THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

555 FRANKLIN STREET · SAN FRANCISCO, CALIFORNIA 94102 · (415) 561-8303
1149 SOUTH HILL STREET · LOS ANGELES, CALIFORNIA 90015 · (213) 765-1500

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 1998 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 1998 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The handwritten answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Contents

TUESDAY AFTERNOON
JULY 28, 1998

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

State v. Arthur

(THIS PAGE INTENTIONALLY LEFT BLANK)

State v. Arthur

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the fictional United States Court of Appeals for the Fifteenth Circuit.

3. You will have two sets of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the task you are to complete.

4. The Library contains the legal authorities needed to complete the tasks. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit citations.

5. Your answer must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate about 90 minutes to reading and digesting the materials and outlining and organizing your answer before you start writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response.

(THIS PAGE INTENTIONALLY LEFT BLANK)

CHILTON COUNTY DISTRICT ATTORNEY
PRE-TRIAL UNIT
Chilton County Courthouse
Chilton, Columbia 01010

Memorandum

TO: Applicant
FROM: Marie Padilla, Unit Chief
RE: Columbia v. Raymond Arthur 1998-5852 (Suppression Motion)

I want you to help me prepare for the hearing on defendant's motion to suppress evidence seized in the case of State v. Arthur.

The defendant is charged with possession with intent to distribute a controlled narcotic substance (cocaine) and with attempted introduction of contraband into a penal institution in violation of the Columbia Criminal Code. The evidence defendant has moved to suppress was taken from his person during a routine screening of visitors to the Chilton Correctional Center (CCC) pursuant to posted prison rules.

This matter is of some importance to the District Attorney's Office. Recent accounts in both the electronic and print media have decried the alleged huge increase in drug use by prisoners at CCC. Suppression of the evidence in this case will make it even more difficult to interdict drugs being smuggled into the correctional facility.

The hearing is set for next week, and we have just received the defendant's motion to suppress and supporting memorandum of points and authorities. At the hearing, I expect three witnesses will testify: the defendant, Warden Sam Jeffries, and Corporal Bernard Price, the Correctional Department officer who conducted the search of the defendant.

I want you to prepare the memorandum of points and authorities in opposition to defendant's motion to suppress in accordance with Office Memo 121 attached.

CHILTON COUNTY DISTRICT ATTORNEY
PRE-TRIAL UNIT
Chilton County Courthouse
Chilton, Columbia 01010

Office Memorandum 121

TO: All Members of the Unit
FROM: Marie Padilla, Unit Chief
RE: Persuasive Briefs and Memoranda

All persuasive briefs or memoranda such as memoranda of points and authorities to be filed in support or opposition of pre-trial motions shall conform to the following guidelines.

1. Statement of Facts. All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

2. Questions Presented. Following the Statement of Facts, the document shall include a section entitled Question(s) Presented. Your objective in this section is to state the precise question or questions presented in the case. Simply to present the question "was there probable cause?" or "was the confession voluntary?" is insufficient. We want to present the questions as a combination of the legally relevant facts combined with the precise point of law. For example, Improper: DID THE ARRESTING OFFICER HAVE PROBABLE CAUSE TO DETAIN THE DEFENDANT? Proper: WAS THE ARRESTING OFFICER, WITH A DETAILED DESCRIPTION OF THE ASSAILANT AND A GENERAL DESCRIPTION OF THE VEHICLE IN WHICH THE ASSAILANT LEFT THE SCENE OF THE CRIME, JUSTIFIED IN STOPPING A VEHICLE WHICH FIT THE DESCRIPTION AND WAS COMING FROM THE AREA IN WHICH THE CRIME TOOK PLACE? As with the Statement of Facts, the issues must be stated accurately, although emphasis is not improper.

3. Summary of Argument. After the Question(s) Presented, there must be a brief Summary of Argument. In not more than one brief paragraph per issue, the Summary must succinctly and persuasively encapsulate the argument in the State's favor.

4. Argument. Following the Summary of Argument, the Argument should begin. The Unit follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, Improper: THE EVIDENCE IS SUFFICIENT TO CONVICT THE DEFENDANT. Proper: EVIDENCE OF ENTRY THROUGH AN OPEN WINDOW IS SUFFICIENT TO SATISFY THE "BREAKING" ELEMENT OF BURGLARY.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

You need not prepare a table of contents, a table of cases, or the index. These will be prepared by the support staff.

IN THE COLUMBIA CIRCUIT COURT
CHILTON COUNTY

STATE OF COLUMBIA	:	CRIMINAL NUMBER
v.	:	1998-5852
RAYMOND ARTHUR	:	

MOTION TO SUPPRESS EVIDENCE

The defendant, Raymond Arthur, by his attorney, T.S. Ellis, moves the Court to suppress the evidence seized from his person during a strip search conducted by Corporal B. Price at the Chilton Correctional Center on June 17, 1998. The evidence includes an unknown quantity of a substance alleged to be cocaine.

As grounds for this motion, defendant asserts:

1. The search of defendant's person was without a warrant, probable cause, reasonable suspicion or any other justifiable reason.

2. The search of defendant's person was over his specific objections and without his consent.

WHEREFORE, the defendant requests the Court to grant his motion to suppress.

Respectfully submitted,
THE DEFENDANT
BY: *T.S. Ellis*

T.S. Ellis, Esq.
Counsel for Defendant

IN THE COLUMBIA CIRCUIT COURT
CHILTON COUNTY

STATE OF COLUMBIA	:	CRIMINAL NUMBER
V.	:	1998-5852
RAYMOND ARTHUR	:	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

FACTS

Defendant expects that the following facts will be established at the hearing on his motion to suppress evidence seized from his person on June 17, 1998.

On June 17, 1998, Raymond Arthur sought admittance as a visitor to the Chilton Correctional Center (CCC) in order to have a full-contact visit with his brother, Charles Arthur, an inmate at that Columbia penal institution. The defendant was on the approved list of visitors maintained by CCC and had visited his brother approximately six times in the preceding eleven months. Upon his arrival at the facility, Raymond Arthur went to the visitors' trailer where he presented his photo Columbia drivers license and provided his brother's inmate number. He received a printout authorization from visitor's check-in which Arthur gave to a corrections official as he passed through a metal detector. The official then directed Arthur to the male shakedown area, a separate room in the trailer, where he was confronted by Corporal Bernard Price.

Corporal Price informed Raymond Arthur that he would have to remove the hooded sweatshirt he was wearing before entering CCC. Although Arthur complained about how chilly the contact visiting area was going to be, he voluntarily removed his sweatshirt, leaving only a T-shirt on his upper body. Next, Price thoroughly inspected Arthur's mouth, patted down his entire upper body, had him empty his pockets and remove his shoes and socks, and examined Arthur's watch and ring. Throughout this portion of the inspection, one he had experienced on earlier visits, Arthur cooperated fully.

Price next felt around the waistline of Arthur's blue jeans and discovered the defendant was wearing sweat pants underneath. Corporal Price told Arthur that he would have to remove this second layer of clothing. Arthur objected, repeating his concern about the temperature in the contact visiting area. Price insisted that Arthur remove his jeans. Arthur took off his jeans. Price then told defendant to remove the sweat pants and replace them with the jeans. Again Arthur protested, stating that the sweats were warmer and more comfortable than the jeans. When Price persisted, Arthur removed the sweats and began putting his jeans back on.

At this point, Corporal Price told Arthur that he was going to pat down defendant's groin area. Arthur strenuously objected, telling Price that such action was embarrassing and humiliating and that it had never been done to him on previous CCC visits. Price said he would not touch defendant's genitals but would only conduct a visual examination of his private parts. Arthur again declared he would not expose himself to Corporal Price and stated that he was terminating his visit and would file a formal protest with the warden's office.

Price then told the defendant that he could not withdraw once the search process had begun. Corporal Price called in another correctional officer who clamped Arthur in a full Nelson, a wrestling hold which pinned Arthur's arms above his head and forced his head down against his chest. While Arthur was restrained, Price forcibly pulled down defendant's jeans, jockey shorts and an athletic supporter he was wearing. A full visual examination of Arthur's exposed groin area revealed nothing. Price ordered Arthur to pull up his garments slowly, one leg at a time. As Arthur complied, Price ordered him to cease pulling up his athletic supporter. Price reached into the protective cup pocket of the athletic supporter and removed a blue balloon. This balloon contained ten plastic baggies with a substance alleged to be cocaine.

ARGUMENT:

1. The strip search of defendant's person was without his consent and over his specific objections.

It is obvious the State will claim that Raymond Arthur consented to the strip search

that resulted in the discovery of alleged contraband. The court should reject this contention. The State cannot justify this search on the authority of Terry v. Ohio (U.S. Sup. Ct. 1968). Terry searches are restricted to limited probes for weapons to protect an officer, not invasive and extensive searches for evidence of a crime. As the Columbia Supreme Court noted recently in a case quite instructive in this matter: "(T1he kind of weapons search described in Terry must by its very nature be less intimate and intrusive than the manual search of a person's genital area for any small bump which might turn out to be a glassine envelope or a small rock of crack .... Terry... cannot provide the safe haven for the police search of the intimate body parts of an ordinary citizen against whom there is no suspicion of crime."

In State v. Rodney (Columbia Supreme Court, 1994) the court quoted Terry for the proposition that a mere patdown search of the outer garments itself constitutes "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." The Rodney court went on to quote with approval the description in United States v. Blake (11th Cir. 1989) of a search of the genital area as "outrageous conduct" likely to lead to "fists thrown by indignant persons subjected to these searches."

The touchstone of the Fourth Amendment is reasonableness. Warrantless searches are per se unreasonable unless the search falls within one of "a few specifically established and well-delineated exceptions." Katz v. United States (U.S. Sup. Ct. 1967). Confronted with a warrantless search, it is the burden of the state to prove that the search was reasonable under a particular exception. Coolidge v. New Ham so hire (U.S. Sup. Ct. 1971).

At the outset, the defendant must emphasize the visit to CCC that concluded in the strip search which is the subject of this motion was exceptional in his experience. He had visited the institution at least a half dozen times before this and had never been the victim of a public disrobing. On earlier visits, as on this occasion, Arthur consented to routine and reasonable

examinations, including examination of his mouth, shoes, pockets, watch, ring and a brief patdown of his outer garments. The defendant never consented -- either on previous visits or on this one -- to an invasive and embarrassing search of the private parts of his body.

