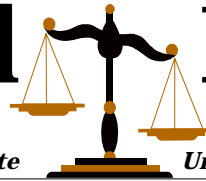




CJI Legal Briefs



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Contents

- 1 AMERICANS WITH DISABILITIES ACT - CLAIM THAT FAILURE TO FOLLOW ADA WAS THE PROXIMATE CAUSE OF A SHOOTING
- 4 BRUTON STATEMENTS - CONFESSION DESCRIBES CO-DEFENDENT AS "ANOTHER INDIVIDUAL"
- 4 CIVIL LIABILITY - CONVICTION FOR OFFENSE IS BAR TO CIVIL SUIT ALLEGING ARREST WAS MADE WITHOUT PROBABLE CAUSE
- 5 COMMERCE CLAUSE - CONGRESS EXCEEDS AUTHORITY IN APPLYING STATUTE TO A PRIVATE RESIDENCE
- 5 FAIR LABOR STANDARDS ACT - POLICY REQUIRING EMPLOYEES TO SCHEDULE TIME OFF IN ORDER TO REDUCE THE AMOUNT OF ACCRUED COMPENSATORY TIME
- 6 FIRST AMENDMENT RIGHTS - ORDINANCE MAKING IT AN OFFENSE TO KNOWINGLY OR INTENTIONALLY APPEAR IN PUBLIC IN A "STATE OF NUDITY"
- 7 GENDER-MOTIVATED VIOLENCE
- 9 POSSESSION OF DRUGS - CONSTRUCTIVE POSSESSION
- 9 SEARCH AND SEIZURE - AUTOMOBILE EXCEPTION
- 9 SEARCH AND SEIZURE - EMERGENCY ENTRY BASED ON 911 CALL
- 10 SEARCH AND SEIZURE - EXPECTATION OF PRIVACY IN DRIVEWAY
- 11 SEARCH AND SEIZURE - EXPECTATION OF PRIVACY IN A PUBLIC STORAGE BUILDING OWNED BY THE STATE
- 13 SEARCH AND SEIZURE - PHYSICAL MANIPULATION OF A BUS PASSENGER'S CARRY-ON LUGGAGE
- 14 STOP AND FRISK - ANONYMOUS TIP THAT A PERSON IS CARRYING A FIREARM

AMERICANS WITH DISABILITIES ACT – CLAIM THAT FAILURE TO FOLLOW ADA WAS THE PROXIMATE CAUSE OF A SHOOTING

In *Hainze v. Richards*, CA5, No. 99-50222, 4/26/00, Alicia Cluck made a 911 call in the early morning hours on 11/16/97 requesting that the police transport her suicidal nephew, Kim Michael Hainze, to a hospital for mental health treatment. Cluck advised that Hainze had a history of depression and currently was under the influence of alcohol and anti-depressants, carrying a knife, and threatening to commit suicide or "suicide by cop." Uniformed Williamson County Sheriff's deputies, Steve Allison, Kevin Hallmark, and Scott Zion, were given this information and dispatched in marked police cars to a convenience store where Hainze was located. Upon arriving at the store the officers observed a man, believed to be Hainze, standing by the passenger door of a pickup truck occupied by two unidentified individuals. Hainze appeared to be holding the door's handle and talking to the individuals. He had a knife in his hand and was not wearing shoes, despite the cold temperature. Deputy Allison exited his vehicle, drew his weapon, and ordered Hainze away from the truck. Hainze responded with profanities and began to walk towards Allison. At this point, Zion, who was riding with Allison, and Hallmark had also exited their vehicles with their weapons drawn. Allison twice ordered Hainze to stop but Hainze ignored him. When Hainze was within four to six feet, Allison fired two shots in rapid succession into Hainze's chest. Allison immediately called EMS. Hainze survived. Approximately 20 seconds elapsed from the time the officers pulled into the store parking lot until Hainze was shot.

On August 21, 1998, Hainze was convicted by a Williamson County jury of aggravated assault with a deadly weapon for his conduct at the convenience store on November 16, 1997. Hainze sought declaratory, injunctive, and compensatory relief under Title II of the Americans with

(Continued on page 2)

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Disabilities Act and Section 504 of the Rehabilitation Act against Williamson County and Sheriff Richards in his official capacity. These claims were based on the defendant's alleged failure to establish a policy or train deputies to protect the well-being of mentally ill individuals, for having actually discriminated against Hainze on the basis of his disability, and for failing to conduct a self-evaluation, all of which Hainze contends were the direct and proximate causes of the near-fatal shooting. Summary judgment was ultimately granted in favor of all defendants on all claims. Hainze appealed.

A disabled plaintiff can succeed in an action under Title II if he can show that, by reason of his disability, he was either "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity," or was otherwise "subjected to discrimination by any such entity." Neither party disputes that Hainze is a disabled person or that the Williamson County Sheriff's Department is a public entity. The broad language of the statute and the absence of any stated exceptions has occasioned the courts' application of Title II protections into areas involving law enforcement. There is some disagreement, however, whether an arrest falls within the ambit of Title II, and only one court has considered whether Title II applies to in-the-field investigations by police officers that may or may not lead to an arrest.

In *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999) the Tenth Circuit recently addressed a case strikingly similar to the one at bar. There the defendant, Officer Enright, responded to a disturbance

call shortly after midnight and encountered Lucero, a paranoid schizophrenic, walking down the middle of the road clutching his right hand to his chest. Enright exited his vehicle armed with his nightstick, pepper spray and a pistol, identified himself and asked Lucero to talk to him. Lucero continued walking and Enright ordered him to stop. Lucero stopped for a moment, put his right hand behind his back and again began to approach Enright "at a 'fast pace.'" He then brought his right hand from behind his back and began swinging, in a stabbing motion, an object that Enright perceived to be a knife. Enright ordered Lucero to "drop the knife" and attempted to retreat behind his vehicle. When Lucero reached Enright's vehicle he "either stepped or lunged toward Enright, making a stabbing motion with the object." Enright fired his pistol twice, killing Lucero. The entire confrontation lasted between 20 and 30 seconds. As representative of Lucero's estate, Gohier asserted various claims against Officer Enright and the City of Colorado Springs, and sought to amend her complaint to include claims under Title II of the ADA.

