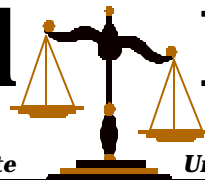




CJI Legal Briefs



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ARREST – Entry Into Residence

In *United States v. Bervaldi*, CA11, No. 98-5419, 9/14/00, the United States Court of Appeals for the Eleventh Circuit discussed entry into a residence to make an arrest. The Court noted that in *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 1388 (1980), the Supreme Court held that for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. *Payton* requires a two-part inquiry to determine if entry pursuant to an arrest warrant complies with the Fourth Amendment's proscription of unreasonable searches. See *United States v. Magluta*, 44 F.3d at 1530 (11th Cir. 1995). In particular, the Eleventh Circuit has held that first, there must be a reasonable belief that the location to be searched is the suspect's dwelling, and second, the police must have reason to believe that the suspect is within the dwelling. Elaborating on this, the Court explained that for law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling and that the suspect is within the residence at the time of entry. In evaluating this on-the-spot determination, courts must be sensitive to common sense factors.

CIVIL LIABILITY – Posing an Arrested Subject for the Media

In *Lauro v. Charles*, CA2, No. 99-7239, 7/28/00, the issue before the United States Court of Appeals for the Second Circuit was whether the police may constitutionally force an arrested person to undergo a staged "perp walk" for the benefit of the press when the walk serves no law

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enforcement purpose. The Court of Appeals for the Second Circuit held that such a staged “perp walk” exacerbates the seizure of the arrestee unreasonably and therefore violates the Fourth Amendment. Because the Fourth Amendment right at issue was not clearly established until this decision, the defendant police officer in this case was entitled to qualified immunity.

The “perp walk”—as it is popularly known—is a widespread police practice in New York City in which the suspected perpetrator of a crime, after being arrested, is “walked” in front of the press so that he can be photographed or filmed. The perp walk both publicizes the police’s crime-fighting efforts and provides the press with a dramatic illustration to accompany stories about the arrest. Not surprisingly, then, police and press often cooperate to ensure that perp walks occur. But while the walks arguably benefit both the police and the media, their effect on the “walked” suspects can be less benign. Although a perp walk commonly occurs before any judicial determination that a suspect has actually committed the crime for which he was arrested, or even that there is enough evidence to justify a trial, a suspect in handcuffs being led into a station house is a powerful image of guilt. Indeed, the perp walk has been described as a ritual degradation that publicly signals the arrestee’s change in status from an ordinary citizen.

Perp walks come in several varieties. Commonly, the arrestee is filmed while in the normal course of being transferred by the police

from one location to another. In such cases, the police may or may not notify the press that the arrestee will be moved and is thus available for photographing at a particular time. These walks are very different from staged perp walks. In a staged walk, the police take the suspect outside the station house, at the request of the press, for no reason other than to allow him to be photographed. The perp walk to which John Lauro was subjected was of this sort.

The defendant, John Lauro, was charged with burglary, petit larceny, and possession of stolen property. About two hours after Lauro was brought to the precinct squad room by Detective Michael Charles, he received a telephone call from the Police Department’s Office of the Deputy Commissioner of Public Information (DCPI). Charles was told that the media were interested in Lauro’s case and that Lauro should be taken on a perp walk. Charles handcuffed Lauro and walked him out the front door and outside the station house. He then placed Lauro in an unmarked police car, drove around the block, removed Lauro from the car, and walked him back into the station house. The perp walk was filmed by a television crew from Fox 5 News, and footage of the walk was subsequently broadcast by Fox 5 News.

The Court of Appeals stated that the interests of the press and of the public who might want to view perp walks, are far from negligible. In this case, however, the press and the public were not viewing the actual event of Lauro being brought to the police station, but rather, were offered a staged

recreation of that event. Even assuming that there is a legitimate state interest in accurate reporting of police activity, that interest is not well served by an inherently fictional dramatization of an event that transpired hours earlier. The Court concluded that the perp walk that occurred in the case not only intruded upon the privacy protected by the Fourth Amendment, but also lacked any legitimate law enforcement purpose and hence was unreasonable.

The Court pointed out that it did not hold that all, or even most, perp walks are violations of the Fourth Amendment. The Court noted they were not talking about cases in which there is a legitimate law enforcement justification for transporting a suspect. The Court did not address the case—seemingly much more common than the kind of staged perp walk that occurred here—where a suspect is photographed in the normal course of being moved from one place to another by the police. Nor did the Court reach the question of whether, in those circumstances, it would be proper for the police to notify the media ahead of time that a suspect is to be transported.

The Court further held that because the unconstitutionality of the staged perp walk was, until this decision, not clearly established, Detective Michael Charles was entitled to qualified immunity for his participation in the perp walk.



**CIVIL LIABILITY –
State Action; Negligence;
State Action That Violates
Substantive Due Process**

In *S.S. v. McMullen*, CA8, No. 98-1732, 9/13/00, the Eighth Circuit Court of Appeals dealt with an action to recover damages under 42 U.S.C. § 1983 for the violation of substantive due process rights. When S.S. appealed the district court’s dismissal of her complaint for failure to state a claim, a panel of the Eighth Circuit reversed. See *S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999), vacated (8th Cir. Sept. 30, 1999). The Eighth Circuit then granted rehearing and vacated the panel opinion. The United States Court of Appeals for the Eighth Circuit now affirms the order of the district court.

S.S. alleged in her complaint that three employees of the Missouri Division of Family Services acted unconstitutionally when they released her from state custody and returned her to her father, although they had notice that her father was allowing her to have contact with the known pedophile who subsequently sodomized her on at least two occasions. S.S. also alleged that, before her return to her father, the known pedophile himself called one of the defendants to complain that it was unfair to try to limit his contact with S.S.

The place for determining whether these facts, if proved, would give rise to liability for a constitutional tort is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In that case, the United States

Supreme Court approved summary judgment against Joshua DeShaney, who claimed that although the state removed him temporarily from the custody of his abusive father, it did not do so permanently. His father finally beat him so severely that he suffered permanent brain damage. The Court emphasized that the constitutional right to be free from bodily harm is a right secured only against state actors, not against private ones. The purpose of the Fourteenth Amendment “was to protect the people from the State, not to ensure that the State protected them from each other.” In denying Joshua a recovery, the Court remarked that while the state may have been aware of the dangers that Joshua faced, “it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”

In *DeShaney*, the State did nothing to render the plaintiff more vulnerable to risks created by others. This has led some courts, including this one, to conclude that if the State acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a constitutional tort. See, e.g., *Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). While the correctness of that principle is indisputable, it cannot give rise to liability in the present case. In returning S.S. to her father, the State did not increase the danger of significant harm to S.S.; it merely placed her back into the situation from which it had originally retrieved her.

DeShaney, in fact, speaks specifically to this kind of situation. The Court held that the State was not liable to Joshua because “when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual’s safety by once having offered him shelter.” 489 U.S. at 201. Previous cases have emphasized this aspect of *DeShaney*. For instance, in *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), this Eighth Circuit stated that individuals in an action like the present one had to establish that the State affirmatively placed them in a position of danger that they would not otherwise have been in. It is true that two and a half years elapsed between the time that S.S. was taken from her father’s custody and the time when she was returned to it, but there is nothing in that interval that created a greater risk of abuse than the one that she would have faced had she never been taken from her father in the first place. In other words, the complaint contains no allegations that would justify a conclusion that by returning S.S. to her father, the State created greater risks to her than the ones to which she was originally exposed.

