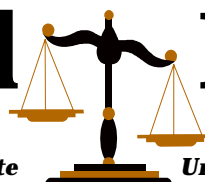




# CJI Legal Briefs



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## CIVIL LIABILITY – FAILURE TO TRAIN

In *Ratliff v. City of Columbia*, CA8, No. 99-1986, 11/24/99 [Unpublished], Mary A. Ratliff alleged her arrest was racially motivated and without probable cause. Ratliff brought this 42 U.S.C. § 1983 action against the City of Columbia, Missouri, and police officers Rob Sanders, Dennis Veach, Mike McFarland, and Ernie Barbee in their official capacities (collectively the City). Ratliff claimed her arrest was the result of the failure to discipline officer Sanders for earlier misconduct and the failure to train officers in cultural diversity. The district court granted summary judgment for the City, and Ratliff appeals. Because Ratliff sued the officers in their official capacities, the Eighth Circuit Court of Appeals treated her entire lawsuit as one against the municipality.

Ratliff cannot prevail on her failure-to-discipline claim unless there is a municipal policy or custom of failing to act on earlier similar complaints of unconstitutional conduct. See *Andrews v. Fowler*, 98 F.3d 1069, 1074-75 (8th Cir. 1996). The Eighth Circuit Court of Appeals agreed with the district court that the record fails to establish the existence of that kind of policy or custom. Ratliff points to eight earlier complaints of misconduct against Sanders, but the complaints were investigated each time and officer Sanders was found to have acted improperly on just three occasions. Only two complaints were for false arrest, and one of those arrests was found to be proper. Sanders was disciplined for the improper arrest. None of the eight complaints involved allegations of racial discrimination or insensitivity. The earlier complaints are insufficient as a matter of law to show a persistent pattern of unconstitutional misconduct on Sanders’s part, notice to officials of such misconduct, or deliberate failure to act on complaints of false arrest or racial discrimination. *Thelma D. v. Board of Educ.*, 934 F.2d 929, 932-33 (8th Cir. 1991). Ratliff cannot prevail on her failure-to-train claim unless the municipality had notice its training was inadequate.

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See *Andrews*, 98 F.3d at 1076. Here, the record does not establish the municipality had any notice of earlier incidents of misconduct caused by a failure to train its officers in cultural diversity. Thus, Ratliff's failure-to-train claim fails.

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**CIVIL LIABILITY –  
OFFICERS RESPONSE TO  
DOMESTIC VIOLENCE**

In *Fletcher v. Town of Clinton*, CA1, No. 99-1377, 11/8/99, the First Circuit Court of Appeals overturned an order denying officers immunity from a civil rights action based on a warrantless entry and arrest. In this case before the night of July 31, 1997, Fletcher had called the police for help with McDonald three separate times before she obtained a restraining order. On May 22, 1997, Fletcher called the police and complained that McDonald was extremely angry, was refusing to leave her home, and had thrown her kitten across her apartment. Officer Genest went to Fletcher's home, where Fletcher told him that things were now under control. A pastor from Fletcher's church had arrived and McDonald had agreed to leave with him. The police left once McDonald did.

About two weeks later, on June 6, 1997, Fletcher called the police again. She told the dispatcher that McDonald was drunk, had refused to leave, and was stealing her property and threatening to damage her car. The dispatcher heard McDonald tell Fletcher to hang up the phone and call someone to come pick him up; the dispatcher urged Fletcher to stay on

the line until officers arrived. The dispatcher heard an escalating argument and got McDonald on the phone. Officers Genest and Bessey arrived shortly thereafter and found McDonald outside the home. Despite their orders not to do so and their warnings of arrest if he persisted, McDonald tried to go back into Fletcher's home. McDonald was arrested and charged with criminal trespass. McDonald was later released on bail on the condition that he not have any direct or indirect contact with Fletcher or her home.

On July 16, 1997, Fletcher again called the police, this time from the home of Clinton Police Sergeant Steve Trahan (or his mother). Fletcher said that her "ex-boyfriend" McDonald was in her home in violation of his bail conditions and that she had been forced to flee to call for help. Fletcher told the police that McDonald had been at her home when she returned from work, that they had argued, and that Fletcher had fled to her car. She was talking to McDonald's ex-girlfriend (who had called to speak with McDonald) on her cordless phone. McDonald had been "screaming in the background." When Fletcher asked McDonald's ex-girlfriend to call for help, McDonald had grabbed the phone away and thrown it into a field. Fletcher went for help and the ex-girlfriend called the police. Fletcher did not know Sergeant Trahan, but she had seen a police car parked outside of the house and was "just taking a chance hoping someone was there that could help her."

Officers picked up Fletcher and took her home. McDonald was gone. They saw that McDonald

had damaged Fletcher's property, and noted that her kitten's eye was swollen shut. McDonald telephoned Fletcher while the police were with her; he told her that he was in Fairfield, Maine. It was a ruse. When the police left to find him, McDonald appeared outside of Fletcher's house. Fletcher once again called the police. McDonald was arrested later that evening, his bail was revoked, and he was returned to jail.

The next day, July 17, Fletcher applied for an ex parte temporary restraining order against McDonald in the state district court. Under Maine law at the time, temporary ex parte orders of protection could be granted on a showing of "immediate and present danger of physical abuse to the plaintiff." Me. Rev. Stat. Ann. tit. 19, § 765(2). In her application, Fletcher swore that she was "in immediate and present danger of abuse by the defendant." She described the previous day's events—the same events she had described to the police the night before—and reported that she had "called for help on previous occasions because she was frightened for her safety and for the safety of her property." Fletcher also told the court that McDonald had "threatened her on several occasions, that if I leave him he will wreck my car and my belongings." The court issued an order that prohibited McDonald from, among other things, entering Fletcher's home and having any contact, direct or indirect, with her. The order was served on McDonald in jail. A copy was also delivered to the Clinton Police Department, as the agency responsible for enforcing the order.

On the evening of July 31, 1997, the date of the incidents in question, Officers Genest and Bessey went on duty at 6 p.m. Shortly before going on duty, Trahan informed Genest that he had seen McDonald at Fletcher's home, when Fletcher was not there, earlier in the day or the day before. Both Genest and Bessey were aware of the history of problems between Fletcher and McDonald. Genest had responded to Fletcher's May 22 and June 6 calls for help, and Bessey had responded to the June 6 call. Additionally, both officers were aware of the events of July 16 and knew that Fletcher had obtained a restraining order against McDonald. Before leaving the station, Genest called the Kennebec County Sheriff's Office and was informed that the restraining order was still in effect.

At approximately 9 p.m. that evening, the officers drove past Fletcher's home. As they drove by, they both saw a man they recognized as McDonald through a first floor window. He was standing in Fletcher's bedroom and talking to her. The officers did not see any sign of conflict between Fletcher and McDonald. Their prior experiences with McDonald as well as their knowledge that a protective order existed made them concerned for Fletcher's safety, however. As Genest stated in his affidavit, "it was apparent to me that the situation had escalated to the point that Ms. Fletcher feared for her safety to the point of repeatedly calling for police assistance and obtaining a court order prohibiting Mr. McDonald from having any contact with her or her property." Bessey reacted similarly, conclud-

ing that Fletcher's life was in danger because of "Mr. McDonald's violent nature," Mr. McDonald's drinking, her calling us, calling the county, and her putting a protection order on him." The officers turned their cruiser around and stopped briefly to contact Trahan. Trahan once again confirmed that the restraining order was in effect and told them to pick up McDonald and bring him in.