After a careful analysis of arrest cases arising under Title II, the Tenth Circuit held that Gohier could not establish a viable claim and affirmed the decision denying the motion to amend. First, the court noted that this case did not fit into the "wrongful arrest" category of Title II claims because Lucero's conduct was not lawful conduct attributable to Lucero's mental illness that Enright perceived as unlawful activity. Indeed, Lucero's conduct of attacking Enright with a knife was criminal.

Second, the court did not answer the question whether a valid cause of action exists under the second category of Title II arrest cases, the "reasonable accommodation" theory, because Gohier did not claim that Colorado Springs failed to train its police officers properly to investigate and handle situations involving mentally ill individuals in a manner that reasonably accommodates their disability. We, however, must resolve that question and, viewing the facts in the light most favorable to Hainze, now answer it in the negative.

Hainze first claims he was denied the benefits and protections of Williamson County's mental health training provided to its deputies when, in contravention of that training, Allison used excessive and deadly force to restrain him. Specifically, Hainze alleges that Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use less than deadly force, and never attempted to create any opportunities for the foregoing to occur. We must conclude that this argument fails. A necessary prerequisite to a successful claim under Title II is that a disabled person be denied the benefits of a service, program or activity by the public entity that provides such service, program or activity. Hainze was not denied the benefits and protections of Williamson County's mental health training by the County, Sheriff Richards, or the officers. Rather, Hainze's assault of Allison with a deadly weapon denied him the benefits of that program.

Second, Hainze claims that the county failed to reasonably ac-

commodate his disability by “failing and refusing to adopt a policy protecting the well-being of [Hainze], as a person with a mental illness in a mental health crisis situation, thus resulting in discriminatory treatment from [the] sheriff’s deputies. He advances the same contentions as raised above, and stresses that the county’s policy of treating mental health calls identical to criminal response calls and those not involving people with mental disabilities resulted in his discriminatory treatment. Despite Hainze’s claims, the Fifth Circuit Court of appeals held that Title II does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public. Our decision today does not deprive disabled individuals, who suffer discriminatory treatment at the hands

of law enforcement personnel, of all avenues of redress because Title II does not preempt other remedies available under the law. The Court held that such a claim is not available under Title II under circumstances such as presented herein.

When the officers reached the convenience store parking lot, Hainze was holding a knife and standing next to a pickup truck occupied by two persons. The police did not then know that the persons were unharmed and were related to Hainze. After being ordered to get away from the truck, Hainze immediately walked quickly towards Allison with the knife, ignoring Allison’s repeated orders to stop. Allison did not shoot until Hainze was within a few feet. Approximately 20 seconds elapsed from the time the officers drove into the parking lot until Allison fired. Allison’s actions were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene. The Court was not persuaded that requiring Allison and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions, is the type of “reasonable accommodation” contemplated by Title II.

Once the area was secure and there was no threat to human safety, the Williamson County Sheriff’s deputies would have been under a duty to reasonably accommodate Hainze’s disability in handling and transporting him to a mental health facility. That would have put this case squarely within the holdings of *Pennsylvania Dep’t of Corrections v. Yeskey*,

524 U.S. 206 (1998) and the cases that have followed.

Hainze’s last contention is that Williamson County failed to conduct a self-evaluation of its existing policies and procedures to ensure that they were ADA compliant and that its failure to do so caused his injuries.

The regulations issued by the Justice Department require all public entities, within one year of the regulations’ effective date, to “evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [the regulations]” and to modify such services, policies, and practices to the extent necessary to bring them into compliance. The regulations further provide an opportunity for interested persons to participate in the evaluation process by submitting comments. A self-evaluation of Williamson County’s existing physical facilities was performed in October 1992, but no similar evaluation was conducted of the County’s policies and procedures in responding to mental health disturbances and effectuating seizures of mentally disabled individuals. Such an evaluation was clearly required of the County to ensure its compliance with the ADA. The Court did not suggest that the County’s law enforcement officers received no training to deal with mental health situations. During the course of their regular training, all officers are required to undergo some measure of mental health instruction, and some officers are certified to handle mental health related issues. Allison was certified as a mental health officer based on his completion of a program offered by the County which included

at least 16 hours of such training.

The Court concluded that Hainze's injuries were caused by his own criminal actions, not Williamson County's failure to perform a self-evaluation. Consequently, the judgment dismissing all claims against all defendants was affirmed.

**BRUTON STATEMENTS –
CONFESSION DESCRIBES
CO-DEFENDANT AS
“ANOTHER INDIVIDUAL”**

In *United States v. Logan*, CA8, No. 98-2839, 4/24/00, the single issue was whether, in the circumstances of this case, Benjamin Matthew Logan was denied his rights under the confrontation clause when a nontestifying codefendant's statement was admitted into evidence. The Eighth Circuit Court of Appeals concluded that Logan's rights were not violated and affirmed his convictions.

Mr. Logan's complaint centers on the manner in which the trial court admitted the confession of Zachary Roan, Mr. Logan's codefendant and alleged accomplice in an armed robbery and a murder. A detective was allowed to testify that Mr. Roan said that he planned and committed the relevant robbery with "another individual." Despite the fact that the trial court instructed the jury not to use the statement as evidence of Mr. Logan's involvement, Mr. Logan maintains that he was denied his sixth amendment rights of confrontation because Mr. Roan did not testify.