Assuming that the allegations in S.S.’s complaint are true, they make out a case for negligence only. In order to succeed, a complaint for a violation of substantive due process rights must allege acts that shock the conscience, and merely negligent acts cannot, as a constitutional matter, do that. Even if the State’s activities could be said to have

been grossly negligent or even reckless in the circumstances present here, S.S.'s constitutional claim must fail. Gross negligence is not actionable under 42 U.S.C. § 1983.

Actionable cases must demonstrate a level of abuse of power or activity that was so brutal and offensive that it did not comport with traditional ideas of fair play and decency. *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957); *Rochin v. California*, 342 U.S. 165, 174 (1952). The acts that S.S. claims were perpetrated against her once she was returned to her father were utterly indecent and egregious, and these acts shock the conscience. The focus here is not on those acts, but on the State's acts that S.S. says led to her injuries. The state's acts cannot be made actionable without violating the Supreme Court's caveat against making of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

**CIVIL LIABILITY –
Detention of
Students at School**

In *Milligan v. City of Slidell*, CA5, No. 98-31335, 10/5/00, Officers John Emery and Louis Thompson requested a vice-principal to call certain students from class for questioning about a rumored after school fight possibly involving weapons. The meeting lasted ten to fifteen minutes, as the officers questioned the students about the fight and warned them that their parents would be called if a fight should occur and an

investigation connected them to it. The officers had no physical contact with the students and the vice-principal testified that the students appeared to want to tell their side of the story. The officers' intervention succeeded in warding off any showdown.

Through their parents, a suit was filed against the officers and the City of Slidell. At the trial, one of the students asserted that he felt physically intimidated and that he did not feel free to leave the meeting. The district court held that the two officers had violated the student's Fourth Amendment rights, and they were not entitled to qualified immunity. The United States Court of Appeals for the Fifth Circuit reversed.

The Court stated that even assuming that the students had some kind of right to avoid detention at school for disciplinary questioning, the seizure effected here was reasonable because students' Fourth Amendment rights are evaluated according to the special needs of the public school environment. See *Vernovia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

**DRIVING WHILE
INTOXICATED –
Actual Physical Control**

In *Stephenson v. City of Fort Smith*, CA CR 00-155, 10/18/00, Officer Ron Depriest of the Fort Smith Police Department was dispatched on July 7, 1999, at 10:22 P.M. to the "Kwik Trip" to investigate a person who was passed out behind the wheel of a vehicle.

When he arrived, Officer Depriest saw a white Chevrolet pickup truck parked in front of the Kwik Trip's doors. The officer found Austin Stephenson asleep, intoxicated, and sitting behind the steering wheel. Officer Depriest did not see Stephenson "driving the truck or otherwise physically operating it." However, the driver's side window was down, the motor and the car lights were off, and the keys to the vehicle were on the car dashboard.

Stephenson first argued that the trial court erred in finding that he was in actual physical control of a motor vehicle. "Actual physical control" of a vehicle is an element of driving while intoxicated pursuant to Ark. Code Ann. § 5-65-103 (Repl. 1997). Stephenson contends that there is insufficient evidence that he had actual physical control of the vehicle.

In *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), the Arkansas Supreme Court held that Dowell was not in actual control of his vehicle within the meaning of the DWI statute. Dowell was found asleep in his automobile, which was parked with the motor not running. The keys were in the seat of the vehicle by Dowell's side. Here, appellant was also found asleep in his vehicle, which was parked with the motor not running. The keys were on the dash of the vehicle. We find that the case at bar is substantially similar to *Dowell* with the only difference being the location of the keys in the vehicle. Under these circumstances, we do not wish to create a legal distinction between keys found on the seat of a vehicle and keys found on the dash of a vehicle. Therefore, the Arkansas

Court of Appeals held that Stephenson was not in actual control of his vehicle. Accordingly, his conviction for second-offense driving while intoxicated was reversed.

Stephenson next argued that the trial court erred in finding him guilty of refusal to submit to a breath test when the facts did not show him in actual physical control of a motor vehicle. In order to fall under the implied-consent laws, one must operate a motor vehicle or be in actual physical control of a motor vehicle. Ark. Code Ann. § 5-65-202(a) (Repl. 1997).

The Arkansas Court of Appeals reasoned that since Stephenson was not operating a motor vehicle or in actual physical control of a motor vehicle, his conviction for refusal to submit to a breath test must also be reversed.

Editor's Note: Judge Margaret Meads, dissenting in Stephenson v. City of Fort Smith, reasoned that Stephenson could have awakened and started the vehicle and thus was in as much control of the vehicle as an intoxicated person could be.

Dowell v. State, 283 Ark. 161, 671 S.W.2d 740 (1984), was generally considered to be a poor decision on “actual physical control” of a motor vehicle. The Arkansas Supreme Court, while not overruling *Dowell*, followed other reasoning in cases like *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985). In *Wiyott*, the arrested individual attempted to start the vehicle when the officer awoke him. This was adequate for the Arkansas Supreme Court to find *Wiyott* in actual physical control of the vehicle.

The weight of authority in most states is contrary to the *Dowell* decision. This decision by the Arkansas Court of Appeals injects new uncertainty into the Arkansas law enforcement officer's decision to make a DWI arrest when an intoxicated individual is located asleep behind the wheel of a parked vehicle. The Arkansas law enforcement officer needs to be able to point to other factors to indicate actual physical control to justify the arrest.

**EVIDENCE –
Business Records**

In *United States v. Brockman*, CA8, No. 00-1753, 9/19/00 [Unpublished], the Eighth Circuit Court of Appeals stated that a pager service contact was properly admitted into evidence as a business records exception to the rule against hearsay.

**EVIDENCE –
Chain of Custody**

In *Goodwin v. State*, No. CR 99-1192, 9/28/00, the Arkansas Supreme Court discussed chain of custody. In this case, the defense argued that there was a break in the chain of custody from the time drug evidence was given to Sergeant Hatman and the time it was secured in the evidence locker. Goodwin points to the fact that Hatman testified that he locked the marijuana in the evidence locker on February 9, the same day it was received; however, Officer Poland testified that his log showed the marijuana was not logged in the

evidence locker until February 10.

The Arkansas Supreme Court has consistently held that the purpose of establishing a chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997); *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997); *Lee v. State*, 326 Ark. 229, 931 S.W.2d 433 (1996); see also Ark. R. Evid. 901. The State is not required to eliminate every possibility of tampering with the evidence; rather, the trial court must be satisfied within a reasonable probability that there has been no tampering. *Crisco*, 328 Ark. 388, 943 S.W.2d 582; *Newman*, 327 Ark. 339, 939 S.W.2d 811. In this case, there was testimony from officers of the correctional facility that they consistently maintained custody of the items once they were seized from Goodwin. Those same officers also testified that the marijuana introduced at trial was in substantially the same condition as it was when they originally took possession of it. The fact that there is a one-day discrepancy between when Sergeant Hatman stated that he locked the evidence in the locker and when the log showed that it was placed in the locker is not enough to establish a break in the chain of custody. Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. *Crisco*, 328 Ark. 388, 943 S.W.2d 582; *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

The Court also disagreed with Goodwin's assertion that the

present situation is analogous to that in *Crisco*, 328 Ark. 388, 943 S.W.2d 582. There, the description of the substance seized was completely different from the way it appeared when analyzed by a chemist at the State Crime Lab. On appeal, the Court held that the State had failed to sufficiently establish the chain of custody. The Court recognized that proof of the chain of custody for interchangeable items like drugs or blood needs to be more conclusive. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999); *Crisco*, 328 Ark. 388, 943 S.W.2d 582. In this case, however, there is no assertion that the substance introduced at trial differed in appearance or content from the substance seized from Goodwin. Moreover, there are no allegations of any tampering with the marijuana. The State established a sufficient chain of custody over the marijuana. Goodwin’s argument is without merit.

