 620 (1997), the Iowa Supreme Court upheld the constitutionality of the search under a bright-line "search incident to citation" exception to the Fourth Amendment's warrant requirement, reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest. The United States Supreme

Court granted certiorari and reversed.

In *Robinson*, supra, the United States Supreme Court noted the two historical rationales for the “search incident to arrest” exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. 414 U.S., at 234. See also *United States v. Edwards*, 415 U.S. 800, 802-803 (1974); *Chimel v. California*, 395 U.S. 752, 762-763 (1969); *Preston v. United States*, 376 U.S. 364, 367 (1964); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914). But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case.

The United States Supreme Court has recognized that the first rationale—officer safety—is “both legitimate and weighty,” *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam)). The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest. In *Robinson*, the Court stated that a custodial arrest involves “danger to an officer” because of “the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.” 414 U.S., at 234-235. The Court recognized that the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress and uncertainty, and not from the grounds for arrest. *Id.*, at 234. A routine traffic stop, on the other hand, is a relatively brief encoun-

ter and “is more analogous to a so-called ‘*Terry stop*’ . . . than to a formal arrest.” *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). See also *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (“Where there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence”).

This is not to say that the concern for officer safety is absent in the case of a routine traffic stop. It plainly is not. See *Mimms*, supra, at 110; *Wilson*, supra, at 413-414. But while the concern for officer safety in this context may justify the “minimal” additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search. Even without the search authority Iowa urges, officers have other, independent bases to search for weapons and protect themselves from danger. For example, they may order out of a vehicle both the driver, *Mimms*, supra, at 111, and any passengers, *Wilson*, supra, at 414; perform a “patdown” of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous, *Terry v. Ohio*, 392 U.S. 1 (1968); conduct a “*Terry patdown*” of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon, *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest, *New York v. Belton*, 453 U.S. 454, 460 (1981).

Iowa has also not shown the second justification for the authority to search incident to arrest—the need to discover and preserve evidence. Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Iowa argued that a “search incident to citation” is justified because a suspect who is subject to a routine traffic stop may attempt to hide or destroy evidence related to his identity (e.g., a driver’s license or vehicle registration), or destroy evidence of another, as yet undetected crime. As for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation. As for destroying evidence of other crimes, the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote.

In *Robinson*, the Court held that the authority to conduct a full field search as incident to an arrest was a “bright-line rule,” which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here the Court is asked to extend that “bright-line rule” to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not

present at all. The Court declined to do so, reversed the Iowa Supreme Court, and remanded the case for further proceedings not inconsistent with their opinion.

*Editors Note:* This United States Supreme Court decision would seem to reverse the decision of the Arkansas Supreme Court in *State v. Earl, Jr.*, CR97-1310, 6/11/98; *CJI Legal Briefs*, 9/98, Volume 3-3 at page 13.

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**SEARCH AND SEIZURE -  
VEHICLE SEARCH;  
INVENTORY SEARCH  
OF IMPOUNDED  
VEHICLE'S ENGINE  
COMPARTMENT**

In *United States v. Lumpkin*, CA6, No. 96-5627, 11/6/98, on May 10, 1995, at approximately 12:45 p.m., Special Agent Glen Anderson of the Bureau of Alcohol, Tobacco, and Firearms (ATF) received a call from a confidential informant (CI) who had provided him with reliable information in the past. The CI told Anderson that Lumpkin would be driving westbound on I-440 toward I-65 in a turquoise Mercury Tracer with Tennessee license number 862-BXX. The CI stated that Lumpkin would be in possession of one or two pounds of methamphetamine, described Lumpkin and stated that he would be traveling with a white female passenger. At approximately 1:00 p.m., the same day, Anderson relayed this information to Officer Troy Gene Donegan of the Metropolitan (Nashville) Police Department's Narcotics Section. Donegan contacted several officers for assistance and began

to drive in a direction calculated to intercept Lumpkin's vehicle. Shortly thereafter, Donegan observed the turquoise Mercury Tracer traveling west on I-440 toward I-65 with the license plate and occupants as described by the CI. He asked Officer Lynn Hampton, driving a marked police car, to stop the Mercury on a pretense that the vehicle fit the description of one that had driven off from a gasoline pump without paying. Donegan turned around at the next exit and arrived at the scene approximately six minutes after giving these instructions; by this time Lumpkin was in the back of a police car and the female occupant, Dusty Thompson (the spelling of her name varies throughout the record), was standing outside.