In support of his contention, Mr. Logan directed the attention to

Bruton v. United States, 391 U.S. 123, 126 (1968), which overturned a conviction because the trial court admitted, over the defendant's objection, a codefendant's statement that he and the defendant had committed an armed robbery. The Court held in that case that an instruction to the jury to disregard the statement to the extent that it implicated the defendant insufficiently safeguarded the defendant's confrontation rights.

In *Richardson v. Marsh*, 481 U.S. 200, 208-09, 211 (1987), however, picking up on a hint dropped in *Bruton*, the Court approved the admission of a nontestifying codefendant's confession that was redacted to eliminate any reference to the defendant's existence. The Court held that so long as a proper cautionary instruction is given to the jury, if the confession itself does not implicate the defendant, the fact that it might do so in light of other evidence introduced at the trial is of no moment.

Here, Mr. Logan asserts that replacing his name with the phrase "another individual" somehow ineluctably led the jury to conclude that he was the person meant. He says this, evidently, for two reasons. The first is that another confession of Mr. Roan's was admitted during the trial before the detective testified, and in it Mr. Roan refused to name his accomplice. Mr. Logan maintains that because in the redacted statement Mr. Roan said that he committed the crimes with "another individual," and since there was no reference to a refusal to name the accomplice, the jury would infer that a name (namely, Mr. Logan's) was purposely redacted from the second statement.

The Eighth Circuit Court of

Appeals did not see the logic of this argument. There is no inconsistency between a statement that includes a refusal to name an accomplice and a statement that "another individual" committed a crime. A refusal to name an accomplice necessarily presupposes the existence of "another individual." Since the two statements are perfectly consistent, the Court could see no reasonable possibility that a jury would infer that Mr. Roan had named his accomplice in the second statement but that the name had been redacted from that statement.

**CIVIL LIABILITY –
CONVICTION FOR
OFFENSE IS BAR TO CIVIL
SUIT ALLEGING ARREST
WAS MADE WITHOUT
PROBABLE CAUSE**

In *Bell v. McCord*, CA 8, No. 99-1430EA, 5/11/00 [Unpublished], the Eighth Circuit Court of Appeals concluded that a state conviction was a complete defense to any allegations that the officers lacked probable cause to arrest or detain Albert Bell. The Court cited *Malady v. Crunk*, 902 F.2d 10 (8th Cir. 1990) which adopted the common-law rule that conviction of an offense for which the arrest is made is a complete defense to a civil rights action under 42 United States Code § 1983 asserting that the arrest was made without probable cause.

**COMMERCE CLAUSE –
CONGRESS EXCEEDS
AUTHORITY IN APPLYING
STATUTE TO A PRIVATE
RESIDENCE**

In *Jones v. United States*, No. 99-5739, 5/22/00, the United States Supreme Court dealt with a challenge to United States Code, Section 18 U.S.C. § 844(i), which makes it a federal crime to maliciously damage or destroy, ... by means of fire or an explosive, any building ... used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Dewey Jones tossed a Molotov cocktail into a home owned and occupied by his cousin as a dwelling place for everyday family living. The ensuing fire severely damaged the home. Jones was convicted in the District Court.

The Seventh Circuit rejected Jones's contention that §844(i), when applied to the arson of a private residence, exceeds the authority vested in Congress under the Commerce Clause. The United States Supreme Court held that because an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity, thus, arson of such a dwelling is not subject to federal prosecution under §844(i).

**FAIR LABOR STANDARDS
ACT – POLICY REQUIRING
EMPLOYEES TO
SCHEDULE TIME OFF IN
ORDER TO REDUCE THE
AMOUNT OF ACCRUED
COMPENSATORY TIME**

In *Christensen v. Harris County*, No. 98-1167, 5/1/00, Harris County, Texas, adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. Employees of the Harris County Sheriff's Department sued, claiming that the Fair Labor Standards Act (FLSA) prohibits such a policy. The Court of Appeals rejected their claim. Finding that nothing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time, the United States Supreme Court affirmed the decision of the United States Court of Appeals for the Fifth Circuit.

The FLSA generally provides that hourly employees who work in excess of 40 hours per week must be compensated for the excess hours at a rate not less than 1½ times their regular hourly wage. Although this requirement did not initially apply to public-sector employers, Congress amended the FLSA to subject States and their political subdivisions to its constraints. States and their political subdivisions, however, did not feel the full force of this latter extension until the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Garcia* overruled the holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which stated that the FLSA could not constitu-

tionally restrain traditional governmental functions.

In the months following *Garcia*, Congress acted to mitigate the effects of applying the FLSA to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985. Those amendments permit States and their political subdivisions to compensate employees for overtime by granting them compensatory time at a rate of 1½ hours for every hour worked. To provide this form of compensation, the employer must arrive at an agreement or understanding with employees that compensatory time will be granted instead of cash compensation. The FLSA expressly regulates some aspects of accrual and preservation of compensatory time. For example, the FLSA provides that an employer must honor an employee's request to use compensatory time within a "reasonable period" of time following the request, so long as the use of the compensatory time would not "unduly disrupt" the employer's operations. The FLSA also caps the number of compensatory time hours that an employee may accrue. After an employee reaches that maximum, the employer must pay cash compensation for additional overtime hours worked. In addition, the FLSA permits the employer at any time to cancel or "cash out" accrued compensatory time hours by paying the employee cash compensation for unused compensatory time. And the FLSA entitles the employee to cash payment for any accrued compensatory time remaining upon the termination of employment.

This action grew out of a suit by 127 deputy sheriffs employed

by respondents Harris County, Texas, and its sheriff, Tommy B. Thomas (collectively, Harris County). It is undisputed that each of the petitioners individually agreed to accept compensatory time, in lieu of cash, as compensation for overtime.