EVIDENCE – DNA

In *Birmingham v. State*, No. CR 99-678, 9/21/00, Birmingham argues that the trial court erred when it allowed the State’s expert witness to testify that he was the person who produced the DNA found in the victim’s rape kit. Specifically, he contends that an expert may only testify as to the probabilities of some other individual contributing the DNA found in the rape kit, but may not express an opinion that the DNA evidence shows that Birmingham was the donor of the DNA material found on the victim’s vaginal swab.

The testimony that is objected to is as follows:

Q: [Mr. Long, State’s Attorney]: And what is the probability of finding someone random, in the world, who matches on all fifteen points as that does?

A: [Mr. Channel of the Arkansas Crime Laboratory] The statistics that would generate from that would be one in one trillion. And what that does, we’re trying to determine how rare or how common that DNA profile is in the general population and specifically in the Caucasian population. So that gives me the ability to render an opinion on that to say that the DNA profile on the DNA vaginal swabs from S.W. came from that of Robert Birmingham.

Q: Period?

A: Yes, that’s correct.

Q: When you reach that order of numbers, you’re not talking about probabilities any more. What you are saying is, it is him?

A: Right —

Mr. Miller: [Defense Attorney] Your honor, I object —

Dr. Channel: Right, It’s my opinion that it’s him.

The Court: Hold on, Mr. Channel. What’s the basis of your objection?

Mr. Miller: This witness has just testified as to probabilities. He cannot, based on what he just

said, testify with absolute certainty that in his; it can only be him. He can testify to the probability, but not to identify him as the only person to the exclusion of all others. I don’t think —

Mr. Long: He just said that he could. Now, if Mr. Miller wants to bring an expert witness that says he can’t, then fine, we can wait for him.

The Court: The objection is overruled. You may proceed.

Birmingham argues that an expert witness can only express statistical probabilities of a DNA match and must refrain from expressing an opinion as to the origin of the tested DNA material. This argument must fail. The Court first noted the testimony by the State’s expert that the DNA material on the swab was identical to that obtained from a blood test from Birmingham in all fifteen points analyzed, and that the probability of finding such a match would be one in one trillion. This scientific analysis was not challenged by Birmingham’s DNA expert. The Arkansas Supreme Court noted that it has been nearly a decade since the decision in *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991) where it held that DNA testing is a reliable scientific procedure. Based upon the undisputed testimony in this case, the Court held that the trial court did not err in permitting the expert to testify that, in his opinion, Birmingham was the source of the DNA material found on the victim’s vaginal swab.

EVIDENCE – Polygraph Examination

In *Oates v. State*, CA CR 00-280, 10/25/00, the issue before the Arkansas Court of Appeals was whether the results of a polygraph examination should be admissible under the limited circumstances where the police are told about the test before it is given and are advised of the results, and where the jury is faced with the sole question of determining the credibility of the witnesses. The Court stated that it has long been the rule in Arkansas that the results of polygraph examinations are not admissible absent a stipulation by both parties. *See* Ark. Code Ann. § 12-12-704 (Repl. 1999); *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999); *State v. Bullock*, 262 Ark. 394, 557 S.W.2d 193.

EYEWITNESS IDENTIFICATION – Suggestive Prior Identification

In *Tester v. State*, CR 00-409, 11/9/00, Roy Tester appealed his convictions of first-degree murder for the death of his father and capital murder for the death of his mother. He received a life sentence for each conviction and raised several issues on appeal. One of the issues was that the trial court erred in refusing to suppress the in-court identification of Sam Platt, a Houston pawn-shop owner who identified Tester in a photograph shown him by officers investigating the case.

Sergeant John Swaim, an investigator in the homicide division

of the Houston Police Department, testified at the hearing that he interviewed Platt, who described a man who had visited his pawnshop as “a white male, about five foot eight inches tall, medium build, and dark hair. I believe he said he had a ponytail.” It was not until after Platt described the man he had observed that Sergeant Swaim showed him a photo of Tester. When Swaim asked if the man in the photograph was the man Platt had described, Platt responded that it was.

After considering this testimony, the trial court ruled that it would allow in-court identification during the trial but stated there was a problem with the identification given to the officer when the photograph was presented. The trial judge ruled that Platt could give an in-court identification based on the period that he observed Tester but could not refer to the photograph the officer showed him on their subsequent visits. Platt offered testimony consistent with this ruling.

Even if prior identifications may have been improper or suggestive, in-court identification will not be suppressed if indicia of reliability are found to independently exist. *Burnett v. State*, 302 Ark. 279, 790 S.W.2d 137 (1990). A court may consider a number of factors in determining whether such indicia of reliability exist, including the following: the prior opportunity to observe the alleged criminal act; the existence of any discrepancy between any pre-lineup description; any identification prior to lineup of another person; the identification by picture of the defendant prior to the lineup; failure to identify the

defendant on a prior occasion; the lapse of time between the alleged act and the lineup identification; and the degree of certainty which a witness professes to possess that the perpetrator and the defendant are the same individual. *Burnett*, 302 Ark. at 282 (citing *United States v. Wade*, 388 U.S. 218 (1967), and *Neil v. Biggers*, 409 U.S. 188 (1972)). The conclusion to be drawn from these factors is dependent on the totality of the circumstances.

Even if the identification technique is impermissibly suggestive, it is for the trial court to determine if there are sufficient aspects of reliability surrounding the identification to permit its use as evidence, and then it is for the jury to decide the weight the identification testimony should be given. *Chenowith v. State*, 321 Ark. 522, 905 S.W.2d 838 (1995). The Arkansas Supreme Court stated that it will not reverse a ruling on the admissibility of an identification unless it is clearly erroneous. The Court will not inject itself into the process of determining reliability unless there is a very substantial likelihood of misidentification.

Platt had seen Tester in a brightly-lit area for approximately fifteen minutes and gave an accurate description of him before ever seeing a photograph of him. Platt never identified anyone else as the man he had observed in his pawnshop. The first identification came only five-and-a-half weeks after seeing him for the first time. The Court stated that it cannot be said that there is a “very substantial likelihood of misidentification” in this case. The trial court’s ruling was not clearly erroneous.

INFORMANTS – Promise of Immunity from Prosecution by Law Enforcement Officer

In *United States v. Flemmi*, CA1, No. 99-2292, 9/11/00, the issue before the United States Court of Appeals for the First Circuit was whether an FBI Agent, acting independently, has the authority to confer use immunity on a confidential informant.

Stephen J. Flemmi has long been a fixture in Boston's organized crime hierarchy, reputedly engaging in (or overseeing) activities as varied as loan-sharking, extortion, gambling, drug trafficking, and homicide. For much of that period, as the leader of the Winter Hill Gang (also known as the Irish Mob), he did extensive business with La Costra Nostra (LCN). In the 1960s, Flemmi saw a chance to hamstring competitors and simultaneously ingratiate himself with the authorities. Accordingly, he began talking to the FBI about LCN activities. By 1967, the FBI had designated him as a top-echelon informant—a term defined at the time, according to a knowledgeable witness, as encompassing individuals who “could provide a continuous flow of quality criminal intelligence information regarding the leaders of organized crime.” The data that Flemmi provided enabled the FBI to make significant progress in its investigation and prosecution of major LCN figures. Many of the particulars of this uneasy alliance are disputed, and Flemmi often attributes promises and assurances to FBI agents who deny having made them.