Defendant Arthur not only failed to consent but specifically objected to various attempts by Corporal Price to search his clothing and his person. For example, when Price told him to remove his sweatshirt and pants, Arthur explained how cold the visiting area was. When Price ordered Arthur to wear his jeans and to discard his sweat pants, Arthur objected on the grounds that the sweats were warmer. The defendant contends that Price took these steps solely to examine his clothing and his body without probable cause or reasonable suspicion and not for any sound penological reason.

When Corporal Price told Raymond Arthur that he was about to initiate a physical examination of his groin, the defendant strenuously objected. And when Price said he would conduct a visual instead of a manual inspection of defendant's private parts, Raymond Arthur maintained his specific objection to the strip search. When the correctional officer ignored Arthur's explicit objections to the proposed search of the most intimate parts of his person, the defendant took the only course possible: he notified Price of his dual intentions, to abandon his visit and to complain to the warden. Faced with Arthur's precise and definite rejection of his proposed searches and his request to terminate his visit, Corporal Price decided to use force to restrain the defendant and impose the search upon him. Under these circumstances, the State cannot credibly claim that Raymond Arthur consented to the strip search.

In determining the voluntariness of a consent, a court must examine "the totality of all the surrounding circumstances." Schneckloth v. Bustamonte (U.S. Sup. Ct. 1973). Facts developed at the hearing will show that Price used aggressive and intimidating statements during a prolonged exchange that would invalidate any consent.

But even if Arthur consented voluntarily to a body search, he did not consent to the

search of his crotch area for drugs. As the court noted in State v. Raymond, supra: "Such an intimate and intrusive search [as the palpation of the person's genital area in an effort to detect drugs] exceeds the scope of any general permission to conduct a brief pat-down search."
Nor can the State argue that since the search here was for drugs, and drugs are frequently secreted in the crotch of carriers, a citizen's consent to search his "person" also automatically includes the genital area. State v. Raymond, supra. Indeed, in Raymond, the State conceded that the test in Flori v. Jimeno (U.S. Sup. Ct. 1991), "if applied unflinchingly, could encompass disrobing, and even more intimate probings...and that such consequences would be unacceptable, if not unthinkable, in our society." Here the State apparently wishes this court to apply the Jimeno test unflinchingly. Defendant urges the court to reject, as the Columbia Supreme Court rejected, such an entreaty.

This court should also reject the notion that consent once given cannot thereafter be withdrawn. Reliance on State v. Haynie (Columbia Supreme Court 1987) or United States v. Jenkins (15th Cir. 1993) would be misplaced. An airport setting involving luggage, such as in Haynie, is quite different from the search of the intimate parts of a person. The Supreme Court has historically recognized that privacy interests of a person in his body are far greater than in the property in his possession or control. See Schmerber v. California (U.S. Sup. Ct. 1965) (intrusions upon the human body are treated differently from state interferences with property relationships or private papers); Winston v. Lee (U.S. Sup. Ct. 1984) ("intrusions upon the individual's dignitary interests in personal privacy and bodily integrity" are different from property intrusions). Cited in State v. Rodney, supra. Moreover, threats of bombs, guns and hijacking are qualitatively different from contraband in prison.

Similarly, the use of "implied consent" to search persons in military base cases is a far cry from implying consent to strip searches in a prison. The court in Jenkins went to pains to list the critical interests involved in that case:

> "[A military] base is an inviting target for terrorists, as well as for a hostile military strike, and a successful attack could seriously jeopardize the national welfare. The more the public or national interest is involved, as in the case of a closed, top-security installation, the more the judiciary may weigh this in the scale in determining whether the recognized constitutional right of individuals... to be free from unreasonable searches has been invaded."

No such national security interests are involved in this case that could possibly justify implying consent to strip search and prohibiting the withdrawal of any consent previously given.

2. The search was illegal under New Mexico v. Castro

This case is controlled by New Mexico v. Castro (New Mexico, 1993), where the Supreme Court of New Mexico held that a prison visitor must be permitted the option of terminating a search and leaving the prison. The court specifically stated:

> In sum, we hold that strip searches of prison visitors can be justified on the basis of reasonable suspicion, but only if such searches are conducted as part of a prison procedure that informs visitors before being searched that they have the right to refuse to be searched, in which case they will be escorted off the prison grounds. In other words, part of the consideration for the reasonable suspicion standard is the warning given the visitor and the opportunity to avoid the search by leaving the premises.

In this case, the defendant was never given a warning of his right to avoid the search by leaving the premises.

The State of Columbia should be required to accomplish their objectives by less intrusive means. The legitimate goals of the State -- to prevent the introduction of weapons or contraband into a prison facility -- can be met without violating a visitor's constitutional right

to privacy. For example, prisons could use drug sniffing dogs with prisoners or visitors; reduce full-contact interviews where weapons or contraband can be passed; and search prisoners (rather than visitors) following contact with outsiders. An even less costly and absolutely effective alternative to visitor strip searches would be to escort a visitor who refuses to submit to a search based on reasonable suspicion off the prison grounds. If a suspected smuggler is denied access to the prison, guns and drugs are also denied entry into the environment.

CONCLUSION:

For the foregoing reasons, the defendant, Raymond Arthur, urges the court to grant his motion to suppress evidence seized from his person in violation of the Fourth Amendment to the United States Constitution.

Respectfully submitted
THE DEFENDANT

T.S. Ellis

BY: T.S. Ellis, Esq.
Counsel for Defendant

CHILTON CORRECTIONAL CENTER
INCIDENT REPORT

_____ _____
Reporting Officer Date of Incident

STATEMENT OF REPORTING OFFICER:

On June 17, 1998 I was on the 3:00 to 11:00 p.m. shift, assigned to the male shakedown room in the Visitor Processing trailer. At about 2040 hours, 20 minutes short of the close of visiting hours, a visitor, Raymond Arthur, entered the trailer. To enter the trailer, Arthur had to pass a 3'x5' sign which reads:

> NOTICE TO ALL VISITORS: DRUGS, CONTRABAND AND WEAPONS OF ALL TYPES ARE PROHIBITED IN THE CHILTON CORRECTIONAL CENTER. ANYONE VIOLATING THIS PROVISION OF THE COLUMBIA CRIMINAL CODE WILL BE PROSECUTED TO THE FULL EXTENT OF THE LAW. ALL VISITORS ENTERING THE FACILITY WILL BE SEARCHED TO DETERMINE IF THEY POSSESS DRUGS, CONTRABAND OR WEAPONS OF ANY TYPE. ALL VISITORS SHOULD SEARCH THEIR PERSON AND THEIR POSSESSIONS PRIOR TO ENTRY TO ENSURE THEY DO NOT CARRY A PROHIBITED ITEM INTO THE FACILITY.

Once he was inside the Visitor Processing trailer, Arthur presented a photo ID to the processing clerk who checked to see if he was on the approved list of visitors. Arthur is an approved visitor of his brother, Charles Arthur (#076399). CCC records indicate Raymond Arthur has visited his brother seven times between May, 1997 and the date of the incident. Arthur received his visit print-out which contains the following warning:

> ALL PERSONS ENTERING THIS FACILITY WILL BE SUBJECT TO A SEARCH. ANY INDIVIDUAL CAUGHT ATTEMPTING TO SMUGGLE NARCOTIC CONTRABAND OR ANY WEAPON WILL BE ARRESTED AND PROSECUTED TO THE FULLEST EXTENT OF THE LAW AND IS SUBJECT TO IMPRISONMENT FOR MORE THAN TEN YEARS.

Arthur then moved through the metal detector station without any problem (i.e., no automatic or visual alarm, name checked out on current list). After completing this check, Arthur was directed to the male shakedown area, a separate 12' x 14.5' room in the trailer.

As standard procedure, I conducted a thorough inspection of Arthur's mouth (top and lower gum areas, cheeks and under tongue) and a patdown of the entire upper body area (back, front, sides and armpits). During the patdown, I discovered Arthur was wearing a hooded

sweatshirt so I told him to remove it because he wasn't allowed to enter with it on according to CCC rules. Arthur said he preferred to wear the sweatshirt because it was often cold in the visitor's room. I told him I understood his concern but that it was the rule of CCC and that the weather was milder than normal for that time of year. Arthur voluntarily removed the sweatshirt and he was left wearing a T-shirt. I also had him remove his shoes and socks and I examined his watch, ring and his fingernails.

Again as part of standard search procedure, I checked along the waist line of Arthur's blue jeans and discovered that he was wearing two pairs of pants. When I questioned him about this, he told me he was wearing sweatpants under his jeans. I informed him that two layers of clothing could not be worn into CCC and that he would have to remove the sweats. Arthur complained again about the cold in the visitors' room but he went about removing his jeans. When I told him that he had to discard the sweats because it was easier to hide drugs in the folds of heavy sweatpants than it is to secrete narcotics in tight-fitting jeans, Arthur mumbled something but took off his jeans. However, despite what I had just told him, Arthur tried to get me to take the jeans and allow him to continue to wear the sweats into the main facility. I found this suspicious because I had just told him what the rule was and he still tried to put one over on me.

When Arthur removed his sweat pants, I saw that he was wearing both jockey shorts and an athletic supporter underneath. I told him that I was going to patdown his groin area. Up until this moment, Arthur had cooperated in the search and had indicated no desire to abandon the visit or stop the search. Arthur objected to my intended patdown of his private parts. I noted that Arthur, at this time, was perspiring, appeared "jittery" and kept his head down, avoiding eye contact with me. My suspicion that Arthur was carrying contraband was aroused because in my experience most of the people I found with contraband concealed in the groin area objected to a patdown search of that area. To accommodate Arthur's objection, I offered to do only a visual inspection of his groin area in lieu of touching or feeling the area. Arthur was not satisfied; he persisted in his objection, saying he was embarrassed. This further aroused my suspicions as I knew that most people typically submitted to patdown and strip searches in the male shakedown room. In the past, I have patted down or visually examined the groin areas of hundreds of visitors without objection. Given all this, my suspicions were aroused and I called in Officer Janto to be on standby.