As these deputy sheriffs accumulated compensatory time, Harris County became concerned that it lacked the resources to pay monetary compensation to employees who worked overtime after reaching the statutory cap on compensatory time accrual and to employees who left their jobs with sizable reserves of accrued time. Harris County implemented a policy under which the employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.

The deputy sheriffs sued, claiming that the county's policy violates Section 207 (o)(5) of the FLSA which requires that an employer reasonably accommodate employee requests to use compensatory time. The deputy sheriffs contend that this provides the exclusive means of utilizing accrued time in the absence of an agreement or understanding permitting some other method. The District Court agreed, granting summary judgment for the deputy sheriffs and entering a declaratory judgment that the county's policy violated the FLSA. The Court of Ap-

peals for the Fifth Circuit reversed, holding that the FLSA did not speak to the issue and thus did not prohibit the county from implementing its compensatory time policy. The United States Supreme Court granted certiorari.

After a review of the FLSA, the United States Supreme Court determined that no relevant statutory provision expressly or implicitly prohibits Harris County, Texas, from pursuing its policy of forcing employees to utilize their compensatory time. The judgment of the Court of Appeals was affirmed.

**FIRST AMENDMENT
RIGHTS – ORDINANCE
MAKING IT AN OFFENSE
TO KNOWINGLY OR
INTENTIONALLY APPEAR
IN PUBLIC IN A “STATE OF
NUDITY”**

In *City of Erie v. PAP'S A.M., dba Kandyland*, No. 98-1161, 3/29/00, the United States Supreme Court considered an Erie, Pennsylvania ordinance making it a summary offense to knowingly or intentionally appear in public in a “state of nudity.” Pap's A. M., a Pennsylvania corporation, operated “Kandyland,” an Erie establishment featuring totally nude erotic dancing by women. To comply with the ordinance, these dancers had to wear, at a minimum, “pasties” and a “G-string.” Pap's filed suit against Erie and city officials, seeking declaratory relief and a permanent injunction against the ordinance's enforcement. The Court of Common Pleas struck down the ordinance as unconstitu-

tional, but the Commonwealth Court reversed. The Pennsylvania Supreme Court in turn reversed, finding that the ordinance's public nudity sections violated Pap's right to freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court held that nude dancing is expressive conduct entitled to some quantum of protection under the First Amendment. The Pennsylvania court explained that, although one stated purpose of the ordinance was to combat negative secondary effects, there was also an unmentioned purpose to “impact negatively on the erotic message of the dance.” Accordingly, the Pennsylvania court concluded that the ordinance was related to the suppression of expression. Because the ordinance was not content neutral, it was subject to strict scrutiny. The court held that the ordinance failed the narrow tailoring requirement of strict scrutiny. After this Court granted certiorari, Pap's filed a motion to dismiss the case as moot, noting that Kandyland no longer operated as a nude dancing club, and that Pap's did not operate such a club at any other location. This Court denied the motion.

The United States Supreme Court stated being “in a state of nudity” is not an inherently expressive condition. As the Court explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although it falls only within the outer ambit of the First Amendment's protection. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)

To determine what level of scrutiny applies to the ordinance at issue here, the Court must decide

“whether the State’s regulation is related to the suppression of expression.” *Texas v. Johnson*, 491 U.S. 397, (1989); see also *United States v. O’Brien*, 391 U.S. 367 (1968). If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the “less stringent” standard from *O’Brien* for evaluating restrictions on symbolic speech. *Texas v. Johnson*, supra, at 403; *United States v. O’Brien*, supra, at 377. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O’Brien* test and must be justified under a more demanding standard. *Texas v. Johnson*, supra, at 403.

The city of Erie argues that the ordinance is a content-neutral restriction that is reviewable under *O’Brien* because the ordinance bans conduct, not speech; specifically, public nudity. Pap’s A.M. counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions of an “Indecency and Immorality” ordinance that has been on the books since 1866, predating the preva-

lence of nude dancing establishments such as Kandyland.

Even if this Court had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State’s interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. Similarly, even if Erie’s public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is minimal.

The Court concluded that Erie’s asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid if it satisfies the four-factor test from *O’Brien* for evaluating restrictions on symbolic speech.

The first factor of the *O’Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie’s efforts to protect public health and safety are clearly within the city’s police powers. The second factor is whether

the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. The ordinance also satisfies *O’Brien*’s third factor, that the government interest is unrelated to the suppression of free expression. The fourth and final *O’Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is minimal. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer’s erotic message.

The United States Supreme Court held, therefore, that Erie’s ordinance is a content-neutral regulation that is valid.

GENDER-MOTIVATED VIOLENCE

In *United States v. Morrison*, No. 99-5, 5/15/00, the United States Supreme Court was called upon to determine the constitutionality of 42 United States Code, § 13981 which was part of an enactment known as the Violence Against Women Act of 1994. Section 13981 provided a federal civil remedy for victims of gender-motivated violence. In this case Christy Brzonkala filed suit alleging that she was raped by

Anthony Morrison and James Crawford while the three were students at the Virginia Polytechnic Institute, and that this attack violated 42 U.S.C. § 13981. Morrison and Crawford moved to dismiss on the grounds that the complaint failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States intervened to defend the section's constitutionality. In dismissing the complaint, the District Court held that it stated a claim against Morrison and Crawford. However, the District Court stated that Congress lacked authority to enact Section 13981 under either the Commerce Clause or the Fourteenth Amendment, which Congress had explicitly identified as the sources of federal authority for § 13981. The entire Fourth Circuit Court of Appeals affirmed the District Court.

