



CJI Legal Briefs



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CIVIL ACTION: Slander of a Law Enforcement Officer

In *Rodriguez v. Panayiotou*, CA9, No. 00-56923, 12/3/02, the U.S. Court of Appeals for the Ninth Circuit held that a law enforcement officer's slander action could go forward.

On April 7, 1998, Rodriguez, a police officer for the City of Beverly Hills, California, was working with his partner in Will Rogers Park in Beverly Hills due to complaints of lewd acts taking place in the men's restroom. Rodriguez entered the park's restroom after observing pop star George Michael enter. As he exited one of the stalls, Rodriguez saw Michael fully exposed and engaging in a lewd act. Rodriguez left the restroom, and he and his partner arrested Michael, as he exited the restroom, for disorderly conduct. Michael pled no contest to the charge. He was fined and placed on probation, which included community service and a requirement to undergo psychological counseling.

In September 1998, Michael released a new song and music video entitled *Outside*, which made vague references to and parodied the incident. A few months later, in a series of magazine and television interviews to promote his new album, Michael responded to questions regarding the arrest with allegations that Rodriguez had entrapped him. Michael claimed that Rodriguez had induced him to engage in the lewd act for which he was arrested by first exposing himself and masturbating in front of him. Rodriguez contends that these statements are slanderous.

Rodriguez commenced a damage action against Michael in state court, which Michael removed to federal court on diversity grounds. Michael then moved to dismiss the complaint for failure to state a claim. The district court dismissed the slander and intentional infliction of emotional distress claims. The Ninth Circuit Court of Appeals reversed. They found as follows:

"Michael argues that his statements did not charge Rodriguez with a crime, contending that the alleged conduct was not criminal because

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Rodriguez was acting in an undercover capacity and would presumably have been immune from criminal prosecution. We have, however, found no case which would support such a presumption and Michael has cited none to us. While it may be true that police involvement in otherwise illegal acts is often permitted for the purpose of investigating possible violations, there is simply no blanket immunity doctrine that covers all types of illegal activity performed by officers in the context of an investigation or an undercover 'sting' activity.

"In the present case, it is doubtful that the police conduct alleged—the exposure of a police officer's genitals and an act of masturbation in a public place—is an accepted practice of the Beverly Hills Police Department in the conduct of undercover operations. Certainly, it is not an issue that can be disposed of on a motion to dismiss. Thus, it can easily be distinguished from the common practice of using undercover vice officers as 'decoys for soliciting acts of prostitution' and is more comparable to an undercover decoy officer actually engaging in the solicited sexual acts with the suspect prior to making the arrest. In such a case, as well as in the case before us, immunity from prosecution cannot be presumed; therefore, dismissal cannot be sustained on this basis.

"Likewise, a reasonable fact finder could conclude that Michael's statements accuse Rodriguez of conduct that would disqualify him from service as a

police officer, regardless of whether it was done to further an undercover operation. Because of the public nature of the location at which the alleged undercover operation took place, it is likely that the alleged conduct would be perceived not only as an exercise in bad judgment and misconduct on the job but also as a possible threat to children and other residents who use the park restroom.

"We hold that the assertions that Rodriguez first exposed himself and masturbated in front of Michael are factual and susceptible of being proved true or false. They therefore give rise to an action for slander. Accordingly, we conclude that Michael's interview statements regarding Rodriguez's conduct are provably false assertions of fact and are not shielded as opinion."

CIVIL LIABILITY: Failure To Investigate

Murray v. Fouts, CA8, No. 02-2626, 3/17/03, is an appeal from a successful § 1983 claim for stalking and sexual harassment by a police officer. The City of Onawa, Iowa, was found not to have protected Amy Murray from sexual harassment. The district court awarded her \$7,428 in attorneys' fees. The City appealed, and the Eighth Circuit Court of Appeals affirmed, noting the following:

"Amy Murray began a consensual extramarital affair with Dan Fouts, an officer with the Onawa Police Department. After two months, Amy decided she did

not want to continue the affair and told Officer Fouts their liaison was over. Fouts indicated that he did not consider the affair over and continued to stalk Amy. While in uniform and driving a police squad car, Fouts would drive behind Amy and turn on his lights and siren, causing her to pull over. Fouts would accost Amy and demand that their relationship continue.

"The Murrays went to see Onawa City officials about Fouts' behavior. The Murrays first talked to Jeff Pratt, then Acting Chief of Police. Amy disclosed that Fouts had been following her in a patrol car and pulling her over while in uniform. Pratt responded that he was not in a position to do anything and recommended speaking with Mayor David Sick. Sick explained that he was not going to become involved in the police department's internal affairs. The Murrays finally went to talk to the city attorney, Gary Taylor. Taylor, after hearing Amy's story, opined that she should consider a different route home. The record indicates that no formal action was taken to address the Murrays' requests for an investigation, nor was any other action taken by city officials. Fouts eventually ceased harassing Amy, but only after her husband physically assaulted him.

"Amy Murray filed suit against the City of Onawa and Officer Fouts under 42 U.S.C. § 1983. The jury decided in favor of Officer Fouts but found that the City had violated § 1983 and awarded Amy one dollar. She then moved for attorneys' fees. The district court determined that fees and costs were not warranted in the case against Officer Fouts but

were reasonable against the City. The district court therefore awarded Amy one-half of her attorneys' fees, or \$7,428.25. The City of Onawa appeals both the jury's award and the court's imposition of attorneys' fees.

"The City argues the district court erred by awarding attorneys' fees on a nominal jury award. We review the award of attorneys' fees for an abuse of discretion. Under 42 U.S.C. § 1988, a district court may award attorneys' fees to a party who prevails on a § 1983 action. The district court did not abuse its discretion. First, the amount Amy sought and the amount she received was not an outrageous split. Second, we believe compelling city officials to make at least cursory investigations into serious allegations of police abuse and misconduct are significant legal issues. Finally, we find that a clear public policy is served by this case. Specifically, police departments and cities should be on notice that they cannot ignore allegations of sexual harassment and other abuses. The City should have at least investigated Amy's complaints."

**CIVIL LIABILITY:
Policy of Department;
Failure to Train**

In *Hernandez v. Borough of Palisades Park Police Department*, CA3, No. 02-2210, 1/29/03, Lillian Hernandez, a Hispanic female, lived in the Borough of Palisades Park ("Borough"). The Borough of Palisades Park Police Department

had a policy of encouraging citizens to advise the department when they would be away from home. On February 12, 1993, Ms. Hernandez informed Police Officer Michael Anderson that she would be away from home for a few days and asked him to keep an eye on her residence. Anderson promised that he would do so. However, rather than fulfill his duty to protect Ms. Hernandez's property, Anderson, with the approval of Lt. John Giannantonio, used this opportunity to rob Hernandez's home. The robbery was part of an ongoing string of robberies that were committed by five Borough police officers beginning in 1992.

In 1994, the Police Department began investigating police corruption and turned over its findings to the Bergen County Prosecutor's Office. This investigation resulted in the indictment of Anderson and four other police officers in 1997. Anderson eventually pleaded guilty.

Hernandez filed a complaint against the Borough and its Police Department under 42 U.S.C. § 1983 for violation of her rights pursuant to the First Amendment (violation of privacy), Fourth Amendment (illegal search and seizure), Fifth Amendment (taking) and Fourteenth Amendment (violation of due process and equal protection because the robberies allegedly were committed disproportionately against minority citizens). She alleged that the Police Department and Borough had a custom of committing these robberies and negligently trained and supervised the rogue officers.

The District Court granted summary judgment on behalf of the defendants. The Third Circuit Court of Appeals affirmed this judgment and found as follows:

"The Borough may be liable for the constitutional violations of its police officers only to the extent that the injuries arose from its policies or customs. See, e.g., *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, (1978). The mere fact that Borough employees committed the burglaries is insufficient because municipalities cannot be held liable in a Section 1983 suit under the doctrine of *respondeat superior*. A policy may be made only when a policymaker issues an official proclamation or decision. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990). A 'policymaker' is an individual with final and unreviewable authority to make a decision.

"In this case, both New Jersey statutes and the Borough's own Police Manual establish that the Chief of Police was the relevant policymaker. Although it is clear that there was a series of robberies by police officers in years prior to 1993, the year the Hernandez burglary took place, the robberies were not municipal custom because Hernandez introduced no evidence suggesting that the Chief of Police knew or should have known that his officers were robbing citizens. The mere existence of past robberies in the Borough is insufficient to establish that the Police Chief had constructive knowledge that the robberies were being committed by police officers.

“Neither can Hernandez prevail on her theory that the Borough had a custom of deliberate indifference through failure to train or inadequate supervision. Here, it was hardly obvious that police officers, sworn to uphold the law, would burglarize the homes of the very citizens whom they were duty-bound to protect because they lacked training that instructed them that such activity was unlawful. Here, there is nothing to suggest that there is an inherently high risk that police officers will commit robberies absent ethics training. Thus, the failure to train police officers that they should not commit burglaries, or the failure to supervise them to ensure that they do not commit such felonies, is not so likely to result in a violation of a constitutional right as to demonstrate deliberate indifference by Borough policymakers.”

DRESS CODES

In *Zalewska v. County of Sullivan*, CA2, No. 02-7099, 1/10/03, Grazyna Zalewska was employed by the Sullivan County Transportation Department in Sullivan County, New York, as a van driver. On December 1, 1999, the county instituted a policy mandating that all Department of Transportation employees wear a uniform while working. Its stated purpose was to encourage customers to be more respectful of the drivers, to foster a positive esprit-de-corps among drivers, and to project an overall positive appearance for the County of Sullivan in its ongoing efforts to

promote itself. The required uniform consisted of a shirt, a jacket, and a pair of pants. Pants were mandated because the county believes pants are safer than skirts for the operators of vans.

Upon learning of the new policy, Zalewska, who as a matter of familial and cultural custom had never worn pants in her entire life, asked her supervisor, Transportation Coordinator Terence O’Neill, why she could not wear a skirt. She was told the policy would not be altered and that no exception would be made for her. Nonetheless, when Zalewska went to the private vendor to be fitted for her uniform, she requested and obtained a skirt instead of pants. She explained her action by stating that for her the wearing of a skirt constitutes an expression of a deeply held cultural value. Zalewska worked in her customized uniform for three weeks without incident. On April 17, 2000, her supervisor demanded that she return the skirt, and informed her that she had to wear pants if she wanted to return to work. Subsequently, the county filed charges of misconduct and insubordination against Zalewska, accusing her of refusing to return items that were charged to and paid for by the Transportation Department and of refusing to wear the required uniform to work. Zalewska was suspended from her position as a van driver and transferred to another county department where she still works at the time of this appeal. At her new post, she is allowed to wear a skirt and receives the same pay as she had as a van driver.

In response to the county’s action, Zalewska filed suit in the United States District Court for the Southern District of New York seeking damages under 42 U.S.C. §§1981 and 1983. In her complaint, she alleged that Sullivan County deprived her of her rights to due process and equal protection of the law under the Fourteenth Amendment, and of her right to free expression under the First and Fourteenth Amendments to the United States Constitution. The district court dismissed Zalewska’s claims and granted summary judgment for Sullivan County. Zalewska appeals that judgment and the Second Circuit Court of Appeals affirmed the decision of the district court, finding as follows:

“Zalewska alleges that Sullivan County’s regulation prohibiting van drivers from wearing skirts is a violation of her right to free expression under the First and Fourteenth Amendments. We realize that for Zalewska—as for most people—clothing and personal appearance are important forms of self-expression. For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles, flamboyancy, gender identity, and social status. From the nun’s habit to the judge’s robes, clothing may often tell something about the person so garbed.

“Yet, the fact that something is in some way communicative does not automatically afford it constitutional protection. To determine whether conduct is

expressive and entitled to constitutional protection requires an inquiry into whether the activity is sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendments, *Texas v. Johnson*, 491 U.S. 397 (1989), for not all conduct may be viewed as speech simply because by his or her conduct the actor intends to express an idea. See *Spence v. Washington*, 418 U.S. 405, 409 (1974). To be sufficiently imbued with communicative elements, an activity need not necessarily embody a narrow, succinctly articulable message, *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, (1995), but the reviewing court must find, at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it. Neither of those elements is present here.

“First, the message that Zalewska intends to convey is not a specific message, but rather a broad statement of cultural values. Second, it is difficult to see how Zalewska’s broad message would be readily understood by those viewing her since no particularized communication can be divined simply from a woman wearing a skirt. Although Zalewska’s activity is expressive, it does not constitute the type of expressive conduct which would allow her to invoke the First Amendment in challenging the county’s regulation because the ordinary viewer would glean no particularized message from her wearing of a skirt rather than pants as part of her uniform.

“Zalewska further maintains that Sullivan County’s dress code deprived her of her liberty interest in personal appearance without due process of law in violation of the Fourteenth Amendment. The question is whether Sullivan County unconstitutionally infringed on Zalewska’s liberty interest by mandating that she wear pants on the job. The appropriate standard depends, in part, on context and circumstances. In examining context, courts have found greatly significant the distinction between regulating public employees and regulating members of the public at large. In *Kelley, Comm’r. Suffolk County Police Department v. Johnson*, 425 U.S. 238 (1976), the Supreme Court upheld a police department’s hair and grooming regulation against a challenge similar to the one presented here. The Court noted the wide latitude accorded the government in managing its internal affairs, particularly in regulating a police force.

“Whatever constitutional aspect there may be to one’s choice of apparel generally, it is hardly a matter which falls totally beyond the scope of the demands which an employer, public or private, can legitimately make upon its employees. The county’s dress code is valid unless it is so irrational that it may be branded arbitrary, and therefore a deprivation of Zalewska’s liberty interest. The county need only articulate a legitimate government interest to which its regulation is rationally related. The record before us reflects that the county believes the wearing of a skirt, rather than pants, presents a safety issue for

van operators and the wearing of pants as part of the uniform projects a professional appearance for the drivers, encourages customers to demonstrate respect for County drivers, fosters a positive attitude on behalf of the drivers, and projects an overall positive image for the County of Sullivan.

“We accept that safety, professionalism, and a positive public image are legitimate interests for the county to pursue, and we are not in a position to weigh arguments in favor of and against a pants-only uniform for fear of treading on executive ground. We accept that safety, professionalism, and a positive public image are legitimate interests for the county to pursue. Hence, we defer to the county’s decision and uphold its no-skirt dress code for female van drivers employed by the county.

“We similarly conclude that the dress code did not violate appellant’s right to equal protection of the law.”

**EMPLOYMENT LAW:
At Will Employment;
Policy and
Procedure Manuals**

In *Eddings v. City of Hot Springs*, CA8, No. 02-1895, 3/12/03, Jeff Eddings, a former Hot Springs, Arkansas police officer, appeals the district court’s adverse grant of summary judgment on his 42 U.S.C. § 1983 claims. The claim was based on events surrounding the termination of Mr.

Eddings from his position as a Hot Springs police officer.

The City of Hot Springs hired Mr. Eddings as a police officer in March of 1997. He completed his training and graduated from probationary status in March of 1998. The terms of his employment were set forth in an employee handbook, the *Hot Springs Police Department Policy and Procedures Manual*. The *Manual* provided a review procedure for use by employees following their receipt of adverse employment decisions. The *Manual* did not state that employees could only be terminated for cause.

The following is the decision of the Eighth Circuit Court of Appeals in this case:

“Mr. Eddings alleged that he enjoyed a protected property interest in continued employment and a protected liberty interest in his good name and reputation. He further alleged that the defendants were state actors who violated his Fourteenth Amendment procedural due process rights by depriving him of these protected interests without a pre-termination hearing or a name-clearing hearing. The district court determined that Mr. Eddings had no protected interest in continued employment and that he failed to identify evidence of defamation or damage to his reputation. We agree.

“To determine whether an employee enjoys a protected property interest in continued employment, we look to state law. *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976); *Thompson v. Adams*, 268 F.3d 609, 611 (8th Cir. 2001). In Arkansas, employment is “at-will” unless the employment is

for a fixed term or unless an employee handbook contains an *express provision* against termination except for cause. *Gladden v. Arkansas Children’s Hospital*, 728 S.W.2d 501, 505 (Ark. 1987). Mr. Eddings’ employment was not for a fixed term, and the Hot Springs Police Department Policy and Procedures Manual contained no cause requirement for termination.

“The Manual did provide ‘an absolute right to due process prior to the imposition of a disciplinary action.’ However, such a provision is not sufficient to change the at-will status of an employee under Arkansas law. Applying Arkansas law, we have repeatedly held that a handbook which provides a review procedure does not give rise to an expectation of continued employment, but rather only supports an expectation of a right to participate in the review procedure. *Thompson*, 268 F.3d at 612-13 (8th Cir. 2001); *Hogue v. Clinton*, 791 F.2d 1318, 1324-25 (8th Cir. 1986) (stating that a handbook that provides for a review procedure, creates only an expectancy of review, not of continued employment; the procedures outlined place no significant substantive restrictions on the decision-making. We do not see, then how [the employee] could have harbored anything more than a unilateral expectation of continued employment, insufficient to entitle him to due process protection.) Because Mr. Eddings was an employee at will, he enjoyed no protected interest in continued employment and summary judgment was appropriate as to his deprivation of

property interest procedural due process claim.”

SEARCH AND SEIZURE: Emergency Search

In *United States v. Bradley*, CA9, No. 02-10168, 3/11/03, at approximately 1 a.m. on May 20, 2001, the police stopped David Bradley as he was driving with his girlfriend, Tammie Williams, and her two-year-old daughter. A consensual search revealed methamphetamine in the car and in Williams’ purse. Deputy Sheriff Tim Wetzel arrested both Bradley and Williams, and took Williams’ daughter into protective custody. Wetzel knew from a previous incident involving the defendant that Williams also had a nine-year-old son. When Wetzel asked Williams where her son Christopher was, she told him that he was “at home with a friend.” Wetzel and a second officer, Sergeant Contini, went to the home where Williams and Bradley resided. They knocked on the front door, but nobody answered their knocks.

Wetzel then contacted the officers transporting Williams and asked her again where her son was. This time she said he was across the street with a neighbor. The two officers went across the street and woke the neighbor, who told them that he did not have Christopher. The officers returned to Williams’ house and knocked again on the front door. They then went around to the back of the house, where they found the door unlocked. Wetzel and Contini

opened the back door, announced themselves, and walked into the house. At that time, Christopher came out of the front room. Wetzel walked Christopher to his bedroom to help him get dressed so he could be taken into protective custody, and Wetzel walked through the house to see if anyone else was there. As he went through the house, Wetzel observed a cash register, with a severed electrical cord, that looked as if it belonged in a retail gun store. He also observed a cup with hypodermic needles sticking out of it sitting on a desk.

While Sergeant Contini drove Williams' two children to a receiving home, Wetzel phoned in his observations to another detective, who used the information to obtain a search warrant to search for the cash register and other drug evidence. After the search warrant was signed, Wetzel and other officers began to search the residence. One of the items the search revealed was a firearm in a drawer in the master bedroom. Because Bradley had previous felony convictions, he was indicted for possession of a firearm.

Bradley moved to suppress the evidence seized during the execution of the search warrant. The district court denied Bradley's motion to suppress the evidence. It found that the officers' warrantless entry into the home was justified under the emergency doctrine and was not in violation of the Fourth Amendment. Bradley appealed to the Ninth Circuit Court of Appeals, who affirmed and found as follows:

"...The emergency doctrine is derived from the police officers' community caretaking function. The United States Supreme Court recognized this function in *Mincey v. Arizona*, 437 U.S. 385, 392 (1978), when it acknowledged the right of police to respond to emergencies. In *Mincey*, the Court reasoned that an entry or search that would otherwise be barred by the Fourth Amendment may be justified by the need to protect life or avoid serious injury.

"The appropriateness of the emergency doctrine is best understood in light of the particular facts of a case in which it is invoked. The officers here knew that Christopher's mother was not caring for him, and they could not locate him in the places she said he was. They were also unaware of the safety conditions inside the house. The possibility of a nine year-old child in a house in the middle of the night without the supervision of any responsible adult is a situation requiring immediate police assistance.

"The record reflects that the officers acted out of a genuine concern for Christopher's welfare. Wetzel specifically testified that he entered the house to determine if Christopher was being supervised by a responsible adult. Additionally, before the officers entered the house, they took several other steps. They knocked at the front door first, asked Williams again where Christopher was, and went across the street to wake up a neighbor and ask him about the boy. This evidence supports the district court's finding that the officers' entry was motivated by a concern for Christopher's welfare.

Thus, we agree that Wetzel and Contini's entry was lawful.

"Bradley contends that even if the entry itself was lawful, the officers' 'protective sweep' conducted inside the house was in violation of the Fourth Amendment. In fact, the record does not reflect that in obtaining the warrant, the officers made use of any information they may have obtained in the course of any intrusive search. Rather, the record reflects that the officers lawfully walked through the house in order to assist Christopher in dressing. All of the evidence described in the search warrant to establish probable cause for the subsequent search was in plain view. Thus, the use of the evidence was lawful."

**SEARCH AND SEIZURE:
Search by
Private Person;
Computer Hacker**

In *United States v. Steiger*, CA11, No. 01-15788, 1/14/03, the Montgomery, Alabama Police Department (MPD) initiated an investigation of Brad Steiger when an unidentified person ("anonymous source") sent the following e-mail on July 16, 2000:

I found a child molester on the net. I'm not sure if he is abusing his own child or a child he kidnaped. He is from Montgomery, Alabama. As you see he is torturing the kid. She is 5-6 y.o. His face is seen clearly on some of the pictures. I know his name, internet account, home

address and I can see when he is online. What should I do? Can I send all the pics and info I have to these emails?

Regards

P.S. He is a doctor or a paramedic.

The anonymous source attached to this e-mail a picture of a white male sexually abusing a young white female who appeared to be approximately four to six years of age.

On July 17, 2000, Captain Kevin Murphy of the MPD replied, asking the anonymous source to call him at his office. The source responded that he was from Turkey and could not afford an overseas phone call but could send everything by e-mail. Captain Murphy then sent an e-mail stating: "Please feel free to send the information that you have." The source next sent an e-mail with eight attached images showing an adult white male nude from the waist down fondling and pressing the young girl against his body in various positions and exposing her genitalia. One picture depicted clamps connected to a chain attached to the child's labia. The girl was nude in several photographs and partially dressed in others. The anonymous e-mail again identified the molester as "Brad Steiger," and provided Steiger's Internet service account information with AT&T WorldNet, possible home address, telephone number used to connect to the Internet, and a fax number.

The anonymous source also informed Captain Murphy that he had Steiger's IP number, also known as an Internet Protocol (IP) address, the unique address assigned to a particular computer connected to the Internet. All computers connected to the Internet have an IP address.

Captain Murphy viewed the eight images and, on July 19, asked the source to send Steiger's IP address. The source sent three IP addresses used by Steiger on July 14 and 15; thus, it appears that Steiger's Internet Service Provider assigned dynamic IP addresses for each login. Apparently without being asked to do so, the source sent an e-mail to the MPD on July 19 providing Steiger's checking account records. On July 21, the source sent another e-mail that identified specific folders where pornographic pictures were stored on Steiger's computer.

Captain Murphy collected the information the source provided and referred it to Special Agent Margaret Faulkner of the FBI, who viewed the images and verified the details the anonymous source provided in his first two e-mails. She issued a subpoena to Security at AT&T Worldnet Service, who advised Agent Faulkner that the Internet account the anonymous source referred to was registered to a Brad Steiger at the home address the source provided. Agent Faulkner then performed an Alabama Driver's License check and obtained a "photo ID" copy of the license issued to a "Bradley Joseph Steiger." She concluded that the photo "appeared identical to the white male subject depicted in the photographs with the young

girl." She also checked with the Alabama Medical Board and determined that a "Brad Steiger" had a license to dispense medicine as a practitioner in Alabama and had worked as an emergency room physician in Montgomery. Agent Faulkner went to the hospital where the Medical Board indicated Steiger had been working and showed one of the pictures of Steiger with the young girl. A security officer identified the man as Brad Steiger, a doctor who had been seen around the hospital on occasion. Agent Faulkner then learned that Steiger had become employed by a hospital in Selma, Alabama. She also discovered that Steiger then resided at an address different from the one the source supplied.

Agent Faulkner next prepared an affidavit in support of a search warrant in which she stated that "an anonymous source...had located a child molester on the Internet." The affidavit described the pictures the anonymous source sent on July 17 without mentioning that the source had obtained the evidence by "hacking" into Steiger's computer. Agent Faulkner also described in the affidavit the steps she took to corroborate the information the anonymous source provided. After obtaining a warrant, law enforcement officers searched Steiger's home and seized his computer and related equipment, as well as leg restraints, clamps connected to a chain, and what appeared to be a blindfold.

A federal grand jury returned an indictment against Steiger on November 9, 2000, charging violation of various federal statutes

involving sexual exploitation of minors. Steiger filed several motions to suppress, claiming, that: (1) the evidence asserted in support of the search warrant was obtained in violation of the Fourth Amendment; (2) Agent Faulkner failed sufficiently to corroborate the information the source supplied; (3) Agent Faulkner intentionally omitted material evidence from her affidavit by failing to inform the magistrate that the source had obtained the information by hacking into Steiger's computer; and (4) the information the source obtained was inadmissible under the Wiretap Act. A magistrate judge recommended denial of Steiger's first motion to suppress. The district court adopted the magistrate's findings and denied the motion.

An FBI agent stationed in Turkey attempted to interview the source at the end of November 2000 to determine how he had acquired the information regarding Steiger that he sent to the MPD. The source was adamant about not revealing his identity, but explained in an e-mail on November 30, 2000, how he obtained that information:

I will not tell you my name or meet you...If I tell you my name and make an official interview with you, that guy and his lawyer will know all about me so I will have an overseas enemy.

I'm not a computer freak. I'm a 33 years [sic] old professional. I have a family. I don't want to risk my peace because of a hobby. I'll

answer some of your possible questions.

Do [sic] I know him before? No. I caught [sic] at least 2000 child pornography collectors with my trap. 3 of them including this guy was [sic] producing their own. The other two realized whats [sic] going on and cut the connection.

How did I know his home address, his fax number, etc? I couldn't find him on white pages so I searched all the ms word documents in his pc and found this document... How did I get access to his pc?

I used the well known trojan horse named subseven. . . . I made it undetectable so av softwares [sic] couldnt [sic] see it and bind it with a fake program. After this I posed it to a news group where one can find 1000s of sick people.

If you have any more questions, just mail me. I tell you again "I WILL NEVER TELL YOU MY NAME AND NEVER MEET YOU."

After Steiger downloaded the fake picture the source posted to the news group, the Trojan Horse program permitted the source to enter into Steiger's computer via the Internet and find the images and identifying information he sent to the MPD.

The Court of Appeals for the Tenth Circuit stated that a search

by a private person does not implicate the Fourth Amendment unless he acts as an instrument or agent of the government. *United States v. Ford*, 765 F.2d 1088, 1090 (11th Cir. 1985).

For a private person to be considered an agent of the government, we look to two critical factors: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor's purpose was to assist law enforcement efforts rather than to further his own ends. *See United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990) (citing *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)).

"The district court's finding of probable cause for the search warrant was based on the information provided in the anonymous source's first and second e-mails, together with Agent Faulkner's affidavit describing how she personally corroborated that information. The information conveyed in those two e-mails was limited to that which the source had acquired *before* making *any* contact with the MPD. Thus, even assuming that the MPD tacitly encouraged further nonconsensual searches, the information relied on in support of the warrant—graphic images showing Steiger sexually abusing a young child and identifying information regarding Steiger which Agent Faulkner thoroughly corroborated—more than sufficed to establish probable cause.

"We also reject Steiger's argument for suppression based on Agent Faulkner's failure to advise the judge who issued the warrant

how the source obtained the information he sent to the MPD. Steiger asserts that no judge would have found probable cause knowing that the source had hacked into his computer. But he supplies no authority for this assertion. To justify suppression of evidence seized under a warrant, the alleged deliberate or reckless failure to include material information in the affidavit must conceal information that would defeat probable cause. *See United States v. Cross*, 928 F.2d 1030, 1040 (11th Cir. 1991); *see also United States v. Jenkins*, 901 F.2d 1075, 1080 (11th Cir. 1990) (Minor or immaterial omissions from the affidavit will not invalidate a warrant where the omitted information, if furnished, would not have precluded a finding of probable cause.) And we must give ‘great deference’ to a lower court’s determination that the totality of the circumstances supported a finding of probable cause. *United States v. Brundidge*, 170 F.3d 1350, 1352 (11th Cir. 1999).

“Agent Faulkner put the magistrate judge on notice regarding the manner in which she had received the information asserted in support of the warrant—*i.e.*, that it came from an anonymous source who claimed to have found a child molester on the Internet. Because information obtained by a private person is not subject to the Fourth Amendment’s exclusionary rule, a statement that the anonymous source had hacked into Steiger’s computer to obtain that information would not have affected the magistrate’s finding of probable cause.”

The Tenth Circuit Court of Appeals also held that the anonymous source did not intercept electronic communications in violation of the Wiretap Act. The Court also held that the Wiretap Act provides no basis for moving to suppress the information gathered through the Trojan Horse program.

SEARCH AND SEIZURE: Show of Hands

In *United States v. Enslin*, CA9, No. 02-50087, 1/13/03, United States Marshals were searching a residence for a fugitive, Mickey Bass. The Marshals entered a back bedroom and observed Bobby Der Enslin in bed. Concerned for their safety while they searched the room for Bass, Maddry and Kitts ordered Enslin to show his hands. The record indicates that the marshals likely had their hands on their weapons at the time. When Enslin put his hands in the air and began to sit up, his movement shifted the covers and the marshals could see a gun in the bed next to him. The marshals drew their weapons and placed Enslin under arrest. Only later did they learn that Enslin was on parole. He was charged subsequently and convicted of being a felon in possession of a firearm.

Enslin made several arguments including one that the “show hands order” was a seizure. The Ninth Circuit of Appeals concluded that the marshal’s order was a seizure but stated that this did not end the inquiry:

“The Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. The marshals’ order to Enslin to show his hands, although technically a seizure, does not violate the Fourth Amendment because it was not an unreasonable seizure under the circumstances. The obligation placed upon Enslin to reveal his hands for officer safety during the search for a fugitive was minimal and thus constitutionally reasonable.

“Any inquiry into the reasonableness of a seizure requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake. In this case, that balance affirmatively favors the Government’s interest in officer safety, leading us to conclude that the marshals’ order was constitutional. On Enslin’s side of the balance, requiring an individual to reveal his hands does force him to show a part of his person that was otherwise concealed. However, the nature and quality of the intrusion are minimal.

“On the Government’s side of the balance, we have the substantial and important interest in preserving officer safety. The marshals were searching an unfamiliar residence for a fugitive. During their search, they came across an unknown adult male. They knew the man was not the fugitive and requested that he reveal his hands. In *Michigan v. Summers*, 452 U.S. 692 (1981) the Supreme Court held that, during a house search, the risk of harm to both the police and the occupants

is minimized if the officers routinely exercise unquestioned command of the situation. Further, in *United States v. Garcia*, 997 F.2d 1272 (9th Cir. 1993), we held that officers may restrain an individual by placing him against a wall even during a consent search of a house while the officers completed a protective sweep. Compared to restraining an individual up against a wall during a protective sweep, it is clear that merely requiring an individual to show his hands while the marshals complete their search of a single room is a less significant intrusion into the individual's liberty.

"Therefore, upon conducting the required balancing of interests pursuant to the Fourth Amendment, we conclude that the balance substantially favors the Government's interest in preserving officer safety during a consent search for a fugitive. Enslin does have a minimal liberty interest in keeping his hands beneath the covers while the marshals searched the room, just as a driver or passenger in a vehicle has a minimal liberty interest in remaining inside the vehicle during the stop. However, similar to the mere inconvenience of being ordered out of the vehicle, being required to show one's hands is simply too small an intrusion into Enslin's liberty to overcome the weighty interest in protecting officer safety. Because the marshals' order to Enslin to show his hands was a constitutionally reasonable seizure, the district court correctly refused to suppress the gun that the marshals saw in plain view after Enslin complied with their order."

SEARCH AND SEIZURE: Stop and Frisk; Flight

In *United States v. Franklin* CA11, No. 01-15562, 3/12/03, the Riviera Beach Police Department Special Response Team (SRT)—a Special Weapons and Tactics (SWAT) team—was patrolling the "problem areas" of the city for drinking, loitering, drug-trafficking, trespassing, and crowd control. The team traveled in a two-vehicle caravan: a marked van followed by a sport utility vehicle. The team members were dressed in their SRT uniforms including body armor, boots, fatigues, and side arms.

At approximately 10:15 p.m., the team noticed Louis Franklin. He was standing, by himself, underneath a "no loitering" sign in front of a Chinese take-out restaurant. The officers decided to ask Franklin what he was doing. They pulled up in front of Franklin and stopped. The officers began to step out of the van.

As soon as he saw the officers, Franklin ran away. Two of the SRT officers, Detective Newton and Officer Mammino, gave chase. Franklin ran around the side of the building and climbed a chain link fence. After climbing the fence, he ran diagonally across a parking lot and began to scale a second fence. Detective Newton caught Franklin as he was attempting to climb the second fence.

As Franklin was struggling with Detective Newton, Franklin attempted to reach for something in his waistband. Newton thought

it might be a weapon. Officer Mammino arrived and helped Newton secure Franklin, handcuff him, and move him to a lighted area. The officers asked Franklin why he had run. He said that he had an outstanding arrest warrant. Officer Mammino searched Franklin and found two bags of marijuana and a pill bottle containing 18.5 grams of crack cocaine. Detective Newton searched the area around the second fence; he found Franklin's hat and 106 small zipped plastic bags containing a white powder which tested positive for cocaine.

Franklin argues the district court erred when it denied his motion to suppress claiming the police officers lacked reasonable suspicion to stop him and, therefore, the drugs found both at the scene and on his person are inadmissible. The Eleventh Circuit Court of Appeals found as follows:

"The Supreme Court has said flight is a relevant consideration for a finding of reasonable suspicion. Our cases agree that flight is an appropriate consideration. See *United States v. Gordon*, 231 F.3d 750, 756 (11th Cir. 2000)('It is the powerful evidence of flight that drives the district court's findings and dictates the outcome of this appeal.');

United States v. Hunter, 291 F.3d 1302, 1306 (11th Cir. 2002). While flight is not proof of wrongdoing, it is indicative of such. Innocent persons might run from police officers, but flight creates an ambiguity and the officers may stop the person to resolve the ambiguity.

"Franklin's flight was particularly suspicious because of its nature and its duration. He ran

away at full speed as soon as he saw the officers. He did not turn and start to walk away. He did not act like he was going about his business. Instead he took off in 'headlong' flight. While any kind of flight, even walking away, might support a finding of reasonable suspicion, headlong flight—wherever it occurs—is the consummate act of evasion.

"The duration of Franklin's flight is also significant. He ran behind the building, climbed a fence, sprinted across a parking lot and began to scale a second fence. While initially his flight might have indicated that he was just trying to remove himself from a potentially dangerous situation, at some point between when he cleared the first fence and started to scale the second, his flight more clearly indicated his potential involvement in wrongdoing and his desire to evade the police. We believe this flight—combined with the other factors—gave the officers reasonable suspicion to stop Franklin.

"Franklin argues that his flight cannot be considered because it was provoked by the SRT's 'unreasonable show of force.' We accept that officers cannot improperly provoke—for example, by fraud—a person into fleeing and use the flight to justify a stop. *Wong Sun v. United States*, 83 S.Ct. 407, 415 (1963). We believe Franklin's flight—fast and far—was not provoked improperly. We must ask whether a reasonable and innocent person facing this situation would have been caused to flee in the same manner as Franklin. Taking the facts in the light most favorable to the

government, as we must, we believe a reasonable person would not have fled in this dramatic manner.

"The officers approached in a clearly marked police van. They were wearing SRT uniforms, including boots and body armor. While these uniforms are distinctive, they are recognized as police uniforms. The officers wore sidearms, like most police officers, but they never drew them. The van pulled up and came to a normal stop. The door opened, and the officers began to step out.

"While we recognize that a SWAT team can sometimes be intimidating, nothing was extraordinary about how the team arrived. A reasonable person could have believed the team was arriving to place an order at the Chinese restaurant. While a reasonable person might have believed the team's arrival indicated some imminent violence (a possibility, we suppose, when a SWAT team is involved), we cannot say a reasonable person would have reacted like Franklin. A reasonable person might have dropped to the ground. A reasonable person might have moved away from the building. But Franklin's flight went further, he continued to flee vigorously after he had removed himself from the immediate area, that is, from what might have been reasonably perceived as the zone of danger. His sustained flight suggested it was from the law instead of from a perceived place of danger.

"Because we conclude the facts here would not have caused a reasonable person to flee like Franklin, we cannot say this flight

was wrongfully provoked. So, his flight can, be considered to support reasonable suspicion. Considering Franklin's flight (including its 'headlong' nature and its duration), and his presence in a 'problem area,' at night, directly underneath a 'no loitering' sign, the officers had reasonable suspicion to conduct a brief investigatory stop."

**SEARCH AND SEIZURE:
Stop and Frisk;
Use of a Twist Hold**

In *United States v. Novitsky*, CA10, No. 02-1310, 2/11/03, the Aurora, Colorado police department received a "man down" call requesting a check on the welfare of an apparently unconscious man leaning out of a car parked in a YMCA parking lot. Officers Michael Wortham and Paul Marshall arrived at the scene and observed a man, seemingly unconscious, hanging out of an open front passenger door. As they approached, the officers noticed another man, later identified as Sergey Novitsky, lying in the back seat in a fetal position on his left side with his feet towards the open door.

While Officer Marshall remained near the rear passenger door of the car, Officer Wortham roused the man in the front seat, who smelled of alcohol, slurred his speech, and had difficulty standing. After assisting him out, Officer Wortham frisked the passenger and sat him down on the pavement in front of the car. Officer Wortham then awoke Novitsky by tapping on the window and

directed him to get out of the car. Although the car smelled of alcohol, Officer Wortham did not know whether Novitsky was intoxicated.

Novitsky reached up with his right hand as though to grasp the car door and help himself out. As he did so, Officer Wortham grasped Novitsky's hand in a "twist lock" also known as the "escort" or "pain compliance" position, which he applied primarily to control Novitsky's actions and to assist him out of the car.

As described by Officer Wortham, the pain compliance hold is an arrest control technique taught at the police academy in which an officer grasps an individual by the hand and twists to tighten up the arm. The hold permits the officer to twist the arm further if an individual begins to fight or otherwise resists. According to Officer Wortham's testimony, the twist hold divides the individual's attention: "the mind starts thinking about the pain in the arm instead of what they are going for or what they are doing...that way you can basically distract them and get them out of the vehicle without having further problems." Once the twist hold is applied, a person would not be able to walk away. Because in this case Novitsky did not resist, Officer Wortham did not apply pressure beyond the basic twist lock position. He did not have any evidence or suspicion that Novitsky had committed a crime, that he was armed, or that he posed a threat to the officers' safety.

As Novitsky got out of the car, Officer Wortham began to turn him around to perform a pat-down

search. Almost immediately, the officer observed a handgun in Novitsky's right front pocket. Officer Wortham yelled "gun," and Novitsky exclaimed, "It's a toy, it's a toy." A loaded Smith & Wesson .44 caliber pistol was removed from Novitsky's pocket. The district court found Officer Wortham discovered the weapon upon turning Novitsky around to conduct the pat-down search, not afterward.

Sergey Novitsky was charged in a one count indictment with felon in possession of a firearm. He moved to suppress the weapon on Fourth Amendment grounds. After a motions hearing, at which the Government offered the testimony of an agent not present when the gun was discovered, the district court denied Novitsky's motion.

At trial, Officer Wortham testified that utilizing a procedure he considered "standard," he applied the twist hold as Novitsky exited the vehicle. Upon motions by both parties, the court granted a mistrial, calling for a re-examination of the suppression issue to consider whether Officer Wortham reasonably applied the pain compliance hold. After a subsequent evidentiary hearing, the district court granted Novitsky's motion to suppress, finding Officer Wortham acted unreasonably in using the twist hold to draw Novitsky out of the vehicle and turn him around for a pat-down. The court suppressed the firearm, as well as Novitsky's "it's a toy" statement, as direct and immediate fruits of the illegal seizure. Now, the Tenth Circuit Court of Appeals has found as follows:

"This case is analyzed under the framework of *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Under *Terry*, a police officer in certain circumstances may detain a person for an investigation on less than probable cause and, if appropriate, conduct a protective search for weapons. To determine reasonableness, a court asks whether the officer's action is 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the inference in the first place.' *Terry*, 392 U.S. at 20.

"To justify a detention, a 'police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' A protective search is justified at its inception if the officer harbors the articulable and reasonable suspicion that the person is armed and dangerous. The court employs an objective standard in reviewing the propriety of the use of a forceful technique, asking would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate. *Terry*, 392 U.S. at 21-22 [*citing Beck v. State of Ohio*, 379 U.S. 89, 96-97 (1964)].

"The Supreme Court has recognized that police officers are permitted and expected to carry out community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. In this case, the report of a 'man down,' coupled with the discovery

of two people asleep or passed out in a car, authorized the officers to check their condition. Novitsky concedes the officers properly roused him and ordered him out of the vehicle.

“The narrow issue presented in this case is whether Officer Wortham acted reasonably in applying the twist hold to Sergey Novitsky as he removed him from the car.

“Although the district court found the initial stop justified, it held the use of a control hold in this case was unreasonable. The court quoted at length the officers’ cross-examination testimony, including their ‘no’ responses to questions about whether they had evidence or suspected a crime had been committed, that Novitsky was engaged in criminal behavior, or that he posed a threat to their safety. The court noted Officer Wortham placed Novitsky in a control hold with the intent of performing a pat-down search.

“As Officer Wortham testified, and the district court correctly noted, there was no evidence a crime had occurred, that Novitsky had engaged in criminal activity, or that he posed a threat to the officers’ safety. Sergey Novitsky did not resist Officer Wortham in any way; in fact, his demeanor was apparently benign, as he had begun to help himself out of the car when the twist hold was applied. That the use of a pain compliance hold to extract an individual from a car was a standard procedure, that the officers had, as usual, a general concern for their safety, and that the pressure applied to Novitsky was minimal, do not suggest an officer of reasonable caution

would believe the use of the twist control grip was warranted in this case. Further, although the court noted Officer Wortham’s intent to conduct a pat down search, its Fourth Amendment violation finding was based upon the absence of Novitsky’s criminal activity, resistance, or threat, not upon the officer’s intentions.”

SEX OFFENDER REGISTRATION ACT

In *Smith v. Doe*, No. 01-729, 3/5/03, the United States Supreme Court deal with the Alaska Sex Offender Registration Act. Under this Act, any sex offender or child kidnapper incarcerated in the State must register with the Department of Corrections within 30 days before his release, providing his name, address, and other specified information. If the individual is at liberty, he must register with local law enforcement authorities within a working day of his conviction or of entering the State. If he was convicted of a single, non-aggravated sex crime, the offender must provide annual verification of the submitted information for 15 years. If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender’s information is forwarded to the Department of Public Safety, which maintains a central registry of sex offenders. Some of the data, such as fingerprints, driver’s license number, anticipated change of address, and whether the offender

has had medical treatment afterwards is kept confidential. The offender’s name, aliases, address, photograph, physical description, driver’s license number, motor vehicle identification numbers, place of employment, date of birth, crime, date and place of conviction, length and conditions of sentence, and a statement as to whether the offender is in compliance with the Act’s update requirements or cannot be located are, however, published on the Internet. Both the Act’s registration and notification requirements are retroactive.

The defendants in *Smith v. Doe* were both convicted of aggravated sex offenses. Both were released from prison and completed rehabilitative programs for sex offenders. Although convicted before the Act’s passage, they are covered by it. After the initial registration, they are required to submit quarterly verifications and notify the authorities of any changes. Both of the defendants, along with the wife of one of them, brought this action under 42 U.S. C. §1983, seeking to declare the Act void as to them under, *inter alia*, the *Ex Post Facto* Clause, U.S. Const., Art. I, §10, cl. 1. The District Court granted petitioners summary judgment. The Ninth Circuit disagreed in relevant part, holding that, because its effects were punitive, the Act violates the *Ex Post Facto* Clause.

The United States Supreme Court, overruling the Ninth Circuit Court of Appeals, stated:

“The Alaska Legislature’s intent was to create a civil, nonpunitive regime. The statutory

text states the legislature's finding that sex offenders pose a high risk of reoffending, identifies protecting the public from sex offenders as the law's primary interest, and declares that release of certain information about sex offenders to public agencies and the public will assist in protecting public safety. This Court has already determined that an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective. There is nothing on the statute's face that suggests the legislature sought to create anything other than a civil scheme designed to protect the public from harm.

"The question here is not whether the legislature has made the best choice possible to address the problem it seeks to remedy, but whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard."

In *Connecticut Department of Public Safety v. Doe*, No. 01-1231, 3/5/03, Connecticut's "Megan's Law" requires persons convicted of sexual offenses to register with the Department of Public Safety (DPS) upon their release into the community and requires DPS to post a sex offender registry containing registrants' names, addresses, photographs, and descriptions on an Internet Website that is available to the public in certain state offices. A convicted sex offender who is subject to the law filed a 42 U.S.C. § 1983 action on behalf of himself and similarly situated sex offenders, claiming that the law violates the Fourteenth

Amendment's Due Process Clause. The District Court granted summary judgment and permanently enjoined the law's public disclosure provisions. The Second Circuit affirmed, concluding that such disclosure both deprived registered sex offenders of a "liberty interest," and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be "currently dangerous."

The United States Supreme Court reversed the Second Circuit Court of Appeals because "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme. Mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. Due process does not entitle an individual to a hearing to establish a fact—that he is not currently dangerous—that is not material under the statute. The law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest."

SUBSTANTIVE LAW: Conspiracy Termination

In *United States v. Recio*, No. 01-1184, 1/21/03, the United States Supreme Court considers the validity of a Ninth Circuit rule that a conspiracy ends automatically when the object of the conspiracy becomes impossible to achieve—

when, for example, the Government frustrates a drug conspiracy's objective by seizing the drugs that its members have agreed to distribute. In the Court's view, however, conspiracy law does not contain any such "automatic termination" rule.

On November 18, 1997, police stopped a truck in Nevada. They found, and seized, a large stash of illegal drugs. With the help of the truck's two drivers, they set up a sting. The Government took the truck to the drivers' destination, a mall in Idaho. The drivers paged a contact and described the truck's location. The contact said that he would call someone to get the truck. Three hours later, the two defendants, Francisco Jimenez Recio and Adrian Lopez-Meza, appeared in a car. Jimenez Recio drove away in the truck; Lopez-Meza drove the car away in a similar direction. Police stopped both vehicles and arrested both men.

A federal grand jury indicted Jimenez Recio, Lopez-Meza, and the two original truck drivers, charging them with having conspired, together and with others, to possess and to distribute unlawful drugs. A jury convicted all four. But the trial judge then decided that the jury instructions had been erroneous in respect to Jimenez Recio and Lopez-Meza. The judge noted that the Ninth Circuit had held that the Government could not prosecute drug conspiracy defendants unless they had joined the conspiracy before the Government seized the drugs. That holding, as applied here, meant that the jury could not convict Jimenez Recio and Lopez-

Meza unless the jury believed they had joined the conspiracy before the Nevada police stopped the truck and seized the drugs. The judge ordered a new trial where the jury would be instructed to that effect. The new jury convicted the two men once again.

Jimenez Recio and Lopez-Meza appealed. They pointed out that the jury had to find that they had joined the conspiracy before the Nevada stop, and they claimed that the evidence was insufficient at both trials to warrant any such jury finding. The Ninth Circuit panel agreed. The government sought certiorari, and the U.S. Supreme Court found as follows:

“The Ninth Circuit has held that a conspiracy continues until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy. The critical portion of this statement is the last segment—that a conspiracy ends once there has been defeat of its object. The Circuit’s holdings make clear that the phrase means that the conspiracy ends through ‘defeat’ when the Government intervenes, making the conspiracy’s goals impossible to achieve, even if the conspirators do not know that the Government has intervened and are totally unaware that the conspiracy is bound to fail. In our view, this statement of the law is incorrect. A conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has defeated the conspiracy’s object.

“Two basic considerations convince us that this is the proper view of the law. First, the Ninth

Circuit’s rule is inconsistent with our own understanding of basic conspiracy law. The Court has repeatedly said that the essence of a conspiracy is ‘an agreement to commit an unlawful act.’ *Iannelli v. United States*, 420 U. S. 770, 777 (1975); see *United States v. Shabani*, 513 U. S. 10, 16 (1994); *Braverman v. United States*, 317 U. S. 49, 53 (1942). That agreement is ‘a distinct evil,’ which may exist and be punished whether or not the substantive crime ensues. *Salinas v. United States*, 522 U. S. 52, 65 (1997). The conspiracy poses a threat to the public over and above the threat of the commission of the relevant substantive crime—both because the combination in crime makes more likely the commission of other crimes and because it decreases the probability that the individuals involved will depart from their path of criminality. Where police have frustrated a conspiracy’s specific objective but conspirators, unaware of that fact, have neither abandoned the conspiracy nor withdrawn, these special conspiracy-related dangers remain. So too remains the essence of the conspiracy—the agreement to commit the crime. That being so, the Government’s defeat of the conspiracy’s objective will not necessarily and automatically terminate the conspiracy.

“Second, the view we endorse today is the view of almost all courts and commentators but for the Ninth Circuit. No other Federal Court of Appeals has adopted the Ninth Circuit’s rule. Three have explicitly rejected it. In *United States v. Wallace*, 85 F. 3d 1063,

1068 (CA2 1996), for example, the court said that the fact that a ‘conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant.’ One treatise, after surveying lower court conspiracy decisions, has concluded that ‘impossibility of success is not a defense.’ 2 LaFave & Scott, *Substantive Criminal Law* §6.5, at 85. And the American Law Institute’s *Model Penal Code* §5.03, p. 384 (1985) would find that a conspiracy ‘terminates when the crime or crimes that are its object are committed or when the relevant agreement...is abandoned.’ It would not find ‘impossibility’ a basis for termination.

“It is argued that the more traditional termination rule threatened endless potential liability. To illustrate the point, the majority talked about a sting in which police instructed an arrested conspirator to go through the telephone directory and call all of his acquaintances to come and help him, with the Government obtaining convictions of those who did so. The problem with this example, however, is that, even though it is not necessarily an example of entrapment itself, it draws its persuasive force from the fact that it bears certain resemblances to entrapment. The law independently forbids convictions that rest upon entrapment. This example fails to explain why a different branch of the law, conspiracy law, should be modified to forbid entrapment-like behavior that falls outside the bounds of current entrapment law. At the same time, the Ninth Circuit’s rule would reach well beyond arguable police mis-

behavior, potentially threatening the use of properly run law enforcement sting operations. See *Lewis v. United States*, 385 U. S. 206, 208-209 (1966) (Government may 'use decoys' and conceal agents' identity); see also M. Lyman, *Criminal Investigation* 484-485 (2d ed. 1999) (explaining the importance of undercover operations in enforcing drug laws).

"We conclude that the Ninth Circuit's conspiracy-termination law holding erroneous. Because Jimenez Recio and Lopez-Meza have raised other arguments not here considered, we remand the case, specifying that the Court of Appeals may consider those arguments, if they were properly raised. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion."

THREE STRIKE LAWS

In *Ewing v. California*, No. 01-6978, 3/5/03, the United States Supreme Court had to decide whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's "Three Strikes and You're Out" law.

On parole from a 9-year prison term, petitioner Gary Ewing walked into the pro shop of the El Segundo Golf Course in Los Angeles County on March 12, 2000. He walked out with three golf clubs, priced at \$399 apiece, concealed in his pants leg. A shop employee, whose suspicions were aroused when he observed Ewing

limp out of the pro shop, telephoned the police. The police apprehended Ewing in the parking lot.

Ewing is no stranger to the criminal justice system. In 1984, at the age of 22, he pleaded guilty to theft. The court sentenced him to six months in jail (suspended), three years' probation, and a \$300 fine. In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. After Ewing completed probation, however, the sentencing court reduced the crime to a misdemeanor, permitted Ewing to withdraw his guilty plea, and dismissed the case. In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. One month later, he was convicted of theft and sentenced to 10 days in the county jail and 12 months' probation. In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to 10 days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.

In October and November 1993, Ewing committed three

burglaries and one robbery at a Long Beach, California, apartment complex over a 5-week period. He awakened one of his victims, asleep on her living room sofa, as he tried to disconnect her video cassette recorder from the television in that room. When she screamed, Ewing ran out the front door. On another occasion, Ewing accosted a victim in the mailroom of the apartment complex. Ewing claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to the apartment itself. While Ewing rifled through the bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim's money and credit cards.

On December 9, 1993, Ewing was arrested on the premises of the apartment complex for trespassing and lying to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. A jury convicted Ewing of first-degree robbery and three counts of residential burglary. Sentenced to nine years and eight months in prison, Ewing was paroled in 1999.

Only 10 months later, Ewing stole the golf clubs at issue in this case. He was charged with, and ultimately convicted of, one count of felony grand theft of personal property in excess of \$400. See Cal. Penal Code Ann., §484 (West Supp. 2002); §489 (West 1999). As required by the three strikes law, the prosecutor formally alleged, and the trial court later found, that Ewing had been convicted

previously of four serious or violent felonies for the three burglaries and the robbery in the Long Beach apartment complex. See §667(g) (West 1999); §1170.12(e) (West Supp. 2002).

At the sentencing hearing, Ewing asked the court to reduce the conviction for grand theft, a “wobbler” under California law, to a misdemeanor so as to avoid a three strikes sentence. See §17(b) (West 1999); §667(d)(1); §1170.12(b)(1) (West Supp. 2002). Ewing also asked the trial court to exercise its discretion to dismiss the allegations of some or all of his prior serious or violent felony convictions, again for purposes of avoiding a three strikes sentence.

See *Romero*, 13 Cal. 4th, at 529–531, 917 P. 2d, at 647–648. Before sentencing Ewing, the trial court took note of his entire criminal history, including the fact that he was on parole when he committed his latest offense. The court also heard arguments from defense counsel and a plea from Ewing himself.

In the end, the trial judge determined that the grand theft should remain a felony. The court also ruled that the four prior strikes for the three burglaries and the robbery in Long Beach should stand. As a newly convicted felon with two or more “serious” or “violent” felony convictions in his past, Ewing was sentenced under

the three strikes law to 25 years to life.

The United States Supreme Court found enhanced sentences under recidivist statutes like the three strikes law, serve the “legitimate goal” of deterring and incapacitating repeat offenders. The Court concluded that Ewing’s sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.



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