At this point in time, Arthur expressed his desire to terminate the attempt to visit in order to halt the search. This request was refused by me because I was suspicious and the attempted entry and search had progressed too far. Then, although Arthur was not physically resisting, out of an abundance of caution, I asked Officer Janto to restrain Arthur by placing a full-Nelson on him while I undid Arthur's jeans and dropped them to Arthur's knees along with Arthur's underpants and athletic supporter, the latter included a pocket for a protective athletic cup. The pocket is intended to hold a plastic protective cup to cover and shield the genitals of the wearer. A visual examination of Arthur's exposed groin area disclosed no contraband. Officer Janto then released Arthur, who began to pull up his jeans and undergarments. I ordered Arthur to stop and to pull up only one leg at a time. Arthur complied and as he was pulling up his athletic supporter, I again directed him to stop to permit an inspection of this garment. In the course of this inspection, I opened the protective cup pocket and saw inside a blue balloon. If I had patted down Arthur, I would have discovered this item. At once, I knew on the basis of my training and experience that 1 had discovered contraband. In the balloon were ten baggies containing a substance later determined to be cocaine. I placed Arthur under arrest and had him transported to the State Police Narcotic Control Unit. I turned the marked evidence over to the same Unit.

CHILTON CORRECTIONAL CENTER

Personnel Record

BERNARD PRICE — Name of Employee

OCTOBER 18, 1990 — Date of Employment

D.O.B. June 15, 1964
Address: 6423 Drexel Road
Framer, Columbia 00123
Phone: 555-973-3790

Marital Status: Married
Betty Lou Parsons
2 children: Ben (9)
Sara (6)

Education: Framer High School, 1982
Chilton County Community College, Assoc, Degree in Law Enforcement, 1990

Military Service: U.S. Army (1982-1986)
Rank: Staff Sergeant, Military Police Unit
Department Rank: Corrections Officer I (1990-1994)
Corporal (1994 to present)

In-Service Training:
1992: Deviant Behavior
1992: Small Group Psychology
1994: Corporal Exam Prep Course
1994: Martial Arts (Karate) - Black Belt
1995: U.S. Drug Enforcement Administration - Narcotics Interdiction in Corrections Setting
1996: Correctional Management: Team Supervision
1996: CCC Research Team - Drug Interdiction Task Force
1998: Sergeant Exam Prep Course

Commendations:
Meritorious Service Award (1994)
Leadership Award (1996)
Warden's Outstanding Service Award (1997)

CHILTON CORRECTIONAL CENTER

January 15, 1998

Memorandum

T0: All CCC Staff

FROM: Warden Samuel T. Jeffries

RE: Report of Drug Interdiction Task Force

I am pleased to announce that the Drug Interdiction Task Force of the CCC Research Team has completed its two year study. Copies of the 228 page Report have been placed on reserve in the CCC Library. Following is a summary of some highlights from the Report.

* Drugs are the central problem confronting Columbia prisons. Virtually all witnesses who came before the Task Force -- outside experts, federal officials, Corrections Department and CCC staff, prisoners -- described how drugs contribute to prison violence. Various inmate gangs fight over control of the drug trade in a particular cell block or wing. Inmates who owe a drug debt they cannot pay may be attacked or killed. Inmates and their families are sometimes forced to participate in drug smuggling under threat of physical harm. The impact on communities outside prison is a more recent phenomena. Law abiding friends and relatives of inmates are being coerced into illegally acquiring drugs by threatening the inmate with violence or death within prison if his visitors fail to smuggle drugs to him.

* Nationwide studies by correctional administrators confirm the belief at CCC: visitors are the main source of contraband within prisons. According to experts, however, conventional visitor screening techniques cannot discover contraband secreted in undergarments or body cavities, as is often the case. At a minimum, strip and body cavity searches must be employed. Some experts disagree. They claim stepped up searches will not keep drugs from being smuggled into even maximum security prisons. These experts suggest reduction or even elimination of full-contact interviews where weapons or contraband can be passed. They also favor increased post-visit searches of prisoners immediately following contact with outsiders. If visitor searches are to be retained, these experts favor mandatory strip searches for all visitors with those who refuse such a search being escorted off prison grounds, thereby eliminating the possibility of visitor smuggling.

* Another favorite strategy is the introduction of dogs into the prison environment. Reed Davis, president of a private company that trains dogs used by the Federal Bureau of Prisons, told the Task Force that the animals are trained to detect marijuana, heroin, cocaine and their derivatives. According to Davis, a dog's olfactory ability is "at least a million times better" than that of a human. Davis explained that his dogs are trained to "pinpoint" the precise spot where

drugs are hidden and they should require less than one minute to complete a search of a person. Trained dogs are capable of detecting the odor of drugs on a car seat even after the drugs are removed or if they were secreted in the body cavity of a person who sat on a seat. However, the Task Force concluded that the costs of acquiring, training and maintaining a canine detection unit were prohibitive at this time.

****

I encourage all staff to study the Report and contribute to the continuing CCC dialogue on this subject. I also want to thank the diligent and devoted members of the Drug Interdiction Task Force. They did an amazing job. When you see them, please say thanks to: Alfred Staunton, Ass't Warden; Mary Cambell, Admin Services; Michael Crawford, Education & Recreation; and Bettie Weaver, Buildings & Grounds.

TUESDAY AFTERNOON
JULY 28, 1998

California
Bar
Examination

Performance Test A

LIBRARY

State v. Arthur

LIBRARY

STATE v. HAYNIE

SUPREME COURT OF COLUMBIA (1987)

At approximately 1:30 a.m. on June 1, 1985, Donald Haynie approached a security screening area in the Palmer International Airport where signs warned passengers that they were subject to a search of their luggage and their person. Upon his attempt to enter the boarding area to await an arriving associate, airport security guards requested that Haynie open the briefcase he was carrying. After expressing his unwillingness and inability to open the case, Haynie again expressed the desire to pass through the screening area. The security officers again refused Haynie admittance and Haynie suggested that he leave the screening area and await the arrival of the flight elsewhere in the airport.

Michael O'Brien, a deputy of the Palmer County Sheriff's Office assigned to the airport, observed this exchange and noted that Haynie appeared to be very nervous, had begun sweating noticeably and stammered while discussing the briefcase. Based upon his observations, O'Brien became concerned about the possibility that Haynie's briefcase might contain an explosive device and directed that the case be passed through an X-ray scanning machine. The X-ray revealed a number of regular, rectangular packages inside the case.

Deputy O'Brien then escorted Haynie to a lounge in the airport sheriff's office where he passed the briefcase through a second X-ray scanner and questioned Haynie concerning its contents. After Haynie gave conflicting explanations of his knowledge of and interest in the briefcase, O'Brien asked directly whether Haynie owned the case and was told that he did not. Haynie subsequently surrendered the case in return for a property receipt. At the conclusion of this interview, O'Brien opened the briefcase and found $95,020 and a quantity of hashish inside the case. It is the admission of evidence of this search and seizure at Haynie's trial for possession of a controlled substance to which appellant now objects.

The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment proscribes only searches and seizures which are unreasonable. Warrantless searches are per se unreasonable unless the search falls within one of "a few specifically established and well-delineated exceptions." Katz v. United States (U.S. Sup. Ct. 1967). Confronted with a warrantless search, it is the burden of the state to prove that the search was reasonable under a particular exception. Coolidge v. New Hampshire (U.S. Sup. Ct. 1971). One of these specific exceptions to the warrant requirement is a warrantless search conducted pursuant to consent. Schneckloth v. Bustamonte (U.S. Sup. Ct. 1973). In principle, it is reasonable for the police to conduct a search once they have been permitted to do so by the person being searched. For a

warrantless search premised on consent to be valid, the state must show that the consent was freely and voluntarily given--a factual question to be determined by the totality of the circumstances. Schneckloth, supra.

Courts are warned in Schneckloth to guard jealously against untoward tactics used to obtain a person's consent to a search. Thus, we are particularly wary of claims of implied consent based simply on a posted notice. A sign cautioning someone about the potential of a search is certainly relevant, however, when examining the totality of the circumstances. At least when there are plausible alternatives to subjecting oneself to a search, a reasonable person who freely assumes the risk of a search would obviously not maintain the same expectations of privacy as one who chose to avoid the risk. The expectations of privacy of the person risking the search would be diminished.

In reviewing claims of implied consent based on notice, we believe three factors must be evaluated: (1) adequacy of the notice of a potential search; (2) voluntary conduct subjecting the person to a search; and (3) the importance of the interests served by the search. We find that Haynie was adequately notified that he was subject to being searched and that he voluntarily requested admission into a protected area. We also find that there are unique security concerns at an airport and these special circumstances permit implying consent to search.

In United States v. DeAngelo (15th Cir. 1978), cert. denied (1979), the federal appellate court that sits in our State upheld an airline boarding search on facts remarkably similar to those presented here on the ground that it was conducted with the consent of the defendant as well as on the ground that the search was not unreasonable. There, DeAngelo presented himself at an airport security screening station and submitted his briefcase to X-ray examination in the presence of signs warning that physical inspection might be requested. When the X-ray examination proved suspicious and DeAngelo was advised that a physical inspection was necessary, he protested that he preferred not to take the flight rather than permit the inspection. Security officers nonetheless opened his briefcase and found quantities of marijuana and hashish. The Court of Appeals held:

> "DeAngelo had a choice of traveling by air or by some other means. The signs in the terminal gave him fair notice that if in the course of the total screening process a physical inspection of his hand luggage should be considered necessary to assure the safety of the traveling public, he could be required to submit to it for that purpose. When he voluntarily entered upon the screening process DeAngelo acquiesced in its full potential scope as represented to him if,

> as it developed, that should be requested. Allowing him to withdraw his luggage when the x-ray raised the suspicions of the security officers would frustrate the regulation's purpose of deterring hijacking."

After DeAngelo, this case presents no novel aspect. Haynie voluntarily entered the screening process at the Palmer Airport by presenting himself to security personnel manning an X-ray scanner. While there is no evidence here that signs described the exact scope of the prospective searches, Haynie's repeated expressions of his desire to be admitted to the boarding area through a security check point employing an X-ray scanner cannot be construed as other than a knowing consent to the full scope of the search conducted.