The United States Supreme Court held that the Commerce Clause does not provide Congress with authority to enact § 13981's federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez*, 514 U.S. 549. The Court stated that the proper framework for analyzing such a claim is provided by the principles the Court set out in *Lopez*. First, in *Lopez*, the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court's conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence are not, in any sense, economic activity. Second, like the statute at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal

cause of action is in pursuance of Congress' regulation of interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce to come within Congress' authority, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. Third, although Section 13981, unlike the *Lopez* statute, is supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families, these findings are substantially weakened by the fact that they rely on reasoning that this Court has rejected. This reasoning is a but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning will not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and child rearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct

based solely on the conduct's aggregate effect on interstate commerce.

The Fourteenth Amendment does not give Congress the authority to enact § 13981. The assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record. However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. Assuming that there has been gender-based disparate treatment by state authorities in this case, it would not be enough to save Section 13981's civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias. Section 13981 visits no consequence on any Virginia public official involved in investigating or prosecuting Brzonkala's assault, and it is thus unlike any of the remedies this Court has previously upheld. See e.g., *South Carolina v. Katzenbach*, 383 U.S. 301. Section 13981 is also different from previously upheld remedies in that it applies uniformly throughout the Nation, even though Congress' findings indicate that the problem addressed does not exist in all, or even most, States. In contrast, the remedy in *Katzenbach* was directed only to those States in which Congress found that there had been discrimination.

**POSSESSION OF DRUGS –
CONSTRUCTIVE
POSSESSION**

In *Dodson v. State*, No. CR 99-1088, 4/13/00, the Arkansas Supreme Court discussed constructive possession of drugs in a vehicle. The Court stated that it is not necessary for the State to prove literal physical possession of drugs in order to prove possession. *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994). Possession of drugs can be proved by constructive possession. Although constructive possession can be implied when the drugs are in the joint control of the accused and another, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be some other factor linking the accused to the drugs:

Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and (5) whether the accused acted suspiciously before or during the arrest.

The Court noted in this case, there was joint occupancy of the automobile, but Mr. Dodson exercised dominion or control over the vehicle, in that he was the driver. Furthermore, although the contraband was not found on the same side of the vehicle where Mr. Dodson was sitting, it was found

in close proximity to Mr. Dodson. Moreover, Mr. Dodson acted suspiciously during his arrest, as evidenced by Officer Randle's testimony that Mr. Dodson was making wild movements while seated in the patrol unit. Additionally, Officer Randle found approximately \$6,000 in cash hidden on Mr. Dodson's person. All of these factors link Mr. Dodson to the drugs that were found in the car.

**SEARCH AND SEIZURE –
AUTOMOBILE
EXCEPTION**

In *United States v. Maggard*, CA8, No. 00-1146, 5/26/00 [Unpublished], Larry M. Maggard argues that a warrantless search of his pickup truck could not be made since the pickup truck was not mobile.

As the Supreme Court has observed, "Although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception." *California v. Carney*, 471 U.S. 386, 391 (1985). "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." (quoting *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)).

Here, although not readily mobile, the pickup truck did not appear to have lost its inherent mobility. It was merely stuck in a ditch. Inasmuch as there was no evidence of any permanent immo-

bility, it was reasonable for the officers who conducted the search to conclude that all the truck needed was to be towed out of the ditch and then it could have been driven away. Additionally, Maggard does not dispute that the officers had probable cause to believe the truck contained contraband. Thus, since the occupants of the truck could have returned to the scene to remove the contraband while the officers were obtaining a warrant, quick action by the officers was justified. All of these circumstances created sufficient exigency to justify application of the automobile exception. See *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (per curiam) (justification to conduct warrantless search "does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant").

**SEARCH AND SEIZURE –
EMERGENCY ENTRY
BASED ON 911 CALL**

In *United States v. Richardson*, CA7, No. 99-1190, 4/3/00, the Seventh Circuit Court of Appeals stated that a 911 caller's report that a murder had been committed and that the victim's body was located in a particular residence provided exigent circumstances justifying a warrantless search of the premises.

The week before the call in issue, police had received a 911 call reporting a murder at the same resi-

dence. The call turned out to be a bogus call. The caller who made the second report gave a name and claimed to live at the residence. He told police that a woman had been raped and killed and that her body was in the basement. Richardson, who was the landlord and a sometime resident of the dwelling, was in front of the two-unit building when the police arrived. Without obtaining his consent, officers entered and searched the premises, starting not with the basement but with areas on the first floor. While the officers found drug trafficking paraphernalia and an illegal weapon, no body was found.

Richardson filed a motion to suppress the evidence claiming the search was illegal. The trial court found that although Richardson had a privacy expectation in the dwelling, the warrantless search was supported by exigent circumstances. Richardson argued that the police did not actually believe that exigent circumstances existed. He pointed out that the officers parked half a block from the residence, did not summon an ambulance, and did not proceed immediately to the part of the house where the murder victim was reported to be located.

The Seventh Circuit Court of Appeals described this case as close since the alleged exigency was based entirely on a call that repeated a report that had proved false only a week before. The Court stated that it goes too far to argue, as Richardson did, that a 911 call by itself cannot provide what the Fourth Amendment requires for an emergency entry: a reasonable belief that someone inside the dwelling was in need of immediate assistance. On the contrary, 911

calls reporting emergencies have been held sufficient to trigger the exigent circumstances doctrine particularly when, as here, the called identified himself. Use of the 911 system to inform police of persons in urgent need of help fits neatly within the exigent circumstances doctrine's purpose of ensuring that police may provide emergency assistance.

The court stressed that the test for an exigency is objective but acknowledge that the exigency in this case was questionable. A subjective test, however, would endanger privacy by opening up the possibility of warrantless searches anytime the police officer actually believed that an exigency existed regardless of the objective basis of that belief.

In the lower court the law enforcement officers who responded to the 911 call testified that they were unaware of the previous false report. They also testified that, in their experience, laypersons couldn't say definitely whether a person is dead or alive. For this reason, the officers testified that they always assume that a person reported dead by a lay person may in fact be alive.