In 1980, the FBI purposed to

introduce an electronic listening device into a redoubt on Prince Street, reputed to be LCN's regional headquarters. Agents asked Flemmi and another individual to visit the site and gather information regarding alarms, locks, and other security devices. The agents allegedly assured them that, once the bug became operational, nothing on the ensuing tapes would be used against them. The two informants carried out this mission and, in addition, supplied information on which the government relied to establish probable cause for the necessary wiretap warrant application. Although Agents warned Flemmi to avoid the Prince Street location, and he did so, the electronic surveillance yielded taped conversations that implicated Flemmi in multifarious criminal activity.

In 1986, the FBI obtained information from Flemmi that established probable cause for electronic surveillance of Vanessa's Restaurant (where LCN meetings supposedly were taking place). Flemmi claims that Agents asked him to provide a diagram of the meeting room. Although he received no express assurances, he asserts that he “reasonably understood” that the same promises applied here as at Prince Street. Flemmi also asserts that he understood the Prince Street promises to pertain to his 1989 role in securing a “roving bug” that memorialized an LCN induction ceremony at 34 Guild Street in Medford, Massachusetts.

In 1990, the FBI “closed” Flemmi as an informant. Not too long thereafter, a federal grand jury began probing the activities of

Flemmi. On January 10, 1995, a federal grand jury handed up an indictment against Flemmi. The indictment charged Flemmi with suborning perjury, Hobbs Act extortion, conspiracy to commit extortion, racketeering, and racketeering conspiracy.

Flemmi filed a series of motions seeking to dismiss the charges against him due to government misconduct or, alternatively, to suppress evidence derived directly or indirectly from statements he had provided to the government. The district court convened an evidentiary hearing and took testimony from January 6 to October 30, 1998.

The court concluded that the FBI had promised Flemmi immunity regarding the conversations intercepted at Prince Street, Vanessa's Restaurant, and Guild Street. In reaching this conclusion, the judge found that FBI Agents expressly promised Flemmi that none of the evidence overheard at Prince Street would be used against him “directly or indirectly.” Based on this assurance, the judge reasoned that, although agents had not made any equivalent promises with respect to Vanessa's Restaurant and Guild Street, Flemmi “had an agreement implied in fact from the promise concerning 98 Prince Street and the conduct of the government that there would be no direct or indirect use against him” of the evidence intercepted at those locations. The government appealed.

The United States Court of Appeals for the First Circuit started with the principle that a formal grant of immunity must be honored. The United States Attorney's implied

authority to offer assurances of immunity is closely connected with, and arises out of, Congress's express grant of authority to prosecute. This fit is much tighter than that between the FBI's authority to investigate and its supposed ability to promise immunity. After all, use immunity is at bottom immunity from the use of evidence in a criminal prosecution, see Black's Law Dictionary 751 (6th ed. 1990), and plea bargaining is part of the warp and woof of the prosecutorial process. The idea that the authority to promise use immunity is linked to the FBI's responsibility to develop informants (and, thus, more efficiently investigate crimes) requires a much greater leap of faith. The test is not whether such a power might from time to time prove advantageous, but, rather, whether such a power usually accompanies, is integral to, or is reasonably necessary for the due performance of the task.

Not surprisingly, the case law supports this result and, at the same time, contradicts the district court's premise that officials having lesser authority over prosecutions than United States Attorneys, such as FBI agents, may bind the United States either to dismiss an indictment or to refrain from prosecution. See, e.g., *Cordova-Perez*, 65 F.3d at 1554 (stating that INS agent who made a "no prosecution" promise could not bind the United States); *United States v. Fuzer*, 18 F.3d 517, 520-21 (7th Cir. 1994) (holding that ATF agents lacked authority to promise that defendant would not be prosecuted); *Streebing*, 987 F.2d at 373 (finding that FBI agent "lacked any actual or apparent authority to make the alleged promise not to prosecute"); *United States v.*

Kettering, 861 F.2d 675, 676 (11th Cir. 1988) (holding that a DEA agent lacked authority to guarantee immunity); *In_re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 888 (D.C. Cir. 1981) (holding there is "no authority for ruling that oral promises of immunity by an investigator [FBI agent], not in accord with statutory requirements, bind all federal...prosecutors"); *United States v. Hudson*, 609 F.2d 1326, 1329 (9th Cir. 1979) (holding that Secret Service Agent's promise to drop charges did not bind the United States); *Dresser Indus.*, 596 F.2d at 1237 (holding that "the SEC's agents lacked actual authority to contractually limit the prosecutorial function of the Department of Justice, [so] any such agreement... would be unenforceable").

The First Circuit Court of Appeals rejected other arguments of Flemmi in concluding that the ruling suppressing evidence stemming from the electronic surveillance of Prince Street, Vanessa's Restaurant, and Guild Street is insupportable and must be set aside.

JAILS AND PRISONS – Suicide Watch Policy

In *Horse v. Pennington County*, CA8, No. 99-2419, 9/5/00, Alan Ray Yellow Horse, Administrator of the estate of his brother, Frederick Yellow Horse, brought suit pursuant to 42 U.S.C. § 1982 against Pennington County, South Dakota. The suit alleged that the county had violated Yellow Horse's constitutional rights by failing to maintain adequate suicide prevention policies at the jail and failing to adequately train its

employees in suicide prevention. The district court granted summary judgment in favor of Pennington County and Alan Ray Yellow Horse appealed.

One of the issues was the alleged failure of Pennington County to maintain adequate suicide prevention policies. Specifically, the estate alleges the county's policies were inadequate regarding the procedure for removing a prisoner from suicide watch, how to supervise suicidal prisoners, and the failure to provide "refresher" suicide prevention courses for jail employees. The estate's complaints can be characterized and analyzed as failure to train claims. See *Liebe v. Norton*, 157 F.3d 574 (8th Cir. 1998) (alleged failure of county to have adequate suicide prevention policies in place appropriately analyzed under failure to train standard set forth in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). A municipality may be liable for failure to train its employees when that failure can be shown to be deliberate indifference to the rights of others. See *Canton*, 489 U.S. at 389.

The undisputed facts show that: (1) before officers are released to work on their own, they are required to complete training courses which include suicide prevention; (2) at the time of the suicide, in September 1994, Pennington County Jail was accredited by the American Correctional Association, which requires jails to have a suicide intervention policy; and (3) in July 1994, the county held a training session at the jail regarding suicide prevention. The county's suicide prevention policy provided that

during a new inmate's intake procedures, the inmate was to be screened for possible suicide indicators such as drug or alcohol abuse, mental illness, or other strange behavior. Inmates who were already in jail and subsequently became suicidal could also be placed on suicide watch by any officer. Only a supervisor could remove an inmate from suicide watch, and before doing so, the supervisor would interview the inmate and review the inmate's records to determine if he had been eating, socializing, etc. Correctional officers on duty were to check on an inmate on suicide watch every thirty minutes. Officers were trained to note significant events such as deaths in the family, divorces, and unfavorable court rulings which might trigger suicidal tendencies in inmates. The policy was reviewed annually by the officers and also periodically reviewed by prison medical staff. In light of these facts, the Eighth Circuit found the district court was correct in holding the county's policy did not show deliberate indifference to the rights of others. The policy was reasonable and comprised an effort to prevent suicides rather than deliberate indifference to the possibility of suicides. See *Liebe*, 157 F.3d at 579; *Rellergert*, 924 F.2d at 797.



SEARCH AND SEIZURE – Consent Given by Driver to Search Vehicle When Owner Is Passenger and Does Not Object

In *United States v. Padilla*, CA8, No. 00-1738, dated 10/18/00, [Unpublished], Cruz Guerreo Padilla appeals the United States District Court for the Eastern District of Arkansas's denial of his motion to suppress the search of his tractor trailer. Padilla was the owner of the tractor-trailer but was riding as a passenger when the vehicle was stopped. The driver of the truck consented to a search of the vehicle, and Padilla did not object to the search at that time.

The Eighth Circuit Court of Appeals stated that a driver of a vehicle can properly give consent to the search of that vehicle since he is in immediate control of its operations. *United States v. Eldridge*, 984 F.2d 943, 948 (8th Cir. 1993). The failure of Padilla to object to a search when there is ample opportunity to assert a superior interest in priority of ownership results in a valid search. No Fourth Amendment violation occurred under these facts.

SEARCH AND SEIZURE – Entry onto Premises; Reasonableness of Going to Rear of Residence

In *Miller v. State*, No. CR 00-336, 10/5/00, Stephen and Janet Miller were charged in Washington County Circuit Court with manufacturing marijuana and possession of drug paraphernalia. After the trial court denied the Millers'

motion to suppress evidence seized pursuant to a search warrant, they both entered conditional pleas of guilty. They appealed the trial court's decision on the motion to suppress to the Arkansas Court of Appeals. The Court of Appeals affirmed the decision of the trial court in a 5-4 decision. The Arkansas Supreme Court granted the Millers' petition for review. The Arkansas Supreme Court found no error and affirmed.

On October 22, 1989, Officer Sharalin Fichtl stopped the Millers for speeding near Denison, Texas. A search by consent was conducted of the Millers' vehicle, and three pounds of marijuana were located. Ms. Miller informed Fichtl that a friend had brought the package to their residence in Fayetteville, Arkansas, and had given it to her for her to deliver.

On October 23, 1989, Fichtl contacted Detective Mike Henderson of the Fourth Judicial Drug Task Force in Fayetteville, Arkansas. Henderson, along with Sergeant Kenny Yates and Detective Mike Reynolds, went to the Millers' home. The officers knocked several times on the front door. After officers received no response, the officers went around to the back door of the residence and knocked again. According to Yates, when he stepped onto the back porch, he smelled the strong odor of marijuana coming from the home. He also noticed small pots, potting soil, and plant food on the back porch. While Yates and Reynolds left to obtain a search warrant, two officers were assigned to watch the residence.

While conducting surveillance from a parking lot next door to the

Millers' residence, Officer McCarville observed six marijuana plants growing in a garden in the Millers' back yard. This information was relayed to Yates and Henderson. A search warrant was obtained. When the warrant was executed, marijuana in a sealed container was located in the kitchen; marijuana was located growing in the attic; six marijuana plants were located in the garden; and several weapons and drug paraphernalia were seized.

The Millers contended that the law enforcement officers had no right to go to their residence and that it was improper for the officers to go to the back of their house. The Arkansas Supreme Court stated that it was not unreasonable for the officers to go to the residence if there was anyone there to interview as part of their investigation of any drug-related activity.

The Arkansas Supreme Court then had to determine whether the police action of entering the Millers' back porch area violated any Fourth Amendment principles. While Arkansas has never addressed an issue such as the present one, the Eighth Circuit Court of Appeals has considered it and found that the Fourth Amendment is not implicated when police approach the common entryways of residences, including the rear of a home, for legitimate purposes. See *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977). The issue in *Anderson* was whether the police action of proceeding to the backyard of a home after receiving no response at the front door, violated Fourth Amendment principles. The court determined that the police had entered an area in which there was a reasonable expectation of privacy

but went on to state that the initial intrusion was justified by legitimate police objectives, namely questioning a suspect. In so holding, the court stated:

We cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded as the fruit of an illegal search.

Here, the facts and circumstances also support a finding that the police acted reasonably in going to the rear of the home. The police entered the Millers' property as part of a legitimate police investigation to determine if anyone was at the home that they could interview. The record here indicates that the Millers' property was not fenced, and there was a little path leading around the house. Following that path, the police entered the back porch to again knock on the door. This conduct by the police did not so exceed the scope of their purpose for going to the residence as to render their conduct an unlawful search.

Finally, even if the police conduct of entering the rear of the Millers' residence had resulted in an illegal search, it was proper for the trial court to deny the Millers' motion to suppress the evidence seized from their home under the "inevitable discovery" doctrine. See *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998); *Brunson v. State*, 296 Ark. 220, 753 S.W.2d 859 (1988). In *Thompson*, this court held that suppressed

evidence is otherwise admissible if the State proves by a preponderance of the evidence that the police would have inevitably discovered the evidence by lawful means.

SEARCH AND SEIZURE – Inventory Search of Automobile

In *Benson v. State*, No. 99-1455, 11/16/00, it was argued that the Fourth Amendment protection against unlawful search and seizure requires police to provide the driver of a car about to be impounded an opportunity to otherwise dispose of the vehicle and thus avoid an inventory search. The Arkansas Supreme Court, finding no such Fourth Amendment protection, noted that the United States Supreme Court rejected this argument in *Colorado v. Bertine*, 479 U.S. 367 (1986); the Eighth Circuit Court of Appeals rejected this argument in *U.S. v. Agofsky*, 20 F.3d 886 (1994); and the Fifth Circuit Court of Appeals rejected this argument in *U.S. v. Skillern*, 947 F.2d 1268 (1991).

SEARCH AND SEIZURE: Knock and Announce

In *United States v. Cantu*, CA5, No. 99-41151, 10/6/00, Robert Andrew Cantu appeals the district court's order denying his motion to suppress evidence discovered pursuant to a search of his home. The sole issue before the Fifth Circuit is whether the district court erred in denying Mr. Cantu's motion to suppress evidence obtained after the officers failed to

announce their presence and purpose when attempting forcible entry of Mr. Cantu's home.

On July 1, 1998, at approximately 1:00 a.m., a seven-person team of officers with the Calhoun County Sheriff's Office executed a warrant to search Cantu's mobile home in Port Lavaca, Texas. The officers obtained the warrant pursuant to information from a confidential source who indicated that Cantu was selling cocaine and that the drugs were located at the defendant's residence. The officers did not have any specific reason to believe that the occupants of the Cantu residence were armed or posed any other substantial physical threat.

Operating under a "breach and announce" policy, which governed all forced entry cases undertaken by the Calhoun County Sheriff's Office, the seven officers donned ski masks, approached Cantu's front door, and tried to pry it open without first announcing their presence. The Court of Appeals for the Fifth Circuit stated that why the officers donned ski masks defies the imagination.

The initial attempt to enter the home proved unsuccessful because the walls of the mobile home were too flimsy to support the leverage needed to pry the door open. After the failed initial attempt, the officers announced, "Sheriff's Office, search warrant!" Two officers testified that they detected movement within the mobile home, but were unable to point to anything else that would indicate that evidence was being destroyed. The officers continued to try to gain entry using the crowbar. At no time during this

period did any of the occupants of the mobile home open the door. Both Cantu and his wife testified that they were asleep at the time of the raid, but awoke when they heard what sounded like a fight or someone trying to break into their home. Approximately forty-five seconds after they announced their presence, one of the officers broke the door's window and unlocked the door from the inside. Defendant moved to suppress the cocaine, LSD, and marijuana seized from the residence alleging that it was the result of an unreasonable search and seizure.

The underlying rationale for the common-law knock-and-announce rule serves several fundamental interests including "(1) protecting law enforcement officers and household occupants from potential violence; (2) preventing the unnecessary destruction of private property; and (3) protecting people from unnecessary intrusion into their private activities." *United States v. Sagaribay*, 982 F.2d 906, 909 (5th Cir. 1993). In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Supreme Court explained that the rule was justified in part by the belief that announcement generally would avoid the destruction or breaking of any house by which great damage and inconvenience might ensue. (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K.B. 1603)). The rule is also intended to protect against intrusions occasioned by law enforcement officers' mistakes. See *Ker v. California*, 374 U.S. 23, 57 (1963) (noting that the knock-and-announce rule is also based on such practical considerations as the possibility that

police may be misinformed as to the name or address of the suspect).