Metropolitan Police Officer Al Burrow, also present at the scene, asked Thompson whether she had any drugs or firearms in the car, and she replied that she had a pistol in her purse. Burrow recovered the purse from the passenger front floorboard and removed a loaded .38 caliber Derringer. Thompson was advised of her rights by Donegan while Lumpkin was advised of his rights by another officer present. Based upon the information from the CI and its corroboration—the loaded weapon, a slight conflict in Lumpkin's and Thompson's stories about where they were going and where they had been, and Lumpkin's statement that there was approximately \$20,000 cash in the car trunk—Officer Gene Donegan determined that probable cause existed to search the Mercury. The currency was recovered from the trunk and after a search of the interior of the passenger

compartment yielded nothing else, Donegan raised the hood of the vehicle. Lying against the car battery was a cylindrical roll wrapped with brown tape and containing a white powder; Donegan testified that the powder had a slight odor of what he believed to be methamphetamine. At this point, both individuals were placed under arrest for possession of a controlled substance for resale. The substance was later analyzed by the Tennessee Bureau of Investigation and was confirmed to be methamphetamine.

While still at the scene of the initial stop, Thompson told officers that she and Lumpkin had driven to Tennessee from Oklahoma and that she didn't understand why they had rented a car in Nashville when the red and white pickup truck they had arrived in was parked at the Opryland Complex. The keys to this truck were promptly recovered from Thompson's purse and Officers Donegan and Burrow went to the Opryland Complex to seize the truck, believing it to have been used in a drug transaction. The truck was first transported to the police impound lot, where its contents were inventoried. Another tape-wrapped cylinder containing approximately one pound of methamphetamine was found in the engine compartment of the truck.

Lumpkin was indicted on the two counts of possessing over 500 grams of methamphetamine with intent to distribute in violation of 21 U.S.C. 841(a)(1) on July 13, 1995. He subsequently submitted a motion to suppress the evidence obtained from the car and truck as violating the Fourth Amendment prohibition against unreasonable

searches and seizures. Following a two-day hearing, the district court denied Lumpkin's motion to suppress. On October 25, 1995, Lumpkin entered a guilty plea, while reserving the right to appeal his suppression issues.

Lumpkin first argues that the district court erred in denying his motion to suppress the warrantless search of his rental car. The Sixth Circuit Court of Appeals concluded that the district court properly denied the motion to suppress.

Under the automobile exception to the warrant requirement, law enforcement officers may search a readily mobile vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime. *United States v. Ross*, 456 U.S. 798, 799 (1982); *Smith v. Thornburg*, 136 F.3d 1070, 1074 (6th Cir. 1998) (citing *California v. Carney*, 471 U.S. 386, 390-94 (1985)). "Probable cause exists when there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Smith*, 136 F.3d at 1074 (quoting *United States v. Wright*, 16 F.3d 1429, 1437 (6th Cir.), cert. denied, 512 U.S. 1243 (1994)). Probable cause may come from a confidential informant's tip, when sufficiently detailed and corroborated by the independent investigation of law enforcement officers. See *Chambers v. Maroney*, 399 U.S. 42, 44, 52 (1970) (finding probable cause for warrantless search of a vehicle that matched description given by eyewitness to a robbery); *United States v. Padro*, 52 F.3d 120, 123-24 (6th Cir. 1995) (upholding a warrantless search of vehicle where officer had probable cause to believe car con-

tained cocaine based upon an informant's tip and officer's corroboration); *United States v. Brown*, 49 F.3d 1346, 1350 (8th Cir. 1995) (upholding a warrantless search of vehicle when truck matched description given by informant and it arrived at location specified for drug transaction).

In this case, the CI's tip was corroborated by the officers' own observations, thus providing probable cause for the search of the automobile. Nonetheless, Lumpkin argues that this information should have been used to obtain a search warrant, claiming that the extensive planning described at the suppression hearing afforded officers plenty of time to apply to a magistrate for a warrant. The testimony presented at the suppression hearing refutes this claim. The informant's tip came in to the ATF agent at 12:45 p.m. on May 10, 1995. Anderson relayed this information to local police officers at 1:00 p.m., and the Mercury was stopped by police sometime between 1:30 and 2:00 p.m. Time was clearly of the essence; the Mercury was enroute to I-65 and there was, contrary to Lumpkin's assertion, little time to find a magistrate and obtain a search warrant. The district court specifically found that there was no time to obtain a warrant, and this finding is not clearly erroneous.

Furthermore, the search under the car's hood was proper. The Fifth Circuit had occasion to consider the scope of a probable cause search of a car stopped for speeding. As officers approached the car, they detected the odor of burnt marijuana and observed a box of ammunition in the back seat. The court concluded that under the to-

totality of the circumstances, officers had probable cause to believe that the car contained evidence of illegal drug trafficking, and thus had the right to search all of the car, including the locked trunk and engine compartment. *United States v. Kelly*, 961 F.2d 524, 527-28 (5th Cir. 1992). The Sixth Circuit Court of Appeals agreed with the Fifth Circuit's analysis and concluded that, under the totality of the circumstances of this case, officers had probable cause to search the engine compartment of Lumpkin's rental car.