SEARCH AND SEIZURE – EXPECTATION OF PRIVACY IN DRIVEWAY

In *Burdyshaw v. State*, CA CR 99-685, 3/1/00, Deputy Bobby Johnson of the Craighead County Sheriff's Department received an anonymous telephone call on 7/21/98, informing him that Burdyshaw was operating a methamphetamine lab at his house in Bono, Arkan-

sas, and had some methamphetamine in his possession. At approximately 7:45 that night, Deputy Johnson and several other law enforcement officers went to Burdyshaw's house. When they arrived, appellant and two other men were standing outside a shop building. Deputy Johnson approached Burdyshaw, told him that he had received an anonymous tip that appellant was operating a methamphetamine lab, and asked if he could conduct a search. Burdyshaw verbally consented to the search. Then Deputy Johnson asked Burdyshaw if he owned the property, and Burdyshaw informed him that his father, Ralph Burdyshaw, owned the property. At that point, Deputy Johnson instructed Officer Mark Smith to obtain consent from Ralph Burdyshaw. Officer Smith approached Ralph Burdyshaw, who was sitting in a chair in the carport, and obtained his written consent to search the residence, the shop building, and all surrounding areas. Guns, drug paraphernalia, methamphetamine, and marijuana were found in the residence as a result of the search, and Burdyshaw was arrested at that time.

Burdyshaw contends that the officers should not have entered the driveway to the property because they lacked probable cause to do so. However, the expectation of privacy in driveways and walkways, which are commonly used by visitors to approach dwellings, is not generally considered reasonable. *Freeman v. State*, 37 Ark. App. 81, 824 S.W.2d 403 (1992). Nevertheless, the question of whether a driveway is protected from entry by police officers de-

depends on the circumstances, with reference to such factors as accessibility and visibility from a public highway. *Freeman, supra* (citing *United States v. Smith*, 783F.2d 648 (6th Cir. 1986)).

In the present case, Deputy Johnson testified that the Burdyshaws' driveway was long and narrow, and although the house was perhaps seven hundred feet from the road, it was visible from the county road. Burdyshaw's mother, Terisita Burdyshaw, testified at the suppression hearing that their property was posted with "no trespassing" signs and that three gates along the driveway were usually open.

The Arkansas Court of Appeals believed the rationale of *United States v. Ventling*, 678 F.2d 63 (8th Cir. 1982), is applicable to the case at bar. In that case, Ventling was convicted of two counts of interfering with the use of a U. S. Forest Service Road for erecting several large boulders as roadblocks. When a Forest Service agent investigated, he observed tractor tire tracks between the boulders leading to Ventling's driveway. The agent drove up the driveway and approached the home, where he noticed more tire tracks and a tractor equipped with a backhoe and a front-end loader. Although he was denied permission to inspect the tractor tires and was told to leave the premises, the agent took photographs of the tire tracks before he left and obtained a search warrant based upon the observations he made while on Ventling's property. Ventling moved to have the evidence suppressed on the basis that he had a reasonable expectation of privacy in his driveway and the area around his

house and because he had "No Trespassing" signs on his driveway. In denying the motion to suppress, the trial court held:

The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request and if the request is refused to leave by the same way. The presence of "no trespassing" signs in this country without a locked or closed gate make the entry along the driveway for the purposes above described not a trespass and, therefore, does not constitute an intrusion prohibited by the Fourth Amendment.

The district court agreed with the trial court's analysis and affirmed the denial of the motion to suppress, stating that the extension of Ventling's expectation of privacy to the driveway did not appear to be reasonable. Applying the rationale set forth in *Ventling* to the facts of this case, even though the property was posted, the gates were open, the driveway was not blocked, and entry onto the property was not an intrusion prohibited by the Fourth Amendment.

Furthermore, in *Oregon v. Corbett*, 516 P.2d 487, 490 (1973), the Court of Appeals of Oregon stated:

In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends.... If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he

should find it equally likely that the police will do so.

We hold that the police officers did not violate Burdyshaw's Fourth Amendment right to be free from unreasonable searches and seizures by merely driving up the driveway to the house and requesting consent to search the premises. The officers were not required to have reasonable cause to enter the driveway and approach the residence in order to request consent to search. The officers performed no search until they received written consent to do so from the owner of the premises. The trial court did not err in denying Burdyshaw's motion to suppress the evidence found in the house.

**SEARCH AND SEIZURE –
EXPECTATION OF
PRIVACY IN A PUBLIC
STORAGE BUILDING
OWNED BY THE STATE**

In *Embry v. State*, CA CR 99-1011, 4/26/00, [Unpublished], Officer Phillip Hubbard of the Atkins Police Department on November 13, 1998, testified he responded to a call of a possible fire at around 10:00 p.m. He subsequently observed smoke coming from a small storage building or tool shed at the Atkins Housing Authority, a state-owned facility. Officer Hubbard witnessed Embry exit the storage building and close the door. Embry told the officer he was fumigating the building. Officer Hubbard testified that he heard a voice inside and asked Embry if he could search the building. Officer Hubbard further testified that Embry agreed and started to open the door with a

key when another individual exited the building.

Officer Hubbard then entered the building. He testified that he smelled a strong odor of ether and observed a fog or vapor inside. The building contained tools and cleaning supplies, as well as numerous items used in the manufacture of methamphetamine. Tracy Spencer, a narcotics investigator with the Arkansas State Police, testified that inside the shed he found two HCL generators that consisted of two twenty-ounce plastic bottles sealed with plastic tubing. These items were found underneath a workbench along a wall. He testified that the HCL generators were emitting a heavy white vapor. He further stated that prolonged exposure to the fumes could cause health problems and that there was a danger of explosion. Officers also found two-gallon water jugs, empty ephedrine tablet bottles, coffee filters, heating elements, syringes, muriatic acid, sulfuric acid, denatured alcohol, and funnels, all in plain view inside the building.

