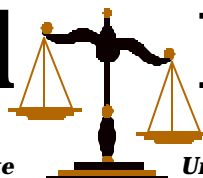




# CJI Legal Briefs



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## ARREST WITHIN INDIVIDUAL'S HOME – Consensual Entry Followed by a Warrantless Arrest

In *United States v. Hampton*, CA8, No. 00-3157, 8/1/01, sexual abuse and production of child pornography might well have gone unnoticed and unpunished if the chance intervention of a thief had not occurred.

In September of 1999, William Hampton's home was burglarized, and his video camera was stolen. The burglar was arrested shortly thereafter on other charges and instructed his mother to sell the video camera to raise bail. The person who purchased the camera found a videotaped recording of Hampton sexually abusing a young girl and turned the tape over to police. The burglar's mother elicited the address of the burgled house from her son, and the police determined that Hampton, the house's sole inhabitant, was the man on the tape by comparing it to his driver's license and Department of Revenue photos.

Intending to arrest Hampton, the police knocked on the glass storm door that opened onto a porch at the front of Hampton's home. Hampton answered, leaving the front door open behind him and holding the storm door open while he spoke with police. The police identified themselves and inquired whether he was William Hampton. He denied being William Hampton and said that his name was Stephen Hampton. When the police asked him for identification, he told them that it was inside the house and held the door open to admit them. In the house, he handed over his own identification and admitted that he was William Hampton, whereupon the police informed him that he was under arrest.

Hampton then asked to be allowed to secure his home before being taken into custody, and an officer accompanied him while he put away some items and locked the house. While inside the home, the officers observed rooms and items that were shown on the videotape. Because the house also contained children's toys, they inquired whether there were children in the house. Hampton told them that there were not and that the toys were present because he was a "surrogate father" to a

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four-year-old child. The items the police saw in Hampton's home became the basis for a search warrant that, when executed, led to the discovery of evidence against Hampton—most notably ten separate tapes documenting his sexual abuse of a four-year-old girl who spent one night a week with Hampton. The police found no evidence that Hampton had distributed or intended to distribute the tapes, and no other child pornography was found in his home.

Hampton argues that his warrantless arrest was in violation of the Fourth Amendment, and therefore the evidence obtained pursuant to a search warrant, which was based largely on the observations of police officers in his home to effect the arrest, should have been excluded as fruits of the poisonous tree. In *Payton v. New York*, 445 U.S. 573, 576 (1980), the Supreme Court held that the Fourth Amendment, as incorporated by the Fourteenth Amendment, "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest."

However, the Court in this case stated, "While *Payton* did not deal with the issue of whether an initial consensual entry would justify a subsequent warrantless arrest, we have held that a valid and voluntary consent may be followed by a warrantless in-home arrest." *United States v. Briley*, 726 F.2d 1301, 1303 (8th Cir. 1984) [citing *United States v. Shigemura*, 682 F.2d 699, 706 (8th Cir. 1982) and *United States v. Ruiz-Altschiller*, 694 F.2d 1104, 1106-07 (8th Cir. 1982)]. Accordingly, Hampton's arrest was constitutionally valid if

he voluntarily and without coercion consented to the officers' entry into his home.

Whether Hampton voluntarily consented to the entry is a question of fact to be determined from all the circumstances, and the government bears the burden of showing that the consent was freely given. In this case, not only is there a complete lack of evidence showing the use of force, coercion, or deception by police, but what evidence there is indicates that Hampton literally opened the door to admit them into his home. Because Hampton consented to the police entry, his arrest and the ensuing search were valid.

#### **CIVIL LIABILITY – Seizure of a Person and the Americans With Disabilities Act**

In *Bates v. Chesterfield County, Virginia*, CA4, No. 99-1663, 6/19/01, Brian Bates brought suit against Chesterfield County, Virginia, and several of its police officers under 42 U.S.C. § 1983 and the Americans with Disabilities Act. Bates claims that the officers violated his Fourth Amendment right to be free from unreasonable seizure and discriminated against him on account of his autism. The district court granted summary judgment to the defendants. The Fourth Circuit Court of Appeals concluded that the officers acted reasonably, both in conducting the initial investigatory stop and in their use of force to restrain Bates. Since the officers complied with the Fourth Amendment in all respects, the Fourth Circuit Court of Appeals was unable to discern any discrimination on account of disability.

At approximately 6:00 P.M. on September 28, 1998, Ivan Schwartz went outside his home to play with his sons. Schwartz spotted a tall, skinny, shirtless teenager on the street at the end of his driveway. Unbeknownst to Schwartz, this teenager was seventeen-year-old Brian Bates. Bates, who lived approximately two miles from Schwartz's home, has been autistic since birth.

While Schwartz was talking to his boys, Bates began walking up the driveway. Schwartz told his boys to go inside. Bates entered Schwartz's garage and approached a cage containing kittens. Schwartz notes that Bates was talking incoherently to the kittens, making animal noises, and reaching into the cage. Schwartz asked Bates twice if he could help him, but Bates did not respond. Schwartz then said, "Look, I'm asking you a question. Talk to me." Bates still did not respond. Schwartz asked Bates for his name, but Bates again did not reply. Schwartz then asked Bates where he lived. Bates stated, "Death Valley, California." When Schwartz again asked Bates where he lived, Bates responded, "In Hell." Schwartz was ultimately able to back Bates out of his garage and down his driveway. Schwartz again attempted to communicate with Bates. The only coherent response Schwartz received was Bates screaming out the names of professional wrestlers. When Bates reached the end of Schwartz's driveway, he ran into the woods at the end of the cul-de-sac.

Schwartz immediately called 911 and told the dispatcher what had happened. The dispatcher