Lumpkin also challenges the warrantless search of the pickup truck, asserting that there was no evidence to link it to illegal activity and that, in any event, the search of the engine compartment exceeded the scope of a valid inventory search. Whether the scope of an inventory search includes the engine compartment of a vehicle is an issue of first impression in the Sixth Circuit.

The district court first found that Thompson's statement regarding the pick-up truck and the presence of methamphetamine in the rental car provided a sufficient basis to seize the truck following Lumpkin's arrest. Again, the district court's finding is not clearly erroneous. From Thompson's story, officers knew that she and Lumpkin had driven to Tennessee from Oklahoma in that truck, but then left it parked at the Opryland Complex and instead, rented another vehicle. Since Lumpkin was found to be in possession of drugs, it was reasonable to suspect the truck of involvement in the criminal activity and to seize it.

After lawfully taking custody of a vehicle, officers may conduct

a warrantless inventory search. Such inventory searches “serve to protect an owner’s property while it is in the custody of the police, to ensure against claims of lost, stolen, or vandalized property, and to guard the police from danger.” *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). Protection of the property was of particular importance in this case because the officers were told that the truck belonged to a friend of Lumpkin’s who lived in Oklahoma. An inventory search may not be conducted for purposes of investigation and must be conducted according to standard police procedures. See *Florida v. Wells*, 495 U.S. 1, 5 (1990). However, the fact that an officer suspects that contraband may be found does not defeat an otherwise proper inventory search. See *United States v. Harvey*, 16 F.3d 109, 112 (6th Cir.), cert. denied, 513 U.S. 900 (1994); *United States v. Lewis*, 3 F.3d 252, 254 (8th Cir. 1993) (per curiam) (noting that the presence of an investigative motive does not invalidate an otherwise valid inventory search), cert. denied, 511 U.S. 1111 (1994). Therefore, the fact that Donegan and Burrow may have suspected that the truck contained evidence of drug trafficking does not render their inventory search invalid if otherwise found to be lawful.

Lumpkin principally objects to the scope of the search and argues that the search of the truck’s engine compartment exceeded the scope of a valid inventory search. Officer Burrow, who conducted the search, testified that in every inventory search of a vehicle which he had performed, he raised the hood of the vehicle to check for missing parts, and that a com-

plete inventory of a vehicle’s contents was standard procedure for the Metropolitan Police Department. “Generally, ‘reasonable’ police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment.” *United States v. Richardson*, 121 F.3d 1051, 1055 (7th Cir. 1997) (quoting *Bertine*, 479 U.S. at 374). Illinois’ policy for inventory searches, quoted in part by the Seventh Circuit in *Richardson*, provides that the examination and inventory of the contents of all vehicles or boats held by department authority “would normally include front and rear seat areas, glove compartment, map case, sun visors, and trunk and engine compartments.” No such written inventory policy for the Metropolitan Police Department is found in the record of this case, but the undisputed testimony of Officer Burrow is sufficient to establish that the search of the pick-up truck was conducted in good faith according to standard operating procedure.

Although the Sixth Circuit has not previously dealt directly with the question of an inventory search under the hood of a vehicle, other circuits have. The Eighth Circuit, when faced with this issue, rejected the defendant’s contention that police officers “went beyond the scope of a permissible inventory search when they searched the van’s engine compartment. Because Lewis had a bag of cocaine in his shirt pocket when he was arrested, the officers had ample justification to search all areas of the van where personal property might be found, to protect the public from persons who might find contraband drugs in the

van.” *Lewis*, 3 F.3d at 254. In that case, officers had searched the van in question six hours after the defendant’s arrest and discovered a box containing an amount of heroin valued at \$125,000 hidden in the engine compartment.

The Tenth Circuit has taken a similar position on the scope of an inventory search. The inventory then under scrutiny was found to be “entirely consistent with the purposes of an inventory search, showing inter alia: engine, battery, radiator, generator, bumpers, stereo, seats . . . .” *Smyth v. City of Lakewood*, No. 95-1481, 1996 WL 194715, (10th Cir. April 19, 1996).

The Sixth Circuit Court of Appeals agreed with the position taken by the Eighth and Tenth Circuits and, therefore, held that a valid inventory search conducted by law enforcement officers according to standard procedure may include the engine compartment of a vehicle. Accordingly, the district court did not err in denying the motion to suppress evidence obtained from the warrantless search of the pickup truck.