On returning to Fletcher's home, Bessey knocked on the front door while Genest went to the window where they had seen Fletcher and McDonald earlier "to ensure that McDonald did not harm Fletcher" and to "watch McDonald in case he tried to flee." When Genest approached the window, he saw Fletcher in her bedroom. Although Bessey's knocking was audible in the bedroom and although Fletcher had seen the police cruiser outside, she ignored the knocking at her door. Speaking through her window, Genest told Fletcher that he was from the police department, that he knew McDonald was in the home, and that she should go to the door. He said that he would arrest her if she did not. She denied that McDonald was there.

Genest and Bessey say that Fletcher eventually went to the door and opened it. Fletcher, in contrast, says that she never opened the door, but that the officers let themselves in through the front door, which might have been locked. We will take Fletcher's version of events.

Once inside, the officers saw Fletcher and told her that they were looking for McDonald and knew he was in her home. Fletcher denied that McDonald was there,

said that a friend of hers was in the bathroom, and ordered the officers to leave. McDonald spoke from behind the bathroom door, saying he was someone else. The ploy backfired. The officers immediately recognized McDonald's distinctive accent.

Bessey observed that Fletcher "acted kind of shook up and wanted us to leave" and that it seemed as though "Mr. McDonald was directing Ms. Fletcher to request that we leave the residence." Genest knew that McDonald had interfered with Fletcher's attempts to get help on a previous occasion and said that he "did not know if that was the case in this situation, or whether Mr. McDonald had threatened to harm Ms. Fletcher if she told us he was in the apartment and had him arrested."

The officers decided to go further inside the house. As they moved toward the bathroom, Fletcher picked up the phone and dialed 911. Genest took the phone from her hand, told the dispatcher who he was, and explained that no assistance was needed at that time. He hung up the phone and the officers went to the bathroom door. Fletcher stayed close to the officers, demanding they leave and insisting that they had no legal right to be there. Fletcher was warned that she would be arrested if she did not stop interfering with their efforts to reach McDonald. She continued and Genest handcuffed her and placed her in the bedroom.

The officers eventually got the bathroom door open. After a struggle with McDonald, the officers sprayed pepper spray into the bathroom and McDonald slammed the door closed, leaving the officers outside. When the officers

opened the door after waiting for the pepper spray to clear, they found McDonald had escaped out the bathroom window. Both officers left the house to pursue McDonald.

As Genest left the house, he heard the door close and lock behind him. Fearing that McDonald had reentered the home and knowing that Fletcher was vulnerable in her handcuffed position, Genest returned to the front door, found it locked, and shouted a demand that the door be opened. Fletcher did not hear Genest's demand. When there was no response, Genest kicked the door in. He discovered that Fletcher had slipped out of her handcuffs and that she was the one who had locked the front door. She had again called 911, and Genest again removed the phone from her hand and spoke to the dispatcher. Genest then handcuffed Fletcher and took her to the police cruiser.

Meanwhile, Bessey had not found McDonald. Genest radioed for assistance and the officers who reported to the scene proceeded to search for McDonald. They did not find him. Fletcher was eventually taken by Genest and Bessey to the police station, where she waited until the bail commissioner arrived. Fletcher was released on bail that evening. No charges were ever prosecuted against Fletcher. McDonald turned himself in the next day, and was released on bail. He eventually pled guilty to violation of the protective order.

Fletcher claims that both the initial entry into her home and the reentry after McDonald had escaped through the bathroom window violated her Fourth Amendment rights. Both entries were without warrant and this Court

evaluated these claims together.

It is clearly established that a search warrant is ordinarily required to enter the home of a third person to arrest an individual who is believed to be inside the home. See *Steagald v. United States*, 451 U.S. 204, 216 (1981). This rule applies regardless of the existence of an arrest warrant. Just as clearly established, however, is the "exigent circumstances" exception to this rule. See *Joyce v. Town of Tewksbury*, 112 F.3d 19, 21-22 (1st Cir. 1997) (en banc). Exigent circumstances exist where "there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *United States v. Almonte*, 952 F.2d 20, 22 (1st Cir. 1991) (quoting *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980).

There are four recognized categories of exigent circumstance: (1) hot pursuit of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to herself. The defendants say that "safety" exigencies justified their warrantless entries into Fletcher's home.

An officer's reasonable belief that the delay needed to obtain a warrant would pose "a threat to police or the public safety" is sufficient to create exigent circumstances. *United States v. Curzi*, 867 F.2d 36, 42 (1st Cir. 1989). "The Supreme Court's standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circum-

stances are present." *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). Fletcher argues that the police were required to obtain a warrant because it was unreasonable to conclude that her safety was threatened.

To the extent that the decision below rested on the ground that the officers did not see McDonald being violent toward Fletcher, that ground alone is inadequate to deny immunity. Evidence of extreme danger in the form of shots fired, screaming, or blood is not required for there to be some reason to believe that a safety risk exists. See *Tierney v. Davidson*, 133 F.3d 189, 198 (2d Cir. 1998) ("The absence of blood, overturned furniture or other signs of tumult" did not render the officer's belief that danger existed unreasonable and did not require the officer "to withdraw and go about other business, or stand watch outside the premises listening for the sounds of splintering furniture."); *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) ("We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams. Doubtless outcries would justify entry, but they are not essential.")

On the spot reasonable judgments by officers about risks and dangers are protected. Deference to those judgments may be particularly warranted in domestic disputes. In those disputes, violence may be lurking and explode with little warning. Domestic violence victims may be intimidated or suffer from a dependence inherent in the abusive relationship. The signs of danger may be masked. See

generally *State v. Greene*, 784 P.2d 257, 259 (Ariz. 1989) (en banc) (noting that domestic violence calls “commonly involve dangerous situations in which the possibility for physical harm or damage escalates rapidly”); S. Rep. No. 102-197, at 38 (1991) (noting that “fear of retaliation and the lingering stigma of sex crimes and violence in the home” mean that “both literally and figuratively, these crimes remain hidden from public view”); Charles Patrick Ewing, *Battered Women Who Kill* 19 (1987) (noting that battered women often form a “traumatic bond” with their abusers, which leads them to become “extremely dependent” on their abuser and makes them “more incapable of fending for themselves”); Bureau of Justice Statistics, U.S. Dep’t of Justice, Rep. No. NCJ-167237, *Violence by Intimates* at v (1998) (noting that one of the “most common reasons given by victims for not contacting the police” was that they “feared retaliation”). Maine has had many episodes of domestic disputes turning violent and even fatal. See Maine Coalition for Family Crisis Services, *Domestic Abuse in Maine: Data Project 1990-1995*, at 26 (n.d.) (finding that 51% of all homicides in Maine from 1990-1995 were “domestic violence related”).

Police must often make balanced choices. Domestic violence situations require police to make particularly delicate and difficult judgments quickly. See *Tierney*, 133 F.3d at 197 (“Courts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer’s belief that warrantless entry was justified by exigent circumstances

when the officer had substantial reason to believe that one of the parties to the dispute was in danger.”). At the same time, officers must respect basic freedoms guaranteed by the Fourth Amendment. A person’s home is her sanctuary, not ordinarily to be entered by the police unless that entry is authorized by a warrant. *Payton v. New York*, 445 U.S. 573, 585-87 (1980). This is true, even when the officers want to enter the home in order to arrest a third person whom they believe is there. See *Steagald*, 451 U.S. at 216. Victims of domestic violence do not give up their constitutional rights or the sanctity of their homes as the price for obtaining a restraining order against an abuser.

The balanced choice the officers must make is protected by qualified immunity if it is an objectively reasonable one. The officers here chose not to seek a warrant, which inevitably would have caused delay. If their choice not to delay but to enter Fletcher’s home was an objectively reasonable one, then the officers receive the protection of qualified immunity. Such immunity is given not only for the protection of the officers, but also to protect victims of crime. In the domestic violence context, immunity is given so that officers will not have strong incentives to do nothing when they believe a domestic abuse victim is in danger. Permitting suit against officers who have acted reasonably when there is reason to fear would create exactly the wrong incentives. Indeed, if the officers had done nothing, and Fletcher had been injured, they would have faced the threat of suit. In either event, their choice would be protected if it was objectively

reasonable in light of clearly settled law.

Officers’ decisions to enter a home to ensure the safety of those believed to be at risk of domestic violence have been found reasonable by other courts. *United States v. Gwinn*, 46 F. Supp. 2d 479, 482-83 (S.D. W. Va. 1999) (finding entry to be reasonable, even though alleged abuser had been detained, because alleged victim was crying and might have needed assistance); *Greene*, 784 P.2d at 259 (“The call to 911 itself creates a sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstance indicates that entry is unnecessary.”); *State v. Lynd*, 771 P.2d 770, 773 (Wash. Ct. App. 1989) (concluding that entry was reasonable where there had been a hang-up call to 911 and the husband, who was outside the house, reported that he and his wife had been arguing).

In this case, Fletcher’s arguments—that the officers’ belief that there was a threat to her safety was unreasonable—do have some weight. The officers saw no violence occurring within the home. Fletcher clearly told the officers that she did not want them in her home that night. McDonald had not been physically violent with Fletcher, Fletcher had not hesitated to call the police when she felt in danger, and the officers saw no evidence of violence. Despite these facts, the officers intervened, and Fletcher, who had sought the protection of the law, was the one arrested. But Fletcher’s subjective view of the facts is not the test. We conclude that an objectively reasonable officer, facing the circumstances that Genest and Bessey faced that evening, could

have concluded that both of the warrantless entries into Fletcher's home were justified by the threat to Fletcher's safety.

It was reasonable to conclude that Fletcher was at risk. The sequence of events described earlier—three calls to the police, a protective order, McDonald's being jailed—could easily lead the officers to the conclusion that Fletcher was at risk on the night of July 31, indeed at greater risk than she had been previously. There was good reason to believe that McDonald might well be vindictive and try to hurt Fletcher for having him arrested on July 16 and sending him back to jail. Fletcher's own testimony was that she sought the protective order because she felt that the situation might escalate dangerously. "I was afraid that he would come back to my apartment when he did get out of jail and be very, very upset that they had arrested him and tried to blame it on me. . . . I was afraid that he could hurt me because—he had never hurt me, but he had hurt people in the past and he had thrown my kittens, so, yes, I was afraid."

Fletcher's fear was well-founded. Arrests, protective orders, and other attempts to break the cycle of violence often increase the short-term danger to abuse victims. See *Women and Violence: Hearings before the Comm. on the Judiciary, U.S. Senate, on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 2d 145 (1991) (statement of Susan Kelly-Dreiss, Executive Director, Pennsylvania Coalition Against Domestic Violence); Ewing, *supra*, at 13 ("Violence against battered women often escalates any time they attempt

to take any control over their lives or the battering relationship."); Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 Vt. L. Rev. 1, 12 (1982) ("One of the most dangerous times for both partners is at the point, or threat, of separation."). The officers also knew that McDonald was in violation of both the protective order and his bail conditions. His defiance of court orders, at the risk of going back to jail, suggested a man out of control or bent on revenge.

Fletcher's refusal to admit the officers and her denial that McDonald was in the home did not make the officers' conclusion that her safety was threatened unreasonable. Instead of opening the door and telling the officers that McDonald was there with her permission and was not threatening her safety, Fletcher ignored the knocking at her door and later lied about McDonald's presence. This gave them additional reason to fear for her safety, given their knowledge that McDonald had previously interfered with Fletcher's efforts to contact the police. In domestic violence situations, officers may reasonably consider whether the victim is acting out of fear or intimidation, or out of some desire to protect the abuser, both common syndromes. *United States v. Bartelho*, 71 F.3d 436, 438 (1st Cir. 1995) (noting that officers are often trained not to take the statements of abuse victims at face value, but instead to consider whether the victims are acting out of fear). Indeed, one commentator has estimated that domestic violence victims are uncooperative in 80 to 90 percent of attempted criminal prosecutions against their

batterers. See Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 367-68 (1996). This same commentator concluded that victims often lie "to minimize the violence and protect the batterer." *Id.* at 392 n.197; see also Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1232-35 (1993). Particularly given their knowledge of the prior incidents between Fletcher and McDonald, the officers were not required to accept Fletcher's statements. Thus, the officers are entitled to qualified immunity as to the first entry.

The officers' second entry into Fletcher's home was also justified by the exigencies of the situation. When Genest entered Fletcher's home the second time, he knew that someone had locked him out. It was reasonable for him to believe that McDonald might have done so by reentering the home. And he knew that if McDonald had reentered the house, Fletcher would be vulnerable in her handcuffed position. Further, the situation had, at this point, escalated, increasing the possibility that McDonald might engage in violence.

The Magistrate Judge, in denying summary judgment, found that the officers' "lack of haste" meant that exigent circumstances did not exist to justify the entries. In particular, he relied upon the fact that the officers learned around 6 p.m. that McDonald had been seen at Fletcher's home sometime in the last day or two, but did not go by her house until approximately 9

p.m. This analysis ignores the fact that these officers did not themselves have any information that McDonald was still at the house and, thus, that Fletcher was in danger until they drove past her house at 9 p.m. At that point, they delayed only briefly to confirm that the protective order was in effect and to receive instructions from Trahan as to how they should proceed. The information that they received before they went on duty that evening—that McDonald had been seen in Fletcher’s home, when she was not there, at some time during the last two days—did not create an exigency. The exigent circumstances arose when Genest and Bessey saw McDonald in the house with Fletcher, and they did not delay unreasonably in acting to address the safety risk they perceived at that time. See *United States v. Rengifo*, 858 F.2d 800, 804 (1st Cir. 1988) (“An agent does not avoid or delay applying for a warrant if he or she is conducting an investigation spurred by suspicion, but without, in her reasonable judgment, sufficient evidence to establish probable cause to support a warrant.”).

The officers are entitled to qualified immunity as to both entries, and thus to dismissal of these claims.




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**CONSTITUTIONALITY OF  
ACT 989 OF 1997 – SEX  
AND CRIMINAL  
OFFENDER  
REGISTRATION ACT OF  
1997**

In *Kellar v. Fayetteville Police Department*, No. 99-517, 12/2/99, the Arkansas Supreme Court was faced with the constitutionality of Act 989 of 1997 known as the Sex and Child Offender Registration Act of 1997. Kellar challenged the constitutionality of the Act as violating the *ex post facto* and due process clauses of the United States and Arkansas Constitutions.

After a lengthy analysis, the Arkansas Supreme Court concluded that Act 989 of 1997 was constitutional.

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**GAME AND FISH  
ENFORCEMENT – CIVIL  
LIABILITY AND  
QUALIFIED IMMUNITY;  
SEARCH AND SEIZURE**

In *Rainvey v. Hartness*, No. 99-529, 12/2/99, Jerry Rainey and James Harton filed a civil rights suit in Grant County Circuit Court against James Hartness, a wildlife enforcement officer with the Arkansas Game and Fish Commission. The suit alleged that Hartness (1) entered their property without authority; (2) seized Harton’s rifle through an illegal search and converted it without due process of law and just compensation; and (3) damaged their crops by driving over them on a four-wheel, all-terrain vehicle.

Rainey and Harton were hunting on October 21, 1995, during muzzleloading deer season on lands owned by Rainey and leased by Harton. Hartness issued Rainey a citation for being in possession of the hunting license of another person. Hartness cited Harton for violation of Regulation 07.03 which provides that it is “unlawful to have in immediate possession a centerfire or rimfire weapon while participating in muzzleloading deer seasons.

Rainey and Harton brought suits against Hartness, in his individual capacity as a wildlife officer for Grant County, Arkansas, pursuant to the Arkansas Civil Rights Act of 1993 and 42 United States Code, Section 1983.

The Arkansas Supreme Court noted government officials performing discretionary functions are granted a qualified immunity from suit under section 1983 and are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Wilson v. Layne*, No. 98-83, 526 U.S. \_\_\_, \_\_\_, slip op. at 4-5 (May 24, 1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Courts evaluating a claim of immunity must determine whether the plaintiff has alleged the deprivation of an actual constitutional right and, if so, whether that right was clearly established at the time of the alleged violation. This court adopted the Supreme Court’s test for qualified immunity in section 1983 cases in *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987). The issue of whether the official’s conduct violated clearly established

constitutional rights is a question of law that may be resolved by summary judgment. With this test in mind, the Arkansas Supreme Court turned to the Fourth Amendment issued.

The Supreme Court has recognized that the protection afforded by the Fourth Amendment does not extend to open fields or lands. *United States v. Dunn*, 480 U.S. 294 (1987) (citing *Hester v. United States*, 265 U.S. 57 (1924)). This court has also recognized the “open fields” doctrine. *See, e.g., Sanders v. State*, 264 Ark. 433, 572 S.W.2d 397 (1978); *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977); *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975), *cert. denied*, 430 U.S. 931 (1977). Additionally, Rule 14.2 of the Arkansas Rules of Criminal Procedure provides: “An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure.”

Here, the evidence showed that Rainey’s property was open, wooded land. Rainey and Harton admit in their complaint that the land was used for the recreational purpose of hunting deer and other game. Regulation 01.00-B provides in pertinent part that wildlife officers have authority to “go upon any property outside of private dwellings, posted or otherwise, in the performance of their duties,” and that they “may with or without a warrant according to law, conduct searches.” Thus, Hartness’s entry onto the property on his four-wheel vehicle did not violate the Fourth Amendment. The next question then is whether Hartness’s actions in climbing up the ladder to look into Harton’s deer stand vio-

lated those constitutional provisions. It is argued that Harton enjoyed a legitimate expectation of privacy in his deer stand, and that, therefore, the warrantless search of the stand’s interior violated the Fourth Amendment. The Arkansas Supreme Court disagreed.

Within the meaning of the Fourth Amendment, a search “occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” *United States v. Roby*, 122 F.3d 1120, 1123 (8<sup>th</sup> Cir. 1997) (quoting *United States v. Jacobson*, 466 U.S. 109, 113 (1984) (footnote omitted)). A person who knowingly exposes an object to the public cannot expect the protection from unreasonable search and seizure provided by the Fourth Amendment. *Webster v. State*, 300 Ark. 169, 777 S.W.2d 849 (1989) (citing *Katz v. United States*, 389 U.S. 347 (1967)). Even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon. *State v. Hamzy*, 288 Ark. 561, 565, 709 S.W.2d 397, 399 (1986) (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (citing *Katz*, 389 U.S. 347; *Lewis v. United States*, 385 U.S. 206 (1966); *United States v. Lee*, 274 U.S. 559 (1927); *Hester*, 265 U.S. 57)). When an expectation of privacy is claimed, the trial court must determine: (1) Whether the defendant has asserted or manifested a subjective expectation of privacy, and (2) whether that expectation is objectively reasonable. *United States v. Stallings*, 28 F.3d 58 (8<sup>th</sup> Cir. 1994). Although the first prong is a question of fact, the second is

one of law. Thus, even assuming that the defendant has proven a *subjective* expectation of privacy, in the final analysis, that expectation must be objectively reasonable.

The evidence presented below demonstrates that the stand was little more than a metal box, with sides three to four feet high and a roof elevated on poles at each corner of the box. Persons standing inside the box were exposed to the public’s view, as Hartness testified that he observed Harton on the stand as he approached the area. There was no evidence that Harton used the stand to engage in private activity, other than eating meals, or that he attempted to shield his activities from the public. Moreover, Harton employed no apparent means of restricting access to the stand. *Stallings*, 28 F.3d 58. There was no evidence that the structure was inaccessible to other persons (*i.e.*, that the hatch door was locked or that the ladder was removed whenever he was not using the stand), only Harton’s claim that it was not open to use by other persons unless he invited them. Accordingly, there was a “theoretical possibility” that “animals, children, scavengers, snoops, and other members of the public” would happen onto the stand, thus rendering any claimed expectation of privacy objectively unreasonable. *Id.* at 61 (quoting *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1242 (8<sup>th</sup> Cir. 1990)).

Based on the foregoing, we conclude that Hartness was entitled to qualified immunity from civil-rights claims. Hartness’s conduct on October 21, 1995, did not violate any clearly established constitutional rights possessed by Rainey

and Harton. These individuals enjoyed no rights under the Fourth Amendment that would protect them from (1) Hartness's entry onto their property and (2) Hartness's search of Harton's deer stand. Because Hartness's search of the stand was legal under the Fourth Amendment, his seizure of the rifle as evidence was valid. Rule 10.2 of the Arkansas Rules of Criminal Procedure provides that a permissible object of seizure includes evidence of a criminal offense or other violation of the law. Accordingly, seizure of the gun was not a "taking" proscribed by Article 2, § 21 and 22, of the Arkansas Constitution.

The Arkansas Supreme Court continued by stating that the facts in the instant case clearly demonstrate that Hartness was acting in the scope of his employment with the Commission at the time that he entered onto Rainey's land. Accordingly, he is immune from damages for the state-law civil-rights claims. Hartness is also immune from the tort claim of damage to Appellants' crops allegedly caused by his driving over them on his four-wheel vehicle.

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**EVIDENCE – DYING  
DECLARATION**

In *Hammon v. State*, CR 98-525, 10/7/99, Roger Cousins was found on the edge of a highway outside Judsonia by Tommy Cole. Cousins had been shot four times in the back and called out to Cole as he drove by, "Please help me. I've been shot. I'm dying." Cole stopped his car and called 911 and requested assistance. Cole then

heard Cousins say that a "Roger Hammon" had "shot me all to pieces." Upon the arrival of the police and being told that his wounds were life-threatening, Cousins replied, "I know," and said twice more that "Roger Hammon shot me."

Hammond appealed his conviction alleging that the trial court erred in allowing the testimony of Cole and two police officers of the victim's dying declaration that Hammon shot him, because Cousins was incompetent and his statement was unreliable based on the presence of drugs in his urine.

The Arkansas Supreme Court stated that pursuant to the Arkansas Rules of Evidence, Rule 802 (1999), hearsay is not admissible except as provided by law or by the rules of evidence. One exception to the hearsay rule is found in Rule 804(b)(2), which provides that a statement made under the belief of impending death, commonly known as a dying declaration, is not excludable as hearsay if the declarant is unavailable as a witness. In order to qualify as a dying declaration under Rule 804, the statement must have been made by a declarant while believing that his death was imminent, and it must concern the cause or circumstances of what he believed to be his impending death. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991). The trial court determines whether a statement is admissible as a dying declaration, and the Arkansas Supreme Court will reverse that determination only if the trial court abused its discretion. Dying declarations are deemed inherently trustworthy. The principal consideration upon which such statements are admitted is that one

who realizes that death is inevitable in consequence of the injury inflicted, speaks with solemnity, and will not resort to fabrication in order to unjustly punish another. *Pinson v. State*, 210 Ark. 56, 194 S.W.2d 190 (1946).

The testimony of the medical examiner was that drugs were present in Roger Cousin's urine but not his bloodstream. The absence of the drugs from Cousins's blood indicated that they had already been metabolized and did not render Cousins intoxicated at the time of his death. According to the witness, one is "only intoxicated when alcohol or drugs are found in the blood. If they are found in any other body fluids, you're not under the influence." The testimony of the three persons who heard the declarations was that Cousins was coherent: he spoke clearly, made sense, was rational, and did not appear to be drunk. The Arkansas Supreme Court concluded that Cousins was competent and thus his dying declaration was admissible, and that the further question of credibility was for the jury to consider.

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**FIRST AMENDMENT**

In *Los Angeles Police Department v. United Reporting Publishing Company*, No. 98-678, 12/7/99, the publishing company provides the names and address of recently arrested individuals to its customers, who include attorneys, insurance companies, drug and alcohol counselors, and driving schools. It received this information from not only the Los Angeles Police Department but also other

California state and local law enforcement agencies. The State of California amended the California Government Code Section 6254(f)(3) to require that a person requesting an arrestee's address declare that the request is being made for one of five prescribed purposes—scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator—and that the address will not be used directly or indirectly to sell a product or service.

The United Reporting Publishing Company sought declaratory and injunctive relief to hold the amendment unconstitutional under the First and Fourteenth Amendments. The Federal District Court ultimately granted the publishing company summary judgment, having construed its claim as presenting a facial challenge to amended section 6254(f)(3). The Ninth Circuit affirmed concluding that the statute unconstitutionally restricts commercial speech.

The United States Supreme Court held that the United Reporting Publishing Corporation was not entitled to prevail on a “facial attack” on Section 6254(f)(3). The allowance of a *First Amendment* overbreadth challenge to a statute is an exception to the traditional rule that “a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.” *New York v. Ferber*, 458 U.S. 747, 767. The overbreadth doctrine is strong medicine that should be employed only as a last resort. At least for the purposes of

facial invalidation, the Los Angeles Police Department is correct that §6254(f)(3) is not an abridgment of anyone's right to engage in speech, but simply a law regulating access to information in the government's hands. This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. California law merely requires respondent to qualify under the statute if it wishes to obtain arrestees' addresses. California could decide not to give out arrestee information at all without violating the *First Amendment*. Cf. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14. To the extent that respondent's “facial challenge” seeks to rely on the statute's effect on parties not before the court—the publishing corporation's potential customers, for example—its claim does not fall within the case law allowing courts to entertain facial challenges. No threat of prosecution, see *Gooding v. Wilson*, 405 U.S. 518, 520-521, or cut off of funds, see *National Endowment for Arts v. Finley*, 524 U.S. 569, hangs over their heads.

The United States Supreme Court reversed the Ninth Circuit but but stated that the alternative bases for affirmance urged by the United Reporting Publishing Corporation will remain open on remand if properly presented and preserved in the Ninth Circuit.

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**INFORMANTS –  
TESTIMONY OF PAID  
INFORMANT**

In *United States v. Harris*, CA8, No. 98-3721, 10/18/99,

Kelwyn Harris argued that the United States District Court erred by failing to exclude the testimony of a paid government informant.

The Eighth Circuit Court of Appeals stated that the fact that the government had paid the informant for his past assistance and had paid or intended to pay him for his assistance in this case was made known to the jury and was fully explored at trial before the jury found Harris guilty as charged. In these circumstances, the District Court properly admitted the informant's testimony and left it to the jury to assess his credibility and decide what weight, if any, to give to his testimony. The Eighth Circuit Court of Appeals concluded that Harris's argument provides no basis for reversing his conviction.

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**JAILS AND PRISONS – LAW  
LIBRARY**

In *McLennan v. McKee*, CA8, No. 98-4215, 9/7/99, [Unpublished], one of the claims of James Venron McLennan, an Arkansas inmate, was that while he was incarcerated at the Washington County Jail, he was denied access to a law library.

The Eight Circuit Court of Appeals discussed the jail's failure to have a law library. The Court stated that McLennan's access to the courts was constitutionally adequate because he was represented by the public defender's office and his requests for meetings with his attorney were promptly forwarded. See *Johnson v. El Schoemehl*, 878 F.2d 1043 (8<sup>th</sup> Cir. 1989) (pretrial detainees

must be provided with either acceptable law libraries or adequate assistance from legally trained persons.) Further, Mr. McLennan did not establish a systemic denial of access to the courts, or show prejudice or actual injury. See *Jones v. James*, 38 F.3d 943 (8<sup>th</sup> Cir. 1994).

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**JAILS AND PRISONS –  
MEDICAL TREATMENT**

In *Davis v. Norris*, CA8, No. 99-1364, 11/1/99, [Unpublished], Len Edwin Davis claims that there was deliberate indifference to his serious dental needs when he was denied a root canal and delayed dental treatment.

The Eighth Circuit Court of Appeals stated that the record shows that while one examining dentist had recommended a root canal, another had recommended extraction. Thus, the record shows only a disagreement over a particular type of dental procedure. See *Long v. Nix*, 86 F.3d 761 (8<sup>th</sup> Cir. 1996) (inmate does not have constitutional right to any particular type of treatment; prison officials do not violate Eighth Amendment when, in exercise of their professional judgment, they refuse to implement inmate's requested course of treatment); *Vaughan v. Lacey*, 49 F.3d 1344 (8<sup>th</sup> Cir. 1995) (doctors' disagreement as to proper course of prisoner's treatment is not actionable under Eighth Amendment).

The Eighth Circuit Court of Appeals concluded that Davis failed to present a triable issue of fact on his claim that the defendants subjected him to an unconstitutional delay in treatment. See

*Coleman v. Rahjia*, 114 F.3d 778 (8<sup>th</sup> Cir. 1997)

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**SEARCH AND SEIZURE –  
POLICE DUTY BAG**

In *United States v. Chandler*, CA8, No. 99-1236, 12/2/99, former St. Louis Police Officer Reginald Chandler appealed his conviction for unlawful distribution of crack cocaine and for possession of crack cocaine and heroin. The possession charges were based upon narcotics found during a warrantless search of a duty bag Chandler left in the police station when he was suspended without pay for suspected drug trafficking.

The Eighth Circuit Court of Appeals stated that when Chandler was indefinitely suspended from duty, the Police Department had the right to reclaim any of its property in his possession. To that end, IAD officers padlocked Chandler's lockers and advised that he could not return to his former police station. The Department would reasonably believe that Chandler's duty bag, like his lockers, might contain Department property (as the subsequent search confirmed). Therefore, had Chandler attempted to leave police headquarters with the bag at the time of his suspension, Captain Nocchiero would have inventoried its contents, and the narcotics would have been discovered. Chandler left the bag in Major Zambo's office (whether intentionally or inadvertently is irrelevant to our analysis). Had he later retrieved the bag, the Department would have inventoried the bag with Chandler before relinquishing its custody. Again, the narcotics would

have been discovered. Instead, Zambo found the bag in storage many months later. As Chandler's employer, the Department could have—and perhaps as a matter of fair procedure should have—contacted Chandler, advised that his duty bag had been discovered, and asked whether he wished to reclaim it. If Chandler said no, that would be an unambiguous abandonment for Fourth Amendment purposes, and the bag could then be searched. See *Tugwell*, 125 F.3d 600, 603 (8<sup>th</sup> Cir. 1997), cert. denied, 118 S. Ct. 721 (1998) (failure to claim luggage at a bus station after three public announcements is a denial of ownership). If Chandler said yes, the Department would have opened the bag with him to recover any of its property. In either event, the narcotics would have been discovered and lawfully seized. Thus, the inevitable discovery doctrine applies, not because the government was actively pursuing a substantial alternative line of investigation, which is the typical inevitable discovery situation, but because the law enforcement agency's legitimate interests as employer would have inevitably led it to discover the contraband before Chandler, a suspended employee, could remove it from the workplace.

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**SEARCH AND SEIZURE –  
THE “HOMICIDE CRIME  
SCENE EXCEPTION”**

In *Flippo v. West Virginia*, No. 98-8770, 10/18/99, the United States Supreme Court in a per curiam decision dealt with Flippo's motion to suppress evidence seized

in a warrantless search of a “homicide crime scene.” The motion was denied on the ground that the police were entitled to make a thorough search of any crime scene and the objects found there. Because the rule applied directly conflicts with *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court reversed.

One night in 1996, Flippo and his wife were vacationing at a cabin in a state park. After Flippo called 911 to report that they had been attacked, the police arrived to find Flippo waiting outside the cabin, with injuries to his head and legs. After questioning him, an officer entered the building and found the body of Flippo’s wife, with fatal head wounds. The officers closed off the area, took Flippo to the hospital, and searched the exterior and environs of the cabin for footprints or signs of forced entry. When a police photographer arrived at about 5:30 a.m., the officers reentered the building and proceeded to “process the crime scene.” For over 16 hours, they took photographs, collected evidence, and searched through the contents of the cabin. According to the trial court, “at the crime scene, the investigating officers found on a table in Cabin 13, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives.”

Flippo was indicted for the murder of his wife and moved to suppress the photographs and negatives discovered in an envelope in the closed briefcase during the search. He argued that the police had obtained no warrant, and that no exception to the warrant

requirement justified the search and seizure.

In briefs to the trial court, Flippo contended that *Mincey v. Arizona*, *supra*, rejects a “crime scene exception” to the warrant requirement of the *Fourth Amendment*. The State also cited *Mincey*; it argued that the police may conduct an immediate investigation of a crime scene to preserve evidence from intentional or accidental destruction, and characterized the police activity in this case as “crime scene search and inventory.” The State also relied on the “plain view” exception, *id.*, at 393 (citing *Michigan v. Tyler*, 436 U.S. 499 (1978)), noting only, however, that the briefcase was unlocked.

In denying the motion, the trial court said nothing about inventory or plain view, but instead approved the search as one of a “homicide crime scene”:

“The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of the briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine.”

After hearing an oral presentation of Flippo’s petition for appeal of this ruling, and with the full record before it, the Supreme Court of Appeals of West Virginia denied discretionary review.

A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant

requirement, *Katz v. United States*, 389 U.S. 347 (1967), none of which the trial court invoked here. It simply found that after the homicide crime scene was secured for investigation, a search of “anything and everything found within the crime scene area” was “within the law.”

This position squarely conflicts with *Mincey v. Arizona*, *supra*, where the United States Supreme Court rejected the contention that there is a “murder scene exception” to the Warrant Clause of the *Fourth Amendment*. The United States Supreme Court noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, but the Court rejected any general “murder scene exception” as “inconsistent with the *Fourth* and *Fourteenth Amendments*—... the warrantless search of *Mincey*’s apartment was not constitutionally permissible simply because a homicide had recently occurred there.” See also *Thompson v. Louisiana*, 469 U.S. 17 (1984) (*per curiam*). *Mincey* controls here.

Although the trial court made no attempt to distinguish *Mincey*, the State contends that the trial court’s ruling is supportable on the theory that Flippo’s direction of the police to the scene of the attack implied consent to search as they did. As in *Thompson v. Louisiana*, *supra*, however, the Court expressed no opinion on whether the search here might be justified as consensual, as “the issue of consent is ordinarily a factual one un-

suitable for the Court's consideration in the first instance." Nor, of course, does the Court take any position on the applicability of any other exception to the warrant rule, or the harmless vel non of any error in receiving this evidence. Any such matters, properly raised, may be resolved on remand. See also *United States v. Matlock*, 415 U.S. 164 (1974).

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari were granted, the judgment of the West Virginia Supreme Court of Appeals was reversed, and the case was remanded for further proceedings not inconsistent with this opinion.

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#### SEARCH AND SEIZURE – MANIPULATION OF LUGGAGE

In *United States v. Gwinn*, CA8, No. 99-1155, 9/15/99, drug interdiction detectives Robert Delameter and Larry Ealy of the Kansas City, Missouri, Police Department, on the morning of September 27, 1998, boarded the "Southwest Chief." The "Chief" was an Amtrak train en route from Los Angeles to Chicago, during its regularly scheduled stop in Kansas City. They were assigned to look for narcotics on the train's coach section.

Delameter testified that the train frequently transported narcotics from the Southwest to the Midwest and that he had interdicted drugs on that train on numerous occasions in the past.

On board, the passengers' luggage was stored in open overhead racks located above the seat rows.

As Delameter made his way through one of the coach cars, he spotted a soft-sided black Nike bag next to a gray bag in the overhead compartment. The black bag had no name tag or other identification. To obtain a better look, Delameter stepped up on the back of a foot rest and the arm rest of one of the seats. He reached up, lifted the black bag, and felt its sides. As he did so, Delameter felt what he thought were bundles of narcotics. Delameter then pushed on the sides of the bag to expel air from inside, at which time he smelled the odor of marijuana. He then slid the bag back in its original location.

Delameter and Ealy then waited at the rear of the car while passengers reboarded to see if anyone would pick up the bag or in some way claim it. When no one did so, they decided to move the bag to see if anyone would claim ownership. With Ealy remaining at the rear of the car, Delameter picked up the bag and took a few steps with it, whereupon he heard someone say, "Hey, that's my bag." As Delameter turned around with the bag in his arms, he saw Gwinn stand up. Gwinn again stated, "That's my bag." Delameter asked him, "This is your bag?" Gwinn replied, "Yes, that's my bag." Delameter then walked towards Gwinn, handed him the bag, and identified himself as a police officer. Delameter testified that Gwinn looked frightened and shocked, and began eyeing the stairs leading to the lower portion of the car. Thinking that Gwinn might attempt to flee, Delameter motioned to Ealy, who came up behind Gwinn, grabbed his arms, and handcuffed him. The bag fell onto a seat. Delameter then asked Gwinn if he had any other

luggage. Gwinn answered that the gray bag belonged to him. Delameter then asked Gwinn if those were the only two bags he had. Gwinn responded that he had only one bag, the gray bag. Delameter testified that he twice asked Gwinn again if the black bag was his, and Gwinn denied ownership of it each time.

Detective Ealy took Gwinn and the black bag off the train and onto the platform area where a police dog sniffed the bag for drugs. The dog alerted on the bag. Gwinn was then taken to the conference room at the Amtrak station, where he was advised of his Miranda rights. He refused to make any statements. Delameter then opened the bag and searched it. He found three bundles of marijuana and a bundle of cocaine. Gwinn was charged with knowingly and intentionally possessing with intent to distribute cocaine, in an amount of 500 grams or more, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B). Gwinn filed a motion to suppress evidence and testimony relating to such evidence as unlawfully obtained in violation of his Fourth and Fourteenth Amendment rights to be free from unreasonable searches.

After a hearing, the magistrate judge recommended suppression of the evidence, concluding that Delameter's manipulation of the black bag, as well as the subsequent detention of the bag for the dog sniff, violated Gwinn's Fourth Amendment rights. The magistrate judge rejected the government's contention that Gwinn had no standing to challenge the search because he had abandoned the bag. The district court adopted the report and recommendation and

granted Gwinn's motion to suppress. The government appeals.

Gwinn argues that Delameter's manipulation of the exterior of his bag while in the overhead compartment constitutes a search within the meaning of the Fourth Amendment and that the search was unlawful because it was conducted without a warrant, consent, probable cause, or even reasonable suspicion. The government claims that feeling the exterior of Gwinn's bag is not a search for Fourth Amendment purposes because passengers have no reasonable expectation that bags placed in an overhead compartment will not be subject to such touching. Alternatively, the government argues that Gwinn lacks standing to assert any Fourth Amendment violation because he voluntarily abandoned the bag when he twice denied its ownership.

The Eighth Circuit Court of Appeals first addressed the government's claim that Gwinn voluntarily abandoned his bag by twice denying that he owned it. When a person voluntarily abandons property, he forfeits any expectation of privacy that he might otherwise have had in it. See *United States v. Washington*, 146 F.3d 536, 537 (8th Cir. 1998). In *Washington*, a case involving the search of a bag in the overhead compartment of a bus, this court held that Washington's abandonment of the bag was a voluntary decision of his own free will. The evidence showed Washington had not been informed that he was a target, *nor did the officers seize him prior to his first denial of ownership of the bag.* (emphasis added). Also see *United States v.*

*Liu*, 180 F.3d 957 (8th Cir. 1999), a recent decision involving a similar search by the same Kansas City drug interdiction unit. In *Liu* this court held that the defendant's abandonment of his bag was voluntary when he was not seized by the officers until he began to run and had already left the bag behind on the train. Here, Gwinn denied that he owned the black bag only after he had been seized and handcuffed by the officers. Given this scenario, Gwinn's actions can hardly be characterized as a voluntary act.

Because the Court found Gwinn's abandonment of the black bag was not voluntary, the Eighth Circuit Court of Appeals addressed the constitutionality of Delameter's manipulation of the bag's exterior. The Court reviews the district court's factual findings regarding the search of the bag for clear error and its conclusion as to whether the search violated the Fourth Amendment de novo. See *United States v. Martinez*, 78 F.3d 399, 401 (8th Cir. 1996). The magistrate judge found that Delameter's physical manipulation of the exterior of the bag constituted an improper search within the meaning of the Fourth Amendment. Specifically, the magistrate judge concluded that "by handling defendant's bag in this manner, the detective departed from the type of handling a passenger would reasonably expect his luggage to be subjected to and entered the domain protected by the Fourth Amendment."

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and sei-

zures, shall not be violated, and no Warrants shall issue, but upon probable cause." *U.S. Constitution, Amendment IV.* A defendant moving to suppress evidence on the basis of an unlawful search bears the burden of proving that he had a legitimate expectation of privacy that was violated by the challenged search. See *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). To establish a legitimate expectation of privacy, the defendant must demonstrate: (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable. There is no dispute that Gwinn had a subjective expectation that the exterior of his bag, placed on an overhead rack of a train, would not be subjected to physical manipulation by others. The question before this court then is whether this expectation is one that society would recognize as reasonable. The government argues that it is not. The Eighth Circuit Court of Appeals disagreed.

Individuals possess a privacy interest in the contents of their personal luggage that is protected by the Fourth Amendment. See *United States v. Place*, 462 U.S. 696, 707 (1983); *United States v. Nicholson*, 144 F.3d 632, 636 (10th Cir. 1998). Of course, not every intrusion with an individual's luggage constitutes a search within the meaning of the Fourth Amendment. For example, a canine sniff of an individual's luggage does not constitute a search. See *United States v. Harvey*, 961 F.2d 1361, 1363 (8th Cir. 1992). Similarly, no search occurs when an officer briefly moves luggage from the overhead compartment of a bus to

the aisle in order to facilitate a canine sniff. See *id.* at 1364 (stating that passengers have no objective, reasonable expectation of privacy from such action because it is not uncommon for other passengers or the bus driver to move baggage in order to rearrange and maximize use of compartment space); *United States v. Gant*, 112 F.3d 239 (6th Cir. 1997) (same); see also *United States v. Gault*, 92 F.3d 990 (10th Cir. 1996) (no search when officer kicked and lifted a bag protruding into aisle of a train compartment to determine its weight and also when officer sniffed the bag); *United States v. Guzman*, 75 F.3d 1090 (6th Cir. 1996) (no search when officer merely placed hand on bag in the overhead rack and asked to whom it belonged).

The Court thought, however, that Delameter's contact with Gwinn's bag, went beyond the limited intrusiveness of a canine sniff or the incidental touching of luggage which took place in *Harvey*. Just recently, this Court stated that we had "grave doubts about the constitutional propriety" of an officer's conduct when he lifted, manipulated, and felt along the bottom of a bag in the overhead compartment of a Greyhound bus. *Washington*, 146 F.3d at 537. In *Nicholson*, the Tenth Circuit held that an unlawful search took place when officers felt the sides of luggage in the overhead racks of a bus without a warrant, probable cause, reasonable suspicion, or consent. See *Nicholson*, 144 F.3d at 638-39. While it acknowledged that luggage placed in the overhead racks of a commercial bus was subject to some intrusions, the court emphasized that the degree of intrusion is the determining factor as to

whether an officer's contact with the exterior of luggage constitutes a search under the Fourth Amendment." *Id.* at 639. The Court found that the officer's manipulation went beyond the degree of intrusion that a passenger would reasonably expect his bag to encounter from other passengers. See *id.* But see *United States v. Bond*, 167 F.3d 225 (5th Cir. 1999) (holding that feeling and squeezing exterior of luggage in overhead compartment of bus is not a search under the Fourth Amendment), petition for cert. filed, No. 98-9349 (U.S. May 10, 1999); *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996) (same). This Court agrees with the line drawn by the Tenth Circuit.

While a passenger can expect that others will perhaps push aside or briefly touch his bag in an attempt to accommodate their own luggage or to maximize storage space, the majority of the traveling public would not expect their luggage, even those pieces placed in an overhead compartment, to be subject to a calculated and thorough squeezing and manipulation of their exteriors. Unlike a canine sniff or the incidental touching that accompanies the moving of luggage from the overhead, the feeling and manipulation of a bag's exterior involves a much more intrusive and prolonged contact with the piece. See *Place*, 462 U.S. at 707 (finding canine sniff of luggage to be a very limited intrusion that reveals only presence or absence of narcotics). Indeed, this Court can envision situations where the extensive tactile examination of a soft-sided bag's exterior by an officer may reveal almost as much information as opening the bag it-

self, such as information about the number, shape, and character of items, perhaps very personal items, inside the bag. See *Nicholson*, 144 F.3d at 639; *McDonald*, 100 F.3d at 1333.

While this Court is not unsympathetic to the uphill task faced by law enforcement in their efforts to curb the flow of illegal narcotics through the nation's channels of commerce, we must guard against the temptation to eviscerate the protections of the Fourth Amendment for the sake of expediency. The Eighth Court of Appeals concluded that Delameter's feeling of Gwinn's bag while it was on the overhead rack constitutes a search within the meaning of the Fourth Amendment and because the officers had neither a warrant, probable cause, reasonable suspicion, nor consent, the search was unlawful.

The district court did not err in granting Gwinn's motion to suppress. The decision of the district court is affirmed.

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**SEARCH AND SEIZURE –  
STOP AND FRISK;  
OFFICERS MADE DRUG  
STOP WITH WEAPONS  
DRAWN; VEHICLE  
OCCUPANTS  
HANDCUFFED**

In *United States v. Navarrette-Brown*, CA8, No. 99-1150, 9/21/99, police officers arrested Jaime Garcia for driving under the influence after stopping him for a traffic violation. After a failed attempt by Garcia to bribe the arresting officer with an offer of \$10,000 in exchange for his re-

lease, the officer searched Garcia's car. The search produced the following items: 14 ounces of crack cocaine, \$37,000 in cash, and ammunition for a 9 millimeter handgun. The officer did not discover a weapon. On Garcia's person, the officer found a key to room number 14 of a local motel. Garcia told the officers that he did not own the car. He claimed that his friend "Luis," with whom he was staying at the motel, recently purchased the vehicle. A police officer immediately began surveillance of room 14 and, shortly thereafter, spotted Navarrete-Barron through a window and an open doorway. Before police officers could obtain a search warrant, a pickup truck arrived. The driver of the truck entered the motel room for a short time and made a quick telephone call. Navarrete-Barron and the driver then exited the motel room with a duffel bag and drove away in the truck. Approximately one-half mile later, two police officers stopped the truck. The officers drew their guns and ordered the driver and the passenger (Navarrete-Barron) to exit the truck with their hands in the air. After the police officers finished handcuffing the two men and placing them in separate squad cars, the driver admitted through an interpreter that he was in the United States illegally. The officers performed a routine inventory search of the truck and found a beeper, cell phone, and recharger. In the duffel bag, the officers discovered the title to the car that Garcia was driving earlier that morning. The title indicated that the car had been transferred the previous day to Luis Jesus Navarrete-Barron (defen-

dant). The police then arrested Navarrete-Barron.

Navarrete-Barron claims that the police officers who stopped the truck actually made an illegal arrest without probable cause, and thus his motion to suppress should have been granted.

An investigatory, or Terry, stop without a warrant is valid only if police officers have a reasonable and articulable suspicion that criminal activity may be afoot. See *Terry*, 392 U.S. at 25-31. When justifying a particular stop, police officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." See *id.* at 21. A Terry stop may turn into an arrest if the stop lasts for an unreasonably long time or if officers use unreasonable force. See *Dunaway v. New York*, 442 U.S. 200, 212 (1979). During a Terry stop, officers can check for weapons and may take any additional steps that are "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." See *United States v. Hensley*, 469 U.S. 221, 235 (1985). Officers must, however, employ the least intrusive means of detention and investigation, in terms of scope and duration, that are reasonably necessary to achieve the purpose of the Terry stop. See *Florida v. Royer*, 460 U.S. 491, 500 (1983). In deciding whether to conduct a Terry stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the investigation. See *United States v. Robinson*, 119 F.3d 663, 666-667 (8th Cir. 1997).

After reviewing the evidence, the Eighth Circuit Court of Appeals found that the officers made a valid Terry stop of the truck and later had probable cause to arrest Navarrete-Barron. First, the initial stop was supported by a reasonable and articulable suspicion of criminal activity. Earlier that morning, officers had discovered a large amount of cocaine base along with \$37,000 and firearm ammunition. This discovery provided direct and substantial evidence of Garcia's involvement in drug trafficking activity. Garcia's statements to the police about a "Luis" back at the motel who had recently purchased the vehicle coupled with a key to the motel room provided enough evidence to support an inference that others were engaged in drug trafficking. Police officers later corroborated Garcia's statements during their surveillance of the motel room. In sum, the officers had a reasonable and articulable suspicion sufficient to make a valid Terry stop of the truck in which Navarrete-Barron was a passenger.

In the circumstances of this case, we also find that the officers did not use unreasonable force when they approached the truck with their weapons drawn. At the time of the stop, the officers had a reasonable suspicion that the occupants of the truck had been or were engaged in drug trafficking, which very often is accompanied by dangerous weapons. In addition, the 9 millimeter ammunition from the earlier stop constituted a reasonable basis to believe that one of the truck occupants could be carrying the missing 9 millimeter weapon. Therefore, the officers were justified in approaching the

truck with their weapons drawn because it was reasonably necessary for their protection.

The limits of a Terry stop were also not exceeded when the defendant was handcuffed and placed in a police car while the officers searched the truck. There were two suspects and only two officers at the scene at the time of the initial stop. In *United States v. Miller*, 974 F.2d 953, 957 (8th Cir. 1992), which involved three officers and six suspects in the area, we agreed that it was reasonable for officers to handcuff two of the suspects during a Terry stop for suspected drug activity. Several other circuits also have found that using handcuffs can be a reasonable precaution during a Terry stop. See, e.g., *United States v. Laing*, 889 F.2d 281, 285 (D.C. Cir. 1989), cert. denied, 494 U.S. 1008 (1990) and 494 U.S. 1069 (1990); *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989); *United States v. Hastamorir*, 881 F.2d 1551, 1557 (11th Cir. 1989); *United States v. Glenna*, 878 F.2d 967, 971-73 (7th Cir. 1989), *United*

*States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983). In light of the dangerous nature of the suspected crime of drug trafficking and the good possibility that the driver or passenger had a weapon, the defendant's confinement with handcuffs in the back of a police car during the search of the truck was reasonably necessary to maintain the status quo, protect the officers, and allow them to conduct the search of the truck immediately and without interference. Furthermore, the detention did not last for an unreasonably long time before probable cause was established to arrest the defendant because the inventory search of the truck occurred shortly after the defendant was safely detained in the police car. Thus, because the officers did not use unreasonable force and did not hold the defendant for an unreasonably long detention during the Terry stop, the Eighth Circuit Court of Appeals rejected Navarrete-Barron's claim that the stop was an arrest without probable cause.

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