Embry's mother testified that she was the executive director of the Atkins Housing Authority where appellant was employed as a part-time maintenance person. She testified that the storage building was used by the housing authority to store tools and complete repair work. She testified she and Embry had keys to the building.

The trial court found that Embry lacked standing to challenge the search. Embry contends that he had standing to challenge the search because he controlled the building as his workplace.

Fourth Amendment rights against unreasonable searches and seizures are personal in nature.

Rakas v. Illinois, 439 U.S. 128 (1978). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998). It is well settled that the defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by a search of a third person's premises or property. *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). One is not entitled to automatic standing simply because he is present in the area or on the premises searched or because an element of the offense with which he is charged is possession of the thing discovered in the search. *Ramage, supra*. The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable.

The Arkansas Court of Appeals found no cases from our court or the Arkansas Supreme Court addressing the specific issue raised in this case. It has been recognized, however, that employees may have a reasonable expectation of privacy in their offices against police intrusion. *See Mancusi v. DeForte*, 392 U.S. 364 (1968). The United States Supreme Court has stated that the expectation of privacy in commercial premises 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). Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987).

Courts that have addressed similar issues have considered: whether the employee had a property or possessory interest in the thing seized or the place searched; had a right to exclude others from that place; exhibited a subjective expectation of privacy that it would remain free from governmental intrusion; took precautions to maintain privacy; and was legitimately on the premises. *See United States v. Cardoza-Hinojosa*, 140 F.3d 610 (5th Cir.), *cert. denied*, 525 U.S. 973 (1998); *United States v. Anderson*, 154 F.3d 1225 (10th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999).

In this case Embry did not own the shed and did not have the right to exclude others from the government-owned storage shed. He was only a part-time employee and the director of the housing authority also had a key to the building. Anyone else entering the shed could observe, in plain view, the various items of paraphernalia. Thus, the items were not stored in a manner indicating anything of a private or personal nature. The building did not house an office environment. There was no desk or phone. It was used mainly for storage, and Embry was provided access to the shed for the purpose of facilitating work on behalf of the Atkins Housing Authority. Embry has also not shown that he was legitimately on the premises at the time of the search. While Embry

no doubt intended the planned activities within the shed to remain private, the United States Supreme Court has explicitly stated that the “subjective expectation of not being discovered” while conducting criminal activities is insufficient to create a legitimate expectation of privacy. *Rakas*, 439 U.S. at 143-44. The Arkansas Court of Appeals concluded that Embry did not have a reasonable expectation of privacy in the storage building, and thus did not have standing under the Fourth Amendment to challenge the warrantless search.

**SEARCH AND SEIZURE –
PHYSICAL
MANIPULATION OF A BUS
PASSENGER’S CARRY-ON
LUGGAGE**

In *Bond v. United States*, No. 98-9349, 4/17/00, the United States Supreme Court was faced with the question of whether a law enforcement officer’s physical manipulation of a bus passenger’s carry-on luggage violated the Fourth Amendment’s proscription against unreasonable searches. The Court held that it did.

Steven Dewayne Bond was a passenger on a Greyhound bus that left California bound for Little Rock, Arkansas. The bus stopped, as it was required to do, at the permanent Border Patrol checkpoint in Sierra Blanca, Texas. Border Patrol Agent Cesar Cantu boarded the bus to check the immigration status of its passengers. After reaching the back of the bus, having satisfied himself that the passengers were lawfully in the United States, Agent Cantu began walk-

ing toward the front. Along the way, he squeezed the soft luggage which passengers had placed in the overhead storage space above the seats. Bond was seated four or five rows from the back of the bus. As Agent Cantu inspected the luggage in the compartment above Bond’s seat, he squeezed a green canvas bag and noticed that it contained a “brick-like” object. Bond admitted that the bag was his and agreed to allow Agent Cantu to open it. Upon opening the bag, Agent Cantu discovered a “brick” of methamphetamine. The brick had been wrapped in duct tape until it was oval-shaped and then rolled in a pair of pants.

Stephen Dewayne Bond was indicted for conspiracy to possess, and possession with intent to distribute, methamphetamine. Bond moved to suppress the drugs, arguing that Agent Cantu conducted an illegal search of his bag. Bond’s motion was denied, and the District Court found him guilty on both counts and sentenced him to 57 months in prison. On appeal, he conceded that other passengers had access to his bag, but contended that Agent Cantu manipulated the bag in a way that other passengers would not. The Court of Appeals rejected this argument, stating that the fact that Agent Cantu’s manipulation of petitioner’s bag was calculated to detect contraband is irrelevant for Fourth Amendment purposes. 167 F.3d 225, 227 (CA5 1999) (citing *California v. Ciraolo*, 476 U.S. 207 (1986)). Thus, the Court of Appeals affirmed the denial of the motion to suppress, holding that Agent Cantu’s manipulation of the bag was not a search within the meaning of the Fourth Amendment. 167 F.3d, at 227. The

United States Supreme Court granted certiorari, 528 U.S. ____ (1999), and reversed the judgment of the Court of Appeals.

The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. A traveler’s personal luggage is clearly an “effect” protected by the Amendment. See *United States v. Place*, 462 U.S. 696, 707 (1983). Indeed, it is undisputed here that Stephen Dewayne Bond possessed a privacy interest in his bag.