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#### SEARCH AND SEIZURE - VEHICLE SEARCH; PROBABLE CAUSE

In *United States v. Nichols*, CA8, No. 98-1980EA, 11/27/98 [Unpublished], an Arkansas police officer stopped Genevieve “Jenny” Nichols for following another vehicle too closely on the freeway. As the officer approached Nichols’ U-Haul vehicle, he smelled marijuana and when Nichols voluntarily opened the

back of the vehicle, the officer noticed a stronger marijuana odor. In response to the officer's question, Nichols denied she was carrying any contraband. Nichols then signed a consent form and permitted the officer to search her vehicle, where the officer found more than 400 pounds of marijuana. Nichols moved to suppress this evidence, arguing the officer's stop and search violated the Fourth Amendment. After a hearing, the district court denied the motion. Nichols entered a conditional guilty plea to possession with intent to distribute marijuana and the district court sentenced her to 30 months in prison. Nichols appeals her conviction and sentence. The Eighth Circuit Court of Appeals affirmed.

Nichols challenges the district court's denial of her suppression motion, claiming the officer did not have probable cause for the stop. Nichols also claims she did not voluntarily consent to the search of her vehicle because the officer coerced her into opening her vehicle and she later signed the consent form merely as authorization of this search. The Eighth Circuit Court of Appeals rejected Nichols's contentions. First, the officer saw Nichols commit a traffic violation, which created probable cause for the stop. See *United States v. Johnson*, 58 F.3d 356, 357 (8th Cir. 1995). Second, contrary to Nichols' contention, the officer testified Nichols volunteered to open her vehicle, and even if Nichols had not opened her vehicle or signed the consent form, the marijuana odor created probable cause that justified the officer's search. See *United States v. Gipp*, 147 F.3d 680, 685 (8th Cir. 1998).

The district court found the officer's testimony at the suppression hearing more credible, and having reviewed the record, the Eighth Circuit Court of Appeals concluded the district court's factual findings supporting its denial of Nichols' suppression motion are not clearly erroneous. See *United States v. White*, 42 F.3d 457, 459 (8th Cir. 1994).

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**WRIT OF EXECUTION -  
JUDGMENT-DEBTORS  
HAVE NO STANDING TO  
SUE UNDER ARKANSAS  
CODE ANNOTATED  
§ 16-66-118**

In *Efurd v. Hackler*, No. 98-480, 12/3/98, heard an appeal from an order of the Franklin County Chancery Court which found that a judgment-debtor has no standing to sue a non-complying sheriff under the provisions of Arkansas Code Annotated § 17-66-118 (1987). The Arkansas Supreme Court accepted certification of this case from the Arkansas Court of Appeals because it involves an issue of first impression and substantial public interest and it raises a substantial question of law concerning the interpretation of section 16-66-118.

The Arkansas Supreme Court stated that the only issue before them was whether judgment-debtors could sue pursuant to § 16-66-118. Section 16-66-118 provides, in part, that:

(a) Each officer to whom any execution is delivered shall be liable and bound to pay the whole amount of money specified in or

endorsed on the execution and directed to be levied, if he:

(1) Neglects or refuses to execute or levy the execution according to law; or

(2) Takes in execution any property, or if any property is delivered to him by any person against whom an execution may have been issued, and the officer neglects or refuses to make a sale of the property so delivered according to law; or

(3) Does not return the execution on or before the return day specified therein;

(c) If the officer, on the return of any execution or at the time the execution ought to be returned, does not have the money which he may have become liable to pay as prescribed in subsection (a) of this section, and does not pay the money over according to the command of the writ, any person aggrieved thereby may have his action against the officer and his sureties, upon his official bond.

(e)(1) The party aggrieved may proceed against the officer by the motion before the court in which the writ is returnable, in a summary manner, ten (10) days previous notice of the intended motion being given, on which motion the court shall render judgment for the amount which ought to have been paid, with interest and damages as provided in subsection (d) of this section, and award execution thereon.

In construing § 16-66-118, the Arkansas Supreme Court has

long held that the judgment-creditor is the aggrieved party who may maintain an action against an officer who fails to timely return the writ or to make a sale of the seized property. See generally *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995). The remedies provided in section 16-66-118 are designed to benefit the creditor by bringing the debtor one step closer to satisfying the judgment via a forced payment. Moreover, the statute is highly penal in nature, and the person seeking to enforce the penalty must bring himself within both the letter and the spirit of the statute. *G.F. Harvey Co. v. Huddleston*, 125 Ark. 522, 189 S.W. 181 (1916).

Here there has been a failure to cite any Arkansas case law where a judgment-debtor has availed itself of section 16-66-118 remedies. Consistent with precedent and in the absence of any compelling argument or authority, the Arkansas Supreme Court held that the trial court did not err in granting Sheriff Ross' motion to dismiss for lack of standing. Accordingly, they affirmed the decision of the Franklin County Chancery Court.

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