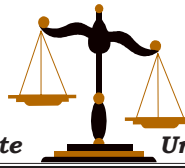




CJI Legal Briefs

Criminal Justice Institute



University of Arkansas System

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CRIMINAL JUSTICE INSTITUTE

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CIVIL LIABILITY:

Alleged Failure to Properly Investigate a Crime

In *Jennings v. City of Stillwater*, CA10, No. 03-6201, 9/14/04, Alison Jennings claimed that members of the Stillwater, Oklahoma Police Department violated her constitutional rights by failing to adequately investigate an alleged rape and by discouraging her from pursuing prosecutions of the alleged assailants. The underlying facts of this case stem from a sexual encounter between Ms. Jennings, then an Oklahoma State University (OSU) student, and Alvin Porter, J.B. Flowers, Evan Howell and Marcellus Rivers, four members of the OSU football team. The encounter took place early Sunday morning on November 21, 1999, at a party at the house of a football teammate, Tim Sydnes. Jennings claims that she was raped; the football players maintain that the encounter was consensual. The football players were not charged with any crime as a result of these events.

In this suit brought under 42 U.S.C. § 1983, Jennings claims that lead investigator, Detective Robert Buzzard, did everything in his power to derail the investigation and make certain that the football players would be shielded from public and legal scrutiny. Specifically, Jennings alleges that Detective Buzzard failed to collect material evidence, failed to challenge the football

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players' account of the events, discouraged Jennings from prosecuting the football players in violation of state and federal law, and finally, caused the physical evidence from the alleged rape to be destroyed, making it difficult to maintain a civil action against the football players.

The Tenth Circuit Court of Appeals emphasized that they in no way condone or excuse the failure of police to conduct an adequate investigation of such a crime. However, in general, federal courts are not entrusted with the responsibility of ensuring the effective enforcement of state criminal laws; that role falls to state and local law enforcement authorities. It is the duty of executive officials—not the courts—to ensure that the criminal laws are faithfully executed.

"The State of Oklahoma has enacted legislation designed to ensure that victims of rape, domestic violence, and sodomy receive a respectful hearing and have a right to request prosecution. Primary responsibility for law enforcement rests with the city and the state. Today, the Court holds only that the United States Constitution does not provide a cause of action on the legal theories invoked by Allison Jennings."

CIVIL LIABILITY:
**"Flash-Bangs" Used Inappropriately
 Can Create Civil Liability**

In *Boyd v. Benton County*, CA9, No. 02-35776, 6/28/04, Kristianne Boyd brought suit against members of the Corvallis Police Department, the City of Corvallis, members of the Benton County SWAT Team, and Benton

County for violation of her Fourth Amendment rights during the execution of a search warrant. Specifically, Boyd argues that the use of a "flash-bang" device constituted excessive force under the circumstances. The district court found that all individual defendants were entitled to qualified immunity, which Boyd challenged on appeal. The Ninth Circuit Court of Appeals determined that Boyd's Fourth Amendment rights were not clearly established at the time of the injury and affirmed the district court. The case is as follows:

Officers of the Corvallis Police Department requested and received a search warrant authorizing them to search a Pickford Street apartment for stolen jewelry and a .357 magnum. After discussing the matter, officers decided to enlist the aid of the Benton County SWAT Team to secure the apartment before conducting the search.

The morning of the search, officers of the Corvallis Police Department (CPD) and the Benton County SWAT Team gathered for a briefing. The officers discussed various circumstances surrounding the operation, including the following: (1) an armed robbery suspect was still at large and could be inside the apartment; (2) the .357 magnum had yet to be recovered and might be in the possession of someone inside the apartment; (3) another individual connected with the apartment had attempted to purchase an "SKS" assault rifle; (4) two armed individuals, who attempted to evade police, had been seen recently exiting the apartment; (5) the apartment had a loft from which a shooter could place the officers in a vulnerable position as they entered the apartment; and (6) there was a possibility that

five to eight people would be sleeping inside the apartment.

In light of these circumstances, Sergeant Skinner, the SWAT Team supervisor, determined that a flash-bang device should be used to gain entry and secure the premises. The manner of deploying the flash-bang was also discussed, taking into account the fact that several people might be sleeping in the apartment at the time of entry. Eventually, Sergeant Skinner determined that the flash-bang should be deployed against the apartment's front wall and near the door because he felt that the risk of someone sleeping there was minimal. Volunteer Deputy Ellison was chosen to deploy the flash-bang. Every CPD officer involved in the operation knew of the plan to use the flash-bang, did not object to that plan, and actively participated in its operation.

The officers executed the search in the early morning hours of October 14, 1997. After the officers announced their presence, Ellison reached inside the door of the dark apartment and, without looking, tossed the flash-bang near the front wall and a few feet from the door. As it turned out, Boyd was sleeping on the floor, near the front wall where the flash-bang came to rest. Consequently, Boyd suffered burns on her forearm when the device ignited. Moments later, the SWAT Team entered and secured the apartment, followed by the CPD officers who conducted the search. After the officers secured the apartment, Boyd was treated for her injury and later transported to a local hospital.

Viewing the facts of the case in the light most favorable to Boyd, the Ninth Circuit Court of Appeals believed that the officers' use of force

was constitutionally excessive: "The officers had information leading them to believe that up to eight people could be sleeping within the apartment. Without considering alternatives such as a controlled evacuation followed by a search, the officers deployed the explosive flash-bang device—which the officers knew had the potential to cause injury—in the room without looking or warning the occupants. The officers had reason to believe that a suspect and a gun could be in the apartment, and that there was a loft on the premises. But this cannot have reasonably caused the officers to believe that it was appropriate to toss, without either looking or sounding a warning, an explosive, incendiary weapon into an apartment where it was believed there were up to eight people, most of whom were unconnected to the robbery and many of whom were likely asleep.

"There are likely circumstances in which a risk to officers' safety would make the use of a flash-bang device appropriate, and we recognize that less-than-lethal alternatives are intended to avoid unnecessary fatalities. Nonetheless, given the dangerous nature of the flash-bang device, it cannot be a reasonable use of force under the Fourth Amendment to throw it 'blind' into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives, and appropriate measures to reduce the risk of injury. Given the facts Boyd has presented, the use of the flash-bang here did not meet these requirements, and thus she has established a Fourth Amendment violation."

The Ninth Circuit Court of Appeals next discussed whether the officers were entitled to qualified immunity. The Court reviewed flash-bang cases which had been before other

courts at the time these officers utilized the device during their raid:

“In *United States v. Baker*, 16 F.3d 854 (8th Cir. 1994), police officers were executing a search warrant on a known ‘crack house.’ Without knocking or announcing their presence, the officers lobbed one distraction stun device through the kitchen window and rolled another through the front door. Before entering the house, the police had information that the front door had been barricaded and that two Doberman Pinschers were inside. Presented with the question of whether the use of the distraction device was unreasonably executed so as to warrant suppression of the fruits of the search, the Eighth Circuit upheld the district court’s finding that ‘the police reasonably believed the use of distraction devices was needed to effect a safe entry.’

“The Supreme Judicial Court of Massachusetts was presented with this issue in *Commonwealth v. Garner*, 672 N.E.2d 510 (Mass. 1996). In *Garner*, police officers had obtained a warrant to search an armed robbery suspect’s apartment. The officers had information that the inhabitants of the apartment might be armed and that two children and a pregnant woman could also be inside the apartment. Under these circumstances, the officers broke a bedroom window, dropped a flash-bang device into the bedroom without looking, and proceeded to storm the apartment. As it turned out, a four-year-old child was sleeping in the bedroom where the flash-bang was deployed and, as a result, suffered from shock and smoke inhalation when the device ignited.

“The *Garner* Court found that there had been no use of force so excessive that it warranted suppression of the evidence found in the search. The court reasoned that the factors that

might militate against the use of a flash-bang in this case were swamped by the very strong grounds the police had for believing the occupants of the apartment were armed and vicious. Thus, the court concluded that the use of the device within the apartment cannot be described as an unreasonable part of a plan designed to get the operation over with as quickly as possible and to minimize the possibility of a gun battle.

“The Tenth Circuit addressed the issue of whether the use of a flash-bang amounted to excessive force in an opinion that was published approximately eight months prior to the incident in this case. In *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997), police obtained a warrant to search a residence that was suspected of housing a marijuana growing operation. A background check revealed that Myers, one of the occupants of the home, had prior convictions for burglary, theft, and cocaine trafficking. Additionally, Myers had been involved with a fire bombing and possession of a firearm while he was a juvenile. When the officers effectuated the search, they announced their presence, battered down the door, and rolled a flash-bang into the living room of the house. Myers, his wife, nineteen-year-old stepson, nine-year-old stepdaughter, and seventeen-month-old daughter were inside the residence.

“In determining whether the officers’ use of the flash-bang was sufficiently unreasonable to warrant suppression of the evidence, the Tenth Circuit reasoned as follows:

The use of a flash-bang device in a house where innocent and unsuspecting children sleep gives us great pause. Certainly, we could not countenance the use of such a

device as a routine matter. However, we also recognize that we must review the agents' actions from the perspective of reasonable agents on the scene who are legitimately concerned with not only doing their job but with their own safety.'

"The Tenth Circuit Court of Appeals went on to hold that although it might seem that the agents' actions in this case came dangerously close to a Fourth Amendment violation, they could not say that their actions were objectively unreasonable given the circumstances. The circumstances that the Tenth Circuit relied on were Mr. Myers' history of drug trafficking and fire bombing and the suspected marijuana growing operation inside the home.

"After a review of the foregoing cases, we conclude that without any guidance from this Circuit and an absence of non-binding authority that otherwise clearly establishes the right, the officers here were not put on sufficient notice that using a flash-bang in these circumstances was unconstitutional.

"Other undisputed facts indicate that the officers' decision to use the flash-bang in these circumstances was not so patently violative of the constitutional right that they should have known what they were doing was unconstitutional without judicial guidance. First and foremost, two individuals had recently left the apartment with firearms, drugs and jewelry in their possession and thereafter attempted to evade law enforcement in a high-speed chase. Second, a suspect, believed to have frequented the apartment, and the .357 magnum were still unaccounted for. Additionally, the officers had information that another individual connected with the apartment had tried to purchase an assault

rifle. Third, the apartment had a loft that made the officers particularly vulnerable as they entered the apartment. Fourth, there was a prior report of an assault involving the primary resident of the apartment and the apartment was known to be a location of drug activity.

"At the time of this raid, a reasonable officer faced with these facts, and without guidance from the courts, was not on notice that the use of a flash-bang was unconstitutional. Thus, while we now hold that the officers in the specific circumstances of this case violated Boyd's Fourth Amendment rights in using a flash-bang inside a dark apartment where five to eight people might be sleeping, that error was not so egregious as to have been an unreasonable application of the law that existed at the time of the incident. Consequently, the officers are entitled to qualified immunity because Boyd's Fourth Amendment right to be free from dangerous flash-bang devices under these circumstances was not clearly established."

**CIVIL LIABILITY:
Prompt First Appearance**

H *ayes v. Faulkner County, CA8, No. 03-3787, 10/29/04*, deals with the issue of prisoner civil rights. In this case, James M. Hayes sued Faulkner County and its sheriff and jail administrator, claiming they violated his right to due process by detaining him 38 days before his first court appearance. The case is as follows:

In 1997, a police officer ticketed Hayes for not having automobile tags and vehicle insurance. When Hayes failed to appear at his municipal

court hearing, bench warrants were issued. Stopped for a traffic violation on April 3, 1998, Hayes was arrested on the warrants, given a court date of May 11, and jailed. He did not post the \$593 cash-only bond. He remained in jail at the Center until appearing before the court on May 11.

While in jail, Hayes hand-wrote a grievance on April 26 stating:

"I've been here for 23 days and have not been to court. According Prompt First Appearance Rule 8.1 I should seen a judge within 72 hrs. I have yet to be told when I will go to court. I also know that the arresting told booking to hold me back. I want to know when you plan to obey the law and allow me to go to court?"

The jail administrator responded in writing:

"I don't set people up for court. I hope you go to court & are able to get out. Write the booking officer to find out about your court date."

The jail administrator testified he would have followed the same course of conduct if Hayes had been jailed for 99 days. He said he wanted to obey the court and was not trying to be disobedient as a jailer or law enforcement officer. During the detention, the court met on April 13 and April 29. Though an April 29 appearance date was entered on Hayes' booking card, he did not have the opportunity to appear before a judge until May 11.

The issue in this case is a pretrial detainee's right to a prompt appearance in court after an arrest by warrant. The Eighth Circuit Court of Appeals found as follows:

"The Seventh Circuit decided similar cases in *Coleman v. Frantz* (7th Cir. 1985) and *Armstrong v. Squadrito* (7th Cir. 1998). In *Coleman*, an 18-day detention after arrest by warrant, but before initial appearance, was found to violate Coleman's substantive due process rights. Citing the Fifth, Sixth, and Eighth amendments, the Seventh Circuit stated, 'Almost every element of a "first appearance" under state statutes or the Federal Rules of Criminal Procedure serves to enforce or give meaning to important individual rights that are either expressly granted in the Constitution or are set forth in Supreme Court precedent.' An extended pretrial detention without an initial appearance substantially impinges upon and threatens all of those specific rights. Thus, the ultimate effect of Coleman's 18-day detention was a denial of substantive due process.

"The Seventh Circuit followed *Coleman* in the *Armstrong* case, where a 57-day detention on a (civil) body-attachment warrant without an initial appearance violated substantive due process. The court looked to the totality of circumstances. It considered three questions: (1) whether the Due Process Clause prohibits an extended detention, without an initial appearance, following arrest by a valid warrant; (2) whether the defendants' conduct offended the standards of substantive due process; and (3) whether the totality of circumstances shocks the conscience.

"By that analysis, the 38-day detention here violates substantive due process. First, the Due Process Clause forbids an extended detention, without a first appearance, following arrest by warrant. Second, this Court considers whether the defendants' conduct offends the standards of substantive due process. Deliberate

indifference to prisoner welfare may sufficiently shock the conscience to amount to a substantive due process violation. This Court considers the County's official policy separately from the jail administrator's individual conduct. As for the County, this Court examines what policy is in place and whether it is deliberately indifferent.

"According to the jail administrator and the sheriff, the County adopted a policy requiring that arrestees be taken before a court within 72 hours after arrest. As policy, when a person is arrested, the sheriff's office notifies the court by sending a jail roster to every court in the County. The sheriff's office then relies on the court to schedule hearings, call the Center, and identify which detainees the court will pick up for hearings. Hayes was subject to the same policy as other detainees at the Center.

"The County's policy was to submit the names of confinees to the court and then wait for the court to schedule a hearing. That policy attempts to delegate the responsibility of taking arrestees promptly before a court. In *Oviatt v. Pearce* (9th Cir. 1992), a policy was deliberately indifferent where the jail had no internal procedures to track whether inmates had been arraigned. A policy that ignores whether the jail has the authority for long-term confinement seems to be a policy of deliberate indifference. Because the County's policy here attempts to delegate the responsibility of bringing detainees to court for a first appearance and ignores the jail's authority for long-term confinement, the policy is deliberately indifferent to detainees' due process rights.

"Next, the Court considers whether the jail administrator's individual acts violate the

standards of due process. The jail administrator helped promulgate and enforce the deliberately indifferent policy. Receiving Hayes's specific appearance grievance, the jail administrator made a conscious decision to do nothing. The administrator testified that he would have followed the same course of conduct even if Hayes were held for 99 days. While Hayes sat in the Center for 38 days, the jail administrator consciously disregarded the violation of his constitutional rights. That conscious disregard is deliberate indifference violating the standards of due process.

"In the totality of circumstances in this case, the key is Arkansas Rule of Criminal Procedure, Rule 8.1, entitled **Prompt First Appearance**. The Rule requires: *An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.*

"Rule 8.1 is designed to protect basic and fundamental rights which our state and federal constitutions secure to every arrestee. The County's and Kelley's failure to take Hayes before a judge for 38 days shocks the conscience.

"Rule 8.1 of the Arkansas Rules of Criminal Procedure requires a jailer to ensure that a pretrial detainee appears before a judge 'without unnecessary delay.' A reasonable officer knows that detentions of less than 38 days violate Rule 8.1. A reasonable officer knows that Rule 8.1 protects basic and fundamental rights which our state and federal constitutions secure to every arrestee. A law enforcement officer cannot reasonably believe that holding a person in jail for 38 days without bringing him before a judicial officer for an initial appearance is constitutional. Accord-

ingly, the jail administrator is not entitled to qualified immunity.”

The Eighth Circuit Court of Appeals affirmed the District Court’s finding that the 38 day pre-appearance detention violated Hayes’ right to due process.

CIVIL LIABILITY:
Release-Dismissal Agreements

In *MacBoyle v. City of Parma*, CA6, No. 03-3784, 9/1/04, the Sixth Circuit Court of Appeals dealt with the issue of Release-Dismissal Agreements issued by police departments. The case is as follows:

On July 29, 2000, at approximately 11:30 p.m., Parma Police Department dispatched Officers Pinc and Ciryak to the home of Kimberly Guder to investigate a noise disturbance. Ms. Guder was hosting a surprise party for her boyfriend, Paul Kopin, who had recently turned nineteen. Ms. Guder invited about thirty people to the party, including Kopin’s mother, Shirley Kopin, and Ms. Kopin’s boyfriend, Plaintiff MacBoyle. MacBoyle was thirty-four at the time of the party. Several guests had brought alcohol to the party, and the partygoers were consuming alcohol. According to Officers Pinc and Ciryak, when they arrived at the apartment complex, they observed a female and male noticing them and running to the second floor of the apartment complex. As the officers approached the apartment, a male with keys to the apartment let the police officers into Guder’s apartment. The officers believed they entered the apartment with consent. At the time of the

entry, MacBoyle was on the apartment’s balcony with Ms. Kopin and Ms. Guder.

Inside the apartment, the police officers observed fifteen to twenty individuals. Many of those individuals in the possession of alcoholic beverages appeared to be underage. When the officers requested the name of the apartment’s owner, no one responded. When the officers began requesting identification from the individuals present, no one responded. During this period, several individuals, including MacBoyle, entered the living room. The officers claim that MacBoyle began using vulgarities and demanding to know who let the officers in. MacBoyle claims that it was the police officers who used vulgarities while questioning the partygoers and that he was attempting to diffuse the situation by politely asking the police officers why they were in the apartment. MacBoyle further claims that he asked the police officers to leave only when they failed to respond to his inquiries, and that the police officers declined to leave.

Officer Pinc asked MacBoyle for identification. The officers claim that MacBoyle refused to give any identification and, instead, continued with loud vulgarities and demanded that the officer produce a search warrant. MacBoyle claims that another guest, Kopin, and not he, used profanities and that officers confused the two of them.

The officers claim that at one point during the discussion, MacBoyle moved toward Officer Pinc. Officer Pinc put his hand up to stop MacBoyle from approaching and called for backup police officers. One of those officers, Officer Chihil, went to the apartment’s balcony and instructed the individuals to return into

the apartment for identification purposes. The officers claim that MacBoyle began walking toward the balcony, that they advised him to remain inside the apartment three times, and that he refused to obey their instructions. MacBoyle, on the other hand, claims that, at this point, he decided to call the Mayor's office. MacBoyle also says that the officers, using more profanity, instructed him to get off the phone, and when he refused, one of the officers grabbed the phone and threw it across the room. MacBoyle further says that an officer struck him on the head with a flashlight and that the officers continued their assault on him by throwing him on to a table and then to the floor, and then running him out of the apartment head first into the apartment's metal door.

MacBoyle was charged with obstructing official business, resisting arrest and disorderly conduct. Other guests were also charged with various offenses. The cases were consolidated for trial. While his criminal case was pending, MacBoyle, on advice of his counsel, entered into a release-dismissal agreement with the City of Parma. Pursuant to this release agreement, MacBoyle waived all rights to sue the city and its officers. The City of Parma agreed to dismiss the charges. Notwithstanding the release agreement, MacBoyle filed an action under 42 U.S.C. § 1983.

Upon review of the case, the Sixth Circuit Court of Appeals noted the following: "The

"The enforcement of a release-dismissal agreement is appropriate if a court decides that (1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) the enforcement furthers the public interest."

Supreme Court has upheld the validity of release-dismissal agreements whereby a criminal defendant releases his right to file a civil rights action in return for a prosecutor's dismissal of pending criminal charges, as long as the agreement meets certain criteria. The

enforcement of such an agreement is appropriate if a court decides that (1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) the enforcement furthers the public interest. The burden of proof in this analysis falls upon the party in the § 1983 action who seeks to invoke the agreement as a defense.

"The rationale for this allocation of the burden of proof is based on reasons which include the fact that such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole...

"The district court conducted the three-factor Rumery analysis and concluded that the release agreement should be upheld.

"With respect to the voluntariness prong, MacBoyle was thirty-four years old and

represented by an attorney when he signed the release agreement. He is a college graduate who has been employed since 1989 and takes part in continuing professional education seminars. He was not incarcerated when he signed the release agreement, and there is no evidence that did not have ample time to consider the agreement before signing it... His signing of the release agreement was undeniably voluntary.

“With respect to the prosecutorial misconduct prong, MacBoyle offers no real evidence of prosecutorial misconduct. He does not claim that any of the charges against him were in any way trumped up. In fact, given the police officers’ version of the incident, the criminal charges seem reasonable. MacBoyle claims that the prosecutor changed his mind from dismissing all the charges to wanting the MacBoyle and the other indicted party goers to plead to one charge of minor misdemeanor disorderly conduct. He also says that the prosecutor should not have conditioned the dismissal on all the indicted party goers signing the release. This Court finds that such evidence, even if true, does not rise to the level of prosecutorial misconduct. There is no rule against a prosecutor changing his mind. MacBoyle does not claim that he accepted an earlier offer whereby all claims were dismissed, and then the prosecutor changed his mind and forced him to accept another offer. Rather, he claims that the prosecutor contemplating dismissing all charges, thought better of it, and changed his mind. Such activity is not misconduct. Linking the agreements was also not misconduct. All the charges against the party goers were reasonable in light of the police officers [sic] description of the incident. MacBoyle was free to not sign the release agreement if he chose not to.

“With respect to the public interest prong...enforcing the release agreement serves public interest in that such agreements enable parties to resolve issues ami[c]ably themselves, weed out unmeritorious claims and charges, and conserve[] precious judicial resources. The evidence shows that MacBoyle agreed to the release agreement voluntarily without any prosecutorial misconduct. Public interest mandates holding parties to the agreements they enter into on their own volition. Nullifying the release agreements would provide a disincentive to prosecutors from agreeing to release-dismissal agreements in the future. Therefore the public interest is served by enforcing the release agreement.”

The Sixth Circuit Court of Appeals upheld the release dismissal agreement in this case finding, among other things, that MacBoyle signing the release out of concern for others who were also charged does not affect the voluntariness of his act.

EVIDENCE:

“Death Before Dishonor” Tattoo

In *Morris v. State*, No. CR03-1370, 9/23/04, the Arkansas Supreme Court dealt with the appeal of Calvin Morris, who was charged with first degree murder in a shooting incident occurring at a Little Rock, Arkansas nightclub. Morris introduced evidence showing his peaceful nature. His sole point on appeal is that the circuit court erred in allowing the State to cross-examine him regarding a tattoo on his right shoulder, which read “*Death Before Dishonor*.” Morris argues that the probative value of such evidence was substantially outweighed by the danger of

unfair prejudice to him. The Arkansas Supreme Court disagreed and affirm the judgment of conviction.

The Court stated it was Morris who placed his peaceful nature into issue and opened the door to contrary evidence being presented on that question. Because of this, it would certainly seem relevant for the State to introduce evidence that Morris wore a tattoo advocating death before dishonor as a counter to testimony about his peaceful nature. Moreover, Morris made no attempt to explain any other reason for wearing the tattoo and his defense counsel did not argue there was a different reason.

**EVIDENCE: Expert Opinion
of Narcotic Officers**

The St. Louis Metropolitan Police Department received information from an informant that a person named "Walt" had been at the Save-A-Lot store to discuss a narcotics sale. The informant gave the police a description of the suspect and a description of the suspect's car. As two police detectives, Detective Carl Dulay and Detective Michael Scego, approached the location given by the informant, they saw a man exiting a restaurant who met the description given by the informant. The man turned out to be Walter Robertson. Robertson stated he did not want any problems and informed the detectives he had a gun in his pocket. The detectives seized the gun and approximately thirteen grams of crack cocaine.

In *United States v. Robertson*, CA8, No. 03-4072, 10/13/04, the United States District Court

Judge permitted the expert testimony of Detective Dulay and Detective Scego, despite objections from Robertson. The detectives testified the amount of crack cocaine possessed by Robertson was a distribution amount. They further testified dealers selling this amount of crack cocaine typically carry a gun to protect themselves from being robbed by other drug dealers. This testimonial evidence helped convict Robertson of possession with intent to distribute crack cocaine and possession of a firearm during and in relation to a drug trafficking crime.

In response to Robertson's assertion that the detectives' lack of expertise in the area of drug trafficking renders their testimony inherently unreliable, the Court found as follows:

"We disagree with Robertson's characterization of the detectives' qualifications. In fact, the record shows both detectives possess the necessary knowledge, skill, training, experience and education to qualify as experts in drug trafficking. The record shows that both detectives possess the necessary knowledge, skill, training, experience and education to qualify as experts in drug trafficking. Detective Dulay is a ten-year veteran of the St. Louis Metropolitan Police Department. He attended a two-week training course sponsored by the Drug Enforcement Agency (DEA). Detective Dulay gathers intelligence on the local narcotics trade as part of his daily routine. To gather this intelligence, Dulay interviews addicts, defendants and informants. Detective Dulay has arrested over fifty individuals for state and federal drug and firearm offenses over a two-year period and he has testified in court over fifty times regarding the seizure of controlled substances.

“Similarly, Detective Scego is a thirteen-year veteran of the St. Louis Metropolitan Police Department. He also attended a two-week training course sponsored by the DEA. For at least the last three years, Detective Scego’s primary focus has been in the area of narcotics investigation. He makes narcotics related arrests and conducts narcotics related interviews on a daily basis.

“The business of drug trafficking and the modus operandi of drug dealers are matters unfamiliar to jurors. As such, Rule 702 of the Federal Rules of Evidence permits a district court to allow the testimony of a witness whose knowledge, skill, training, experience or education will assist a trier of fact in understanding the business of drug trafficking. When deciding whether to admit expert testimony under Rule 702, the district court plays a gatekeeping role, allowing in testimony only if it is both relevant and reliable. The district court enjoys broad discretion in its determination of relevancy and reliability. Therefore, we will reverse the district court’s decision to admit the detectives’ expert testimony only upon the showing of an abuse of discretion. The district court in this case did not abuse its discretion in admitting their reliable and relevant expert testimony.”



**EYEWITNESS IDENTIFICATION:
Two Photo Lineups With
One Person Appearing in Both**

On June 7, 2001, shortly before 3:00 p.m., a man wearing a black mask, a white shirt, blue jeans, and a black baseball cap with pink lettering entered the Firststar Bank in Hugo, Minnesota. At the time, two female tellers were working behind the counter and no one else was in the main area of the bank. The masked man walked directly to the counter, stated: “This is a robbery, get down,” and vaulted over the counter.

The masked man ordered the two tellers to “get on the floor,” and they obeyed. He took approximately \$18,000 in cash from the area behind the counter. While the tellers were on the floor, one of them began to cry. The other looked up at her and was ordered by the man to get her head down. She feared that he was going to kick her in the head. The man placed the money in a bag, jumped back over the counter, and fled. After he left, one of the tellers triggered a foot alarm behind the counter.

Around the same time, Jean Nadeau was in her car, approaching the Firststar Bank in Hugo to deposit a check. She was unaware that the bank had been robbed. As she pulled up to the driveway of the bank, she observed a man exit the bank holding a bag. She observed the man drop his hat and stop approximately ten feet in front of her car. He was “kind of shuffling, trying to decide whether he should get his hat.” During this time, he looked directly at Nadeau. He then left without picking up his hat. A short time later, one of the police officers responding at the scene

noticed a black baseball cap with pink lettering lying on the ground in the middle of the bank driveway. The baseball cap was seized as evidence and sent to the Minnesota Bureau of Criminal Apprehension (BCA) Laboratory on June 14, 2001.

On June 13, 2001, Nadeau was interviewed by Sergeant Gary Swanson of the Washington County (Minnesota) Police Department regarding her observations on June 7, 2001, at the Firststar Bank. According to Swanson, Nadeau described the man she saw as in his mid-30s, 5'9" to 5'10", approximately 150 to 160 pounds, wearing a white shirt and blue jeans, and carrying a bag. She also stated that she believed she would recognize him if she were to see him again.

On August 29, 2001, at approximately 1:25 p.m., a white male wearing a black mask, a green shirt, blue jeans, white latex gloves, and carrying a black bag entered the S&C Bank in Harris, Minnesota. Two female bank employees were working behind the counter, and one female bank employee was working at the front desk. The masked man ordered the three bank employees to get down on the floor, and they obeyed. He slid over the bank counter and began taking money, which he placed in the black bag. In the process, he grabbed some bait money and triggered an alarm. He then jumped back over the counter and exited the bank.

Meanwhile, Lawrence Eckl, a volunteer firefighter, was home with his wife playing cribbage when his police scanner indicated that the S&C Bank had been robbed. Eckl, who lives close to the S&C Bank, went to his window and saw a masked man exit the bank, run down the street, and get into a red GM

car. Eckl grabbed his scanner and cell phone, ran out to his truck, and began driving up and down the streets of Harris looking for the same red car. When he spotted the car, Eckl drove up directly behind it and wrote down its license plate number. Eckl called the police on his cell phone, reported his observations of the suspect and the car, and continued to follow the car. At one point, the car pulled over at a corner into the left side of the road. Eckl drove past the car slowly enough to double check the license plate number he had written down. After passing the car, Eckl began turning around, at which point the car drove off. Eckl continued to follow it in his truck. A short time later, Eckl observed the red car pull into the driveway of a game farm and stop.

Eckl drove his truck alongside the red car and looked directly at the driver, who was "scrunched way down in his seat." After Eckl and the driver of the red car looked directly at each other, the driver sped away. During this encounter, Eckl again checked the license plate number. He attempted to continue following the car, but it was traveling too fast. Eckl called the police and again reported the license plate number of the car and the direction it was traveling when he lost sight of it.

A radio bulletin was sent out to area police to be on the lookout for a 1988 maroon Buick Skylark, license plate number 253LNJ, suspected of involvement in the robbery of the S&C Bank. Approximately twenty minutes later, a police officer on patrol spotted a car matching the description in the bulletin. The officer pulled the car over and radioed for backup. The driver, later identified as Gipson, was arrested on three outstanding arrest warrants. No evidence of the S&C Bank robbery was found in the car.

On September 19, 2001, Sergeant Swanson prepared two photographic lineups, each containing six photographs. Gipson was the only person appearing in both line-ups. One line-up contained a photograph of Gipson taken on August 29, 2001. The other line-up contained a photograph of Gipson taken on December 17, 2000. The August 2001 photograph showed Gipson with longer hair, a mustache, and a goatee beard. The December 2000 photograph showed him with shorter hair and a mustache, but no beard.

On September 19, 2001, Swanson again met with Nadeau. At his request, she again described her observations of the man in the driveway of the Firststar Bank in Hugo on June 7, 2001. Swanson then handed her the photographic line-up containing the August 2001 photograph of Gipson and asked her if she recognized anyone. Nadeau immediately returned the line-up to Swanson, stating that all the men in the photographs were too old and their hair was too long.

On September 25, 2001, Investigator Wayne Johnson of the Washington County (Minnesota) Sheriff's Department met with Nadeau and showed her the photographic line-up containing the December 2000 photograph of Gipson. This time, Nadeau focused on the photograph of Gipson, but indicated that he appeared younger and heavier than the man she saw at the bank. Johnson suggested that she imagine him older and thinner. Nadeau then began using her fingers to cover up Gipson's hair. Upon seeing her do that, Johnson gave her some business cards to assist her. Nadeau thereafter positively identified Gipson as the man she saw in the driveway of the Firststar Bank in Hugo on June 7, 2001.

In *United States v. Gispon*, CA8, No. 03-2292, 9/1/04, Gipson maintained that the manner in which Nadeau was shown the two different line-ups, with his photograph appearing in both line-ups, was impermissibly suggestive, and he requested suppression of that evidence. Given that Nadeau clearly did not recognize him in the first line-up, Gipson argued, she likely recognized him in the second line-up only because she had seen his picture in the first line-up just six days earlier. Moreover, Gipson argued, under the totality of the circumstances there was a very substantial likelihood of misidentification because, for example, Nadeau had not been particularly attentive at the Firststar Bank on June 7, 2001, she was not able to provide any more than a general description of the man she saw that day, and over three months had passed between her observations at the bank and her identification of Gipson from the second photographic line-up.

In response, the government argued that neither the line-ups themselves nor the manner in which they were shown to Nadeau was unnecessarily suggestive. The government further maintained that Nadeau was not likely to misidentify the man she saw at the Firststar Bank on June 7, 2001, because she had a good opportunity to observe the man at a close distance, she twice gave a detailed and accurate description of her observations, she stated to Swanson six days after the robbery that she thought she would recognize the man if she were to see him again, the photographic line-ups individually were not suggestive, and nothing was ever said or done to suggest to Nadeau that Gipson was a suspect.

In response, the Eighth Circuit Court of Appeals found as follows:

"...The constitutional standard requires consideration first, whether the pretrial identification procedures used were impermissibly suggestive and, second, if they were impermissibly suggestive, whether they created a very substantial likelihood of irreparable misidentification under the totality of the circumstances.

"While there is a greater risk of improper suggestion when a witness is shown a suspect in two separate line-ups, as opposed to one, that is not to say that such pretrial identification procedures will always be impermissibly suggestive. In the present case, the two photographic line-ups at issue contained two different photographs of Gipson, taken approximately eight months apart and showing him with different hair lengths and amounts of facial hair. In each of the photographic line-ups, Gipson's photo was displayed with five others, and all six photos were of Caucasian men having similar general appearance, build, hair length, and facial hair.

"Upon looking at the first photographic line-up, Nadeau quickly concluded that all six men were too old and their hair was too long for any of them to be the man she saw at the Firststar Bank. She immediately returned the photographic line-up to Sergeant Swanson. Under these circumstances, it is highly unlikely that she could have formed a lasting memory of any particular individual based solely upon the photographs. She was not told that she would be shown another photographic line-up, and nothing was said or done to suggest that any one of the six men in the first photographic line-up was a suspect.

"The second photographic line-up was not shown to her until almost a week later. Six days

after seeing the first photographic line-up, Nadeau was shown the second line-up containing the photograph of Gipson at a slightly younger age and with shorter hair and less facial hair than in the first. This photograph drew Nadeau's attention, and shortly thereafter she identified Gipson as the man she saw at the Firststar Bank. It is true that Investigator Johnson was helpful and responsive to Nadeau as she was trying to focus on Gipson's basic features; however, he did not say or do anything to indicate to Nadeau that Gipson was in fact a suspect."

The Eighth Circuit Court of Appeals held that the pretrial identification procedures used in this case were not impermissibly suggestive.

**FAIR LABOR STANDARDS ACT:
City with Less than Five Officers;
Use of Volunteer Officers**

In *Cleveland v. City of Elmendorf*, CA5, No. 04-50901, 10/6/04, four police officers, formerly employed by the City of Elmendorf, contend that they are owed overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201. The City asserts an exemption from the overtime provisions of the FLSA because it employs less than five police employees during any given workweek.

The City pays three officers (a police chief and two part-time officers), but the remainder of the police force is comprised of officers commonly referred to as "non-paid regulars." Whether the four plaintiffs, who were paid officers, are owed overtime depends on whether the City's non-paid regulars are "employees" or "volunteers" under the FLSA.

The non-paid regulars who performed police services for the City were not paid at any time by the City. The City did, however, maintain the police commissions of many of the non-paid regulars.

The City of Elmendorf asserted an exemption from the FLSA's maximum hour requirement under 29 U.S.C. § 213(b)(20). This provision provides that maximum hour requirements shall not apply to any employee of a public agency who in any work week is employed in law enforcement activities, if the public agency employs during the work week less than 5 employees in law enforcement activities. The City argued that it employed only three officers; the non-paid regulars were volunteers.

The Fifth Circuit Court of Appeals examined the following issue—whether, by volunteering for the City, having a commission is a tangible benefit sufficient to indicate that the non-paid regulars were employees, not volunteers, under the FLSA. The Court believes it is not, finding as follows:

“Let us look again at what is implicated in maintaining one's commission. To be a peace officer in the State of Texas, an individual must be both licensed by the Texas Commission on Law Enforcement Officers and Education (TCLEOSE) and be utilized in a capacity that is designated by Texas statute. One such capacity is as a police officer of an incorporated city. The only benefit that accrued to the non-paid regulars from the provision of law enforcement services to the City is that the City lists them as being commissioned when reporting to the TCLEOSE. This allows the non-paid regulars to both maintain and keep active their licenses, and to perform law enforcement services as police officers.

“In short, any individual wishing to act as a police officer must be commissioned by the city for which he serves to legally provide law enforcement services. This formality, although understandably required by the law, is not a tangible benefit given to the individual that is sufficient to render these non-paid regulars employees under the FLSA. In essence, the non-paid regulars receive no benefit from the City other than the ability to volunteer their services in compliance with Texas law.”

The Fifth Circuit Court of Appeals held as a matter of law that, under the totality of the circumstances, this benefit provided to volunteer police officers is not sufficient to render these persons employees under the FLSA. The City of Elmendorf, in this case, is exempt from the overtime provisions of the FLSA.

**FIFTH AMENDMENT:
Miranda Rights—Request
for Specific Lawyer**

In *Abela v. Martin*, CA6, No. 00-2430, 8/27/04, Kevin M. Abela called 911 and told the operator that he had stabbed someone. After meeting the police, Abela was taken to a hospital emergency room for treatment of his own injuries.

While at the emergency room, but before being treated for his injuries, Oakland County Police Sergeant Michael McCabe began interrogating Abela about the events leading up to the stabbing. Abela responded by stating, “Maybe I should talk to an attorney by the name of William Evans,” and he showed Sergeant McCabe Evans's business card.

McCabe agreed to call Evans for Abela and left the room, presumably to contact Evans.

Upon his return, McCabe made no mention of Evans, and proceeded to read Abela his *Miranda* rights. Abela then signed a form waiving those rights and gave a statement to Sergeant McCabe. After being treated at the hospital, Abela was taken to the police station. He gave another statement there. In both statements, Abela admitted to stabbing

Underwood, but claimed that he did so in self defense. The statements were admitted at trial and used by the prosecution against Abela.

The Sixth Circuit Court of Appeals was asked to consider whether Abela's statements should be suppressed because they were elicited in violation of his Fifth Amendment right to counsel. The Court, in summary, found as follows:

"The Fifth Amendment to the U.S. Constitution guarantees that 'no person...shall be compelled in any criminal case to be a witness against himself.' Although the Fifth Amendment does not guarantee a right to counsel, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that in certain pretrial stages—namely, custodial interrogation—the privilege against self-incrimination includes an implied right to counsel. This right is triggered when a suspect is interrogated

"After Abela requested counsel, the police were required to cease questioning him until he had a lawyer present. The police's failure to cease questioning Abela violated his right to counsel, the contours of which are clearly established by federal law and Supreme Court precedent."

while 'in custody' or 'otherwise deprived of his freedom in any significant way'...

"After Abela requested counsel, the police were required to cease questioning him until he had a lawyer present. The police's failure to cease questioning Abela—that is, both (1) Sergeant McCabe's returning to Abela, reading him his *Miranda* rights, and proceeding to interrogate him at the hospital, and (2) the police questioning that continued in the

morning, at the police station, after Abela was released from the hospital—violated Abela's right to counsel, the contours of which are clearly established by federal law and Supreme Court precedent. Furthermore, because Abela's statements were self-incriminating and among the most significant evidence marshaled against him by the state, we do not find their admission into evidence harmless.

"Our decision is not altered by the fact that, after requesting counsel, Abela was read his *Miranda* rights, signed a waiver of them, and proceeded to make a statement at the hospital and at the police station (where, although not re-read his *Miranda* rights, he was asked whether he 'remembered' them). As just discussed, when a suspect invokes his Fifth Amendment right to counsel, police questioning must cease until counsel is present. A suspect may waive his Fifth Amendment right to counsel and the Edwards protections

after counsel has been requested, but only if the suspect himself has initiated the conversation or discussions with the authorities. The evidence here shows that Abela did not initiate conversation with the police. Rather, he gave a statement only after Sergeant McCabe returned to the room, read him his Miranda rights, and resumed questioning...

"Accordingly, because we find that Abela's Fifth Amendment right to counsel was violated and the state courts' orders rejecting this claim are contrary to clearly established federal law, as determined by the U.S. Supreme Court, we grant Abela's request for habeas relief on this ground."

**INFORMANTS: Unwitting
Informant; Probable Cause**

In December 2000, Deputy Sheriff Scott Van Wagoner of the Salt Lake County Sheriff's Office was contacted by a confidential informant who claimed to have information regarding an alleged methamphetamine dealer named Fred Artez. The informant drove with Van Wagoner and identified a home in Sandy City, Utah as the home of Artez. The informant explained to Van Wagoner that he could not purchase methamphetamine directly from Artez but that he could purchase it through an unwitting informant (UI).

Van Wagoner verified that Artez owned the home and two of the vehicles parked in front of the home. Van Wagoner also contacted the Sandy City Neighborhood Narcotics Unit and learned that they had received a call within the last two months from an unidentified male

claiming that his wife was purchasing methamphetamine from the residence. Van Wagoner also discovered through the Sandy City records that several other people, all of whom had narcotics-related criminal histories, lived at or frequented the residence. One of these individuals had an active arrest warrant for possession of drug paraphernalia. Van Wagoner also discovered that Artez had been arrested twice, once for larceny and once for driving under the influence of alcohol.

With the informant's assistance, Van Wagoner executed two controlled purchases of methamphetamine. The two purchases were conducted within approximately two weeks of each other and were accomplished in essentially the same manner. Van Wagoner (either himself or with the assistance of another agent) searched the informant and his or her vehicle for money and contraband. Finding none, Van Wagoner gave the informant county funds, accompanied them to the residence of the UI, and watched as the informant knocked on the front door and made contact with the UI. Van Wagoner watched the UI exit the residence and get into the informant's car, and he followed the UI to the Artez residence. Van Wagoner watched the UI exit the vehicle, initiate contact with an occupant of the residence, and enter the residence. After approximately twenty minutes, Van Wagoner watched the UI exit the suspect residence and get into the vehicle, followed the UI back to his or her home, and watched the UI enter his or her home. Van Wagoner then watched the informant exit the UI's home. Van Wagoner followed the informant to a prearranged location, where the informant handed Van Wagoner a quantity of suspected methamphetamine and said that he or she had "purchased it from Artez through the

unwitting." Van Wagoner again searched the CI for money and contraband and found nothing. Van Wagoner later field tested the substance to verify that it was, in fact, methamphetamine.

Following the two controlled purchases, Van Wagoner conducted several brief surveillances of the suspect residence, each of which lasted for approximately thirty minutes. He noticed during these surveillances that several people arrived and stayed for a short period of time. During his surveillance, he stayed a distance away from the residence because the informant had informed him that Artez kept surveillance cameras outside his residence. Based on his training and experience, Van Wagoner found the activity he observed indicative of narcotics distribution.

Van Wagoner prepared an affidavit for a search warrant which relayed all of this information. Van Wagoner also indicated in the affidavit that the informant was an admitted narcotics user and had given Van Wagoner some details about the pricing, packaging, and effects of methamphetamine, which convinced Van Wagoner that the informant was knowledgeable about such things. Van Wagoner stated in the affidavit that he considered the informant to be reliable because the informant had never been in custody and came forward out of his or her concern for the safety of the community.

A warrant for the search of Artez's home was issued based on Van Wagoner's affidavit. Officers conducted a search of his home pursuant to that warrant. They discovered and seized drug paraphernalia and quantities of marijuana and methamphetamine. They also discovered and seized a short barrel shotgun

and a variety of other firearms. Based on this evidence, Artez was charged with possession of a short barrel shotgun in violation of 26 U.S.C. §§ 5861(d) and 5871. Artez moved to suppress the evidence. The district court granted that motion, holding that the warrant was not supported by probable cause and that the Leon good faith exception did not apply. The government timely filed an appeal with the Tenth Circuit Court of Appeals, who reversed the judgment of the district court and remanded the case for further proceedings, finding as follows:

"A tip from an anonymous or confidential informant that narcotics are being distributed at a particular location may be corroborated through the arrangement of a controlled purchase at the suspect location. The common formalities observed by police officers when conducting such controlled purchases are as follows: (1) the police search the informant (and his vehicle, if appropriate) for money and contraband prior to the buy; (2) give the informant money with which to purchase the narcotics; (3) transport the informant to the suspect residence (or follow the informant to the residence); (4) watch the informant enter the suspect residence, disappear while inside the suspect residence, and emerge from the suspect residence; (5) search the informant upon exiting the suspect residence; and (6) receive the narcotics from the informant. The absence of constant visual contact with the informant conducting the transaction does not render a controlled purchase insufficient, nor does the absence of an audio-recording of the transaction.

"In this case, the controlled purchases orchestrated by Van Wagoner deviated from these common formalities only in the use of

an unwitting informant as an intermediary between the confidential informant and the suspect. The use of an unwitting informant introduces an additional layer of uncertainty to the transaction because of the possibility that the narcotics were acquired not at the suspect residence but at the location where the confidential and unwitting informants met before and after the transaction.

“Nonetheless, we have approved the use of an unwitting informant in a controlled purchase situation almost indistinguishable from the one at issue in this case. In *United States v. Richardson*, 86 F.3d 1537 (10th Cir. 1996), an officer arranged a controlled purchase using an unwitting informant as an intermediary between a known informant and the suspect residence. The known and unwitting informants arranged a transaction and designated a meeting place. The officer drove the known informant to the meeting place and gave him money to purchase cocaine. The known informant then got into the unwitting’s truck. Upon exiting the truck, the known informant informed the officer that he had given the unwitting the money and that the unwitting was going to purchase cocaine from the suspect residence. Meanwhile, surveillance officers watched the unwitting enter the driveway of the suspect residence, exit the vehicle, disappear for twenty minutes, and return to his vehicle. The unwitting returned to the location where the known informant waited and gave the cocaine to the known informant. We held that the informant’s tip was corroborated by a controlled narcotics purchase and the observation of Mr. Richardson’s residence.

“The two controlled purchases conducted in this case were conducted in a similar manner

to the controlled purchases in *Richardson* and the other cases that have approved the use of intervening unwitting informants. Each controlled purchase utilized at least one unwitting informant as a middleman between the confidential informant and the suspect location, and each involved a meeting between the confidential informant and the unwitting informant prior to the transaction.

“Consistent with this authority, we conclude that the two controlled purchases conducted in this case corroborated the confidential informant’s tip that he or she, through an unwitting informant, was able to purchase methamphetamine from Arterz’s residence. In sum, we conclude that the two controlled purchases of methamphetamine from Defendant’s residence helped corroborate the confidential informant’s tip that the residence was utilized to distribute methamphetamine.”

The United States Court of Appeals for the Tenth Circuit also noted that other elements of probable cause included the anonymous tip provided to the Sandy City Neighborhood Narcotics Unit, the police surveillances showing an unusually high volume of individuals entering and leaving a residence, and four other individuals who frequented the residence had prior convictions for narcotics-related offenses.

“Deputy Sheriff Van Wagoner reported five pieces of information in his search warrant affidavit: (1) a tip from a confidential informant that methamphetamine was being distributed at Arterz’s residence; (2) the successful execution of two controlled buys of methamphetamine from the suspect residence; (3) a tip from an anonymous informant to a different police unit that

methamphetamine was being distributed at Artez's residence; (4) the results of surveillance of the suspect residence indicating a series of visitors staying for short periods of time, consistent with drug trafficking activity; and (5) the narcotics-related criminal histories of four inhabitants or frequent visitors of the suspect residence, including an active arrest warrant against one of these individuals for possession of drug paraphernalia.

"Certainly this information did not eliminate the risk that the confidential informant was lying or was in error. That risk, however, need not be wholly eliminated. Rather, what is needed is that the probability of a lying or inaccurate informer has been sufficiently reduced by corroborative facts and observations. Viewing the totality of the circumstances, the Court concluded that the information contained in the affidavit sufficiently reduced that probability. Accordingly, the affidavit was sufficient to give the magistrate a substantial basis for determining the existence of probable cause to search Artez's residence."

**JAILS AND PRISONS:
Prison Litigation Reform Act;
Private Prisons**

In *Boyd v. Corrections Corp. of America*, CA6, No. 03-5227, 9/8/04, the Sixth Circuit Court of Appeals held that the provision of the Prison Litigation Reform Act that forbids an inmate to file a federal civil rights action until all administrative remedies available are exhausted requires inmates confined in prisons operated by private companies to comply with

the grievance procedure of the private company.

**SEARCH AND SEIZURE:
Search by a Private Person**

In *United States v. Smith*, CA8, No. 03-3485, 9/3/04, the Eighth Circuit Court of Appeals dealt with the appeal of Lamont Smith, who was convicted of possession of more than 50 grams of cocaine base. Smith contended that an employee of Federal Express conducted a search, not as a private person, but as an agent of the government.

On April 13, 2001, Hawthorne, California, police officer Melanie Newenham, who was participating in a "parcel interdiction" operation at a Federal Express (FedEx) facility, removed a suspicious looking package from a conveyor belt. After removing the package, she gave it to Detective Julian Catano, who, also believing the package to be suspicious, decided to submit it to a canine sniff. The dog alerted to the package, signifying that it contained illegal drugs.

Catano took the package to Lee Edwards, the FedEx facility manager, and told her that he suspected the package contained drugs. Edwards asked whether Catano wanted her to open the package. Catano testified he told her that if she wanted to open it, that would be fine. Edwards opened the box, revealing a pair of children's rubber boots. Inside one of the boots, she found a ball of clear tape containing a white substance.

Catano and Newenham took the package to the Hawthorne police station, where it and its contents were examined and photographed. The package was later resealed and returned to the FedEx facility for controlled shipment to the recipient address in Lincoln, Nebraska. Controlled delivery was executed at the recipient address, where the package was accepted by Smith.

In this case, the Eighth Circuit Court of Appeals found as follows:

“A search by a private citizen is not subject to the strictures of the Fourth Amendment unless that private citizen is acting as a government agent. *United States v. Malbrough*, 922 F.2d 458, (8th Cir. 1990). We look to several factors in determining whether a private citizen was acting as an agent of the government. Chief among these are whether the government had knowledge of and acquiesced in the intrusive conduct; whether the citizen intended to assist law enforcement agents or instead acted to further his own purposes; and whether the citizen acted at the government’s request.

“Because the government certainly knew of, and acquiesced in, the opening of the package, this is a close case. The testimony established, however, that Catano made it clear he was not asking or ordering Edwards to open the package. There is no evidence that Edwards felt she was obligated to open the package. We conclude therefore that the government’s knowledge and acquiescence, when considered in light of Catano’s communication to Edwards that the decision was hers alone to make, did not make Edwards a government agent for the purposes of the Fourth Amendment.

“With respect to the question of intent, the district court found that Edwards’s decision to inspect the package, even if accompanied by a dual motive of assisting the officers, was motivated by her obligation to ensure that her employer was not being used as a means of carrying contraband. As the Supreme Court has pointed out, a commercial carrier such as FedEx has a ‘duty to refrain from carrying contraband,’ and such a carrier’s employees may act to ensure compliance with that duty. *Illinois v. Andreas*, 463 U.S. 765, 769 n.1 (1983). That a private citizen is motivated in part by a desire to aid law enforcement does not in and of itself transform her into a government agent.”

SEARCH AND SEIZURE: Vehicle Stops Based on Anonymous Tips

In *California v. Wells*, Cal. Ct. Appeals, 5th Cir. No. F043125, 9/10/04, the issue was whether California Highway Patrol Officer Julian Irigoyen had reasonable suspicion to stop a vehicle.

Officer Irigoyen received a dispatch report of a possible under-the-influence driver “weaving all over the roadway.” The offending vehicle was described as an ‘80s model blue van northbound on Highway 99 at Airport Drive. Officer Irigoyen was traveling southbound three to four miles north of that location. There was only one off and on ramp between his position and the location of the van. Upon receiving the dispatch, he positioned himself on the shoulder of northbound Highway 99 and watched for the described vehicle. Two or three minutes later, when he saw a blue van,

he activated his patrol car lights and stopped it to investigate whether the driver was impaired. The van, which was traveling approximately 50 miles per hour, did not weave, speed, or otherwise violate any traffic laws in his presence.

At the suppression hearing, defense counsel argued that the evidence should be suppressed because although the officer had reasonable suspicion, he lacked probable cause to stop the van. The court denied the motion. It found the officer had adequate grounds to stop the vehicle based on the sufficiently distinct description of the van coupled with its traveling direction and position a short time later.

Upon review, the California Court of Appeals cited *United States v. Wheat*, 287 F.3d 722 (8th Cir. 2001), where the Eighth Circuit Court of Appeals discussed the factors that justify an investigative stop based on an anonymous report of erratic driving. First, the anonymous tip must provide a sufficient quantity of information, such as the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details, so that the officer and the court may be certain that the vehicle stopped is the same as the one identified by the caller. The time interval between receipt of the tip and location of the suspect vehicle may also be a factor. In *Wheat*, the caller identified the color and

“The governmental interest in immediately stopping an erratic driver to investigate whether he or she is driving under the influence of drugs or alcohol is very strong; and the intrusion upon the constitutionally protected interests of the private citizen, although also significant, is comparatively less.”

general make of the vehicle, named the first three letters of its license plate, and gave its location and direction. Furthermore, the officer made the stop within minutes of the 911 call. Under the circumstances, the court concluded the information in the tip was “sufficiently copious and precise” to justify the stop.

Second, the tip must contain a sufficient

quantity of information to support an inference that the tipster has witnessed a traffic violation that compels an immediate stop. The rationale for allowing less rigorous corroboration of tips alleging erratic driving is that the imminent danger present is substantially greater and more difficult to thwart by less intrusive means.

The violation reported must suggest real exigency. A report of erratic driving will generally be sufficient because it strongly suggests that the driver is operating under the influence of alcohol or drugs and is unable to control his vehicle. Furthermore, the more extensive the description of the alleged offense, the greater the likelihood that the tip will give rise to reasonable suspicion.

Third, regarding the necessary degree of reliability of an anonymous tip of erratic driving, the Court found the traditional emphasis on the predictive aspects of the tip to be less applicable, stating as follows:

"The Supreme Court has emphasized that a primary determinant of a tipster's reliability is the basis of his knowledge. Unlike with clandestine crimes, such as possession of drugs or guns where corroboration of the predictive elements of a tip may be the only means of ascertaining the informant's basis of knowledge, in erratic driving cases, the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from the tipster's eyewitness observations and there is no need to verify that the tipster possesses inside information. The caller simply reported a contemporaneous observation of criminal activity taking place in his sight. The *Wheat* court concluded that an anonymous tip conveying a contemporaneous observation of criminal activity whose innocent details were corroborated was at least as credible as the tip in *Alabama v. White* 496 U.S. 325, (1990) where future criminal activity was predicted, but only innocent details were corroborated.

"The *Wheat* court recognized the danger that an anonymous report of erratic driving can be a malicious prank designed to cause trouble for another motorist. But, the court concluded that the risk of false tips is slight compared to the risk of not allowing the police immediately to conduct an investigatory stop. The governmental interest in immediately stopping an erratic driver to investigate whether he or she is driving under the influence of drugs or alcohol is very strong; and the intrusion upon the constitutionally protected interests of the private citizen, although also significant, is comparatively less. An erratic and possibly drunk driver poses an imminent threat to public safety and there is a substantial government interest in stopping the driver as quickly as possible."

The California Court of Appeals concluded that the anonymous tip was sufficient to justify the vehicle stop. The Court encouraged efforts by law enforcement to gather more information to assess the reliability of 911 calls reporting criminal activity. Factors that enhance the reliability of such a tip would include: (1) the identity of the caller; (2) multiple tips regarding the same erratic driver; (3) the dispatcher's notation as to the source of the call, for example, a cell phone caller on the highway who is observing the erratic driving; and (4) evidence that the dispatch office documents phone calls by voice recording, has caller identification or the ability to trace the call to a telephone number, or utilizes any other mechanism that enables the authorities to identify the informant and hold him or her accountable for false information.

The Court also urged prosecutors to provide the trial court with such evidence, and thus the reviewing court with an adequate record, to assess the reliability of the telephone tip that supports an officer's reasonable suspicion to stop a driver.

**SEARCH AND SEIZURE:
Vehicle Stops; Questioning
Unrelated to the Basis of the Stop**

Editor's Note: The constitutionality of police questioning unrelated to the purpose of a traffic stop is receiving increased scrutiny by the courts. These cases involve requesting consent to search for drugs after a valid traffic stop. The Tenth Circuit decided that a police officer may not ask questions during a traffic stop that are unrelated to the basis for the stop or to

the officer's safety—even if such questioning does not extend the duration of the stop. See United States v. Holt, 264 F.3d 1215 (10th Cir. 2001). The Missouri Court of Appeals and Illinois Appellate Court, Second District, recently held that police officers who stopped motorists for traffic offenses and then asked questions unrelated to the bases for the stop violated the Fourth Amendment rights of the motorists. See State v. Maginnis, Mo.Ct.App. No. WDC62896, 9/28/04; People v. Hall, Ill.App.Ct., No. 02-03-0515, 8/24/04.

However, the Sixth Circuit in United States v. Burton, 334 F.3d 514 (6th Cir. 2003), reached the opposite conclusion, holding that a police officer did violate the Fourth Amendment by briefly delaying his investigation of a traffic stop to ask for permission to search a motorist's car for contraband. In addition, United States v. Childs, 277 F.3d 947 (7th Cir. 2002), agreed that vehicle stops do not have to be strictly limited in scope. The Fifth Circuit Court of Appeals recently dealt with this same issue in the following case:

In *United States v. Brigham*, CA5, No. 02-40719, 8/19/04, Reginald Brigham and three friends were driving on U.S. Highway 59 near Nacogdoches, Texas on May 14, 2000. At 4:13 p.m., State Trooper Shannon Conklin spotted their silver 2000 Buick sedan following too closely behind another vehicle in violation of Texas traffic laws. Conklin stopped the Buick. A video camera and microphone mounted in the patrol car recorded the entire traffic stop. Conklin first approached Brigham, the driver, and asked him to step out of the

vehicle and provide his license and insurance papers. Brigham complied and produced an Arkansas driver's license and a rental agreement from an Avis branch in Memphis, Tennessee, listing Dorothy Harris, a 50-year-old female who lived in West Memphis, Arkansas, as the lessee. Since none of the occupants appeared to be a 50-year old female, and no additional drivers were authorized on the rental agreement, Conklin became suspicious.

At 4:15 p.m., two minutes into the stop, Conklin began asking Brigham a series of basic questions about the group's travel plans. Brigham replied that they were coming from Houston, Texas, that one of the passengers had been visiting family members, and that the rest of the group was on vacation. Conklin asked where the group had stayed and Brigham replied that they had stayed in a La Quinta Inn, but he had difficulty explaining where the motel was located.

Brigham avoided making eye contact with Conklin, appeared to be extremely nervous, and was responding to Conklin's questions with questions of his own. Conklin's five and one-half years of experience with the Texas Department of Public Safety led him to believe that Brigham was fabricating answers to his questions. Brigham identified Dorothy Harris, the renter of the car, as his mother. Bothered by Brigham's demeanor and answers, Conklin decided to verify Brigham's story with the other occupants of the car.

At 4:17 p.m., Conklin asked the passenger who Brigham had indicated was visiting relatives in Houston to step out of the vehicle. The passenger produced what appeared to be a Tennessee I.D. card with the name "Sircrease

D. Brooks." Conklin would soon discover that the I.D. was fictitious and that the passenger's name was actually Brandon Franklin. Conklin questioned Franklin about the group's travel plans. Franklin explained that the group was coming from Houston where they had attended an Isley Brothers concert on Friday night. Conklin then asked Franklin about the specifics of the trip, including what time the group had arrived in Houston, whom they had visited, and where they stayed.

Franklin appeared somewhat confused about the exact time the group had arrived in Houston, first answering Friday evening but then saying he wasn't sure when they arrived. Franklin also mentioned a La Quinta Inn and added that he knew a "couple of girls" in Houston. Notably, Franklin did not state either that he had any relatives in the Houston area or that he was visiting his family. Like Brigham, Franklin avoided eye contact with Conklin and appeared extremely nervous.

At 4:20 p.m., Conklin asked the two remaining passengers for identification and attempted to determine which of the stories he had been told was accurate. The female, Keisha Coleman, indicated that she did not have any identification, and the other male produced an Arkansas card identifying him as Quincy Perry. Perry and Coleman appeared confused and were inconsistent concerning the group's travel plans, as Perry initially stated that they arrived in Houston on Friday morning, while Coleman suggested Saturday.

At 4:21 p.m., now eight minutes into the stop, Conklin returned to his car and initiated computer checks on the Buick and the three identification cards he had received. He noted for the videotape that all three males appeared

"extremely nervous." Nevertheless, Conklin had informed Brigham that if his license was "clean," they would soon be on their way. At 4:23 p.m., the registration check on the Buick revealed that the plates matched the vehicle and there was no stolen vehicle report.

At the suppression hearing, Conklin testified that he remained suspicious because in his experience, the fact that a car is not yet reported as stolen does not necessarily indicate that the car was not actually stolen. As he awaited the results of the I.D. checks, Conklin continued to make verbal notes about the Buick's occupants, stressing that Brigham and Franklin avoided eye contact with him, all three men appeared extremely nervous, their hands were shaking, and the occupants' stories about their arrival time in Houston and the purpose of their visit were in conflict. In addition, Conklin observed that none of the subjects were 25 years old and, consequently, none of them appeared to have the authority legally to possess the rental car.

At 4:29 p.m., the results of the I.D. checks suggested that Franklin's I.D. was likely fictitious. After confirming the I.D. number that he had provided to the dispatcher, Conklin examined Franklin's I.D. more closely and concluded it was a forgery. At approximately 4:31 p.m., Conklin questioned Brigham and learned Franklin's true identity. Franklin, however, continued to insist to Conklin that he was "Sircrease Brooks," until Conklin confronted him about the false I.D. card. Conklin then returned to his patrol car to check Franklin's actual identity.

At approximately 4:34 p.m., while Franklin's I.D. check was still pending, Conklin waved over a Nacogdoches police unit to provide

backup and briefed the officers on the situation and his intent to seek consent to search the vehicle. Conklin then provided Brigham with a written warning for following too closely and returned Brigham's driver's license, while explaining that one of his responsibilities as a state trooper was to intercept illegal contraband such as guns, stolen property, and narcotics.

Brigham denied that any illegal items were in the car and acceded to Conklin's request for a search. Conklin removed all of the passengers from the car and patted them down. While Conklin was searching the car, the dispatcher responded with additional information regarding Franklin's identity. At approximately 4:42 p.m., Conklin discovered in the trunk, inside a cooler, a Minute Maid juice container holding what appeared to be liquid codeine. Conklin then arrested all four occupants of the Buick. Lab tests later confirmed that the substance was liquid codeine syrup.

On January 11, 2001, Brigham, Franklin, and Perry were indicted by a federal grand jury for possessing more than four kilograms of codeine with intent to distribute. Brigham moved unsuccessfully to suppress the evidence discovered during Trooper Conklin's search. A three judge panel, however, held that Trooper Conklin unconstitutionally extended the traffic stop by questioning Brigham before he began a computer check on the I.D.'s and the rental car's registration. The panel majority also held that Brigham's consent to search the vehicle was "involuntary" because it was tainted by the Fourth Amendment violation. The conviction was reversed. A full panel of the Fifth Circuit Court of Appeals agreed to a rehearing, found no Fourth Amendment violation and affirmed the conviction, finding as follows:

"The stopping of a vehicle and detention of its occupants constitutes a 'seizure' under the Fourth Amendment. This court, following the Supreme Court, has treated routine traffic stops, whether justified by probable cause or a reasonable suspicion of a violation, as *Terry* stops. Pursuant to *Terry*, the legality of police investigatory stops is tested in two parts. Courts first examine whether the officer's action was justified at its inception, and then inquire whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop.

"Brigham suggests that the Fourth Amendment required Conklin to return to the patrol car immediately after he learned that none of the occupants seemed to be an authorized driver and undertake a registration check to determine whether the Buick had been reported stolen. This approach misunderstands the Supreme Court's insistence on reasonableness rather than prescriptions for police conduct under the Fourth Amendment. The correct analysis requires district courts to consider the facts and circumstances of each case, giving due regard to the experience and training of the law enforcement officers, to determine whether the actions taken by the officers, including the length of the detention, were reasonable under the circumstances.

"The Supreme Court has long held that the 'touchstone of Fourth Amendment analysis is reasonableness.' (*Ohio v. Robinette*, 1996). Reasonableness requires a balancing of the public interest with an individual's right to be free from arbitrary intrusions by law enforcement. The Supreme Court has also emphasized that courts must allow law enforcement officers to draw on their own

experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.

“Under the second prong of the *Terry* test, the question before the court is whether Conklin’s actions after he legitimately stopped the Buick were reasonably related to the circumstances that justified the stop or to dispelling his reasonable suspicion developed during the stop. This is because a detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges.

“Like other circuits, this court has found no constitutional impediment to a law enforcement officer’s request to examine a driver’s license and vehicle registration or rental papers during a traffic stop and to run a computer check on both. An officer may also ask about the purpose and itinerary of a driver’s trip during the traffic stop. (*United States v. Gonzalez*, 5th Cir. 2003). Such questions may efficiently determine whether a traffic violation has taken place, and if so, whether a citation or warning should be issued or an arrest made. All these inquiries are within the scope of investigation attendant to the traffic stop. But even more important, we reject any notion that a police officer’s questioning, even on a subject unrelated to the purpose of a routine traffic stop, is itself a Fourth Amendment violation..

“Detention, not questioning, is the evil at which *Terry*’s second prong is aimed. The Fourth Amendment is concerned with ensuring that the scope of a given detention is reasonable under the totality of the circumstances. Mere police questioning, without some noncon-

sensual restraint on one’s liberty, is not a ‘seizure’ or detention. (*Florida v. Bostick*, 1991). Indeed, this court has recently noted that a consensual interrogation may follow the end of a valid traffic stop and that such consensual encounters do not implicate Fourth Amendment concerns...

“In sum, Conklin’s actions were reasonable under the circumstances and the detention as a whole was reasonable. As the district court summarized, the absence of the authorized driver, the inconsistent explanation as to the trip to Houston, and Franklin’s presentation of a fictitious I.D., taken together, justified Trooper Conklin’s continued detention of these individuals.”

**VOLUNTARY COOPERATION:
Consensual Encounter;
Request for Identification**

On October 27, 2002, Deputy Tracey Cook of the Salt Lake County Sheriff’s Office responded to a call reporting an altercation between two sisters at a residence in Kearns, Utah. Upon arrival at the scene, Deputy Cook encountered two women. One was standing outside the home and the other in the doorway. The two confirmed they were sisters and had been involved in a verbal dispute. One added that the other had thrown a brick at a car parked in the driveway. The woman told Deputy Cook that the car belonged to her boyfriend, but “he didn’t want anything done about it.” Deputy Cook told the woman she needed to speak to the boyfriend to ask about the damage and to verify ownership. The woman said he was inside the residence and that she would get him.

The boyfriend came outside onto the porch to speak with Deputy Cook. He told Deputy Cook that the car was not his but belonged to a sibling. Deputy Cook testified at the suppression hearing that she then “stated I needed to get some identification from him and run the information on the vehicle...” The boyfriend responded by telling her that “he didn’t want anything done about the damages to the vehicle.” Deputy Cook testified that she told him she found it strange that he would not want the damage investigated since the owner would probably be upset when he returned the vehicle damaged. She reiterated that she “needed” to see his identification, and this time he provided her with an identification card that identified him as Esparza-Mendoza.

Deputy Cook called in Esparza-Mendoza’s information to a dispatch officer, who advised her that Esparza-Mendoza was a deported felon and the subject of a fugitive warrant. To confirm that she was indeed dealing with the person named in the warrant, Deputy Cook contacted the United States Immigration and Naturalization Service (INS). The INS agent spoke first to Deputy Cook and then with Esparza-Mendoza. After the INS agent confirmed he was the subject of the warrant, Deputy Cook arrested Esparza-Mendoza.

Esparza-Mendoza had illegally entered the U.S. from Mexico around March 1997. On April 19, 1999, he was convicted in Utah of a felony cocaine possession charge. The INS subsequently gave him notice it was bringing a deportation action against him. Esparza-Mendoza did not contest the deportation, and on May 20, 1999, the INS ordered his deportation, warning him that reentry without permission would be a criminal offense. On May 22, 1999, he was deported to Mexico.

The only question before the district court was whether Esparza-Mendoza’s identity and the information that the government gathered once it discovered his identity, such as the outstanding warrant and his criminal and immigration history, should be suppressed as the fruits of an illegal search and seizure. At the suppression hearing, the government did not attempt to argue that Deputy Cook had any reasonable suspicion of criminal activity that would justify an investigatory detention of Esparza-Mendoza under *Terry v. Ohio*, 392 U.S. 1 (1968). The government maintained that the encounter between Deputy Cook and Esparza-Mendoza was consensual, meaning there was no search or seizure for purposes of the Fourth Amendment.

Upon review, in *United States v. Esparza-Mendoza*, No. 03-4218, 10/14/04, the Tenth Circuit Court of Appeals found as follows:

“The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation. Thus, police officers may approach citizens, ask them questions and ask to see identification without implicating the Fourth Amendment’s prohibition against unreasonable searches and seizures. A person is seized only when that person has an objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her way. If a reasonable person would feel free to terminate the encounter, the encounter does not implicate the Fourth Amendment.

“Police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly

eliminates the consensual nature of the response. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

“In this case, Deputy Cook encountered Esparza-Mendoza on the porch outside his girlfriend’s home, and although she may have been armed and in uniform, there was no evidence that she drew her weapon or otherwise exhibited an intimidating or coercive demeanor. There were no other officers confronting Esparza-Mendoza. Deputy Cook’s desire to identify Esparza-Mendoza might have been disconcerting to a person who had committed a crime, such as stealing the car or entering the country illegally, but the reasonable person test presupposes an *innocent* person. Deputy Cook’s statements would not have seemed coercive or intimidating to a reasonable innocent person. Thus, the only relevant factor that goes in Esparza-Mendoza’s favor is, Deputy Cook’s second statement regarding her need for Esparza-Mendoza’s identification. This is quite different from frisking, arresting, and searching.

“The distinction on which Esparza-Mendoza hopes to rely is that instead of *asking* for his identification, Deputy Cook *demand*ed it. Though the fact that the request was made in a declaratory rather than interrogatory sentence may be relevant to our overall

consideration, it does not so alter the totality of the circumstances to the point that a reasonable person would have felt compelled to respond. And although Esparza-Mendoza argues that he was forced to either give up his identification or leave the family residence, he had a number of other options. There is no evidence that Deputy Cook would have gone into the home to pursue Esparza-Mendoza had he not come out at his girlfriend’s request, arrested him had he again refused to provide identification, or stopped him from simply going back *into* the family residence. We have held that valid consent has been given by individuals with fewer options than Esparza-Mendoza.

“A reasonable person might indeed have felt compelled by simple good manners, or by an understandable but nonetheless unnecessary unease around law enforcement officers, to accede to Deputy Cook. But a reasonable person should not have felt legally compelled to do so in these circumstances. Thus, Deputy Cook’s encounter with Esparza-Mendoza did not become a detention or seizure until after he had consensually given her his identification and she had thereby learned that he was the subject of an outstanding warrant.

“Because Esparza-Mendoza consensually revealed his identity to Deputy Cook, that identity and the information about Esparza-Mendoza’s past were obtained without a Fourth Amendment seizure. Esparza-Mendoza was only seized after Deputy Cook and the INS determined that he was the subject of a fugitive warrant. Esparza-Mendoza does not contest that Deputy Cook had adequate cause to arrest him at that point. Thus, there was no violation of the Fourth Amendment.”