<p>relayed the call to Chesterfield County police officers. Officer Wayne Genova, who at the time was working radar nearby, responded and drove his police motorcycle to Schwartz's home. Upon arriving, Officer Genova was waved down by Walter Amos, Schwartz's neighbor. Amos had witnessed the incident, and Amos and Schwartz had talked shortly thereafter. Schwartz had to leave before Officer Genova arrived, and Amos told Schwartz he would stay and wait. Although Amos does not recall the specific words he used, he does remember telling Officer Genova something to the effect, "I don't know if this boy is on drugs or drunk, but he is acting weird or crazy and just went running through the woods."</p> <p>Officer Genova, still on his motorcycle, continued searching for the individual described by Amos and the dispatcher. He located him on a nearby street. Officer Genova asked Bates to come talk with him. Bates walked away. Officer Genova then ordered Bates to come back. Bates walked over to the police motorcycle, which Officer Genova had dismounted, and without permission from Officer Genova, Bates sat sideways on the motorcycle. Officer Genova responded by pushing Bates off the motorcycle. Bates then pushed Officer Genova and walked away. Officer Genova attempted to grab Bates, but Bates fought him off. During the struggle, Bates used his fingernails to scratch Officer Genova's left arm. Bates then ran down the street. Officer Genova called for backup and remounted his motorcycle.</p> <p>Officer Genova caught up with Bates, dismounted, and tried to grab</p>	<p>Bates by the wrist. Bates resisted, spit on Officer Genova, and told the officer to leave him alone. Officer Genova grabbed Bates by the throat and wrestled him to the pavement. He warned Bates not to spit on him and then attempted to handcuff Bates, but Bates continued to resist. Bates also bit Officer Genova, drawing blood from the officer's left forearm.</p> <p>While Officer Genova and Bates were struggling, Richard Conroy, the Special Agent in Charge of Enforcement for the Virginia State Charitable Gaming Commission, approached them in his car. Conroy later reported, "It was immediately apparent to me that the officer was in trouble and needed assistance." Conroy got out of his car and identified himself as a law enforcement officer. The two officers then grappled with Bates and ultimately were able to handcuff his arms in front of his body.</p> <p>Shortly thereafter, Officers David Biller and J.R. Boylan arrived. At this point, Bates was bucking up and down on the pavement. The four officers wrestled with Bates and were able to handcuff his arms behind his back. The officers then moved Bates to the grass at the side of the road. At some point during the struggle, Officer Genova asked Bates what his name was and whether he was on any drugs. Bates responded that he was on a number of prescription medications. At no point did Bates inform the officers that he was autistic.</p> <p>While Officer Genova was disinfecting his wounds at Officer Boylan's patrol car, Officers Biller and Boylan stood watch over</p>	<p>Bates. Bates began to kick at the officers. He kicked Officer Biller hard directly in the groin, incapacitating the officer. The officers responded by turning Bates over and holding him face down in an attempt to prevent him from hurting them.</p> <p>Around this time, Sharon Williams arrived on the scene. Williams, who knew Bates' family, informed the officers that Bates suffered from autism. Bates' mother and stepfather, Cheryl and Bill Johns, then arrived. The parents also told the officers that Bates was autistic. Bates' parents sought to approach Bates, but the officers initially kept them back. Once Bates discovered that his parents had arrived, Bates says he "spun around" to face his stepfather. The officers reacted by grabbing Bates and forcing him to the ground. One of the officers grabbed Bates by his neck. Bates claims that the officers were "beating" on him as he struggled to get away.</p> <p>Other Chesterfield County officers arrived on the scene. One of them urged Bates' parents to retrieve his medication, and Bates' mother went to get the medicine. While she was away, Bates' stepfather and a man identifying himself as Bates' uncle were allowed to speak with Bates. When Bates' mother returned, she gave Bates his medication. Bates eventually calmed down.</p> <p>An ambulance arrived, and the paramedics examined both Bates and Officer Genova. One of the paramedics noted that Bates had "minor abrasions" on his torso. He concluded that Bates did not need further medical attention, and the paramedics did not take him to the</p>
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hospital. Officer Genova, on the other hand, went to the hospital where he was tested for exposure to various diseases due to Bates' bite and scratch. Sixteen days later, Officer Biller also sought medical attention because his groin injury had not yet healed.

After consulting with the other officers at the scene, Sergeant Michael Marrion decided to charge Bates as a juvenile for assaulting Officers Genova and Biller. Sergeant Marrion released Bates to his parents rather than transporting him to the detention center as the police would normally have done. Sergeant Marrion thought that a night in the detention center would be detrimental to Bates given his mental disorder and aggressive behavior.

On January 21, 1999, Bates filed suit against both Chesterfield County and several of its officers. Bates alleges that the officers violated his Fourth Amendment right to be free from unreasonable seizure. Bates also alleges a variety of state law tort claims as well as claims that the officers violated the Americans with Disabilities Act. See 42 U.S.C. §§ 12132, 12134 (1994).

Bates first contends that Officer Genova violated the Fourth Amendment on September 28 when he detained Bates to ask him some questions. The Fourth Circuit Court of Appeals disagreed. Because Officer Genova was conducting an investigatory stop and not an arrest, Genova needed only a reasonable suspicion that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). "The level of suspicion required for a *Terry* stop is obviously less demanding than that

for probable cause," and "is considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). An officer merely needs "'some minimal level of objective justification' for making the stop." In other words, the officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch."

Based on the information possessed by Officer Genova at the time, his suspicion that "criminal activity may be afoot" was more than reasonable. Officer Genova was informed by the 911 dispatcher of a "suspicious subject." The dispatcher then passed along the information reported by Schwartz—"a white male juvenile with blonde hair and bad complexion, last seen wearing no shirt, baggy jean shorts...walked up to Schwartz's garage, seemed not to comprehend where he was at, and then ran into the woods at the end of the cul-de-sac." Officer Genova was thus aware that Bates may have trespassed on private property and might trespass again. In addition, Officer Genova was informed that Bates may have been under the influence of intoxicants in public.

When Officer Genova arrived on the scene, he spoke with Amos. Although Amos later could not recall the specific words he used, he remembered telling Officer Genova something to the effect, "I don't know if this boy is on drugs or drunk, but he is acting weird or crazy and just went running through the woods." With these facts in front of him, it was reasonable for Officer Genova to

stop Bates and assess the situation.

Bates next argues that the officers violated the Fourth Amendment by using excessive force against him. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

At every stage of the September 28 incident, the police officers' use of force was objectively reasonable. Officer Genova first attempted merely to speak with Bates. Bates walked away. Officer Genova then ordered Bates to come over to him, at which time Bates approached the officer and sat on his police motorcycle, which Bates had no right to do. By taking the first step to commandeer the officer's motorcycle, Bates threatened not only Officer Genova and police property, but he also put himself and the public at risk. In response, Officer Genova simply pushed Bates off the motorcycle. Officer Genova was surely not constitutionally required to permit an individual suspected of being intoxicated and having committed a trespass to control his police vehicle while Officer Genova was conducting his investigatory stop.

Bates then initiated a series of physical confrontations with the police to which they responded in reasonable fashion. Bates pushed Officer Genova, thereby assaulting a police officer. When Officer Genova tried to grab Bates, Bates fought him off, scratching Officer

Genova's left arm. Officer Genova and the other officers attempted to handcuff Bates as Bates spit, bit, and kicked them. It ultimately required four officers to restrain Bates and to stop him from harming not only the officers but himself as well. Yet, in light of what the district court described as Bates' "fierce resistance," the officers did not pepper spray Bates nor use their batons against him. In fact, Bates suffered minimal injury from the confrontations. Bates himself reports, "As a result of the police officers' actions, I was cut, bruised, and scraped." Furthermore, the attending paramedic saw no need to take Bates to the hospital. See *Dean v. City of Worcester*, 924 F.2d 364, 369 (1st Cir. 1991) (notes that the severity of a § 1983 plaintiff's injuries is a relevant factor in determining whether force was excessive).

With respect to the force used in these confrontations, it is important to consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest." *Graham*, 490 U.S. at 396. Here, all three factors weigh in the officers' favor. First, Bates had committed the offense of assaulting a police officer. Second, Bates was an immediate threat to the officers, as evidenced by the fact that he scratched Officer Genova, bit him to the point of bleeding, and incapacitated Officer Biller by kicking him directly in the groin. Third, it is beyond question that Bates was "actively resisting arrest." In light of these factors, we simply cannot conclude that the force used by the officers was excessive.

Bates makes much of the officers' use of force in light of his mental disability. However, it is undisputed that Bates never told the officers he was autistic. Moreover, in the midst of a rapidly escalating situation, the officers cannot be faulted for failing to diagnose Bates' autism. Indeed, the volatile nature of a situation may make a pause for psychiatric diagnosis impractical and even dangerous.

Even after the officers were informed of Bates' autism, the force used by the officers was reasonable in light of all the circumstances. For example, the police reacted with force when, in Bates' own words, he "spun around" to face his stepfather. In light of Bates' previous resistance to police—his scratching, spitting, biting, and kicking—the officers acted reasonably by forcibly restraining him. Knowledge of a person's disability simply cannot prevent officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual. We do not underestimate the difficulties that an autistic individual may face in dealing with law enforcement officers. At the same time, that fact cannot set aside an officer's responsibility to uphold the law and ensure public safety.

Bates next contends that the defendants violated the Americans with Disabilities Act. See 42 U.S.C. §§ 12132, 12134 (1994). Section 12132 provides, "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of

a public entity, or be subjected to discrimination by any such entity." Bates alleges that his "unjustified detainment and abuse" constituted discrimination against him by reason of his disability. Specifically, Bates contends that the officers should have been aware of his autism throughout the September 28 incident and should have taken this condition into account when interacting with him. Bates argues that if they had, he would not have been detained or arrested, and the ensuing scuffle would not have occurred.

We need not undertake an independent ADA inquiry in this case because our Fourth Amendment scrutiny has already accounted for all the situation's circumstances. For in evaluating the validity of an investigatory stop, a court must consider "the totality of the circumstances—the whole picture." *Sokolow*, 490 U.S. at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). And in examining a claim of excessive force, a court must ask whether the officers' conduct was "objectively reasonable in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 397. Just like any other relevant personal characteristic—height, strength, aggressiveness—a detainee's known or evident disability is part of the Fourth Amendment circumstantial calculus.

Here, we have concluded that under all the circumstances the officers' actions were objectively reasonable. Officer Genova had a reasonable, articulable suspicion that criminal activity was afoot when he conducted his initial investigatory stop. See *Terry*, 392 U.S. at 30-31. The officers' use of

force against Bates was also objectively reasonable—both the force used before the officers were aware or should have been aware of Bates’ autism and the force used after they were notified of the disability. See *Graham*, 490 U.S. at 396-99.

Bates was not arrested because of his disability. Rather, he was arrested because there was probable cause to believe that he assaulted a police officer. Thus the stop, the use of force, and the arrest of Bates were not by reason of Bates’ disability, but because of Bates’ objectively verifiable misconduct. Such reasonable police behavior is not discrimination. As a result, there has been no ADA violation.

### **DEADLY FORCE – Objective Reasonableness**

In *Thompson v. Hubbard*, CA 8, No. 00-2505, 7/30/01, after Ravone Thompson was shot and killed by police officer Bryan Hubbard, Thompson’s parents and his daughter brought an action for damages under 42 U.S.C. § 1983 against Bryan Hubbard, Michael Washington (who is Hubbard’s supervisor), and the city of Pine Lawn, alleging excessive use of force in violation of Thompson’s civil rights. The district court granted summary judgment for the defendants, and the Eighth Circuit Court of Appeals affirmed.

Upon responding to a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery in Pine Lawn, Missouri, Officer Hubbard approached Ravone Thompson as he was getting into his car. Thompson fit the description of one of the

robbery suspects, a black man wearing a blue and gold jacket, and was in an area where, based on the direction of their flight, Officer Hubbard believed the suspects might be. Thompson initially appeared to surrender but then turned to flee. Officer Hubbard attempted to grab him but succeeded only in pulling off his jacket.

A foot chase ensued, ending when Thompson ran into the space between two buildings and climbed over a short fence. According to Officer Hubbard, Thompson got up from the ground, looked over his shoulder at the officer, and moved his arms as though reaching for a weapon at waist level. Thompson’s back remained turned toward Officer Hubbard and obscured his hands from view. Officer Hubbard yelled, “Stop,” and when Thompson’s arms continued to move, he fired a single shot into Thompson’s back just below his right shoulder blade. Thompson died from the wound. No weapon was found on his body. Officer Marvin Berry, who had followed most of the foot chase in a patrol car, stated that he attempted to look down the space between the two buildings where he had seen Thompson and Officer Hubbard run, but he neither saw nor heard the shooting, leaving Officer Hubbard as the lone surviving witness to the shooting.

The Eighth Circuit Court of Appeals stated that § 1983 claims will not lie against either Hubbard and Washington individually or against the city unless the plaintiffs can prove an underlying violation of Thompson’s Fourth Amendment rights. See *Krueger v. Fuhr*, 991 F.2d 435, 440 (1993). A claim of

excessive force in apprehending a suspect is analyzed in light of the Fourth Amendment’s prohibition against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. The question is whether the officer’s actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. This Court has held that deadly force is justified where the totality of the circumstances give the officer probable cause to believe that a fleeing suspect poses a threat of serious physical harm to the officer or to others. *Nelson v. County of Wright*, 162 F.3d 986, 990 (8th Cir.1998).

Thus, to defeat the motion for summary judgment, the plaintiffs needed to present enough evidence to permit a reasonable jury to conclude that Officer Hubbard’s use of deadly force was objectively unreasonable. See *Gardner v. Buerger*, 82 F.3d 248, 252 (8th Cir. 1996). The Eighth Circuit concluded that summary judgment was appropriate in this case because Officer Hubbard’s use of force, as he describes it, was within the bounds of the Fourth Amendment, and all of the evidence presented to the district court is consistent with that account. Compare *Krueger*, 991 F.2d at 439 (summary judgment against plaintiffs appropriate despite the fact that the suspect was shot in the back where such a shot was consistent with the reasonable use of force described

by the officer) with *Gardner*, 83 F.3d at 253 (summary judgment inappropriate where officer's own account of shooting raised genuine issue as to its reasonableness). The plaintiffs may not stave off summary judgment "armed with only the hope that the jury might disbelieve witnesses' testimony." *Gardner*, 82 F.3d at 252.

The Eighth Circuit disagreed with the plaintiffs' contention that if, as Officer Hubbard maintains, Thompson turned and looked at him while the two were in close proximity and moved as though reaching for a weapon, a jury could conclude that Officer Hubbard's use of deadly force was objectively unreasonable because Officer Hubbard should have considered the fact that the waistband of Thompson's sweatpants may not have been strong enough to hold a gun.

An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun. See *Ryder v. City of Topeka*, 814 F.2d 1412, 1419 n.16 (10th Cir. 1987) (concludes that a requirement for a suspect to actually have a weapon would place police in "a dangerous and unreasonable situation...whether a particular seizure is reasonable is dependent on the 'totality of the circumstances' and not simply on whether the suspect was actually armed"). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—

about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Moreover, neither the plaintiffs' attacks on Officer Berry's credibility nor anything else in the record undermines Officer Hubbard's credibility. The evidence adduced by the plaintiffs is simply insufficient to support even an inference that Hubbard is lying, nor is it sufficient to satisfy the plaintiffs' burden of proving that his actions were not objectively reasonable. However tragic Thompson's death, the plaintiffs have failed to come forward with sufficient evidence to justify submitting their case to a jury.

### **HIGH SPEED PURSUITS – Intent-to-Harm Standard**

In *Helseth v. Burch*, CA8, No. 00-3235, 7/31/01, the Eighth Circuit Court of Appeals overruled *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000), a case that applied a deliberate indifference standard when the police had a chance to deliberate before the injury-causing accident occurred.

In *County of Sacramento v. Lewis*, 523 U.S. 833, 835 (1998), the Supreme Court held that in a high-speed automobile chase aimed at apprehending a suspected offender...only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a substantive due process violation. In *Feist v. Simonson*, 222 F.3d 455, 464 (8th Cir. 2000), which involved a high-speed pursuit of a stolen car, a panel of this Court declined to apply the intent-to-harm standard

of *Lewis* because the police officer "had ample time to deliberate" during the six-minute chase. In this case, an intoxicated driver seriously injured Timothy Helseth while being pursued at high speed by police officer John Burch. Relying on *Feist*, the district court denied Officer Burch qualified immunity from Helseth's substantive due process claim under 42 U.S.C. § 1983. *Helseth v. Burch*, 109 F. Supp. 2d 1066, 1078 (D. Minn. 2000). Officer Burch appealed, and we granted his petition for initial en banc review. The Eighth Circuit Court of Appeals overruled *Feist* and reversed.

Shortly after midnight on August 22, 1995, an intoxicated Everett Contois raced his car on a straight stretch of road in Blaine, Minnesota, a Twin Cities suburb. Contois' car was traveling 111 mph when it passed Blaine police officer William Bott in his squad car. Officer Bott began pursuit, activating his lights and siren and notifying the police dispatcher of the chase. After Contois had successfully evaded Officer Bott for several miles, running stop signs and stoplights at speeds of 60 to 80 mph, he raced passed Officer Burch, who joined the chase as the lead squad car.

With Officer Burch in close pursuit, Contois drove through four stop signs, stopped briefly in a dead-end cul-de-sac, and then drove through two lawns and over a small retaining wall to another street. As Contois slowed to make a right turn, Officer Burch attempted to stop the Contois vehicle with three Pursuit Intervention Tactics (PIT), in which the officer drives alongside the rear of the fleeing vehicle, turns,

and hits the vehicle's rear end, causing it to spin and stop.

The third PIT maneuver spun Contois' vehicle into a grassy median, but Contois quickly sped off, heading in the wrong direction on Highway 10, a heavily traveled thoroughfare. Another PIT maneuver again spun Contois into the median, but he re-entered Highway 10 (now heading in the right direction) and accelerated to speeds of 80 to 100 mph. Contois turned onto Highway 65 and then 81st Avenue, entering the neighboring suburb of Spring Lake Park, where another police car joined the pursuit.

Just over six minutes after Officer Burch entered the chase, Contois ran a red light and collided with a pickup truck driven by Helseth. The crash killed Helseth's passenger, seriously injured three juvenile passengers in Contois' car, and left Helseth a quadriplegic. Contois was tried and convicted of third degree murder and other offenses in state court.

Helseth filed this § 1983 damage action against Officer Burch, alleging numerous constitutional violations arising from Officer Burch's high-speed pursuit of Contois' vehicle. After substantial discovery, Officer Burch moved for summary judgment. The district court dismissed all but Helseth's substantive due process claim. As to that claim, applying *Feist*, the court denied Officer Burch qualified immunity because the evidence could support a finding that Officer Burch conducted the pursuit with deliberate indifference to public safety and Helseth's rights. Alternatively, applying *Lewis*, the court denied Officer

Burch qualified immunity because the evidence could support a finding that Officer Burch intended to harm Contois and his passengers by engaging in the PIT maneuvers. Officer Burch appeals the denial of qualified immunity. As *Lewis* makes clear, in considering the qualified immunity defense, the Court must first determine whether the plaintiff has alleged a deprivation of a constitutional right at all. That is an issue the Court reviews *de novo*.

*Feist* involved a high-speed police chase that ended when the stolen car being pursued hit Feist's vehicle head-on at 100 mph. Eschewing the intent-to-harm standard of *Lewis*, the Eighth Circuit Court of Appeals panel affirmed the denial of qualified immunity to the pursuing police officer, concluding that the deliberate indifference standard applies to a high-speed pursuit case if the pursuing police officer had ample time to deliberate...and made a deliberative decision to continue the chase and to be indifferent to the dangers obviously inherent in his conduct." 222 F.3d at 464. In this case, the district court concluded that the deliberate indifference standard should apply because Officer Burch, like the police officer in *Feist*, "engaged in conscious deliberation rather than reflexive conduct." *Helseth*, 109F. Supp. 2d at 1076.

Our principal problem with the decision in *Feist* is that the panel paid too little heed to the Supreme Court's actual holding in *Lewis*, instead relying primarily on a portion of the Court's justification for that holding. The Court in *Lewis* was careful to state its holding in the first paragraph of the opinion—

in a high-speed automobile chase aimed at apprehending a suspected offender...only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a substantive due process violation. The Court restated its categorical rule toward the end of its opinion—"We hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983."

For the lower federal courts, an explicit Supreme Court holding is like a statute in that its plain language must be obeyed. Accord *Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 250-51 (2d Cir. 1999). *Lewis* plainly stated that the intent-to-harm standard, rather than the deliberate indifference standard, applies to *all* high-speed police pursuits aimed at apprehending suspected offenders.

To be sure, the Court in *Lewis* explained that the deliberate indifference standard is appropriate "only when actual deliberation is practical." 523 U.S. at 851. The panel in *Feist* saw this language as an invitation to reject intent-to-harm as the governing standard whenever a judge or a jury could say, with the wisdom of



<p>hindsight, that an officer engaged in a high-speed pursuit had “ample time to deliberate.” But this reasoning not only produces a standard that eviscerates the holding of <i>Lewis</i>, it also gives too little recognition to the Court’s other bases for that holding—</p> <ol style="list-style-type: none"> <li>1.) its historical reluctance “to expand the concept of substantive due process,” 523 U.S. at 842;</li> <li>2.) its explicit reliance on <i>Whitley v. Albers</i>, 475 U.S. 312, 320 (1986), which adopted the intent-to-harm standard for a two-hour prison riot, 523 U.S. at 853-54;</li> <li>3.) its doubt whether “it makes sense to speak of indifference as deliberate in the case of sudden pursuit,” 523 U.S. at 851;</li> <li>4.) its recognition that police officers confronting high-speed lawlessness are subject to countervailing law enforcement considerations, 523 U.S. at 855;</li> <li>5.) its concern that any standard less than intent-to-harm “might cause suspects to flee more often, increasing accidents of the kind which occurred here,” 523 U.S. at 858;</li> <li>6.) and the belief of at least some Justices that the question of police officer liability for reckless driving during high-speed pursuits should be decided by the elected branches of government, 523 U.S. at 864-65 (Scalia, J., concurring).</li> </ol> <p>Since <i>Lewis</i>, all other circuits that have examined the issue have applied the intent-to-harm standard in high-speed police pursuits cases, without regard to the potentially limiting factors identified by the panel in <i>Feist</i>—the length of the pursuit, the officer’s training and experience, the severity of the</p>	<p>suspect’s misconduct, or the perceived danger to the public in continuing the pursuit. See <i>Trigalet v. City of Tulsa</i>, 239 F.3d 1150, 1155 (10th Cir. 2001); <i>Davis v. Township of Hillside</i>, 190 F.3d 167, 170 (3d Cir. 1999), cert. denied, 528 U.S. 1138 (2000); <i>Onossian v. Block</i>, 175 F.3d 1169, 1171-72 (9th Cir.), cert. denied, 528 U.S. 1004 (1999); <i>Salamacha v. Lynch</i>, 1998 WL 743905, at *2 (2d Cir. Sept. 25, 1998). The Eighth Circuit Court of Appeals now joins those circuits and overrules <i>Feist</i>. We hold that the intent-to-harm standard of <i>Lewis</i> applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender.</p> <p>Although we overrule <i>Feist</i>, we agree with its decision “that the <i>Lewis</i> intent standard applies regardless of whether a suspect or bystander is hurt.” 222 F.3d at 462. Accord <i>Onossian</i>, 175 F.3d at 1171-72. The district court denied Officer Burch summary judgment under the intent-to-harm standard because his deliberate ramming of Contois’ vehicle in four PIT maneuvers would permit a reasonable jury to “infer from these facts that Burch intended to harm Contois and the three juvenile passengers in his car.”</p> <p>The district court’s decision conflicts with <i>Davis v. Township of Hillside</i>, 190 F.3d at 171, where the Third Circuit concluded that the deliberate ramming of a fleeing suspect’s car “does not permit an inference of intent to harm” under <i>Lewis</i>. We agree with the decision in <i>Davis</i>. In applying the <i>Lewis</i> standard, “only a purpose to cause harm <i>unrelated to the legitimate</i></p>	<p><i>object of arrest</i> will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” Here, the undisputed evidence is that Officer Burch employed the PIT maneuvers in an attempt to stop the fleeing Contois vehicle and apprehend its driver. The only harm intended by this conduct was incidental to Officer Burch’s legitimate objective of arresting Contois. That intent does not, as a matter of law, establish a substantive due process violation.</p> <p>Moreover, the PIT maneuvers failed in their objective, and Contois continued his high-speed flight. Contois eventually crashed into Helseth’s vehicle, with Officer Burch still in pursuit. At that time, Officer Burch had no more intent to harm than that inherent in the high-speed pursuit of any suspected offender. On appeal, Helseth points to Contois’ deposition testimony that he felt terrorized by Officer Burch’s aggressive pursuit and argues that this case is like <i>Checki v. Webb</i>, 785 F.2d 534 (5th Cir. 1986), which the Court in <i>Lewis</i> cited as an example of intent to cause harm unrelated to the legitimate object of an arrest. But unlike the law-abiding citizens in <i>Checki</i>, who were hounded for miles by police officers in an unmarked vehicle, Contois was a fleeing criminal whose irresponsible high-speed driving endangered countless citizens and ultimately killed one innocent bystander and maimed another, Timothy Helseth. Officer Burch and the other police officers who risked their lives to remove this menace from the public highways were not guilty of a conscience-shocking intent to harm.</p>
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Society could reasonably decide that an innocent bystander injured during such high-speed police pursuits should be compensated from the public coffers, but that is a legislative decision. There was no violation of Helseth's rights under the Due Process Clause. The August 18, 2000, order of the district court is reversed in part, and the case is remanded for entry of an order dismissing Helseth's § 1983 complaint.

### **INFORMANTS – Disclosure of Identity of Confidential Informant**

In *Carpenter v. Lock*, CA8, No. 99-4154, 7/17/01, Carpenter argues that the identity of the state's confidential informant should have been revealed prior to his trial. The Eighth Circuit Court of Appeals disagreed and affirmed the conviction of Carpenter for one count of drug trafficking and one count of delivery of a controlled substance.

On March 28, 1994, Officer Robert Shinn was working as an undercover narcotics officer. Officer Shinn and a confidential informant entered a residence in Ferguson, Missouri, where they were greeted by a woman named Robin. Another female, named Lee Ann, was also present. Soon after they arrived, a black male who identified himself as "Blacky" appeared. Officer Shinn testified that Blacky asked who wanted to do business. Officer Shinn responded that he did and then went with Blacky into the residence's master bedroom.

After they entered the bedroom, Officer Shinn testified

that Blacky scanned him with his eyes and asked whether he was a police officer. Officer Shinn said no, and then asked Blacky, "Are you?" They had a short conversation. Blacky then removed a bag from his sock and broke off 3.5 grams of crack cocaine and gave it to Officer Shinn in exchange for \$250. Officer Shinn testified that he was in the bedroom for approximately five to eight minutes. The confidential informant remained in the living room during the entire time Officer Shinn was in the bedroom. Before Officer Shinn left the residence, Blacky gave him a piece of paper with his pager number on it.

On March 30, 1994, Officer Shinn contacted Blacky by using the pager number. The two arranged to meet at a motel parking lot. Blacky arrived in a blue Mustang accompanied by a white female. Blacky asked Officer Shinn if he knew anyone who could exchange marijuana for crack cocaine. Officer Shinn told him he could get five pounds of marijuana. The two agreed to exchange two pounds of marijuana for two ounces of crack cocaine. Blacky then gave Officer Shinn a small piece of crack cocaine as a "good-faith" offer to complete the transaction. Officer Shinn tried to page Blacky again at a later date but was unable to reach him.

At trial, Officer Shinn testified that he prepared a report of each incident on the night of each incident or shortly thereafter; however, Officer Shinn testified that he did not seek an arrest warrant until September 12, 1994, (nearly six months after the events) in order to protect the identity of the confidential informant. Officer

Shinn identified the defendant, Melvin Carpenter, as the individual he knew as Blacky from the March 28 and March 30 encounters. He stated that he didn't know Carpenter's name when they first met on March 28, 1994, but that he determined Carpenter's name shortly after the second transaction.

On August 23, 1995, Carpenter was convicted following a jury trial in the Circuit Court of St. Louis County of one count of first-degree drug trafficking and one count of delivery of a controlled substance. The trial court sentenced Carpenter as a prior and persistent drug offender to two concurrent fifteen-year terms.

Before trial, Carpenter moved for disclosure of the confidential informant for two reasons. First, he argued disclosure of the confidential informant was necessary to his defense of mistaken identity. He argued that even though the informant may not have been present during the transaction, the informant made the arrangements for the meeting and would be a key witness in identifying whether Carpenter was in fact Blacky. Second, Carpenter argued it was necessary to know the name of the informant in order to determine whether he could advance an entrapment defense. The trial court, without elaboration, determined that the criteria for disclosure were not met and denied the motion. On appeal, the Missouri Court of Appeals summarily affirmed his convictions and the denial of Carpenter's state court motions for post-conviction relief without an opinion. See *State v. Carpenter*, 947 S.W.2d 468 (Mo. Ct. App. 1997).

In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court recognized the government’s privilege to withhold the disclosure of the identity of a confidential informant. The Court declined to adopt a fixed rule for determining when disclosure was required. Instead, it adopted a balancing test of “the public interest in protecting the flow of information against the individual’s right to prepare his defense.” Courts should consider factors such as “the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.”

In determining whether disclosure is required, the threshold issue is whether the informant is a material witness. Disclosure of the confidential informant is not mandated “unless it is vital to a fair trial.” *United States v. Bourbon*, 819 F.2d 856, 860 (8th Cir. 1987). “Where the witness is an active participant or witness to the offense charged, disclosure will almost always be material to the accused’s defense.” *Devose v. Norris*, 53 F.3d 201, 206 (8th Cir. 1995). However, if the informant acts as a mere “tipster,” i.e., a person who merely conveys information but does not witness or participate in the offense, disclosure is not required. *Bourbon*, 819 F.2d at 860; see also *Barnes v. Dormire*, \_\_\_ F.3d \_\_\_, No. 00-1407, 2001 WL 579673 (8th Cir., May 31, 2001) (holding that disclosure was not required when a confidential informant was present but acted merely as a facilitator for the transaction). The defendant has the burden of showing materiality, which “requires more than speculation

that the evidence an informant may provide will be material to overcome the government’s privilege to withhold the identity of the informant.” *United States v. Grisham*, 748 F.2d 460, 463-64 (8th Cir. 1984).

The confidential informant helped initiate the first transaction: he took Officer Shinn to the residence where Officer Shinn purchased the crack cocaine. The informant, however, did not participate in or witness the actual transaction. Officer Shinn testified that he was in the bedroom alone with Carpenter and that the door was shut. In addition, the confidential informant did not help set up the second transaction: Officer Shinn called the pager number Blacky had given to him. Even if the confidential informant had witnessed the transfer of the piece of paper with the pager number, it would not make the confidential informant a material witness. Officer Shinn participated in and witnessed both transactions for which Carpenter was convicted and testified at trial to his first-hand account of the events. The confidential informant was not a material witness; therefore, the state court decision was not contrary to clearly established federal law as determined by the Supreme Court.

The informant stayed in the living room the entire time Officer Shinn was in the bedroom with Carpenter. The door was closed so the informant could not have overheard the transaction. The informant did not help set up the second transaction and was not present when Officer Shinn met with Carpenter. On these facts, we cannot say that the state court’s

decision not to reveal the name of the confidential informant was objectively unreasonable.

### LEGAL STATUS – Drug Task Force

In *Brown v. Fifth Judicial District Drug Task Force*, No. 00-3834EA, CA8, 7/2/01, the coordinator for the Fifth Judicial District Drug Task Force brought suit under the Fair Labor Standards Act, claiming that the Drug Task Force, his employer, had failed to pay him for overtime. The Fifth Judicial District Drug Task Force is a multi-governmental unit organized as an interlocal cooperative consisting of Pope County, Arkansas, Franklin County, Arkansas, and Johnson County, Arkansas, together with the Cities of Russellville and Clarksville.

The issue in this case was whether the Fifth Judicial District Drug Task Force was a legal entity that could be sued. The United States District Court for the Eastern District of Arkansas had concluded the Drug Task Force is neither a natural nor an artificial person with a separate legal existence, and it has not been granted statutory authority to sue or be sued; rather, it is an unincorporated, intergovernmental, multijurisdictional task force established to investigate and prosecute drug offenses.

The Eighth Circuit Court of Appeals cited several cases in holding that drug task forces similar to the Fifth Judicial District Drug Task Force are not separate legal entities subject to suit. *Eversole v. Steele*, 59 F.3d 710 (7th Cir. 1995); *Hervey v. Estes*, 65 F.3d 784, 792 (9th Cir. 1995);

*Dillon v. Jefferson County Sheriff's Department*, 973 F. Supp. 626 (E.D. Tex. 1997); *Alexander v. City of Rockwall*, No. CIV. A. 3:95-CV-0489, 1998 WL 684255 (N.D. Tex., Sept. 29, 1998).

### **SEARCH AND SEIZURE – Affidavits for Search Warrants; Description of Items to be Seized in Child Pornography Cases**

In *United States v. Burnette*, CA1, No. 00-2194, 7/5/01, seventy-nine (79) allegedly pornographic images of prepubescent boys were posted on the Internet to the site <alt.fan.prettyboy>. A consumer watchdog group alerted the Internet service provider, Concentric Network Corporation (CNC), to the posting. An investigator from CNC traced the source of the posting to Burnette's account, which was opened with CNC a few months earlier. CNC, in turn, copied 33 of the images onto a disk, which it forwarded to the U.S. Customs Service.

Agent Richard Jereski, who had some 18 months of experience investigating child pornography crimes, viewed those 33 images and concluded that they were pornographic. Jereski applied for a warrant to search Burnette's home, but he did not append any of the allegedly pornographic images to the warrant application, nor did his affidavit contain a description of them. Instead, he merely asserted that they met the statutory definition of child pornography. After the magistrate judge determined that there was probable cause, the warrant was issued, the defendant's home was

searched, and his computers were seized. Other allegedly pornographic images of children were found on those computers.

Burnette was charged with transportation and possession of child pornography. He moved to suppress the images found on the computers that were seized, arguing that the warrant was facially invalid because the affiant's "nondescript legal conclusion" was insufficient to support probable cause. He also argued that the good faith exception to the Fourth Amendment exclusionary rule [see *United States v. Leon*, 468 U.S. 897 (1984)] did not apply because the affidavit falsely asserted that "all" of the images were pornographic. At the suppression hearing, Agent Jereski conceded that some of the images might not have pictured a lascivious display of boys' genitals, and thus, not "all" met the statutory definition of child pornography.

Without viewing the images, the district court ruled that, although a factual description of the images would have been desirable, the agent's training and experience qualified him to make the legal determination that there was probable cause to believe the images were pornographic. The court also found that the use of "all" in Agent Jereski's affidavit was a material misstatement of fact, but that this overstatement was the result of "inadvertence and inattention to detail," not a deliberate attempt to mislead the magistrate judge. Accordingly, the court denied the motion to suppress.

The assessment of probable cause must focus on Jereski's affidavit, which was the only

evidence presented to the magistrate judge in support of the search warrant. Although the affidavit included sufficient indicia to link the images to defendant, i.e., that the postings originated from the defendant's CNC Internet access account, it did not specify with any detail the basis for believing that those images were pornographic. The evidence on the nature of the images consisted solely of Jereski's legal conclusion parroting the statutory definition. Jereski's assertion in his warrant affidavit that the images depicted "a prepubescent boy lasciviously displaying his genitals," was an attempt on his part to mirror the language of 18 U.S.C. § 2256(2)(E). This bare legal assertion, absent any descriptive support and without an independent review of the images, was insufficient to sustain the magistrate judge's determination of probable cause.

The district court excused the absence of descriptive evidence by relying on Agent Jereski's representation that the images were pornographic, finding that his training and experience qualified him to determine they met the statutory definition. But probable cause to issue a warrant must be assessed by a judicial officer, not an investigating agent. See *Gates*, 462 U.S. at 239 ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause. His action cannot be a mere ratification of the bare conclusions of others."); see also *Vigeant*, 176 F.3d at 571 (Unsupported conclusions of an officer are not entitled to any weight in the probable cause determination.)

This judicial determination is particularly important in child pornography cases, where the existence of criminal conduct often depends solely on the nature of the pictures.

As the district court recognized, “The identification of images that are lascivious will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer.” That inherent subjectivity is precisely why the determination should be made by a judge, not an agent. The Fourth Amendment requires no less. See *Gates*, 462 U.S. at 239 (An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and a wholly conclusory statement...fails to meet this requirement.) Moreover, Jereski had less than two years’ experience investigating child pornography crimes, and in that brief tenure, he had testified only twice before in support of warrant applications, one of which included copies of the images at issue.

The district court sought support for its reliance on Jereski’s affidavit from *United States v. Smith*, 795 F.2d 841, 847-48 (9th Cir. 1986). There, the court was “troubled by the fact that the government did not present and the magistrate did not see the photos in question before the warrant



issued,” which would have been the “ideal course.” Despite its misgivings, the Ninth Circuit endorsed reliance on the affidavit of an experienced postal inspector to support the issuance of a search warrant. In *Smith*, however, the agent’s bald assertion that the images met the statutory definition was bolstered by a much stronger investigation prior to applying for the warrant, including interviews with the suspect, some of the victims, and a pediatrician who confirmed that the girls pictured were under eighteen. These other indicia of probable cause, wholly absent here, make *Smith* readily distinguishable.

In sum, there having been no basis for issuing the warrant other than conclusory statutory language, the magistrate judge should have viewed the images and the district court should not have excused his failure to do so. It was error to issue the warrant absent an independent review of the images or at least some assessment based on a reasonably specific description. Ordinarily, a magistrate judge must view an image in order to determine whether it depicts the lascivious exhibition of a child’s genitals.

The First Circuit Court of Appeals stated that a court reviewing a warrant application to search for pornographic materials ordinarily is unable to perform the evaluation required by the Fourth Amendment if the application is based on allegedly pornographic images neither appended to, nor described in, the supporting affidavit. Ideally, copies of such images will be included in all search warrant applications seeking evidence of child pornography

crimes. If copies cannot feasibly be obtained, a detailed description, including the focal point and setting of the image, and pose and attire of the subject, will generally suffice to allow a magistrate judge to make a considered judgment.

### **SEARCH AND SEIZURE – Automobile Search; Passenger Exiting Vehicle to Meet Stopping Officer**

In *United States v. Hunt*, CA5, No. 00-60333, 6/1/01, the Fifth Circuit Court of Appeals had to decide whether Hunt’s Fourth Amendment rights were violated when the automobile he was driving, which had been stopped by a state trooper for a traffic violation, was searched simply because Hunt got out of the car to meet the state trooper rather than waiting inside the vehicle for the trooper to approach him. At the suppression hearing, the trooper testified that, in every case in which a driver disembarks from an automobile after being stopped for a traffic violation, he opens the car door to examine the vehicle’s interior.

On July 13, 1999, Marcellus Hunt was stopped for speeding by Officer Davidson of the Mississippi Highway Patrol. The stop occurred on a four-lane highway at 1:45 P.M. Hunt was driving a 1999 Buick Century that did not have tinted windows. Dewaun Dorse was a passenger in the car.

After being pulled over, Hunt left his car, shutting the door behind him, and walked to the back of the Buick to meet Officer Davidson. After Hunt complied with Officer Davidson’s request to produce a valid driver’s license, Officer

Davidson walked to the driver's side of the Buick and opened the door.

Officer Davidson visually searched the car and spoke with Dorse. As Officer Davidson prepared to shut the driver's side car door, he observed a clear plastic bag stuffed in the indentation that serves as a door handle on the door. He contends that the contents of the clear plastic bag appeared to be crack cocaine.

After spotting the drugs in his search of the vehicle, Officer Davidson walked back towards Hunt who was waiting at the rear of the car. As he was returning to Hunt, Officer Davidson noticed for the first time an empty gun holster on the floorboard behind the driver's seat. He frisked Hunt, placed him under arrest, and then arrested Dorse. Incident to these arrests, Officer Davidson searched the Buick and found a bag of powder cocaine in the glove box and a handgun in the center armrest. Hunt was charged in a two-count indictment. Count One charged Hunt with aiding and abetting possession with intent to distribute 248.47 grams of cocaine salt (powder cocaine) and 5.72 grams of cocaine base (crack cocaine). Count Two charged Hunt with possession of a firearm by a convicted felon.

Hunt filed a motion to suppress, which the district court denied, concluding that the officer was within his authority in opening the door of a car after a traffic search to look for weapons. Following the denial of his motion, Hunt entered a conditional guilty plea, subject to the appeal of the denial of the suppression motion.

The Fourth Amendment

guarantees 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." U.S. Constitution, Amendment IV. The essential purpose of the Fourth Amendment is to impose a standard of "reasonableness" upon law enforcement agents and other government officials in order to prevent arbitrary invasions of the privacy and security of citizens. *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979).

The protection of the Fourth Amendment is enjoyed not only in the home, but on the sidewalk and in a person's automobile. See *Delaware v. Prouse*, 440 U.S. at 663 [citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968) and *Adams v. Williams*, 407 U.S. 143, 146 (1973)] ("People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.")

It is well established that a traffic stop is a limited seizure within the meaning of the Fourth Amendment, *Delaware v. Prouse*, 440 U.S. at 653, and that intrusion into the interior of an automobile for investigatory purposes constitutes a search, *New York v. Class*, 475 U.S. 106, 114-115 (1986). The stopping of an automobile and the detention of its occupants constitutes a "seizure," even when the purpose of the stop is limited and the resulting detention brief. *Delaware v. Prouse*, 440 U.S. at 653. "While the interior of an automobile is not subject to the same expectations of privacy that

exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." *Class*, 475 U.S. at 114-115.

The Court specifically has rejected a "bright-line" rule that an automobile search incident to a traffic citation is permissible without reasonable suspicion or probable cause for the search. See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); see also *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Officer Davidson could not search the automobile without some articulable, individualized suspicion that the automobile contained weapons or contraband. *United States v. Michelletti*, 13 F.3d 838, 840 (5th Cir. 1994) ("Reasonable suspicion must be supported by particular and articulable facts, which, taken together with rational inferences from these facts, reasonably warrant an intrusion.") Thus, we must determine whether Officer Davidson's search of Hunt's automobile, based only on Hunt's exit from the vehicle, was an unnecessary intrusion. We believe that it was.

Hunt admits that he was lawfully stopped for driving 85 miles-per-hour in a 70 mile-per-hour speed zone. Hunt concedes also that Officer Davidson had the right to inspect the car visually for the purpose of observing weapons or contraband in plain view. See *Whren v. United States*, 517 U.S. 806, 809 (1996). The fact that Hunt was lawfully stopped, however, does not justify Officer Davidson's intrusion into Hunt's car for the purpose of performing the search of the vehicle's interior that unearthed the evidence at issue in

this case. Under existing Fourth Amendment jurisprudence, the officer had the right only to remove from the vehicle the Appellant, the driver, (had he still been inside), see *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), and Dorse, the passenger, see *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). Officer Davidson could not search the automobile's interior without objective evidence of criminal activity or of potential danger to the officer. And, had he not opened the car door to search the interior, Officer Davidson admits that he would not have seen the plastic bag stuffed into the driver's side door handle.

Officer Davidson testified that the reason he went to the driver's door was because Hunt had left the vehicle to meet him outside the car. On cross-examination, Officer Davidson stated: "Anytime someone does that, sir, I always go on to the driver's door to make sure there is nothing in there, for officer safety; no weapons or anything else is in the car." Officer Davidson admitted that he "automatically" undertook this search whenever anyone exited a vehicle during a routine traffic stop, and he recognized that his opening of the door and leaning into the car was a "search" under the Fourth Amendment. See *U.S. v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993).

Officer Davidson's regular practice of conducting a search whenever a driver leaves his or her vehicle during a routine traffic stop is in direct conflict with the constitutional requirement that automobile searches be conducted only when there are particular objective factors warranting the intrusion. An individual's decision

to step out of his or her vehicle to greet a detaining officer does not create the individualized suspicion required for an automobile search. See *Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000) (stressing that an officer "must be able to articulate something more than an inchoate and unparticularized hunch" for a search to be permissible). Officer Davidson's admission that his regular practice is to search for contraband without individualized reasonable suspicion is fatal to the government's case.

The government has presented no empirical data, nor has our independent research discovered any, suggesting that the act of a driver who has been stopped for a traffic violation leaving his car to greet the officer creates either a permissible or compellable inference that the automobile contains contraband or weapons. For an intrusion to be warranted, there must be appropriate inferences drawn from the facts that are specific to the situation at hand. No such facts were present here.

#### **SEARCH AND SEIZURE – Expectation of Privacy in Another Individual's Automobile**

In *United States v. O'Neal*, CA8, No. 01-1335, 7/20/01, police in Valley City, North Dakota, became suspicious that O'Neal and his traveling companion, Jane Francis, were involved in the burglary of a local church and the theft of a purse from a car that was parked near another church. The police stopped the two as they were leaving a local motel in

Francis's automobile. Francis consented to a search of her vehicle, and police located under the front passenger seat several tools that could be used to break into a building. Police also searched Francis's purse, which was located in the passenger compartment of the vehicle, wherein they discovered items that they believed had been stolen. O'Neal and Francis were then arrested and were read their Miranda rights.

At the police station, Francis signed a consent form authorizing a more complete search of her vehicle. During the course of this search, police located a 12-gauge semi-automatic shotgun in the trunk of the car and a box of 12-gauge shotgun shells under the front seat. In a subsequent tape-recorded confession, O'Neal admitted that he had stolen the weapon and the ammunition from yet another church, this one located in Dickinson, North Dakota. O'Neal, who has a lengthy felony record, was indicted by a grand jury in the District of North Dakota for being a felon in possession of a firearm and ammunition. O'Neal was convicted by a jury.

The Eighth Circuit Court of Appeals stated that a defendant moving to suppress bears the burden of demonstrating that he had a legitimate expectation of privacy that was violated by the challenged search. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995); *United States v. Kiser*, 948 F.2d 418, 423 (8th Cir. 1991). It is well established that an individual does not have a reasonable expectation of privacy in another person's automobile. *Rakas v. Illinois*, 439 U.S. 128, 134-35 (1978); *Kiser*, 948 F.2d at

423-24. Accordingly, O'Neal's rights could not have been violated by the stop and subsequent search of Francis's vehicle. The record establishes that both the stop and the search of Francis's vehicle were permissible under the Fourth Amendment.

### **SEARCH AND SEIZURE – Terry Stop and Length of Detention**

In *United States v. Leburn*, CA8, No. 01-1448, 8/15/01, April D. Lebrun was convicted of possessing methamphetamine with the intent to distribute, after Officer Rex Scism of the Missouri Highway Patrol found the drug in her vehicle during a routine traffic stop. Lebrun moved to suppress the drug evidence, asserting that Officer Scism violated her Fourth Amendment rights when, on the basis of his suspicions, he detained her vehicle for the purpose of allowing a drug dog to sniff it. The district court rejected her argument and concluded that the search was proper. The Eighth affirmed the judgment of the district court.

Lebrun does not contest the validity of the initial traffic stop. Instead, she challenges the validity of Officer Scism's subsequent decision to detain her vehicle until a drug dog could be brought to the scene.

A law enforcement officer is allowed to make a limited seizure of individuals suspected of criminal activity if he or she has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). To determine whether facts known to

an officer permit the requisite degree of suspicion to justify a so-called *Terry* stop, the totality of the circumstances must be considered. See *United States v. Sokolow*, 490 U.S. 1, 8 (1989); *United States v. Hawthorne*, 982 F.2d 1186, 1189 (8th Cir. 1992). An officer never has a sufficient basis to order a seizure if he is acting on merely an "inchoate and unparticularized suspicion or hunch." See *Terry*, 392 U.S. at 27.

At the time of the traffic stop, Lebrun and another individual were passengers in a vehicle that Lebrun had rented; Steven Krebbs was the driver. While Officer Scism conducted the traffic stop and prepared a warning citation to Krebbs, he asked all three of the occupants of the vehicle some routine questions about their travel plan and the purpose of their trip, and received vague and confused answers from them. Officer Scism also noticed that they were all unusually nervous: Krebbs was sweating profusely even though the temperature was cold; Lebrun fidgeted and kept moving around in her seat; and the other passenger would not make eye contact with the officer, and her hands trembled excessively. Last, Officer Scism saw that there were drink containers, food wrappers, a cellular telephone, a road atlas, pillows, and blankets in Lebrun's vehicle. From this, Officer Scism concluded that the occupants of the car were traveling without making any stops, a common practice, he testified, among drug traffickers.

Based on these facts, Officer Scism had a sufficient basis upon which to form a particularized suspicion of criminal activity. We are aware that some of the things

that Officer Scism observed, such as the food wrappers and a cellular phone in Lebrun's vehicle, are consistent with innocent travel. We are also mindful, however, that innocent facts, when considered together, can give rise to a reasonable suspicion. See *Sokolow*, 490 U.S. at 9-10. This is especially true when we view the totality of the circumstances through the perspective of an experienced law enforcement officer trained in crime detection and acquainted with the behavior of criminals. See *United States v. Wallraff*, 705 F.2d 980, 988 (8th Cir. 1983).

In this case, Officer Scism's thirteen years of experience as a law enforcement officer cannot be lightly disregarded in determining whether he had a reasonable suspicion to conduct the seizure. *Cf. United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999). Lebrun's effort to bring her case within the rule of *United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998), a case in which we held that seized evidence should have been suppressed, fails for a number of reasons. First, although it is true that the defendant in *Beck* appeared nervous when he was confronted by the police, (see 140 F.3d at 1132), in this case, Lebrun and her associates were exceptionally nervous when they were stopped by Officer Scism, and they became only more agitated when he started to ask them questions. Furthermore, unlike the defendant in *Beck*, here the vehicle's occupants provided conflicting and inconsistent answers to Officer Scism about the details of their trip. Finally, when we evaluate Officer Scism's

observations about the suspicious conduct of the occupants of the car, we give weight to his extensive experience as a veteran law enforcement officer familiar with drug trafficking, a matter not adverted to in *Beck*.

Lebrun also maintains that Officer Scism detained her too long while he was waiting for the drug dog to arrive and that he asked her inappropriate questions during the traffic stop. We find no merit in these arguments. The district judge found that the dog arrived at the scene of the traffic stop approximately twenty minutes after Officer Scism requested

assistance, and this finding is not clearly erroneous. As the Supreme Court has held, there is “no rigid time limitation on *Terry* stops.” *United States v. Sharpe*, 470 U.S. 675, 685 (1985). Whether a seizure by the police should be deemed unconstitutional because it lasted too long depends, in part, on the amount of time that is required to effect a legitimate law enforcement purpose. See *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1113 (1995). We observe that the police cannot reasonably be expected to have dogs available for every police officer at every

moment, and we do not think that the length of the detention in this case was excessive given Officer Scism’s legitimate need to call for a drug dog. We also do not believe that the routine questions, rehearsed above, that Officer Scism asked after he stopped Lebrun’s vehicle amounted to an unreasonable investigation. See *United States v. Munroe*, 143 F.3d 1113, 1115-16 (8th Cir. 1998); see also *United States v. Weaver*, 966 F.2d 391, 393 (8th Cir. 1992), *cert. denied*, 506 U.S. 1040 (1992).

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