But the Government asserts that by exposing his bag to the public, Bond lost a reasonable expectation that his bag would not be physically manipulated. The Government relies on the decisions in *California v. Ciraolo*, supra, and *Florida v. Riley*, 488 U.S. 445 (1989), for the proposition that matters open to public observation are not protected by the Fourth Amendment. In *Ciraolo*, the Court held that police observation of a backyard from a plane flying at an altitude of 1,000 feet did not violate a reasonable expectation of privacy. Similarly, in *Riley*, the Court relied on *Ciraolo* to hold that police observation of a greenhouse in a home’s curtilage from a helicopter passing at an altitude of 400 feet did not violate the Fourth Amendment. The Court reasoned that the property was “not necessarily protected from inspection that involves no physical invasion,” and determined that because any member of the public could have lawfully observed the defendants’ property by flying overhead, the defendants’ expectation of privacy was “not reasonable and not one ‘that soci-

ety is prepared to honor.’ ” See Riley, *supra*, at 449 (explaining and relying on Ciraolo’s reasoning).

But Ciraolo and Riley are different from this case because they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection. For example, in *Terry v. Ohio*, 392 U.S. 1, 17—18 (1968), the Court stated that a careful (tactile) exploration of the outer surfaces of a person’s clothing all over his or her body is a “serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.” Although Agent Cantu did not “frisk” Bond’s person, he did conduct a probing tactile examination of Bond’s carry-on luggage. Obviously, Bond’s bag was not part of his person. But travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand.

Here, Bond concedes that, by placing his bag in the overhead compartment, he could expect that it would be exposed to certain kinds of touching and handling. But Bond argues that Agent Cantu’s physical manipulation of his luggage “far exceeded the casual contact [Bond] could have expected from other passengers.” The Government counters that it did not.

The Fourth Amendment analysis embraces two questions. First, the Court will ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve

something as private. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Here, Bond sought to preserve privacy by using an opaque bag and placing that bag directly above his seat. Second, the Court must inquire whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable. When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. The Court, therefore, held that the agent’s physical manipulation of Stephen Dewayne Bond’s bag violated the Fourth Amendment.

**STOP AND FRISK –
ANONYMOUS TIP THAT A
PERSON IS CARRYING A
FIREARM**

In *Florida v. J.L.*, No. 98-1993, 3/28/00, the question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer’s stop and frisk of that person. The Supreme Court held that it is not.

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is

known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males “just hanging out there.” One of the three, J. L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J. L. made no threatening or otherwise unusual movements. One of the officers approached J. L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J. L.’s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing.

J. L., who was at the time of the frisk “10 days shy of his 16th birthday,” was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment. 727 So. 2d 204 (1998).

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject’s “not easily predicted” movements. (quoting *Alabama v. White*, 496 U.S. 325, 332 (1990)). The tip leading to the frisk of J. L., the court

observed, provided no such predictions, nor did it contain any other qualifying indicia of reliability. 727 So. 2d, at 207-208. Two justices dissented. The safety of the police and the public, they maintained, justifies a “firearm exception” to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips.

Seeking review in this Court, the State of Florida noted that the decision of the State’s Supreme Court conflicts with decisions of other courts declaring similar searches compatible with the Fourth Amendment. See, e.g., *United States v. DeBerry*, 76 F.3d 884, 886-887 (CA7 1996); *United States v. Clipper*, 973 F.2d 944, 951 (CAD9 1992). The United States Supreme Court granted certiorari, 528 U.S. – (1999), and affirmed the judgment of the Florida Supreme Court.

The Court stated that their “stop and frisk” decisions begin with *Terry v. Ohio*, 392 U.S. 1 (1968). The Court held in *Terry*:

Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be

used to assault him.

In the instant case, the officers’ suspicion that J. L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see *Adams v. Williams*, 407 U.S. 143, 146-147 (1972), “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity,” *Alabama v. White*, 496 U.S., at 329. As the Court has recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits “sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. The question which the court must confront is whether the tip pointing to J.L. had those indicia of reliability.

In *White*, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. Standing alone, the tip would not have justified a *Terry* stop. Only after police observation showed that the informant had accurately predicted the woman’s movements, the Court explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine. Although the Court held that the suspicion in *White* became reasonable after police surveillance, it regarded the case as borderline. Knowledge about a person’s future

movements indicates some familiarity with that person’s affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. The Court accordingly classified *White* as a “close case.”

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court’s decision in that case. The anonymous call concerning J. L. provided no predictive information and, therefore, left the police without means to test the informant’s knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J. L. of engaging in unlawful conduct. The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect’s visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. The United States “in a friend of the court brief” makes a similar argument, proposing that a stop and frisk should be permitted “when (1) an anonymous tip provides a description of a particular person at

a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip” These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject’s readily observable location and appearance is, of course, reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Cf. 4 W. LaFave, *Search and Seizure* §9.4(h), p. 213 (3d ed. 1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

A second major argument advanced by Florida and the United States is, in essence, that the standard *Terry* analysis should be modified to license a “firearm exception.” Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. The Court’s decisions recognize the serious threat that armed criminals pose to public safety; *Terry*’s rule,

which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. See 392 U.S., at 30. But an automatic firearm exception to established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target’s unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. Several Courts of Appeals have held it per se foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. See, e.g., *United States v. Sakyi*, 160 F.3d 164, 169 (CA4 1998); *United States v. Dean*, 59 F.3d 1479, 1490, n. 20 (CA5 1995); *United States v. Odom*, 13 F.3d 949, 959 (CA6 1994); *United States v. Martinez*, 958 F.2d 217, 219 (CA8 1992). If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams and White*, the Fourth Amendment is not so easily satisfied. Cf. *Richards v. Wisconsin*, 520 U.S. 385, 393-394 (1997) (rejecting a per se exception to the “knock and announce” rule for narcotics cases partly because “the reasons for creating an exception in one category [of Fourth Amend-

ment cases] can, relatively easily, be applied to others,” thus allowing the exception to swallow the rule).

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, see *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam), and schools, see *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer’s prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in today’s decision only of cases in which the officer’s authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in *Adams and White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed