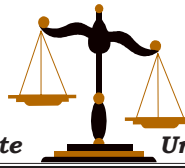




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CIVIL LIABILITY: Deliberate Indifference in High-Speed Police Response to Call

In *Terrell v. Larson*, CA8, No. 03-1293, 6/10/04, on December 29, 2000, at 10:00 p.m., the Anoka County 911 service received a call stating that the caller's wife had locked herself and their three-year-old son in a bedroom and was threatening to run off with the child. The caller stated that the situation was not an emergency, but he was concerned about his son's well-being. At 10:05 p.m., the dispatcher made the following transmission:

20 Jewel Street. Complainant's wife, 23-year-old female, is at the location threatening to harm their three-year-old child. She's currently locked herself in the bedroom, no weapons. She was unaware that the complainant has called.

The call was assigned a level three priority, which meant it was in the "urgent" category. At the time of the transmission, Deputy Brek Larson was doing paperwork and eating dinner at a police substation. Because Jewel Street was within his assigned backup area, Larson immediately prepared to respond to the call. Larson radioed to dispatch that he would provide backup to the primary responders. One minute later, before Larson left the substation, another deputy radioed that Larson could "cancel" because he was responding as the backup in place of Larson. The dispatcher informed Larson of this, but Larson responded, "I'll continue." The dispatcher responded, "I covered you," but Larson again said, "I'll continue."

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Seconds later, the dispatcher notified all units that yet another deputy had advised that he, too, was en route to the Jewel Street call to provide backup to the primary responders. Larson nevertheless decided to proceed in the patrol vehicle, a new Ford F-250 pickup truck that Larson had never driven before his shift that day.

Larson departed for Jewel Street with the siren and emergency lights activated. As he approached Highway 65, which was a short distance from the substation, he saw one of the other responding deputies pass. Larson followed the deputy at a distance of one-quarter mile at speeds as high as 95 miles per hour. The posted speed limit on Highway 65, a four-lane divided highway, was 65 miles per hour. The road was wet and slushy. As Larson approached the intersection of Highway 65 and Crosstown Boulevard, he was alerted by a flashing yellow signal located on the roadside two tenths of a mile before the intersection that the light was about to turn red. Ahead, the other deputy went through the intersection on the green light. Larson slowed to 30-45 miles per hour because he knew the light was about to turn red. However, after seeing no vehicles going through the intersection, Larson sped up as he entered the intersection. Just then, Talena Terrell's vehicle entered the intersection slowly on the green light from the right, and the two vehicles collided. Larson's estimated speed at the time of the collision was 60-64 miles per hour. Terrell died from the injuries sustained in the collision.

Larson had received training that when a vehicle operating in an emergency-response mode goes through a red light, it must first slow almost to a stop when entering the intersection, continue to observe opposing traffic, and then proceed through the intersection at no more than 10-20 miles per hour. An Anoka County Sheriff's Department internal affairs investigation concluded that Larson violated Department policy on emergency response procedures and on the emergency operation of vehicles because he did not drive with due regard to the safety of all persons, did not carefully weigh the risk inherent in disregarding traffic laws, and did not slow down enough when he ran the red light. The

investigation also concluded Larson did not use good judgment in carrying out his duties and had not properly weighed the consequences of his actions. Larson received a thirty-day suspension for his misconduct.

Terrell's heirs and next of kin brought suit, asserting a denial of Terrell's right to substantive due process under the Fourteenth Amendment and alleging that the deputies' actions in this case "were conscience-shocking, and reckless, callous, outrageous and deliberately indifferent to the rights of Talena Terrell." Larson moved for summary judgment, arguing that his actions did not constitute a violation of Terrell's right to substantive due process and that he was entitled to qualified immunity. The district court denied the motion, reasoning that factual issues concerning whether Deputy Larson had time to deliberate and whether the situation was reasonably regarded as an emergency precluded summary judgment. Larson now appeals. The Eight Circuit Court of Appeals found as follows:

"Police officers are protected by qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When qualified immunity is raised as a defense in a § 1983 action, we first must consider whether the facts alleged, taken in the light most favorable to the plaintiff, show that the officers' conduct violated a constitutional right. If a constitutional violation can be made out on the facts alleged, we then must ask whether the right was clearly established at the time of the conduct at issue.

"A violation of the Fourteenth Amendment right to substantive due process may be shown by conduct that 'shocks the conscience.' The primary question in this appeal is what level of culpability should be required to establish that the actions of Larson were conscience-shocking. At one end of the culpability spectrum is mere negligence, which is never sufficient to establish a constitutional violation. At the other end of the spectrum is conduct intended to injure, which generally will rise to the conscience-shocking level. In between these two extremes is a middle

range of culpability known as ‘deliberate indifference.’ The question of whether conduct falling within this middle range reaches the point of conscience-shocking depends on an exact analysis of circumstances.

“Larson was at a police substation eating dinner and doing paperwork when he heard the dispatcher’s transmission. Initially, the transmission described a situation that required immediate attention, and Larson’s initial response that he would provide backup was appropriate. However, one minute after Larson’s response and before he was prepared to leave the substation, another deputy said he would assist and told Larson that he could ‘cancel.’ The dispatcher repeated that Larson could cancel his response, but Larson informed the dispatcher he would continue to the call. The dispatcher again told Larson, ‘I covered you,’ but Larson repeated that he would continue. Shortly thereafter, yet another deputy said he would also provide assistance.

“All of the communications took place before Larson left the substation. Before he even reached his patrol vehicle, he knew at least two other deputies were already en route to provide backup for the primary responders. While en route, Larson saw that another deputy was ahead of him on his way to the call. In our view, these facts support a conclusion that the deputy had time to deliberate whether it was necessary to rush towards the scene at speeds reaching 95 miles per hour, going through a red light on a winter night in a full-size pickup truck that he was driving for the first time. The facts present a situation where actual deliberation was practical.

“The dispatcher had assured Larson that there was no need for him to go to the scene of the disturbance. He nevertheless decided he would go.

“...Officers involved in suspect pursuits may be required to violate traffic laws or risk losing the suspect. In contrast, Larson was not in danger of losing a suspect or of leaving the primary officers in this case without adequate backup...In view of these distinctions, we conclude Larson had time to deliberate before taking the actions he did.”

Placing his high-speed response in an objective light, we conclude any emergency was voluntarily created by Larson himself. There was no necessity as far as Larson was concerned to respond in the manner he did. He had been told to cancel his backup because other officers were responding. His actions were com-

pletely voluntary. In resolving the question of qualified immunity for Larson, there is no question of fact involved because under Plaintiffs’ allegations and evidentiary proof, there was no need for him to embark on an emergency response. Thus, we deem Larson’s response as entirely voluntary and hold that under such facts, as a matter of law, his conduct must be appraised under the deliberate indifference standard.

“There are significant distinctions between the present case and suspect-pursuit cases. First, while officers pursuing suspected offenders generally find themselves, when acting in their official duties, in situations which are thrust upon them, here Larson made a conscious, voluntary decision to respond to the domestic disturbance call even after he was informed that other deputies were responding and he could cancel. Second, while suspect pursuits require instantaneous decisions and on-the-spot reactions, Larson was eating dinner and doing paperwork when he received the call and was afforded the opportunity to deliberate his response before leaving the police substation.

“Finally, officers involved in suspect pursuits may be required to violate traffic laws or risk losing the suspect. In contrast, Larson was not in danger of losing a suspect or of leaving the primary officers in this case without adequate backup, as he was aware other deputies were on their way to the scene. In

view of these distinctions, we conclude Larson had time to deliberate before taking the actions he did.

“Having concluded that deliberate indifference is the appropriate standard to be applied in this case, we next consider whether the facts of this case are sufficient to show that Larson acted with deliberate indifference. Despite knowledge that at least two other deputies were on their way to provide backup and that he could cancel, Larson voluntarily decided to respond to the call. It was a December night. The roads were wet and slushy, and Larson was driving an unfamiliar vehicle. As Larson approached the intersection, he recognized that the traffic light was about to turn red, but, instead of stopping, Larson sped through the intersection at an estimated speed of 60-64 miles per hour. Given his training as a deputy sheriff, Larson certainly was aware of the danger to public safety that arises when a police officer decides to violate a traffic light.

“We believe the facts as alleged show that Larson disregarded the substantial risk of harm attendant to running a red light, especially given the fact that Larson sped up as he entered the intersection instead of proceeding cautiously at a much slower rate of speed. In our view, the alleged facts of this case, taken in the light most favorable to the Plaintiffs, are sufficient to show that Larson was deliberately indifferent to a substantial risk of harm. Under the particular facts presented, Larson’s actions rise to the level of conscience-shocking. Therefore, we hold that the Plaintiffs have alleged a constitutional violation of Ms. Terrell’s right to substantive due process.

“We next address whether Larson would nevertheless be entitled to qualified immunity. This inquiry depends on whether the right violated was clearly established as of December 29, 2000, the time of the alleged constitutional violation. The decision of the United States Supreme Court decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) established that the deliberate indifference standard would apply in situations, other than suspect pursuits, where actual deliberation is practical. *Lewis* also established that a police officer acting with deliberate indifference could be held liable for his

conduct. Thus, we conclude the law in effect at the time of the collision was clearly established. Accordingly, we hold that Larson was not entitled to summary judgment based on qualified immunity.”

**CIVIL LIABILITY:
Search Warrant That Failed to Itemize
Items to be Seized; Qualified Immunity**

Joseph Ramirez and members of his family live on a large ranch in Butte-Silver Bow County, Montana. Jeff Groh has been a Special Agent for the Bureau of Alcohol, Tobacco and Firearms (ATF) since 1989. In February 1997, a concerned citizen informed Groh that on a number of visits to Ramirez’s ranch, the visitor had seen a large stock of weaponry, including an automatic rifle, grenades, a grenade launcher, and a rocket launcher.

Based on that information, Groh prepared and signed an application for a warrant to search the ranch. The application stated that the search was for “any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.” Groh supported the application with a detailed affidavit, which he also prepared and executed, that set forth the basis for his belief that the listed items were concealed on the ranch. Petitioner then presented these documents to a Magistrate, along with a warrant form that petitioner also had completed. The Magistrate signed the warrant form.

Although the application particularly described the place to be searched and the contraband petitioner expected to find, the warrant itself was less specific; it failed to identify any of the items that petitioner intended to seize. In the portion of the form that called for a description of the “person or property” to be seized, petitioner typed a description of respondents’ two-story blue house rather than the alleged stockpile of firearms. The warrant did not incorporate by

reference the itemized list contained in the application. It did, however, recite that the Magistrate was satisfied the affidavit established probable cause to believe that contraband was concealed on the premises and that sufficient grounds existed for the warrant's issuance.

The day after the Magistrate issued the warrant, Groh led a team of law enforcement officers, including both federal agents and members of the local sheriff's department, in the search of Ramirez's premises. Although Ramirez was not home, his wife and children were. Groh states that he orally described the objects of the search to Mrs. Ramirez in person and to Mr. Ramirez by telephone. According to Mrs. Ramirez, however, Groh explained only that he was searching for "an explosive device in a box." The officers' search uncovered no illegal weapons or explosives. When the officers left, Groh gave Mrs. Ramirez a copy of the search warrant, but not a copy of the application, which had been sealed.

The following day, in response to a request from Ramirez's attorney, Groh faxed the attorney a copy of the page of the application that listed the items to be seized. No charges were filed against the Ramirezes. Ramirez sued Groh and the other officers under 42 U. S. C. §1983, raising eight claims, including violation of the Fourth Amendment. The District Court entered summary judgment for all defendants. The Court of Appeals affirmed the judgment with respect to all defendants and all claims, with the exception of the Fourth Amendment claim against Groh. On that claim, the court held that the warrant was invalid because it did not "describe with particularity the place to be searched and the items to be seized," and that oral statements by Groh during or after the search could not cure the omission. The court observed that the warrant's facial defect "increased the likelihood and degree of confrontation between the Ramirezes' and the police" and deprived the Ramirezes' of the means "to challenge officers who might have exceeded the limits imposed by the magistrate." The court also expressed concern that "permitting officers to expand the scope of the warrant by oral statements would broaden the area of dispute between the parties in subsequent

litigation." The court nevertheless concluded that all of the officers except petitioner were protected by qualified immunity. The United States Supreme Court granted certiorari and found as follows:

"It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. Because Groh did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly 'unreasonable' under the Fourth Amendment. The Court of Appeals correctly held that the search was unconstitutional.

"Having concluded that a constitutional violation occurred, we turn to the question whether Groh is entitled to qualified immunity despite that violation. The answer depends on whether the right that was transgressed was 'clearly established'—that is, whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier v. Katz*, 533 U. S. 194, 202 (2001).

"Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. See *Harlow v. Fitzgerald*, 457 U. S. 800, 818–819 (1982) ('If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.') Moreover, because Groh himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid. In fact, the guidelines of Groh's own department placed him on notice that he might be liable for executing a manifestly invalid warrant.

"An ATF directive in force at the time of this search warned: "Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate." Searches and Examinations, ATF Order O 3220.1(7)(d) (Feb. 13, 1997). See also 3220.1(23)(b) ('If any error or deficiency is

discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be postponed until a satisfactory warrant has been obtained.’) We do not suggest that an official is deprived of qualified immunity whenever he violates an internal guideline. We refer to the ATF Order only to underscore that petitioner should have known that he should not execute a patently defective warrant.

“No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. See *Payton*, 445 U. S., at 586–588. Indeed, as we noted nearly 20 years ago, the uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.

“Groh contends that the search in this case was the product, at worst, of a lack of due care, and that our case law requires more than negligent behavior before depriving an official of qualified immunity. But as we have observed, a warrant may be so facially deficient—in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

“The standard of objective reasonableness defines the qualified immunity accorded an officer. This is such a case. Accordingly, the judgment of the Court of Appeals is affirmed.”

DNA: Warrantless Taking of Blood Under Federal DNA Act

The DNA Act applies to federal defendants who have been convicted of various violent crimes and are in prison or on parole, probation, or supervised release. Once a DNA sample is collected, the Federal Probation Office transfers it to the FBI for entry into the Combined DNA Index System (CODIS), a national DNA database.

In *United States v. Kincade*, CA9, No. 02-50380, 8/18/04, it was argued that forced extraction of a blood sample from the defendant violated the Fourth Amendment. The Ninth Circuit Court of Appeals upheld the DNA collection as reasonable.

INTERROGATION: Meaning of Custody in Connection with Miranda Warnings

In *Yarborough v. Alvarado*, No. 02-1684, 6/1/04, the United States Supreme Court evaluates the meaning of “custody” within the context of the Miranda warnings.

Michael Alvarado helped Paul Soto try to steal a truck, leading to the death of the truck’s owner. Alvarado was called in for an interview with Los Angeles detective Cheryl Comstock. Alvarado was 17 years old at the time, and his parents brought him to the station and waited in the lobby during the interview. Comstock took Alvarado to a small room where only the two of them were present. The interview lasted about two hours, and Alvarado was not given a warning under *Miranda v. Arizona*, 334 U. S. 436.

Although he at first denied being present at the shooting, Alvarado slowly began to change his story, finally admitting that he had helped Soto try to steal the victim’s truck and to hide the gun after the murder. Comstock twice asked Alvarado if he needed a break and, when the interview was over, returned him to his parents, who drove him home.

After California charged Alvarado with murder and attempted robbery, the trial court denied his motion to suppress his interview statements on *Miranda* grounds. In affirming Alvarado’s conviction, the District Court of Appeal (hereinafter state court) ruled that a *Miranda* warning was not required because Alvarado had not been in custody during the interview under the test articulated in *Thompson v. Keohane*, 516 U. S. 99, 112, which requires a court to consider the circumstances surrounding the interrogation and then determine

whether a reasonable person would have felt at liberty to leave. The Federal District Court agreed with the state court on habeas review, but the Ninth Circuit reversed, holding that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave the interview. The United States Supreme Court granted certiorari. A wide variety of state statutes provide for many different rules when conducting interviews of juveniles. Accordingly, only the Court's consideration of "custody" is set forth. Their ruling is as follows:

"*Miranda v. Arizona*, 384 U.S. 436 (1965) held that pre-interrogation warnings are required in the context of custodial interrogations given 'the compulsion inherent in custodial surroundings.' The Court explained that 'custodial interrogation' meant 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' The *Miranda* decision did not provide the Court with an opportunity to apply that test to a set of facts.

"After *Miranda*, the Court first applied the custody test in *Oregon v. Mathiason*, 429 U. S. 492 (1977) (per curiam). In *Mathiason*, a police officer contacted the suspect after a burglary victim identified him. The officer arranged to meet the suspect at a nearby police station. At the outset of the questioning, the officer stated his belief that the suspect was involved in the burglary but that he was not under arrest. During the 30-minute interview, the suspect admitted his guilt. He was then allowed to leave. The Court held that the questioning was not custodial because there was no indication that the questioning took place in a context where the suspect's freedom to depart was restricted in any way. The Court noted that the suspect had come voluntarily to the police station, that he was informed that he was not under arrest, and that he was allowed to leave at the end of the interview.

"In *California v. Beheler*, 463 U. S. 1121 (1983) (per curiam), the Court reached the same result in a case with facts similar to those in *Mathiason*. In *Beheler*, the state court had distinguished *Mathiason*

based on what it described as differences in the totality of the circumstances. The police interviewed Beheler shortly after the crime occurred; Beheler had been drinking earlier in the day; he was emotionally distraught; he was well known to the police; and he was a parolee who knew it was necessary for him to cooperate with the police. The Court agreed that the circumstances of each case must certainly influence the custody determination, but reemphasized that the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The Court found the case indistinguishable from *Mathiason*. It noted that how much the police knew about the suspect and how much time had elapsed after the crime occurred were irrelevant to the custody inquiry.

"Our more recent cases instruct that custody must be determined based on a how a reasonable person in the suspect's situation would perceive his circumstances. In *Berkemer v. McCarty*, 468 U. S. 420 (1984), a police officer stopped a suspected drunk driver and asked him some questions. Although the officer reached the decision to arrest the driver at the beginning of the traffic stop, he did not do so until the driver failed a sobriety test and acknowledged that he had been drinking beer and smoking marijuana. The Court held the traffic stop non-custodial despite the officer's intent to arrest because he had not communicated that intent to the driver. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time, the Court explained. The only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. The Court noted that an objective test was preferable to a subjective test in part because it does not place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.

"*Stansbury v. California*, 511 U. S. 318 (1994) (per curiam), confirmed this analytical framework. *Stansbury* explained that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored

by either the interrogating officers or the person being questioned. Courts must examine all of the circumstances surrounding the interrogation and determine how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.

“Finally, in *Thompson v. Keohane*, 516 U. S. 99 (1995), the Court offered the following description of the Miranda custody test:

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

“In this case, the police did not transport Alvarado to the station or require him to appear at a particular time. They did not threaten him or suggest he would be placed under arrest. Alvarado’s parents remained in the lobby during the interview, suggesting that the interview would be brief...During the interview, Officer Comstock focused on another individual’s crimes rather than Alvarado’s. Instead of pressuring Alvarado with the threat of arrest and prosecution, she appealed to his interest in telling the truth and being helpful to a police officer. In addition, Officer Comstock twice asked Alvarado if he wanted to take a break. At the end of the interview, Alvarado went home. All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave. Indeed, a number of the facts echo those of *Mathiason*, in which we found it clear from these facts that the suspect was not in custody.”

INTERROGATION: Interrogation Prior to Miranda Warning

In *Missouri v. Seibert*, No. 02-1371, 6/28/2004, Patrice Seibert’s 12-year-old son Jonathan, who had cerebral palsy, died in his sleep. Seibert feared charges of neglect because of bedsores on his body. In her presence, two of her teenage sons and two of their friends devised a plan to conceal the facts surrounding Jonathan’s death by incinerating his body in the course of burning the family’s mobile home. They planned to leave Donald Rector, a mentally ill teenager living with the family, at the mobile home to avoid any appearance that Jonathan had been unattended. Seibert’s son Darian and a friend set the fire, and Donald died. Five days later, the police awakened Seibert at 3 a.m. at a hospital where Darian was being treated for burns. In arresting her, Officer Kevin Clinton followed instructions from Rolla, Missouri, Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Hanrahan questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating “Donald was also to die in his sleep.”

After Seibert finally admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break. Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning and obtained a confession from her.

After being charged with first-degree murder for her role in Donald’s death, Seibert sought to exclude both her pre-warning and post-warning statements. At the suppression hearing, Officer Hanrahan testified that he made a “conscious decision” to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been

taught: question first, then give the warnings, and then repeat the question “until I get the answer that she’s already provided once.” He acknowledged that Seibert’s ultimate statement was largely a repeat of information obtained prior to the warning.

The trial court suppressed the pre-warning statement but admitted the responses given after the *Miranda* recitation. A jury convicted Seibert of second-degree murder. On appeal, the Missouri Court of Appeals affirmed. The Supreme Court of Missouri reversed, holding that in the circumstances here, where the interrogation was nearly continuous, the second statement, clearly the product of the invalid first statement, should have been suppressed:

“The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. Consistent with the officer’s testimony, the Police Law Institute, for example, instructs that ‘officers may conduct a two-stage interrogation. . . . At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court.’ Police Law Institute, Illinois Police Law Manual 83 (Jan. 2001–Dec. 2003). The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.

“It is argued that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon v. Estad*, 470 U. S. 298 (1985), but the argument disfigures that case. In *Elstad*, the police went to the young suspect’s house to take him into custody on a charge of burglary. Before the arrest,

one officer spoke with the suspect’s mother, while the other one joined the suspect in a brief stop in the living room, where the officer said he ‘felt’ the young man was involved in a burglary. The suspect acknowledged he had been at the scene.

“This Court noted that the pause in the living room ‘was not to interrogate the suspect but to notify his mother of the reason for his arrest,’ and described the incident as having ‘none of the earmarks of coercion.’ The Court, indeed, took care to mention that the officer’s initial failure to warn was an ‘oversight’ that may have been the result of confusion as to whether the brief exchange qualified as custodial interrogation or may simply have reflected reluctance to initiate an alarming police procedure before an officer had spoken the subject’s mother.

“At the outset of a later and systematic station house interrogation going well beyond the scope of the prior admission, the suspect was given *Miranda* warnings and made a full confession. In holding the second statement admissible and voluntary, *Elstad* rejected the ‘cat out of the bag’ theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession. On the facts of that case, the Court thought any causal connection between the first and second responses to the police was ‘speculative and attenuated.’ Although the *Elstad* Court expressed no explicit conclusion about either officer’s state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally. See *Elstad, supra*, at 309 (characterizing the officers’ omission of *Miranda* warnings as ‘a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will’). Justice Brennan’s concern in dissent that *Elstad* would invite question-first practice distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same.

“The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home. A reasonable person in the suspect’s shoes could have seen the station house questioning as a new and distinct experience. The *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

“At the opposite extreme are the facts here, which by any objective measure, reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement

“...Because the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert’s post-warning statements are inadmissible.”

previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters

previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying ‘we’ve been talking for a little while about what happened on Wednesday the twelfth, haven’t we?’

“The impression that the further questioning was a mere continuation of the earlier questions and responses were fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk. Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert’s post-warning statements are inadmissible. The judgment of the Supreme Court of Missouri is affirmed.”

INTERROGATION: Introduction of Non-Testimonial Physical Evidence Allowed Without Miranda Warnings

In *United States v. Patane*, No. 02-1183, 6/28/2004, the United States Supreme Court was asked to decide whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966) requires suppression of the physical fruits of the suspect's unwarned but voluntary statements. Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements, the Court answered the question presented in the negative.

In June 2002, Samuel Francis Patane was arrested for harassing his ex-girlfriend, Linda O'Donnell. He was released on bond, subject to a temporary restraining order that prohibited him from contacting O'Donnell. Patane apparently violated the restraining order by attempting to telephone O'Donnell. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department began to investigate the matter. On the same day, a county probation officer informed an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF), that Patane, a convicted felon, illegally possessed a .40 Glock pistol. The ATF relayed this information to Detective Josh Benner, who worked closely with the ATF.

Together, Detective Benner and Officer Fox proceeded to Patane's residence. After reaching the residence and inquiring into Patane's attempts to contact O'Donnell, Officer Fox arrested Patane for violating the restraining order. Detective Benner attempted to advise respondent of his *Miranda* rights but got no further than the right to remain silent. At that point, Patane interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning.

Detective Benner then asked Patane about the Glock. Patane was initially reluctant to discuss the

matter, stating: "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." Detective Benner persisted, and Patane told him that the pistol was in his bedroom and gave Detective Benner permission to retrieve the pistol. Detective Benner found the pistol and seized it.

A grand jury indicted Patane for possession of a firearm by a convicted felon, in violation of 18 U. S. C. §922(g)(1). The District Court granted Patane's motion to suppress the firearm. The Court of Appeals affirmed the suppression order on the theory that the gun should be suppressed as the fruit of an unwarned statement. The United States Supreme Court granted certiorari and found as follows:

"...the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context. And, just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule does not apply.

"The Self-Incrimination Clause provides: 'No person...shall be compelled in any criminal case to be a witness against himself.' We need not decide here the precise boundaries of the Clause's protection. For present purposes, it suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. The Clause cannot be violated by the introduction of non-testimonial evidence obtained as a result of voluntary statements.

"Our cases make clear that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. This, of course, follows from the nature of the right protected by the Self-Incrimination Clause,

which the *Miranda* rule, in turn, protects. It is a fundamental *trial* right. It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, the exclusion of unwarned statements is a complete and sufficient remedy for any perceived *Miranda* violation.

"Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the 'fruit of the poisonous tree' doctrine. It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.

"In the present case, the Court of Appeals wholly adopted the position that the taking of unwarned statements violates a suspect's constitutional rights. We acknowledge that there is language in some of the Court's post-*Miranda* decisions that might suggest that the *Miranda* rule operates as a direct constraint on police. But *Miranda* itself made clear that its focus was the admissibility of statements.

"Introduction of the non-testimonial fruit of a voluntary statement, such as Patane's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements will be used against him at a criminal trial. And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. We decline to extend that presumption further. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion."

**PROBABLE CAUSE:
Arrest of Passengers in a Vehicle
Containing Evidence of Crime**

In *Maryland v. Pringle*, No. 02-809, 12/15/03, a passenger car occupied by three men was stopped for speeding by a police officer. The officer, upon searching the car, seized \$763 of rolled-up cash from the glove compartment and five glassine baggies of cocaine from between the backseat armrest and the back seat. After all three men denied ownership of the cocaine and money, the officer arrested each of them. The United States Supreme Court held that the officer had probable cause to arrest Pringle—one of the three men.

At 3:16 a.m. on August 7, 1999, a Baltimore County police officer stopped a Nissan Maxima for speeding. There were three occupants in the car: Donte Partlow, the driver and owner, Joseph Pringle, the front-seat passenger, and Otis Smith, the back-seat passenger. The officer asked Partlow for his license and registration. When Partlow opened the glove compartment to retrieve the vehicle registration, the officer observed a large amount of rolled-up money in the glove compartment. The officer returned to his patrol car with Partlow's license and registration to check the computer system for outstanding violations. The computer check did not reveal any violations. The officer returned to the stopped car, had Partlow get out, and issued him an oral warning.

After a second patrol car arrived, the officer asked Partlow if he had any weapons or narcotics in the vehicle. Partlow indicated that he did not and then consented to a search of the vehicle. The search yielded \$763 from the glove compartment and five plastic baggies containing cocaine from behind the backseat armrest. When the officer began the search the armrest was in the upright position flat against the rear seat. The officer pulled down the armrest and found the drugs, which had been placed between the armrest and the back seat of the car.

The officer questioned all three men about the ownership of the drugs and money, and told them that if no one admitted to ownership of the drugs he was going to arrest them all. The men offered no information regarding the ownership of the drugs or money. All three were placed under arrest and transported to the police station.

Later that morning, Pringle waived his rights under *Miranda v. Arizona*, 384 U. S. 436 (1966), and gave an oral and written confession in which he acknowledged that the cocaine belonged to him, that he and his friends were going to a party, and that he intended to sell the cocaine or use it for sex. Pringle maintained that the other occupants of the car did not know about the drugs, and they were released.

The trial court denied Pringle's motion to suppress his confession as the fruit of an illegal arrest, holding that the officer had probable cause to arrest Pringle. A jury convicted Pringle of possession with intent to distribute cocaine and possession of cocaine. The Court of Special Appeals of Maryland affirmed. The Court of Appeals of Maryland reversed, holding that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when Pringle was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession. The United States Supreme Court granted certiorari and reversed the Court of Appeals of Maryland, finding as follows:

"A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause. *United States v. Watson*, 423 U. S. 411, 424 (1976). It is uncontested in the present case that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed. The sole question is whether the officer had probable cause to believe that Pringle committed that crime.

"The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving 'fair leeway for

enforcing the law in the community's protection.' *Brinegar v. United States*, 338 U. S. 160, 176 (1949). On many occasions, we have reiterated that the probable-cause standard is a practical, non-technical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Illinois v. Gates*, 462 U. S. 213, 231 (1983). Probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was \$763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.

"We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.

"Pringle's attempt to characterize this case as a guilt-by-association case is unavailing. His reliance on *Ybarra v. Illinois*, 444 U.S. 85 (1979), and *United States v. Di Re*, 332 U. S. 581 (1948), is misplaced. In *Ybarra*, police officers obtained a warrant to search a tavern and its bartender for evidence of possession of a controlled substance. Upon entering the tavern, the officers conducted pat-down searches of the customers present in the tavern, including Ybarra. Inside a cigarette pack retrieved from Ybarra's pocket, an officer found six tinfoil packets containing heroin. We stated:

A person's mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron v. New York*, 392 U. S. 40, (1968). Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

"We held that the search warrant did not permit body searches of all of the tavern's patrons and that the police could not pat down the patrons for weapons, absent individualized suspicion.

"This case is quite different from *Ybarra*. Pringle and his two companions were in a relatively small automobile, not a public tavern. In *Wyoming v. Houghton*, 526 U. S. 295 (1999), we noted that a car passenger—unlike the unwitting tavern patron in *Ybarra*—will often be engaged in a common enterprise with the driver and have the same interest in concealing the fruits or the evidence of their wrongdoing. Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.

"We hold that the officer had probable cause to believe that Pringle had committed the crime of possession of a controlled substance. Pringle's arrest therefore did not contravene the Fourth and Fourteenth Amendments."

SEARCH AND SEIZURE: Border Searches

In *United States v. Flores-Montano*, No. 02-1794, 2/25/04, at the international border in southern California, customs officials seized 37 kilograms of marijuana from Flores-Montano's gas tank by removing and disassembling the tank. After *Flores-Montano* was indicted on federal drug charges, he moved to suppress the drugs recovered from the gas tank, relying on a Ninth Circuit panel decision holding that a gas tank's removal requires reasonable suspicion under the Fourth Amendment. The District Court granted the motion, and the Ninth Circuit summarily affirmed. The United States Supreme Court reversed and remanded, stating that the search did not require reasonable suspicion.

"In the decision relied on below, the Ninth Circuit panel seized on language from *United States v. Montoya de Hernandez*, 473 U. S. 531, 538, that used 'routine' as a descriptive term in discussing border searches. The panel took 'routine,' fashioned a new balancing test, and extended it to vehicle searches. But the reasons that might support a suspicion requirement in the case of highly intrusive searches of persons simply do not carry over to vehicles. Complex balancing tests to determine what is a 'routine' vehicle search, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles. The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *United States v. Ramsey*, 431 U. S. 606, 616.

"Congress has always granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. *Montoya de Hernandez, supra*, at 537. Flores-Montano's assertion that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy,

is rejected, as the privacy expectation is less at the border than it is in the interior, and this Court has long recognized that automobiles seeking entry into this country may be searched, see *Carroll v. United States*, 267 U. S. 132, 154. And while the Fourth Amendment ‘protects property as well as privacy,’ *Soldal v. Cook County*, 506 U. S. 56, 62, the interference with a motorist’s possessory interest in his gas tank is justified by the Government’s paramount interest in protecting the border. Thus, the Government’s authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle’s fuel tank.”

**SEARCH AND SEIZURE:
Highway Checkpoint; Law Enforcement
Request for Citizen Assistance**

In *Illinois v. Lidster*, No. 02-1060, 1/13/2004, the issue was whether a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident was constitutional.

On Saturday, August 23, 1997, just after midnight, an unknown motorist traveling eastbound on a highway in Lombard, Illinois, struck and killed a 70-year-old bicyclist. The motorist drove off without identifying himself. About one week later, at about the same time of night and at about the same place, local police set up a highway checkpoint designed to obtain more information about the accident from the motoring public. Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer. The flyer said “ALERT...FATAL HIT & RUN ACCIDENT” and requested “assistance in identifying the vehicle

and driver in this accident which killed a 70-year-old bicyclist.”

Robert Lidster drove a minivan toward the checkpoint. As he approached the checkpoint, his van swerved, nearly hitting one of the officers. The officer smelled alcohol on Lidster’s breath. He directed Lidster to a side street where another officer administered a sobriety test and then arrested Lidster. Lidster was tried and convicted in Illinois state court of driving under the influence of alcohol. Lidster challenged the lawfulness of his arrest and conviction on the ground that the government had obtained much of the relevant evidence through use of a checkpoint stop that violated the Fourth Amendment. The trial court rejected that challenge. But an Illinois appellate court reached the opposite conclusion. The Illinois Supreme Court agreed with the appellate court. It held that the decision in *Indianapolis v. Edmond*, 531 U. S. 32 (2000), required it to find the stop unconstitutional. Because lower courts have reached different conclusions about this matter, the United States Supreme Court granted certiorari, finding as follows:

“We now reverse the Illinois Supreme Court’s determination. The Illinois Supreme Court basically held that our decision in *Edmond* governs the outcome of this case. We do not agree. *Edmond* involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles. After stopping a vehicle at the checkpoint, police would examine (from outside the vehicle) the vehicle’s interior; they would walk a drug-sniffing dog around the exterior; and, if they found sufficient evidence of drug (or other) crimes, they would arrest the vehicle’s occupants. We found that police had set up this checkpoint primarily for general ‘crime control’ purposes, *i.e.*, ‘to detect evidence of ordinary criminal wrongdoing.’ We noted that the stop was made without individualized suspicion, and held that the Fourth Amendment forbids such a stop, in the absence of special circumstances.

“The checkpoint stop here differs significantly from that in *Edmond*. The stop’s primary law

enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

"This was a brief information-seeking highway stop. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual. For another thing, information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as responsible citizens to give whatever information they may have to aid in law enforcement. Further, the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime.

"The importance of soliciting the public's assistance is offset to some degree by the need to stop a motorist to obtain that help—a need less likely present where a pedestrian, not a motorist, is involved. The difference is significant in light of our determinations that such an involuntary stop amounts to a 'seizure' in Fourth Amendment terms. After all, as we have said, the motorist stop will likely be brief. Any accompanying traffic delay should prove no more onerous than many that typically accompany normal traffic congestion. And the resulting voluntary questioning of a motorist is as likely to prove important

"The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals."

for police investigation as is the questioning of a pedestrian.

"We now consider the reasonableness of the checkpoint stop before us. The relevant public concern was grave. Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort.

"The stop advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred.

"Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds. Police contact consisted simply of a request for information and the distribution of a flyer. Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically. And there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops. For these reasons we conclude that the checkpoint stop was constitutional."

SEARCH AND SEIZURE:
**Random Suspicionless Searches of
Student Belongings by School Officials**

Jane Doe is a secondary school student in the LRSD. One day during the school year, all of the students in Ms. Doe's classroom were ordered to leave the room after removing everything from their pockets and placing all of their belongings, including their backpacks and purses, on the desks in front of them. While the students were in the hall outside their classroom, school personnel searched the items that the students had left behind, including Ms. Doe's purse, and they discovered marijuana in a container in her purse.

In *Doe v. Little Rock School District*, CA8, Bi, 03-3268, 8/18/04, the Eighth Circuit Court of Appeals was asked to determine whether random, suspicionless searches of students and their belongings by school officials of the Little Rock School District (LRSD) is constitutional. The Eighth Circuit Court of Appeals concluded that such searches violate the students' fourth amendment rights because they unreasonably invade their legitimate expectations of privacy. Their finding is as follows:

"The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The Fourteenth Amendment extends this constitutional guarantee to searches by state officers, including public school officials. See *New Jersey v. T.L.O.*, 469 U.S. 325, 334-37 (1985). In carrying out searches school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment. Reasonableness is the touchstone of the constitutionality of a governmental search, *Board of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002), and the relevant constitutional question

in school search cases is whether the search was reasonable in all the circumstances.

"In determining whether a particular type of school search is constitutionally reasonable, we engage in a fact-specific balancing inquiry, under which the magnitude of the government's need to conduct the search at issue is weighed against the nature of the invasion that the search entails. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

"Whatever privacy interests the LRSD students have in the personal belongings that they bring to school are wholly obliterated by the search practice at issue here, because all such belongings are subject to being searched at any time without notice, individualized suspicion, or any apparent limit to the extensiveness of the search. Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs. Indeed, dogs and magnetometers are often employed in conducting constitutionally reasonable large-scale administrative searches precisely because they are minimally intrusive, and provide an effective means for adducing the requisite degree of individualized suspicion to conduct further, more intrusive searches. The type of search that the LRSD has decided to employ, in contrast, is highly intrusive, and we are not aware of any cases indicating that such searches in schools pass constitutional muster absent individualized suspicion, consent, or waiver of privacy interests by those searched, or extenuating circumstances that pose a grave security threat.

"While the LRSD has expressed some generalized concerns about the existence of weapons and drugs in its schools, it conceded there is nothing in the record regarding the magnitude of any problems with weapons or drugs that it has actually experienced. All schools surely have an interest in minimizing the harm that the existence of weapons and controlled substances might visit upon a student

population, but public schools have never been entitled to conduct random, full-scale searches of students' personal belongings because of a mere apprehension.

"We have upheld a blanket school search somewhat like the one at issue here when school officials had received specific information giving them reasonable grounds to believe that the students' safety was in jeopardy. In *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996), we determined that a single generalized but minimally intrusive search of all male students in the sixth through twelfth grades for knives and guns was constitutionally reasonable because fresh cuts on the seats of a school bus and student reports that there was a gun at the school that morning provided particularized evidence that there were dangerous weapons present on school grounds. In *Thompson*, random, suspicionless searches by school officials were deemed reasonable only after a specific showing was made that not engaging in the searches would have jeopardized some important governmental interest. No such showing has been made here.

"While the line separating reasonable and unreasonable school searches is sometimes indistinct, we think it plain enough that the LRSD's search practice crosses it. In light of the government's legitimate interest in maintaining discipline and safety in the public schools, the privacy that students in those schools are reasonably entitled to expect is limited. The LRSD's search practice, however, effectively reduces these expectations to nothing, and the record contains no evidence of unique circumstances that would justify significant intrusions. The mere assertion that there are substantial problems associated with drugs and weapons in its schools does not give the LRSD *carte blanche* to inflict highly intrusive, random searches upon its general student body."

SEARCH AND SEIZURE: Stop and Identify Statutes; Refusal to Identify

In *Hiibel v. Sixth Judicial District Court of Nevada*, No. 02-6320, 1/26/04, the sheriff's department in Humboldt County, Nevada, received an afternoon telephone call reporting an assault. The caller reported seeing a man assault a woman in a red and silver GMC truck on Grass Valley Road. Deputy Sheriff Lee Dove was dispatched to investigate. When the officer arrived at the scene, he found the truck parked on the side of the road. A man was standing by the truck, and a young woman was sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop.

The officer approached the man and explained that he was investigating a report of a fight. The man appeared to be intoxicated. The officer asked him if he had any identification on him. The man refused and asked why the officer wanted to see identification. The officer responded that he was conducting an investigation and needed to see some identification. The unidentified man became agitated and insisted he had done nothing wrong. The officer explained that he wanted to find out who the man was and what he was doing there. After continued refusals to comply with the officer's request for identification, the man began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail. This routine kept up for several minutes: the officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he continued to refuse to comply, the officer placed him under arrest.

The man arrested on Grass Valley Road is Larry Dudley Hiibel who was charged with "willfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge any legal duty of his office" in violation of Nev. Rev. Stat. (NRS)

§199.280 (2003). The government reasoned that Hiibel had obstructed the officer in carrying out his duties under §171.123, a Nevada statute that defines the legal rights and duties of a police officer in the context of an investigative stop. Section 171.123 provides in relevant part:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime...

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

[Nevada Revised Statute §171.123(3) is an enactment sometimes referred to as a “stop and identify” statute. The United States Supreme Court cited numerous similar statutes in several states including Arkansas Code Annotated §5-71-213(a)(1) (2004).]

Hiibel was tried in the Justice Court of Union Township. The court agreed that Hiibel’s refusal to identify himself as required by §171.123 “obstructed and delayed Dove as a public officer in attempting to discharge his duty” in violation of §199.280. Hiibel was convicted and fined \$250. The Sixth Judicial District Court affirmed, rejecting Hiibel’s argument that the application of §171.123 to his case violated the Fourth and Fifth Amendments. On review, the Supreme Court of Nevada rejected the Fourth Amendment challenge in a divided opinion. Hiibel petitioned for rehearing, seeking explicit resolution of his Fifth Amendment challenge. The petition was denied without opinion. The U.S. Supreme Court granted certiorari and found as follows:

“Hiibel contends the officer’s conduct violated his Fourth Amendment rights. The United States Supreme Court disagreed stating that asking questions is an essential part of police investigations. In the ordinary course, a police officer is free to ask a person for identification without implicating the Fourth Amendment. Interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. *INS v. Delgado*, 466 U. S. 210, 216 (1984). Beginning with *Terry v. Ohio*, 392 U. S. 1 (1968), the Court has recognized that a law enforcement officer’s reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. *United States v. Brignoni-Ponce*, 422 U. S. 873, 881 (1975). To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer’s action must be justified at its inception, and reasonably related in scope to the circumstances which justified the interference in the first place. *United States v. Sharpe*, 470 U. S. 675, 682 (1985). For example, the seizure cannot continue for an excessive period of time, see *United States v. Place*, 462 U. S. 696, 709 (1983), or resemble a traditional arrest, see *Dunaway v. New York*, 442 U. S. 200, 212 (1979).

“Our decisions make clear that questions concerning a suspect’s identity are a routine and accepted part of many *Terry* stops. See *United States v. Hensley*, 469 U. S. 221, 229 (1985) The ability to briefly stop a suspect, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Obtaining a suspect’s name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.

“Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether

the suspect can be arrested and prosecuted for refusal to answer. Hiibel draws our attention to statements in prior opinions that, according to him, answer the question in his favor. In *Terry*, Justice White stated in a concurring opinion that a person detained in an investigative stop can be questioned but is ‘not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.’ 392 U. S., at 34. The Court cited this opinion in dicta in *Berkemer v. McCarty*, 468 U. S. 420, 439 (1984), a decision holding that a routine traffic stop is not a custodial stop requiring the protections of *Miranda v. Arizona*, 384 U. S. 436 (1966).

“In the course of explaining why *Terry* stops have not been subject to *Miranda*, the Court suggested reasons why *Terry* stops have a ‘non-threatening character,’ among them the fact that a suspect detained during a *Terry* stop ‘is not obliged to respond’ to questions. See *Berkemer, supra*, at 439, 440. According to petitioner, these statements establish a right to refuse to answer questions during a *Terry* stop. We do not read these statements as controlling. The passages recognize that the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions. This case concerns a different issue. Here, the source of the legal obligation arises from Nevada state law, not the Fourth Amendment. Further, the statutory obligation does not go beyond answering an officer’s request to disclose a name.

“We cannot view the dicta in *Berkemer* or Justice White’s concurrence in *Terry* as answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop. The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The reasonableness of a seizure under the Fourth Amendment is determined “by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.” *Delaware v. Prouse*, 440 U. S. 648, 654 (1979). The Nevada statute satisfies that standard.

The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration or its location.

“A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures. Hiibel argues that the Nevada statute circumvents the probable cause requirement, in effect allowing an officer to arrest a person for being suspicious. According to Hiibel, this creates a risk of arbitrary police conduct that the Fourth Amendment does not permit. Hiibel’s concerns are met by the requirement that a *Terry* stop must be justified at its inception and reasonably related in scope to the circumstances which justified the initial stop. Under these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop. The stop, the request, and the State’s requirement of a response did not contravene the guarantees of the Fourth Amendment.

“Hiibel further contends that his conviction violates the Fifth Amendment’s prohibition on compelled self-incrimination. The Fifth Amendment states that no person shall be compelled in any criminal case to be a witness against himself. To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.

“In this case, Hiibel’s refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish a link in the chain of evidence needed to prosecute him. Hiibel refused to identify himself only because he thought his name was none of the officer’s business. Even today, Hiibel does not explain how the disclosure of his name could have been used against him in a criminal case. While we recognize Hiibel’s strong belief that he should not have to disclose his identity, the Fifth Amendment

does not override the Nevada Legislature's judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him.

"Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here. The judgment of the Nevada Supreme Court is *Affirmed*."

**SEARCH AND SEIZURE:
Vehicle Searches; Individual to be
Arrested is Leaving Vehicle**

In *Thornton v. United States*, No. 03-5165, 5/24/04, the United States Supreme Court was faced with the issue of whether the bright-line rule in *New York v. Belton*, 435 U.S. 454 (1981) applies as well when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle. The Court concluded that *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle.

Officer Deion Nichols of the Norfolk, Virginia, Police Department, who was in uniform but driving an un-marked police car, first noticed Marcus Thornton when Thornton slowed down so as to avoid driving next to him. Nichols suspected that Thornton knew he was a police officer and for some reason did not want to pull next to him. His suspicions aroused, Nichols pulled off onto a side street and Thornton passed him. After Thornton passed him, Nichols ran a check on the license tags, which revealed that they had been issued to a 1982 Chevy two-door and not to a Lincoln Town Car, the model of car Thornton was driving. Before Nichols had an opportunity to pull him over, Thornton drove into a parking lot, parked, and got out of the vehicle. Nichols

saw Thornton leave his vehicle as he pulled in behind him. He parked the patrol car, accosted Thornton, and asked him for his driver's license. He also told him that his license tags did not match the vehicle that he was driving.

Thornton appeared nervous. He began rambling and licking his lips; he was sweating. Concerned for his safety, Nichols asked Thornton if he had any narcotics or weapons on him or in his vehicle. Thornton said no. Nichols then asked if he could pat him down, to which Thornton agreed. Nichols felt a bulge in Thornton's left front pocket and again asked him if he had any illegal narcotics on him. This time Thornton stated that he did, and he reached into his pocket and pulled out two individual bags, one containing three bags of marijuana and the other containing a large amount of crack cocaine. Nichols handcuffed Thornton, informed him that he was under arrest, and placed him in the back seat of the patrol car. He then searched Thornton's vehicle and found a .9-millimeter handgun under the driver's seat.

A grand jury charged Thornton with possession with intent to distribute cocaine base, possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, and possession of a firearm in furtherance of a drug trafficking crime. Thornton sought to suppress the firearm as the fruit of an unconstitutional search. After a hearing, the District Court denied Thornton's motion to suppress, holding that the automobile search was valid under *New York v. Belton*, and alternatively that Nichols could have conducted an inventory search of the automobile. A jury convicted petitioner on all three counts.

Thornton appealed, challenging only the District Court's denial of the suppression motion. He argued that *Belton* was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car. The United States Court of Appeals for the Fourth Circuit affirmed. The United States Supreme Court granted certiorari, finding as follows:

"In *Belton*, an officer overtook a speeding vehicle on the New York Thruway and ordered its

driver to pull over. Suspecting that the occupants possessed marijuana, the officer directed them to get out of the car and arrested them for unlawful possession. He searched them and then searched the passenger compartment of the car. We considered the constitutionally permissible scope of a search in these circumstances and sought to lay down a workable rule governing that situation.

“We first referred to *Chimel v. California*, 395 U. S. 752 (1969), a case where the arrestee was arrested in his home, and we had described the scope of a search incident to a lawful arrest as the person of the arrestee and the area immediately surrounding him. This rule was justified by the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence. Although easily stated, the *Chimel* principle had proved difficult to apply in specific cases. Similarly, because courts had found no workable definition of the area within the immediate control of the arrestee when that area arguably included the interior of an automobile and the arrestee was its recent occupant, we sought to set forth a clear rule for police officers and citizens alike. We therefore held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile.

“In so holding, we placed no reliance on the fact that the officer in *Belton* ordered the occupants out of the vehicle, or initiated contact with them while they remained within it. Nor do we find such a factor persuasive in distinguishing the current situation, as it bears no logical relationship to *Belton*’s rationale. There is simply no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he remained in the car. We recognized as much, in *Michigan v. Long*, 463 U. S. 1032 (1983), where officers observed a speeding car swerve into a ditch. The driver exited and the officers met him at the rear of his car. Although there was no indication that the

officers initiated contact with the driver while he was still in the vehicle, we observed that it is clear that if the officers had arrested Long they could have searched the passenger compartment under *New York v. Belton*.

“In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect’s vehicle under *Belton* only if the suspect is arrested. A custodial arrest is fluid and the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty. The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation.

“In some circumstances it may be safer and more effective for officers to conceal their presence from a suspect until he has left his vehicle. Certainly that is a judgment officers should be free to make. But under the strictures of Thornton’s proposed ‘contact initiation’ rule, officers who do so would be unable to search the car’s passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble.

“Thornton argues, however, that *Belton* will fail to provide a ‘bright-line’ rule if it applies to more than vehicle occupants. But *Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both occupants and ‘recent occupants.’ Indeed, *Belton* was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee’s status as a ‘recent occupant’ may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.

“To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a ‘recent occupant.’ It is unlikely in this case that Thornton could have reached under the driver’s seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

“Rather than clarifying the constitutional limits of a *Belton* search, petitioner’s ‘contact initiation’ rule would obfuscate them. Under Thornton’s proposed rule, an officer approaching a suspect who has just alighted from his vehicle would have to determine whether he actually confronted or signaled confrontation with the suspect while he remained in the car, or whether the suspect exited his vehicle unaware of, and for reasons unrelated to, the officer’s presence. This determination would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid. Experience has shown that such a rule is impracticable, and we refuse to adopt it. So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as Thornton was here, officers may search that vehicle incident to the arrest.”

SEXUAL HARASSMENT: Constructive Discharge Claim

In *Pennsylvania State Police v. Suders*, No. 03-95, 6/14/04, Nancy Drew Suders, a police communications operator, alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (PSP), of such severity she was forced to resign. The question presented concerns the burden of proof parties bear when a sexual harassment/constructive discharge claim of that character is asserted under Title VII of the Civil Rights Act of 1964.

“To establish hostile work environment, plaintiffs like Suders must show ‘harassing behavior sufficiently severe or pervasive to alter the conditions of her employment.’ *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, 67 (1986). Beyond that, to establish ‘constructive discharge,’ the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.

“An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.”