Limiting the requirement that police should knock and announce their presence and intentions only in situations where they actually break into a house undermines the interests protected by the knock-and-announce rule. First, allowing the police to attempt entry into a home before announcing their presence heightens the possibility that the occupants of a house will react violently against the unknown aggressor, particularly if they resemble highwaymen in ski masks. Second, permitting the police to attempt an unannounced forcible entry subverts the interest in protecting private property. Finally, attempting entry without warning precludes the officers' ability to recognize possible mistakes in identity or location of the suspect or the place to be searched.

The reasonableness test outlined by the Supreme Court in *Richards v. Wisconsin*, 520 U.S. 385 (1997) applies with equal force to attempts at forcible entry as it does to the actual breaking and entering of a person's home. See also *United States v. Gable*, 401 F.2d 765, 766 (3rd Cir. 1968) (holding that insertion of a crowbar into the door of a suspect's house by officers before they announced their presence constitutes an unreasonable search); *United States v. McCloud*, 127 F.3d 1284, 1289 n.2 (10th Cir. 1997) (concluding that the reference point for the reasonableness determination begins prior to the officers' initial attempt to gain entry); *Kornegay v. Cottingham*, 120

F.3d 392, 396 (3rd Cir. 1997) (maintaining that law enforcement officers are required to announce their presence before attempting forcible entry); *United States v. Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (concluding that officers must announce their presence and wait for a brief period before attempting entry).

The requirement that law enforcement officers announce their presence is flexible and should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. *Wilson*, 514 U.S. at 934. Courts must determine whether an unannounced entry is reasonable under the particular circumstances of the case and in light of law enforcement’s actions as a whole. *See id.*; *Jones*, 133 F.3d at 361. In *Richards*, the Court set out the parameters of the reasonableness test:

In order to justify a “no-knock” entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous and futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

The United States Supreme

Court rejected blanket rules allowing no-knock entries based on over-generalizations about today’s drug culture or other general categories of criminal behavior. *Id.* at 392. Instead, officers must at least articulate some reasonable suspicion that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. *United States v. Ramirez*, 523 U.S. at 71 (1998); *United States v. Mendoza-Burciaga*, 981 F.2d 192, 196 (5th Cir. 1992). *See also United States v. Rodriguez*, 663 F. Supp. 585, 588 (D.D.C. 1987) (“In every case in which the courts have invoked the exigent circumstances exception, the police have testified that they had some specific and immediately ascertainable reason for fearing the loss of the desired evidence.”)

In light of these principles, it is clear that the search of Mr. Cantu’s residence was unreasonable under Fourth Amendment analysis. The officers approached Mr. Cantu’s home in the middle of the night and immediately began prying open his door. The officers had no prior knowledge that Mr. Cantu or the occupants of his residence were armed or posed immediate danger. When the officers approached the mobile home, Mr. Cantu, his wife, and two children were asleep inside. The only movement in the home that could rise to the level of any suspicion that evidence was being destroyed occurred after the officers’ first attempt to gain entry. Furthermore, the fact that the officers wore ski masks to execute the warrant reinforces the fact that the officers wanted to conceal their identity. Such law enforcement

practices are clearly unacceptable. Therefore, without any articulation of reasonable suspicion that announcing their presence would be dangerous, futile, or would result in destruction of evidence, the officers’ initial attempt to forcibly enter Mr. Cantu’s home was unreasonable. Accordingly, the district court’s order denying his motion to suppress is reversed and remanded for further proceedings consistent with this opinion.

SEARCH AND SEIZURE – Probable Cause to Search Vehicle

In *United States v. Fladten*, CA8, No. 00-1422, 10/24/00, Agents of the Drug Enforcement Agency and members of the Kansas City Police Department obtained a search warrant for a residence at 6105 East 56th Street in Kansas City, Missouri. During a search of the house, law enforcement personnel found items consistent with the manufacture of methamphetamine, several rifles, and a .22 caliber pistol.

While Detective John Stewart was photographing the exterior of the house, he peered inside the window of the gray Buick parked



in the driveway. In the back seat he saw a reflux condenser glass tube, an item he knew often was used in the manufacture of methamphetamine. Stewart informed Detective James Shey of his discovery, and after consulting with Sergeant Randy Hopkins, they asked the occupants of the house who owned the automobile. Everyone, including Fladten, denied ownership.

The agents decided to search the automobile, first recovering the condenser tube from the unlocked back seat. Then, using the keys recovered from Fladten's pocket, the agents opened the trunk of the automobile and found glass jars containing methamphetamine.

Before trial, Fladten moved to have the evidence from the automobile suppressed because the agents never obtained a search warrant for the automobile. The district court allowed the evidence from the search and Fladten appeals.

As long as the law enforcement officials have probable cause, they may search an automobile without a warrant under the automobile exception. See *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *Martinez*, 78 F.3d at 401. Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In the present case, the automobile was parked in the driveway of a house where law enforcement, lawfully present at the location, had found evidence of

drug-related activity. An item commonly used in the manufacture of methamphetamine was in plain view in the back seat of the automobile. These facts provided a substantial basis for the conclusion that further contraband or evidence may have been in the other parts of the automobile. Since the officers had probable cause, the automobile exception allowed them to search the trunk of the automobile and seize the contraband found there.

SEARCH AND SEIZURE – Stop and Frisk

In *Hunter v. State*, CACR 00-187, 11/8/00, Officer Jim Tankersley of the Little Rock Police Department warned Donald Hunter to stay off all school property. Subsequently, on the afternoon of July 2, 1998, Officer Tankersley saw Hunter sitting on the steps of an elementary school. As the officer approached, he observed that Hunter had a piece of paper in his left hand. Hunter put his left hand behind his back and no longer had the piece of paper in his hand when Officer Tankersley reached him. Officer Tankersley told Hunter to put his hands on the wall and patted him down. In so doing, he noticed that a piece of paper was protruding from Hunter's waistband. Suspecting that the paper might contain narcotics, the officer removed it from Hunter's waistband, manipulated it, and discovered that it contained several rock-like objects, and then opened it. The paper was found to contain rocks of cocaine. Hunter's motion to suppress introduction of the

cocaine as the fruit of an illegal search was denied. He was convicted of possession of a controlled substance. The Arkansas Court of Appeals reversed the conviction.

The Court noted that in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the United States Supreme Court discussed what has come to be called the "plain-feel" doctrine. In *Dickerson*, the United States Supreme Court stated:

Consistent with the Federal Constitution's Fourth Amendment, a police officer may seize non-threatening contraband detected during a protective pat-down search of a person in limited situations. In these instances, the officer has briefly stopped an individual based on the officer's reasonable conclusion that criminal activity may be afoot with respect to that person. The officer must be justified in believing that the person is armed and presently dangerous to the officer or to others. The officer's search is strictly limited to that which is necessary for the discovery of weapons that might be used to harm the officer or others.

The "plain-view" doctrine states that police officers may seize an object without a warrant if the officers are lawfully in a position from which they view the object, its incriminating character is immediately apparent, and the officers have a lawful right of access to the object. This doctrine has obvious relevance by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise

lawful search. If a police officer lawfully pats down a suspect's outer clothing and feels an object which has a contour or mass that makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons.

The warrantless seizure of the object, if it is contraband, is justified by the realization that resort to a neutral magistrate under such circumstances would often be impractical and would do little to promote the objectives of the Fourth Amendment. Further, a suspect's privacy interests are not advanced by a categorical rule barring the warrantless seizure of contraband plainly detected through the sense of touch. Accordingly, the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, such fact suggests only that officers will less often be able to justify seizures of unseen contraband. The Fourth Amendment's requirement that officers have probable cause to believe that an item is contraband before seizing it insures against excessively speculative seizures, and the seizure of an item whose identity is already known occasions no further invasion of privacy.

The Arkansas Court of Appeals stated they had occasion to apply the holding in *Dickerson* to *Bell v. State*, 68 Ark. App. 288, 7 S.W.3d 343 (1999). The Court in *Bell* stated:

In Dickerson, the Court suppressed evidence of the possession of crack cocaine because it was shown that the arresting officer had to manipulate the object in the pocket of Dickerson before determining that it was contraband. This manipulation amounted to an illegal search, as the identity of the contraband was not apparent.

The present case is analogous to Dickerson. The officer was justified in frisking for weapons. When his initial frisk yielded no weapons, the search should have ended. The holding in Dickerson does not permit an officer to search a suspect for contraband under the guise of a weapons search. Because it is clear from the facts that the officer had to manipulate the bulge in Bell's rear pocket to determine that it was contraband, this type of search is contrary to the permissible scope outlined in Dickerson. Bell v. State, 68 Ark. App. at 293-94, 7 S.W.3d at 346.

The Arkansas Court of Appeals thought that the facts of the present case are indistinguishable from those of *Bell*. "Here, the police officer essentially admitted that he was searching for drugs, and the only reasonable view to take of his activities is that he was searching a suspect for contraband under the guise of a weapons search."

Finally, we note that the officer testified that he thought a razor blade might be concealed in the paper underneath the rocky substance. It is true that a protective frisk is justified when the officer has a reasonable suspicion

that the detainee is armed. *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). However, the frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. See generally *Terry v. Ohio*, 392 U.S. 1 (1968). In a similar case, where it was asserted that a police officer was justified in opening a matchbox found in a detainee's pocket because it might have contained a razor blade, this Court said:

The officer went beyond mere protection. There is nothing in the record to suggest that the matchbox taken from the subject's pocket contained a weapon or posed a risk to the officer's safety. Even if this is a high-crime area, without some evidence other than suspicion or a hunch that a matchbox contains a controlled substance, it is patently inappropriate for an officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. This was not a search incident to arrest. A protective search must be no more invasive than is necessary to ensure the officer's safety; looking inside the matchbox ensured no more safety to the officer. Stewart v. State, 59 Ark. App. 77, 84, 953 S.W.2d 599, 602 (1997), affirmed on other grounds, 332 Ark. 138, 964 S.W.2d 793 (1998). It was likewise inappropriate for the officer to open the piece of paper he removed from Hunter's waistband under the circumstances of the present case, where there was no evidence to indicate that it might contain a weapon.

**SEARCH AND SEIZURE –
Vehicle Checkpoints to
Interdict Unlawful Drugs**

In *Indianapolis v. Edmond*, No. 99-1030, 11/28/00, the city of Indianapolis began to operate vehicle checkpoints to interdict unlawful drugs. The city conducted six such roadblocks between August and November that year. During these roadblocks, 1,161 vehicles were stopped and 104 motorists were arrested. Fifty-five arrests were for drug-related crimes, while 49 were for offenses unrelated to drugs. *Edmond v. Goldsmith*, 183 F.3d 659, 661 (CA7 1999). Thus, the overall “hit rate” of the program was approximately nine percent.

At each checkpoint location, the police stop a predetermined number of vehicles. Approximately 30 officers are stationed at the checkpoint. Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. The officer also looks for signs of impairment and conducts an open-view examination of the vehicle from the outside. A narcotics-detection dog walks around the outside of each stopped vehicle.

The directives instruct the officers that they may conduct a search only by consent or based on the appropriate quantum of particularized suspicion. The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any

vehicle out of sequence. The city agreed in the stipulation to operate the checkpoints in such a way as to ensure that the total duration of each stop, absent reasonable suspicion or probable cause, would be five minutes or less.

The affidavit of Indianapolis Police Sergeant Marshall DePew provides further insight concerning the operation of the checkpoints. According to Sergeant DePew, checkpoint locations are selected weeks in advance based on such considerations as area crime statistics and traffic flow. The checkpoints are generally operated during daylight hours and are identified with lighted signs reading: Once a group of cars has been stopped, other traffic proceeds without interruption until all the stopped cars have been processed or diverted for further processing. Sergeant DePew also stated that the average stop for a vehicle not subject to further processing lasts two to three minutes or less.

**NARCOTICS CHECKPOINT
___ MILE AHEAD.**

**NARCOTICS K—9 IN USE.
BE PREPARED TO STOP.**

James Edmond and Joell Palmer were each stopped at a narcotics checkpoint in late September 1998. They then filed a lawsuit on behalf of themselves and the class of all motorists who had been stopped or were subject to being stopped in the future at the Indianapolis drug checkpoints. They claimed that the roadblocks violated the Fourth Amendment of the United States Constitution.

The United States District Court for the Southern District of Indiana agreed to class certification and denied the motion for a preliminary injunction, holding that the checkpoint program did not violate the Fourth Amendment. *Edmond v. Goldsmith*, 38 F. Supp. 2d 1016 (1998). A divided panel of the United States Court of Appeals for the Seventh Circuit reversed, holding that the checkpoints contravened the Fourth Amendment. 183 F.3d 659 (1999). The panel denied rehearing. The United States Supreme Court granted certiorari, 528 U.S. 1153 (2000), and affirmed the ruling of the Seventh Circuit.

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 308 (1997). The Court noted that they have upheld brief, unsuspecting seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens, *Martinez-Fuerte, supra*, and at a sobriety checkpoint aimed at removing drunk drivers from the road, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). In addition, in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), the Court suggested that a similar type of roadblock with the purpose of verifying drivers’ licenses and vehicle registrations would be permissible. In none of these cases, however, did the Court indicate approval of a checkpoint program that was designed to detect evidence of ordinary criminal wrongdoing.

In *Sitz*, the checkpoint involved brief, unsuspecting stops of motorists so that police officers could detect signs of intoxication and remove impaired drivers from the road. Motorists who exhibited signs of intoxication were diverted for a license and registration check and, if warranted, further sobriety tests. This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in the determination that the program was constitutional.

In *Prouse*, a discretionary, unsuspecting stop for a spot check of a motorist's driver's license and vehicle registration was invalidated. The officer's conduct in that case was unconstitutional primarily on account of his exercise of "standardless and unconstrained discretion." The Court nonetheless acknowledged the States' "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles; that these vehicles are fit for safe operation; and hence that licensing, registration, and vehicle inspection requirements are being observed." Accordingly, it was suggested that questioning of all oncoming traffic at roadblock-type stops would be a lawful means of serving this interest in highway safety. The Court further indicated in *Prouse* that they considered the purposes of such a hypothetical roadblock to

be distinct from a general purpose of investigating crime.

The Court stated that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. See *United States v. Place*, 462 U.S. 696, 707 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." Cf. *United States v. Turpin*, 920 F.2d 1377, 1385 (CA8 1990). What principally distinguishes the Indianapolis checkpoints from those we have previously approved is their primary purpose. The Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics.

The United States Supreme Court stated that they had never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, the checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. The Court suggested in *Prouse* that they would not credit the "general interest in crime control" as justification for a regime of unsuspecting stops. Consistent with

this suggestion, each of the checkpoint programs they have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

There is no doubt that traffic in illegal narcotics creates social harms of great magnitude. The law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spin-off crime that it spawns. The same can be said of various other illegal activities, if only to a lesser degree. But the gravity of the threat alone cannot eliminate the questioning of what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, the Court must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. This Court is reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.

Nor can the narcotics-interdiction purpose of the checkpoints be rationalized in terms of a highway safety concern similar to that present in *Sitz*. The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only

with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance “the general interest in crime control.” The United States Supreme Court declined to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. Stops cannot be sanctioned which are justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While the Court would not limit the purposes that may justify a checkpoint program to any rigid set of categories, they decline to approve a program

whose primary purpose is ultimately indistinguishable from the general interest in crime control.

This holding does nothing to alter the constitutional status of the sobriety and border checkpoints that were approved in *Sitz* and *Martinez-Fuerte*, or of the type of traffic checkpoint that we suggested would be lawful in *Prouse*. The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program. See *Sitz*, 496 U.S., at 450—455; *Martinez-Fuerte*, 428 U.S., at 556—564. However, when law enforcement authorities pursue primarily general crime control purposes at checkpoints, such as in this case, stops can only be justified by some quantum of individualized suspicion.

This holding does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute. Nor does the opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control. The holding does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose. Finally, the Court cautioned that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the

minds of individual officers acting at the scene.

Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.

SEXUAL HARASSMENT – Single Episode of Workplace Sexual Harassment

In *Brooks v. City of San Mateo*, CA9, No. 98-15818, 10/23/00, Patricia Brooks, a telephone dispatcher for the City of San Mateo, California, and her coworker, senior dispatcher Steven Selvaggio, manned the city’s Communications Center, taking 911 calls on the evening shift. At some point during the evening, Selvaggio approached Brooks as she was taking a call. He placed his hand on her stomach and commented on its softness and sexiness. Brooks told Selvaggio to stop touching her and then forcefully pushed him away. Perhaps taking this as encouragement, Selvaggio later positioned himself behind Brooks’s chair, boxing her in against the communications console as she was taking another 911 call. He forced his hand underneath her sweater and bra to fondle her bare breast. After terminating the call, Brooks removed Selvaggio’s hand again and told him that he had “crossed the line.” To this, Selvaggio responded “You don’t have to worry about cheating [on your husband]. I’ll do everything.” Selvaggio then approached Brooks

as if he would fondle her breasts again. Fortunately, another dispatcher arrived at this time, and Selvaggio ceased his behavior. Soon thereafter, Selvaggio took a break and left the building. Brooks immediately reported the incident, and the following day, the city placed Selvaggio on administrative leave pending an investigation.

This, it turned out, was not the first time Selvaggio had made improper advances to co-workers. At least two other female employees, including Pat P., another senior dispatcher, had been subjected to similar treatment from Selvaggio. However, Selvaggio's earlier victims had not reported his misconduct. Only after the city launched its investigation into Brooks's allegations did these other incidents come to light. While Selvaggio denied any misconduct, the investigation adopted Brooks's version of events and concluded that Selvaggio had violated the city's sexual harassment policy. Selvaggio resigned after the city initiated termination proceedings against him. He later pled no contest to misdemeanor sexual assault charges and spent 120 days in jail. Despite the city's prompt remedial action, Brooks had trouble recovering from the incident. She took a leave of absence immediately afterward and began seeing a psychologist. She returned to work six months later. According to Brooks, her work environment had changed. Brooks left work and never returned. She then sued the city, the Police Department and its chief, John Stangl, for sexual harassment and retaliatory discrimination in

violation of Title VII of the Civil Rights Act.

The district court held that Selvaggio's assault of Brooks in the Communications Center was not severe enough to give rise to a hostile work environment claim. On appeal, Brooks complains that the district court erred in ruling that the sexual assault was not sufficient to create a hostile work environment.

Sexual harassment falls into two major categories: hostile work environment and quid pro quo. A hostile work environment claim involves a workplace atmosphere so discriminatory and abusive that it unreasonably interferes with the job performance of those harassed. A quid pro quo claim, as the name implies, occurs when a supervisor demands sexual favors in return for a job benefit. Additionally, employees who are subject to adverse employment actions because they lodged complaints of sexual harassment can raise a retaliation claim under Title VII.

In order to prevail on her hostile work environment claim, Brooks must show that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. *Harris v. Forklife Sys., Inc.*, 510 U.S. 17 (1993). The working environment must both subjectively and objectively be perceived as abusive. *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). A totality of the circumstances test is used to determine whether a plaintiff's allegations make out a colorable

claim of hostile work environment. When assessing the objective portion of a plaintiff's claim, the perspective of the reasonable victim is assumed. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) ("A female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.")

Brooks claims the incident pervaded her work environment to such a degree that she required psychological help and even then was unable to successfully return to her job. She has alleged sufficient facts to support the subjective portion of her hostile work environment claim. The question remains whether her apprehension was objectively reasonable. Because only the employer can change the terms and conditions of employment, an isolated incident of harassment by a co-worker will rarely, if ever, give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship. By hypothesis, the employer will have had no advance notice and therefore cannot have sanctioned the harassment beforehand. And, if the employer takes appropriate corrective action, it will not have ratified the conduct. In such circumstances, it becomes difficult to say that a reasonable victim would feel that the terms and conditions of her employment have changed as a result of the misconduct.

In support of her claim, Brooks points to Selvaggio's previous inappropriate advances toward female employees, in addition to her own encounter with him in the Communications Center. However, Brooks cannot rely on Selvaggio's misconduct with other female employees because she did not know about it at the time of Selvaggio's attack. Harassment directed towards others of which an employee is unaware can, naturally, have no bearing on whether she reasonably considered her working environment abusive. This is especially true where the harassment comes from an individual who is terminated as soon as his misdeeds come to light.

Brooks next attempts to morph Selvaggio's single assault into a course of conduct by claiming that each of his improper touches constituted a separate incident. While Selvaggio did touch Brooks inappropriately on her stomach and breast, this happened within the course of a few minutes and was part of a single episode. Additionally, Selvaggio had no chance to become bolder because the City removed him from the workplace once his actions were uncovered. No reasonable woman in Brooks's position would believe that Selvaggio's misconduct had permanently altered the terms or conditions of her employment.

Even were we to assume that the City's knowledge is relevant to establishing a hostile work environment, Selvaggio's conduct was not known to the city until after the assault. Brooks therefore can rely only on the single instance of sexual harassment directed toward her to support her hostile work environment claim.

We need not decide whether a single instance of sexual harassment can ever be sufficient to establish a hostile work environment. As we have previously held, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison*, 924 F.2d at 878 (citing *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir.1990)). If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe.

Brooks did not allege that she sought or required hospitalization; indeed, she did not suffer any physical injuries at all. The brief encounter between Brooks and Selvaggio was highly offensive, but we cannot say that a reasonable woman in Brooks's position would consider the terms and conditions of her employment altered by Selvaggio's actions. Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the long-term, especially given that the City took prompt steps to remove Selvaggio from the workplace.

This holding in no way condones Selvaggio's actions. The conduct of which Brooks complains was highly reprehensible. But, while Selvaggio clearly harassed Brooks as she tried to do her job, not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67

(1986). The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon Brooks the onerous terms of employment for which Title CVII offers a remedy. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The district court's grant of summary judgment with respect to Brooks's hostile work environment claims was affirmed.

**VEHICULAR HOMICIDE –
Choice of Charges;
Prosecuter's Discretion**

In *Simmerson v. State*, CACR 99-1277, 9/6/00, Mark Simmerson was involved in a head-on collision which resulted in the death of a twelve-year-old child, Britteny Kientz. Simmerson was convicted of manslaughter and sentenced to a term of five years in prison. He contends that he should have been charged with negligent homicide.

The Arkansas Court of Appeals, Division IV, concluded that the Arkansas criminal code allows for a range of charges to address a vehicular homicide. The choice of which charges to file against an accused is a matter entirely within the prosecutor's discretion.

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