As in DeAngelo, we do not think that Haynie's attempt to withdraw from the screening process should be recognized as an act vitiating his consent. While there is a division among the courts on this point, the rule adopted in DeAngelo and affirmed here is both prudent and necessary. The danger, protected against, air piracy, is as great today as it has ever been. It appears to us that a rule under which consent to a screening search is limited by the ability to withdraw at any time could only encourage attempted hijackings by providing a secure exit should detection be threatened. Perhaps the court in United States v. Pulido-Baauerizo (9th Cir. 1986) said it best:

> "A rule allowing a passenger to leave without a search after an inconclusive preboarding x-ray scan would encourage airline terrorism by providing a secure exit where detection was threatened. An airport screening agent has a duty to ferret out firearms and explosive devices carried by passengers. This duty could not be fulfilled if the agent was prohibited from conducting a visual inspection and a limited hand search after an inconclusive x-ray scan. Thus, if a potential passenger chooses to avoid a search, he must elect not to fly before approaching the screening area and placing his baggage on the x-ray machine's conveyor belt. "

Because of our analysis of the consent issue, we need not address the independent factual grounds bearing on the reasonableness of the search.

UNITED STATES v. JENKINS

U.S. Court of Appeals, 15th Circuit (1993)

This case requires us to determine whether particularized suspicion was necessary to search appellee on a closed military base. Concluding that it was not, we reverse the district court's order suppressing the evidence obtained from the search.

Anderson Air Force Base is a closed military base to which civilian access is strictly limited. A chain-link fence topped with barbed wire encircles the base; Air Force security police and guard dogs patrol the base at all times. This security is necessary because it is the site of Air Force Systems Command, where highly classified weapons are researched and developed.

Civilians can enter Anderson Air Force Base through four perimeter gates. The security police monitor all four gates, and screen vehicular and pedestrian traffic. At each gate, the following 3 x 5 sign faces incoming traffic:

WARNING

U.S. Air Force Installation

It is unlawful to enter this area without permission of the Installation Commander. Sec. 21, Internal Security Act of 1960. 50 U.S.C. 797. While on this Installation **all personnel and the property** under their control are **subject to search.**

Katrina Jenkins is an airman first class who works at Malcolm Hospital on Anderson Air Force Base. While at work, she received a phone call from her estranged husband, Norman Jenkins. Mr. Jenkins voiced his frustration with their divorce and child custody dispute, and concluded the call by declaring, "I'm going to blow your head off--I'm on base." Ms. Jenkins then called security and requested that someone escort her to her car. As she was leaving the hospital with the officer, she spotted her husband sitting in his car across the street from the exit. When Mr. Jenkins noticed that Ms. Jenkins was accompanied by a security officer, he immediately drove out of the parking lot. The officer radioed ahead, and Mr. Jenkins was arrested at the gate. The police found six cartridges on Jenkins' person, whereupon he told them that he had a gun in the car. A search of the car revealed a .357 Magnum, nineteen other cartridges, and letters indicating that Jenkins intended to kill his wife and then commit suicide.

Jenkins was subsequently indicted for attempted murder and for use of a firearm during the commission of a felony. Before trial, Jenkins moved to suppress the evidence that the police had obtained during his arrest, arguing that the base police did not have probable cause to suspect him of attempted murder at the time of his arrest. The government argued that probable cause was not necessary for a search on a closed military base, and in the alternative

that the police had probable cause of other crimes besides attempted murder. The court rejected these contentions. The government now appeals.

The gravamen of the government's appeal is that the district court erred by not recognizing an "implied consent" exception to the requirement of probable cause for closed military bases. By entering onto the closed base, the government argues, Jenkins gave his consent to be searched at any time. Jenkins maintains that the Fourth Amendment recognizes no such sweeping exception. According to Jenkins, the "special needs" of a military base would be to prevent the inflow of drugs and weapons and the outflow of stolen property--none of which, he claims, would justify his search.

We find the "special needs" analysis unpersuasive. Jenkins concedes that this analysis would entitle the base police to search a departing car as part of a routine gate check for stolen government property. This authority surely does not evaporate when the base police learn that a particular passenger in an exiting vehicle has threatened to kill an airman.

In any event, the validity of closed base searches taken without particularized suspicion does not turn on the case-by-case application of a "special needs" or "exigent circumstances" balancing test. The case law makes clear that searches on closed military bases have long been exempt from the usual Fourth Amendment requirement of probable cause. The rationale is the same for why the base is closed in the first place: to protect a military installation that is vital to national security. Police on a closed military base confront a host of security concerns not present in an ordinary civilian locale. Anderson Air Force Base is a prime example: Senior military officials regularly fly in and out, the President and Vice-President sometimes arrive and depart Columbia City via the base, and the Air Force Systems Command is located there. Such a base is an inviting target for terrorists, as well as for a hostile military strike, and a successful attack could seriously jeopardize the national welfare. The more the public or national interest is involved, as in the case of a closed, top-security installation, the more the judiciary may weigh this in the scale in determining whether the recognized constitutional right of individuals, including civilians who seek and gain entrance to military installations, to be free from unreasonable searches has been invaded.

Jenkins had no right of unrestricted access to Anderson Air Force Base; he thus had no right to be free from searches while on the base. A base commander may summarily exclude all civilians from the area of his command. Greer v. Shock (U.S. Sup. Ct. 1976). It is within his authority, therefore, also to place restrictions on the right of access to a base. Nor did the validity of Jenkins' search turn on whether he gave his express consent to search as a condition of entering the base. Consent is implied by the "totality of all the circumstances." Schneckloth

v. Bustamonte (U.S. Sup. Ct. 1973). The barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common sense awareness of the nature of a military base--all these circumstances combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base.

Because the Anderson Air Force Base police did not need probable cause or particularized suspicion that Jenkins had committed a crime, the search of Jenkins' car and person was a valid one. We thus need not address whether the base police had probable cause to suspect Jenkins of attempted murder, or of other crimes. The suppression order of the district court is hereby reversed.

NEW MEXICO v. CASTRO

Supreme Court of New Mexico (1993)

Diane Castro was charged with bringing marijuana into a place of imprisonment. Following a hearing on an unsuccessful motion to suppress, and subject to the right to appeal the decision concerning suppression of the evidence, Castro pleaded guilty. Because we conclude that the detention and strip search of Castro was conducted by prison authorities in violation of the Fourth Amendment, we reverse the trial court's decision concerning the suppression of evidence and remand.

A prison official at the Southern New Mexico Correctional Facility (hereinafter "SNMCF") received an anonymous telephone call in which he was informed that Diane Castro was smuggling heroin into SNMCF for her husband, an inmate at the prison. Based on this anonymous phone call, a strip search' of Castro during her next visit was authorized by the warden.

On the next occasion Castro signed in at SNMCF to visit her husband, she was informed that the warden wanted to see her. A security guard retained Castro's driver's license, which she had given as identification. A Department of Corrections captain then escorted Castro to the warden's conference room, located within the interior area of the prison and reachable only by passing through electronic security doors. At each security door there was a sign warning visitors that contraband and weapons were barred and that they were subject to being searched. At the conference room, the captain told Castro she was suspected of bringing contraband into the prison and he requested permission from Castro to conduct a strip search. Castro refused to consent to a strip search. The captain then informed Castro that if she did not consent, law enforcement officers would be contacted "to see about" obtaining a search warrant. After further detention, Castro surrendered two baggies of marijuana to the captain.

---

[1] The term "strip search" generally refers to an inspection of a naked individual without scrutinizing the subject's body cavities. The term "visual body cavity search" refers to a visual inspection of a naked individual that includes the anal and genital areas. The term "manual body cavity search" refers to an inspection of a naked individual with some degree of touching or probing the body cavities. Such searches are quite intrusive. "[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience." Hunter v. Auger (8th Cir. 1982); "[A] strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual." Burns v. Loranger (1st Cir. 1990); "A severe if not gross interference with privacy occurs when guards conduct a visual inspection of body cavities." Arruda v. Fair (1st Cir. 1983)

She was then strip searched but nothing further was found.

Strip searches of penal institution visitors present this Court with a question of first impression. However, other courts have considered the appropriate legal standard under which prison authorities may justify strip searches.

Hunter v. Auger (8th Cir. 1982), the seminal federal case, held that the Fourth Amendment requires a reasonable suspicion standard for strip searches of visitors to penal institutions. In Hunter, prison officials who received anonymous information that visitors would attempt to smuggle drugs during their visits, required the visitors to submit to a strip search before being permitted to visit. The Hunter court weighed the interest of correctional officials in securing the penal institution against the intrusion on personal privacy incident to a strip search and concluded that the strip search of a particular visitor is justified under the reasonable suspicion standard if the prison officials have "specific objective facts and rational inferences" that support the suspicion that a visitor will attempt to smuggle contraband into the prison. Hunter further determined that the reasonable suspicion standard requires individualized suspicion directed at the visitor targeted for the strip search. As rationale, the Hunter court stated: "We believe that this standard is flexible enough to afford the full measure of Fourth Amendment protection without posing an insuperable barrier to the exercise of all search and seizure powers."

The great weight of authority follows Hunter, requiring reasonable suspicion before a prison visitor can be strip searched. See, e.g., Cochrane v. Quattro chi (1st Cir. 1991); Daugherty v. Campbell (6th Cir. 1991); Thorne v. Jones (5th Cir. 1985). In the above cases it appears that prison policy permitted a visitor to refuse to be searched, in which case the visitor was escorted off the premises. None of the opinions specifically held that even when reasonable suspicion is present the visitor must be afforded the opportunity to refuse to be searched and be escorted off the premises. We so hold in this case.

Ordinarily, probable cause is required to justify a search or seizure. If the demands of the prison environment are to justify a lesser standard--the reasonable suspicion standard--for strip searches of visitors, the lesser standard can be justified only to the extent necessary. If the objectives of the search -- the prevention of the introduction of weapons or contraband into the prison environment--can be accomplished by less intrusive means, those means should be required of prison officials when they are a reasonable alternative to a search. In our view, the escorted departure of a visitor who refuses to submit to a strip search is such a reasonable alternative. As stated in 4 LaFave & Baum, Search and Seizure (2d ed. 1987):

"A search without probable cause of a jail visitor is justified only by the need to prevent

the introduction of contraband and weapons into the jail, and this is accomplished if the person declines to be searched and departs. In short, special search procedures not based upon probable cause which are reasonable under the Fourth Amendment as means of preventing certain conduct should not be extended to situations in which only detection rather than prevention is accomplished."

In sum, we hold that strip searches of prison visitors can be justified on the basis of reasonable suspicion, but only if such searches are conducted as part of a prison procedure that informs visitors before being searched that they have the right to refuse to be searched, in which case they will be escorted off the prison grounds. In other words, part of the consideration for the reasonable suspicion standard is the warning given the visitor and the opportunity to avoid the search by leaving the premises.

In the present case, after Castro refused to consent to a strip search, she was not advised that her refusal to agree to the search would result in her being escorted off the premises and the loss of the opportunity to visit her husband. Instead, the captain informed Castro that if she refused the search, he would call law enforcement officers to obtain a search warrant. It was only then that Castro surrendered the marijuana to the prison guards.

Nor can the evidence be admitted on the theory that Castro voluntarily turned over the marijuana. In the absence of probable cause, the guards had no right to detain Castro for the purpose of providing police officers time to obtain a search warrant and no right to inform her that she would be detained for that purpose. The threat of unlawful detention tainted any consensual disclosure of evidence by Castro in response to the threat. Further, the link between the unlawful threat and the consent was so direct that there could not be sufficient attenuation between the illegality and the consent.

The rationale behind allowing prison officials an exception to the Fourth Amendment's warrant requirement is their interest in keeping contraband out of the prison environment. By adhering to the strip search policy as announced in the Inmate Visiting Log, whereby visitors who wish not to be strip searched are escorted from the facility, the goal of keeping contraband out of the prison environment is achieved. Further, by adhering to such a policy, prison visitors' Fourth Amendment rights to be free from unreasonable searches are maintained. Here, Castro's rights were not protected. Therefore, we reverse and remand the trial court's decision concerning the suppression of evidence.

STATE V. RODNEY

Columbia Supreme Court (1994)

Shortly after Dylan Rodney stepped off a bus that arrived in Columbia City from Washington, D.C., Detective Beard approached him. Beard displayed identification and asked if Rodney would talk to him. Rodney agreed. Beard asked Rodney whether he lived in either Columbia City or Washington. Rodney replied that he lived in Florida, but had come to Columbia to try to find his wife. She lived in the City, Rodney said, but he was unable to give a more precise location. Beard asked Rodney if he was carrying drugs in his travel bag. After Rodney said no, Beard obtained permission to search the bag. The search failed to turn up any contraband.

Beard then asked if Rodney had drugs on his person. When Rodney again said no, Beard requested permission to conduct a body search. Rodney said "sure" and raised his arms above his head. Beard placed his hands on Rodney's ankles and, in one sweeping motion, ran them up the inside of Rodney's legs. As he passed over the crotch area, Beard felt small, rock-like objects. Rodney exclaimed: "That's me!" Detecting otherwise, Beard placed Rodney under arrest.

At the police station, Beard unzipped Rodney's pants and retrieved a plastic bag containing a rock-like substance that was identified as cocaine base. Rodney was charged with possession and intent to distribute.

Rodney moved to suppress the crack. Rodney argued (1) that he had not consented voluntarily to the body search; (2) that even if he had done so, the consent did not include a search of his crotch area; and (3) that his arrest was unsupported by probable cause.

After a hearing, the trial court denied the motion, finding that Rodney had "given his consent voluntarily to the search of his person and belongings." Rodney entered a conditional guilty plea, reserving the right to withdraw it if this court reversed the denial of his suppression motion. We reverse and remand.

Rodney first contends that his consent to the body search was involuntary, and therefore prohibited by the Fourth Amendment. In determining the voluntariness of a consent, a court must examine "the totality of all the surrounding circumstances." Schneckloth v. Bustamonte (U.S. Sup. Ct. 1973). The record indicates that the police conduct here bore no resemblance to the sort of aggressive questioning, intimidating actions, or prolonged police presence that might invalidate a consent. During the encounter, Beard's gun was concealed, he wore plain clothes, and he spoke in a conversational tone. We reject Rodney's claim that his

consent to be searched was coerced.

Rodney next argues that even if he consented voluntarily to a body search for narcotics, he did not consent to the search of his crotch area. We hold that a citizen's consent to a search of his "person" on a public thoroughfare, given in response to a police request made in the absence of probable cause or even "reasonable suspicion" to believe that he has committed a crime, does not authorize a palpation of the person's genital area in an effort to detect drugs. Such an intimate and intrusive search exceeds the scope of any general permission to conduct a brief pat-down search.

A consensual search cannot exceed the scope of the consent. Florida v. Jimeno (U.S. Sup. Ct. 1991) (consent to search a vehicle included consent to open a closed paper bag within the trunk of the car). As the Jimeno Court phrased it: "the standard for measuring the scope of consent under the Fourth Amendment is that of 'objective reasonableness' - what would the typical reasonable person have understood by the exchange between the officer and the defendant?"

The State argues that since the search here was for drugs, and drugs are frequently secreted in the crotch of carriers, a citizen's consent to search his "person" in public automatically includes the genital area. The State concedes that the Jimeno test applied unflinchingly could encompass disrobing, and even more intimate probings than were attempted here, and that such consequences would be unacceptable, if not unthinkable, in our society. But, the State presses, a continuous sweeping motion over Rodney's outer garments, including his crotch area fell short of that taboo. Such a search is no more invasive, claims the State, than the typical pat-down that accompanies a Terry v. Ohio (U.S. Sup. Ct. 1968) stop-and-frisk.

The Supreme Court has historically recognized that privacy interests of a person in her body are far greater than in the space that surrounds her or the property in her possession or control. See Schmerber v. California (U.S. Sup. Ct. 1965) (intrusions upon the human body are treated differently from state interferences with property relationships or private papers); Winston v. Lee (U.S. Sup. Ct. 1984) ("intrusions upon the individual's dignitary interests in personal privacy and bodily integrity" are different from intrusions into living room, eavesdropping on telephone conversations, or restricting persons' mobility). It may be "objectively reasonable" to expect that a citizen who consents to the search of his car for drugs means to include all unlocked spaces in the car where drugs might be hidden. Jimeno, supra. However, it is not "objectively reasonable" to expect that a citizen on a public street who consents to a police search anticipates that all potential hiding places for drugs in his body, including the genital area, or in the case of a woman, her

breasts and genital area, will be manually searched. It is far more likely that the cooperative citizen anticipates a pat-down of the outside surfaces of the body and an emptying of pockets. Any search that includes touching genital areas or breasts, would not normally be expected to occur in public.

The State's reference to similar searches conducted under the authority of Terry v. Ohio, supra, is inappropriate. Terry itself conceded that the search it authorized constituted "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." In United States v. Blake (11th Cir. 1989), the court described a search of genital area without explicit consent as "outrageous conduct" by police officers, likely to lead to "fists thrown by indignant persons subjected to these searches."

Moreover, it is well to remember why the Terry Court found such an intrusive public search permissible: it was to protect the officer from ambush by hidden weapons in the custody of a person reasonably suspected of a crime. As the Supreme Court cautioned: "We are now concerned with more than the governmental interest in investigating crime; there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."

Furthermore, even the kind of weapons search described in Terry must by its very nature be less intimate and intrusive than the manual search of a person's genital area for any small bump which might turn out to be a glassine envelope or a small rock of crack. In sum, Terry does not purport to define the limits of a cooperating citizen's right to privacy; it defines the balance between a suspect's right to privacy and the need of the police to protect themselves from ambush. The Terry authorization, therefore, cannot provide the safe haven for the police search of the intimate body parts of an ordinary citizen against whom there is no suspicion of crime.

Finally, the fact that drug couriers often hide their stash in the crotch area cannot justify the search of such area without some elementary form of notice that such an offensive procedure is about to take place. A citizen's expectation of privacy in intimate parts of her body is certainly well enough established to merit a particularized request for consent to such an intimate search in public.

Because we conclude that the search of Rodney's person exceeded the scope of the consent he gave to Detective Beard, we need not discuss the issue of probable cause to arrest Rodney. The evidence of criminal activity sufficient to trigger a finding of probable cause was produced only when the officer overstepped the consent of Rodney.

ANSWER 1 TO PERFORMANCE TEST A

State of Columbia
v.
Raymond Arthur

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

1. Statement of Facts

In this case, the defendant, Mr. Arthur, knowingly and voluntarily entered the Chilton Correctional Center (hereafter "CCC") with contraband, namely cocaine. Defendant now seeks to avoid criminal prosecution in this manner and argues for judicial insulation from efforts undertaken to stem a compelling problem affecting the criminal system and the public at large.

The defendant entered the prison at 10:40 p.m., just twenty minutes before closing. Even at this late hour, the prison crews were on alert for contraband. Indeed it is very frequent that prisoners are routinely screened and that this screening is quite thorough. Hundreds of other visitors who have based through the CCC have been strip-searched prior to being allowed bodily contact with the inmates.

Indeed, this activity should come to no surprise as a visitor. There is a 3 foot by 5 foot sign outside the visitor processing center. This sign reads in part:

NOTICE TO ALL VISITORS: DRUGS, CONTRABAND ... OF ALL TYPES ARE PROHIBITED IN THE CHILTON CORRECTIONAL CENTER .... ALL VISITORS ENTERING THE FACILITY WILL BE SEARCHED TO DETERMINE IF THEY POSSESS DRUGS . ...

If this sign is insufficient to bring the search to the attention of entrants, there is an additional warning on the visit print-out (which defendant received on the day in question). This warning again notes that drugs or other contraband are not permitted and that all persons entering the facility will be subject to search.

The routine search procedures are quite thorough. On the day in question, defendant was subject to (without objection) a search which included a thorough inspection of defendant's top and lower gum areas, cheeks, and under his tongue. Defendant had indeed been present on the facilities six times in the last 1 1 months.

The CCC in fact has a rule that prevents visitors from wearing loose items of clothing such as a sweatshirt into the CCC when visiting. This rule is aimed at reducing the troublesome flow of narcotics into the prison. Thus, defendant was asked to remove a sweatshirt before entering. He objected to this, suspiciously citing the cold conditions despite the fact that the weather was milder than normal for the time of year.

In addition, it was discovered that defendant was wearing multiple layers of clothing on his lower body. In fact, he was wearing not only jeans and sweat pants, but also jockey underwear *and* an athletic supporter. Again the only justification of such attire was the coldness of the premises. Indeed, no athletic activities mandating an athletic supporter are typically allowed during visits.

When informed that he would need to remove his sweats, the defendant mumbled something. When he removed his sweats the suspicious combination of jockey shorts and an athletic supporter became apparent. When a need to inspect him by a pat-down was mentioned, the defendant objected. In a conciliatory gesture, the inspecting officer offered

to either do a visual inspection or a pat-down. Again such searches (visual examination or groin pat-down) occurred on hundreds of visitors without objection.

This too was objected to, despite the fact that it was fairly routine to do such searches. Defendant became jittery and kept his head down. The continuing suspicion aroused sufficient suspicion in the inspecting officer, Officer Price, to call for assistance from Officer Janto.

Indeed Officer Price is a decorated and experienced officer. He received numerous trainings regarding drugs. For example he received training from the U.S. Drug Enforcement Administration (DEA) regarding "Narcotics Interdiction in Corrections Setting." He also received training on correctional management, and participated in the Drug Interdiction Task Force. He has received several commendations in connection with his service at CCC, and his job and training brought him substantial familiarity with the problems of drugs in prisons and the techniques used by those attempting to smuggle in drugs.

Thus, Officer Price's analysis of the multiple layers of clothing and the activity of the defendant was tempered by years of experience and training.

Now that another officer was present and we were insisting on the usual inspection of groinal areas, defendant expressed a desire to terminate the search. Officer Price refused to terminate and in an abundance of caution asked Officer Janto to restrain the defendant while the search was conducted.

Indeed, the well-trained suspicions were correct. The defendant was indeed hiding drugs inside a plastic balloon as is often done by drug smugglers. The plastic balloon was underneath the four layers of clothing within the cup portion of the athletic supporter. The contraband was seized and defendant was arrested by the State Police Narcotic Control Unit.

2. Questions Presented

I. Does a Completely Voluntary Entry into A Restricted State Facility With Three Foot by Five Foot Signs Warning of Search Procedures Impliedly Grant Consent to a Strip Search?

II. Once A Suspect Has Consented to a Search, May the Suspect be Permitted to Withdraw from the Search lest and Entire Utility of the Search be Frustrated?

III. Does Reasonable Suspicion for a Search Arises when a Person Wearing Four Layers of Garments and Acting Uncomfortably and Objects to a Routine Search Regularly Performed on Hundreds of Others?

3. Summary of the Argument

The defendant voluntarily entered a highly restricted area, knowing that his personal privacy rights were substantially compromised in this arena. There were multiple blatant warnings including a 3 foot by 5 foot sign, which indicated a search may be conducted. In this environment, the defendant cannot rationally contend that he had not impliedly consented to a search. Moreover, since the warnings specifically elucidated that contraband including narcotics were items to be prohibited and searched for, the defendant knew or should have known that a strip search was appropriate.

To allow a person to withdraw from an environment where a search was consented to would be unjust and would encourage further attempts to avoid the

law. Where an entry with notice of the potential for search has been attempted, such consent cannot be withdrawn at a final moment before contraband is to be discovered.

Additionally, even if the implied consent is not established, the defendant acted in a highly suspicious manner which provided adequate suspicion to justify a strip search. Where the defendant wears four layers of clothing, including jeans, sweat pants, jockey shorts, and an athletic supporter in an environment where no athletic activities are allowed, and during an unseasonably warm winter, adequate suspicion arises. When additional fidgeting and nervous behavior is coupled with refusal to allow search as is routinely performed on hundreds of others, there can be no doubt that sufficient suspicion has arisen to justify a strip search.

4. Argument

I. Completely Voluntary Entry Into A Restricted State Facility With Three Foot By Five Foot Signs Warning of Search Procedures Grants Implied Consent to A Reasonable Search

The government has a strong interest in maintaining the integrity of its protected facilities. Persons who enter restricted government areas are or should be keenly aware that they are entering a zone of substantially reduced privacy rights. Thus, although the United States Constitution prohibits unreasonable invasions of privacy, the scope of reasonableness diminishes greatly in restricted areas.

Consent which is "freely and voluntarily given" justifies a search. Schneckloth v. Bustamonte (USSCT 1973). Such consent is evaluated under the totality of the circumstances. Id. Here, the circumstances plainly included the prison environment where persons are warned that they might be searched for small items such as drugs.

In the Columbia Supreme Court case State v. Havne, the court evaluated the reasonableness of the search of a man with a briefcase. The man attempted to enter the area beyond the metal detectors but withdrew when the security personnel attempted to inspect the contents of the briefcase. The court held that he could not simply withdraw from the area after the possibility of trouble arose.

Clearly this case is directly applicable here. The airport is an area where security is necessary to prevent terrorism. Likewise it is important to have high security in prisons to avoid introduction of contraband and the escape of prisoners. In Hayne, the defendant was not allowed to withdraw once he attempted to enter the secure area.

The court enumerated several factors to determine whether implied consent was given. These factors militate that the search here, as in Havne, be declared reasonable. The factors are:

1. Adequacy of the notice for Potential Search
2. Voluntary Conduct Subjecting Person to the Search
3. The Importance of the Interests Served by the Search

1. Adequacy of the Notice For Potential Search

The defendant voluntarily entered a highly restricted area, knowing that his personal privacy rights were substantially compromised in this arena. There were

multiple blatant warnings including a 3 foot by 5 foot sign, which indicated a search may be conducted. In addition, there was a warning on the visitor print out that defendant received on the day in question. He very clearly had notice of the possibility of the search.

In this environment, the defendant cannot rationally contend that he had not impliedly consented to a search. Moreover, since the warnings specifically elucidated that contraband including narcotics were items to be prohibited and searched for, the defendant knew or should have known that a strip search was appropriate.

His visitation on prior occasions also leads to the conclusion that he should have known a thorough search could be conducted. He had his gums and teeth searched. He did not object to these also somewhat intrusive searches.

Furthermore, in US v. Jenkin, a search of a person in a military base where only one warning was posted was considered to be reasonable. The notice in this case is ample and strongly weighs in favor of the state.

2. Voluntary Conduct Subjecting Person To the Search

Here, defendant was entering the prison for the 6th time in the last 1 1 months to visit his brother. There clearly was no reason why he had to bring drugs along on his visit. He also was in no way compelled to come and see his brother. Thus, he purposefully and voluntarily availed himself of the prison facilities.

Thus, this factor also strongly weighs in favor of not suppressing the evidence.

3. The Importance of the Interests Served by the Search

The drug crisis in the prisons is very serious. There are overflow effects to the surrounding community. According to a recent task force report, "Drugs are the central problem confronting Columbia prisons." Virtually all of the witnesses who came before the task force described how drugs contribute to prison violence. Some examples are inmate gangs fighting over control of the drug trade in a particular cell block or wing, inmates who owe a drug debt they cannot pay being attacked or killed, and inmates and their families sometimes being forced to participate in drug smuggling under the threat of physical harm.

In addition, there are impacts on the communities outside the prison. Law abiding friends and relatives of inmates are being coerced into illegally acquiring drugs by threatening the inmate with violence or death within prison if his visitors fail to smuggle drugs for him. This obviously detrimental impact on the outer community also heightens the interest the state has in combating the problem of drugs in prison.

Finally, it is in the best interests of the prisoners to allow such heightened security measures. The report of the drug interdiction task force reported that even severe measures such as body cavity searches may not be effective in stopping drugs from getting in to even maximum security prisons. A suggestion of eliminating all full-contact meetings with visitors is given as a possible solution. If the state is unable to implement procedures to curb the illegal trafficking of drugs to prisoners, the prisoners may lose all contact with outsiders. Surely this is not in the best interest of the prisoners. If the courts render ineffective preliminary and relatively non-invasive searches (i.e., non-body cavity searches), the elimination of all full contact visits may be required.

Thus, the third factor also weighs heavily in favor of implying consent to the search. Accordingly, this court should find that an implied consent to search for drugs existed. Since drugs are commonly secreted in groinal areas, a strip search would not be too invasive, and the mere requirement of stripping should be found to be

impliedly consented to as well (see also 11.13, infra re: scope of consent).

II Reasonable Suspicion for a Search Arises when a Person Wearing Four Layers of Garments and Acting Uncomfortably and Objects to A Routine Search Regularly Performed on Hundreds of Others

A. Reasonable Suspicion

A frisking of a person is appropriate where a reasonable suspicion arises. Terry. The suspicion may justify a pat-down. Additionally in areas of limited expectations of privacy such as airports, further measures may be appropriate. See Jenkins, Haynie. US v. DeAngelo.

The state corrections officer was a decorated officer with substantial experience in narcotics prevention and prison facilities. His suspicion was reasonably aroused by the defendant who attempted to enter the facility with four layers of clothing including an athletic supporter and underwear on top of it. The defendant also acted in a suspicious manner. The officer therefore reasonably concluded that further searching was appropriate.

B. Scope Of Search

The standard for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness - what would the typical person have understood by the exchange between the officer and the defendant.

State v. Rodney *quoting* Florida v. Jimeno.

Where contraband including small items such as drugs are at issue, one might suspect that strip searches would be necessary to detect them. Indeed, as is the case here, a person may be able to put drugs in a small bag which could be hidden within underwear.

The court in Rodney merely stated that "the fact that drug couriers often hide their stash in the crotch area cannot justify the search of such area *without some elementary form of notice* that such an offensive procedure is about to take place."

Here, there was more than an elementary form of notice. There was a 3 foot by 5 foot sign which indicated that a person was subjecting himself to a search for drugs. While it is unclear whether the possibly large intrusion of a body cavity search would be justified, the state does not contend that the ability to search extended that far.

Hundreds of others had been strip searched previously in the CCC. Under the totality of the facts and circumstances, this court should find that the scope of the search, while somewhat invasive, is justified by clear notice and the diminished expectation of privacy.

III. Once A Suspect Has Consented to a Search, The Suspect May Not Be Permitted to Withdraw From the Search Lest the Entire Utility of the Search Be Frustrated

It would entirely frustrate the protective measures put in place if a person could enter a protected area to determine if a search conducted therein would incriminate him, and then withdraw if such a search was impending.

Indeed, this principle was recognized in State v. Haynie where an airport search was in issue. In that case, the defendant attempted to withdraw from an airport security check after it became clear that he would not be permitted to pass without a full inspection. The Columbia Supreme Court stated that "allowing him to withdraw his luggage when the x-ray raised the suspicions of

the security officers would frustrate the regulation's purpose of deterring hijacking."

This strong language by this state's highest court compels a like conclusion in this case. Here, the defendant attempted to withdraw once it was clear the drugs in his undergarments would be found. Allowing the evidence to be suppressed would frustrate the attempts of the CCC to crack down on the drug problem in prisons. He cannot be allowed to claim this meager excuse as making his justified search impermissible.

The police conduct in this case was not egregious. The officer offered several ways to inspect for drugs in the groinal area. The consent of the defendant to be searched was therefore not exceeded or vitiated. The police conduct bore no resemblance to the sort of aggressive questioning, intimidating actions, or prolonged police presence that might invalidate consent. State v. Rodney (Col. S.Ct 1994).

IV. Binding Authorities Do Not Suaport Defendant's That the In-Prison Non-Body Cavity Search was Unreasonable or Unconsented.

Defendant's seek refuge in a case of the Supreme Court of New Mexico. In New Mexico v. Castro, the defendant was threatened with a strip search and voluntarily turned over marijuana. The NM SCT ruled that the search threat was unreasonable and that a strip search would not have been consented to by the entry into a prison.

There was no evidence in Castro that the defendant had on numerous occasions entered into the prison and undergone serious searches such as mouth and gums. Moreover, there was no evidence that the prisons regularly conducted such searches. In Columbia the CCC regularly searched entrants by strip search and also regularly inspected groinal areas.

Furthermore, the decisions of the NM SCT are not binding in Columbia, especially when they are contrary to the weight of authority. The NM SCT conceded that although at least four other courts had addressed a similar issue, none had specifically held that even when reasonable suspicion is present the visitor must be afforded the opportunity to be searched and be escorted off the premises. Nonetheless, the NM SCT so held.

Moreover, Defendant concedes that he is asking for the court to disregard the literal language of the US Supreme Court. The defendant's motion concedes that the US Supreme Court's test in Florida v. Jimeno would "if applied unflinchingly . . . encompass disrobing and even more intimate probings. Motion to Suppress at 9.

Conclusion

This court should adhere to the traditional tests of reasonableness and adhere to the binding Columbia Supreme Court precedent. Persons who enter into a restricted government area where signs are posted warning of searches for contraband including drugs should not be allowed to dodge justice by asserting an expectation of privacy in the face of blatant warnings and clear objective notice that searches for drugs would be conducted.

The Columbia Supreme Court's three part test overwhelmingly militates that the evidence in this case not be suppressed. In addition, constitutional norms mandate that the suspicion justified the search. Admission of the evidence is appropriate. It is in the best interest of the public. It is in the best interest of the prisoners. It is in the best interest of the criminal justice system.

ANSWER 2 TO PERFORMANCE TEST A

State of Columbia v. Raymond Arthur

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I. STATEMENT OF FACTS

On June 17, 1998, defendant Raymond Arthur sought entrance to the Chilton Correctional Center for a full-contact visit with his brother, who is incarcerated there. From his several prior visits, defendant knew he had to pass through the procedures at the Visitor Processing Center before he would be allowed access to his brother. Nonetheless, he was smuggling cocaine on his person.

To enter the Visitor Processing trailer, defendant passed a 3'x 5' sign which warns in pertinent part:

> All visitors entering the facility will be searched to determine whether they possess drugs, contraband, or weapons of any type. All visitors should search their person and their possessions prior to entry to ensure they do not carry a prohibited item into the facility.

After presenting a photo ID, defendant received his visit print-out, which contains a second strongly worded warning to the effect that "all persons entering this facility will be subject to a search" and arrested and prosecuted to the full extent of the law if discovered to be smuggling narcotics or weapons. Despite these warnings, defendant proceeded to the male shakedown area, a separate 12' x 14.5' room in the trailer. There, defendant was met by Officer Bernard Price, a Chilton Corrections officer with eight years of experience at Chilton, a degree in Law Enforcement, specialized training and research into drug interdiction in a corrections setting, and repeated awards for meritorious service, outstanding service, and leadership.

Officer Price conducted standard-procedure searches of defendant's mouth and upper body, shoes and socks, watch, ring and fingernails. Because defendant was wearing a hooded sweatshirt of a type not allowed by CCC rules, he was asked to remove it and voluntarily complied. Officer Price then did a standard search of defendant's waistband and found him to be wearing sweat pants inside his jeans.

Officer Price informed defendant that Chilton's rules forbade the wearing of two layers of clothing. He instructed defendant that he could wear the jeans but not the loosely fitting sweat pants that could easily disguise contraband. Defendant objected strenuously even though he had earlier been willing to comply with prison rules, thereby arousing Officer Price's suspicions. He did eventually comply and removed the sweat pants.

It was then that Officer Price discovered defendant was also wearing two types of underwear: both jockey shorts and an athletic supporter. Officer Price informed defendant of his intent to pat down his groin.

Defendant objected and became jittery, avoided eye contact, and began perspiring, further arousing Officer Price's suspicions. Officer Price attempted to assuage any potential embarrassment by conducting a purely visual search aided by Officer Janto, who restrained defendant after Officer Price refused his belated request to abort the search. The visual search revealed no contraband, but a pat down of the protective cup of defendant's athletic supporter revealed a blue balloon filled with ten

baggies. On the basis of his extensive training and experience, Officer Price knew he had discovered contraband. In fact, the ten baggies all contained cocaine.

Drugs are the central problem confronting Columbia prisons and visitors are the main source of this contraband. Drugs contribute to prison violence in the form of gang fights and the enforcement of drug debts. They threaten the public welfare as well because law abiding friends and family of inmates are often forced to smuggle drugs under threat of physical harm to themselves or inmate. Many experts agree that strip and body cavity searches provide the most effective and affordable means for halting the flow of drugs into prisons.

II. Questions Presented

1. Did defendant consent to the strip search under the totality of the circumstances when he failed to heed two plainly displayed and strongly worded warnings that he would be searched for drugs? He nonetheless voluntarily proceeded through the Visitor Processing procedures at a well guarded Correctional Center. Freeing prisons of drugs smuggled in by visitors to prisons is strongly within the public interest?
2. Must defendant be offered the opportunity to withdraw his consent to a search and leave the prison when he knows he is about to be discovered with contraband when such withdrawal might encourage future drug smugglers by guaranteeing a safe haven when they are likely to be caught?

3. Was Officer Price's search of defendant alternatively based on reasonable suspicion when defendant dressed to conceal his body, became jittery, avoided eye contact, and perspired when Officer Price asked to search his groin area?

III. Summary of Argument

Defendant impliedly consented to a strip search for drugs under a totality of the circumstances test. He ignored two plain warnings that his person would be searched for drugs, and presented himself for search in a private place in a well-secured correctional facility. Further, the strip search of visitors is a crucial step in furthering the valid penological interest of halting the flow of drugs into Chilton. Nor did defendant's request to withdraw from the search pierce his consent.

Defendant makes his argument in reliance on a New Mexico case which is not and should not become the law of Columbia, because the right of withdrawal would foster rather than stem drug smuggling. Alternatively, if the court does not find consent, it must find that Officer Price's search was legitimately based on reasonable suspicion based on his expertise in drug interdiction in corrections and defendant's suspicious behavior.

IV. Argument

A. Defendant consented to a strip search under the totality of the circumstances when he was twice notified he was subject to a search of his person for drugs, he nonetheless proceeded into a secured area, and the prison has an important interest in freeing itself of drugs brought in by visitors.

The 4th A. proscribes only unreasonable searches and seizures. Warrantless searches, such as the one here, are per se unreasonable unless the search falls within an exception. Katz v. US. One exception is when a warrantless search is conducted pursuant to consent. Schneckloth v. Bustamonte. Consent must be freely and

voluntarily given as judged by the totality of the circumstances. Id.

State v. Haynie, a be implied on the basis of posted notices that a search will be conducted. It held that three factors must be evaluated:
(1) the adequacy of the Notice of a Potential Search; (2) voluntary conduct subjecting the person to a search; and (3) the importance of the interests served by the search. An examination of the Haynie factors leads to a finding of consent in the instant case.

1. The Notice of a Potential Search was adequate because defendant was twice warned of a potential search of his person for drugs and it is objectively reasonable to believe this may include a strip search when conducted in the private anteroom of a prison.

Courts have repeatedly held that posted signs and warnings are relevant to determining whether a defendant consents to search. In Haynie, defendant was found to have impliedly consented to search of his briefcase in part because he presented it for inspection in the airport where signs are posted that passengers were subject to inspection of their bags and persons. Similarly, the 15th circuit noted in US. v. Jenkins that a sign warning entrants to a military base of the possibility of search helped establish that defendant's implied consent to search.

Here, defendant ignored two highly visible warnings of the possible search for drugs: a 3'x 5' sign and another printed warning on the visitor sheet he was individually given. Defendant cannot seriously maintain that he was not on notice of the likelihood of a search of his person for drugs.

Defendant argues, however, that any implied consent based on notice must stop short of a strip search, in part because the signs did not specifically mention this mode of search and in part because of the embarrassing nature of such searches. The test for the scope of consent is not exact notice or embarrassment; instead, it is whether it is objectively reasonable to believe a consented search might include such a component. State v. Rodney (Col. 1994).

Where a defendant, as here, is repeatedly warned that a search of his person for drugs will take place, is taken to a secluded, private area, and consents to a pat-down search and visual search of his oral cavity, it is not objectively unreasonable to believe that such a search might also extend to the visual inspection of other bodily cavities, especially since this is the usual hiding place for the contraband sought.

Defendant relies heavily on Rodney's holding that such a body cavity search is beyond the scope of consent when conducted on a public street. This case is easily distinguished from the case at bar, since in the instant case the search was not conducted in public but instead in a room made private for the purpose of searches of visitors' bodies for contraband. Rodney's public thoroughfare rationale does not apply here.

2. Defendant's conduct was voluntary because he presented himself for search in a highly secured area despite repeated warnings.

In US. v. Jenkins (15th Cir 1993), the defendant was found to have consented to search based on the totality of the circumstances in large part because he had voluntarily entered an obviously well secured military base despite signs warning of possible search. As the court wrote,

> "The barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common sense awareness of the nature of a military base - all these

circumstances combine to puncture any reasonable expectations of privacy. . ."

The same reasoning is equally opposite when applied to a visitor entering a prison. Defendant's voluntary appearance helps establish his consent to search.

3. The penological interests served by the search are important because the importing of drugs by visitors is the central problem confronting Columbia prisons.

Just as Jenkins invoked the concern of national security in finding implied consent to search on a closed military base, here the penological interests served by stemming the flow of drugs into prisons by visitors support a finding of consent to search. Drug smuggling has been described as the prison's "central problem," leading to gang fights and other types of violence. Many experts agree that strip searches of visitors most efficiently and effectively solve this problem.

In sum, the totality of the circumstances of this case support a finding of implied consent.

B. Defendant's request to abort the search did not vitiate his consent because the opportunity to withdraw is not required and withdrawal would encourage the very drug smuggling the searches help prevent.

Defendant relies most heavily on a New Mexico case, NM v. Castro, in which that Supreme Court held that visitors to prisons must be allowed to withdraw their consent to search and leave prison grounds.

Castro is not the law in Columbia, nor should it be. It is the only case to require withdrawal, as it itself admits, and it flies in the face of policies underlying Haynie, which is binding law in this jurisdiction. Haynie argues that airline passengers should not be allowed to withdraw their consent to search, because "a rule under which consent to screening search is limited by the ability to withdraw at any time could only encourage attempted hijackings by providing a secure exit should detection be threatened."

The same reasoning applies with equal force here. Drug smugglers would be encouraged to try to smuggle drugs into prisons if they were assured the right of withdrawal should officers efforts to detect contraband threaten success. This court should follow Haynie and reject Castro and hold that defendant's implied consent was not vitiated by his attempted withdrawal.

C. Alternatively, the search was properly based on reasonable suspicion given Officer Price's specialized knowledge and his evaluation of defendant's suspicious behavior.

If the court rejects consent, it must find that the warrantless search was properly conducted pursuant to reasonable suspicion, a lowered probable cause standard established by Hunter v. Auger (8th Cir 1982) and followed by numerous circuits.

The reasonable suspicion standard is easily met in this case. Officer Price had the specialized experience, knowledge, and training in drug interdiction to evaluate the dress and conduct of defendant for indications of suspicious activity. His suspicions were reasonably aroused and focused on defendant's groin area by his many layers of dress, resistance to removing them despite earlier compliance with similar prison rules, his shiftiness, avoidance of eye contact, and sudden sweating. Combined, these factors all easily meet the hurdle of reasonable suspicion.

THURSDAY AFTERNOON
JULY 30, 1998

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

Cranfield Downtown Improvement Association

(THIS PAGE INTENTIONALLY LEFT BLANK)

CRANFIELD DOWNTOWN IMPROVEMENT ASSOCIATION

Instructions

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Cranfield is located within the jurisdiction of the fictional United States District Court for the Eastern District of Columbia and the fictional United States Circuit Court of Appeals for the 15th Circuit.

3. You will have two sets of materials with which to work: A File and a Library. The ii contains the factual information about your case. The first document is a memorandum containing instructions for the tasks you are to complete.

4. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If any of the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing from the Library, you may use abbreviations and omit volume and page citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should

probably allocate about 90 minutes to reading and digesting the materials and outlining and organizing your answer before you start writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness and organization of your response. The following weights will be assigned to each of the assigned tasks:

A: 50

B: 50%

Coates, Hildebrand and Shull
101 Riverfront Plaza, Suite 1150
Cranfield, Columbia

T0: Applicant
FROM: Rebecca Newell
RE: Request from Cranfield Downtown Improvement Association
DATE: July 30, 1998

As you may know, Cranfield Downtown Improvement Association (CDIA) is a nonprofit corporation established to promote the revitalization of downtown Cranfield. We helped CDIA incorporate several years ago and since that time have provided them with advice and representation on a number of matters. Yesterday I met with CDIA's current president, Brent Richards, concerning CDIA's third annual "Great Pumpkin Festival," to be held the Saturday before Halloween in and around City Center Mall in downtown Cranfield. The festival may seem a long way off, but apparently final booth assignment decisions need to be made in the next few days. CDIA is anxious to preserve the family-oriented nature of the festival, and needs our advice on how to do that.

I did not attend the first two pumpkin festivals, but I have heard good things about them. Richards says they were very successful in attracting families with young children, and that the festival demonstrated to this largely suburban-based group that downtown Cranfield is a "fun place to go." He attributes the reported growth in sales by downtown merchants who target these customers directly to the drawing power of the festival, and wants to maintain its family-oriented atmosphere. The first year the exhibitors, vendors and entertainers who rented booths were all invited to do so by CDIA, and all of them were in keeping with the festival's light-hearted Halloween theme. Last year a number of unsolicited applications were received, and since there was space available, CDIA allowed every group that applied to participate. The CDIA Board now thinks this was a mistake. Richards says some of the participating groups were "too controversial," that complaints were received about them, and that CDIA is afraid they will drive young families away. At this point, however, some of the groups who participated last year seem to feel they have a "right" to be involved again this year, and he came to us to find out if there are in fact any legal problems with scaling back some participants. I told him I wasn't sure, but we would research the issues and get back to him right away.

I had a transcript of my interview with Richards typed up and have attached relevant portions, so you can get more detail on what the problems are and what CDIA wants to do. You will see that I asked a number of questions about CDIA's relationship to the city and where their funding comes from and so forth. I have also attached some notes that were made at the time CDIA was incorporated. On the face of it CDIA is an association of private individuals and businesses, and they should be able to establish whatever policies they want. But since the festival takes place on public as well as private property, and there is at least a working relationship with the city, there may be a question of "state action" that would make the First Amendment applicable.

I want you to do two things:

1) Read the relevant case law in the library and write a memo to me on the state action issue. Don't give me an abstract legal treatise: what I want is a concise, to-the-point analysis of the facts we have about CDIA and the Great Pumpkin Festival, and your conclusion about whether a court will find a basis for attributing CDIA's actions to the state.

2) We need to prepare our client for the worst possible outcome. Assume a court would find state action. Draft an opinion letter for my signature to Richards and the CDIA Board. The letter should do the following:

a. explain the limitations the Constitution places on CDIA's actions and decisions in operating the Great Pumpkin Festival if it is considered to be a state actor;

b. explain whether CDIA can allocate space the way it wants and still be consistent with constitutional requirements; and

c. regardless of whether CDIA's plans would pass constitutional muster, the client needs to know all its options in order to decide how to proceed. .Suggest all other possible options available to it for deciding how to allocate booth space. Be sure to discuss whether these options would meet its needs and whether they are consistent with constitutional requirements.

PARTIAL TRANSCRIPT OF INTERVIEW WITH BRENT RICHARDS

* * * * * *

ATTORNEY NEWELL (Q): So after the first festival was so successful other groups wanted to get in on it?

MR. RICHARDS (A): Right. And we didn't think that would be a problem. But it really changed things. It's the abortion issue that gets people so upset. I mean, we could have the Democrats selling bumperstickers or whatever, and the Republicans doing the same thing, and I think everyone would think it was fine. But last year the right to life people gave out plastic fetuses in little baskets, and we got lots of complaints. And the abortion rights people set up right next to them, and pretty soon people were keeping away from that whole area. I mean, that's not why you take your kids to a Halloween festival.

Q: So on this list of groups which have applied for booth space, the ones you'd like to exclude are Cranfield Area Right to Life, the Religious Coalition for Abortion Rights anyone else?

A: Well, the National Organization for Women. They were distributing abortion rights literature as well. I'd just like to steer clear of the whole issue, if we can. I know we can't keep them from showing up and handing out literature and so forth. I mean, the area is basically open to the public, has to be. But I don't want it to look like we're officially connected with them.

Q: Some of the groups on this list seem to tie in directly to the Halloween theme--apple growers, pumpkin growers, people who sell honey or nuts or whatever. And I assume the civic groups--like the Elks and Kiwanis and Girl Scouts and such-probably also have booths that tie in with the theme.

A: Right. They were invitees both years. The Kiwanis have a pumpkin carving booth, and the scouts have dunking for apples. One of the women's groups sells pies,

and another hot spiced cider. You know the kind of thing. We basically coordinate with them to make sure there's a good variety of activities and refreshment and such, and to avoid duplication.

Q: And then there are some other groups on the list who probably just want to reach the audience, who don't have anything particular to do with Halloween. I guess I'd put Citizens for the Environment in that category, and Amnesty International, and the Greater Cranfield NAACP, and maybe a dozen others.

A: Right. Groups are coming out of the woodwork now. Next year, if not this

year, we're simply going to run out of room. You can only get so many booths in a two-block area.

Q: Would you be willing to make your prohibition broader, if that strengthened your legal case? Say, deny booth space to any group that just wanted to advance its own agenda, and wasn't really interested in sponsoring some specific Halloween activity?

A: Sure. We're getting close to the point of filling the booths with just those that provide entertainment, sell food or beverages, and tie into Halloween themes.

Q: Could you also choose who you'll invite to set up booths?

A: I guess so. That's basically what we did the first year, and it worked fine. But as I say, most of these groups are okay with us; we don't mind helping them get their message out, as long as we have the space. We get some revenue from the fees they pay, and having all these different booths fills up the mall, makes it seem like more of an event. We just don't want anything controversial.

Q: So what you really want to do is to have control over controversial or offensive activities?

A: Exactly, we want people to feel good and have a good time.

Q: O.K. You may have to come up with a policy that has broader application, to avoid charges of discrimination. I'll have to see what our legal research produces on that.

* * * * *

Q: As you know, I didn't work on your incorporation, but I've looked at the file and have a fairly good idea of how you were organized and how you were planning to fund your activities at that time. Has the membership changed since then?

A: Not really. I mean, we've gotten larger, as the number of downtown businesses has increased. And some of the folks who were reluctant at first have signed on.

Q: But essentially you're still a voluntary association, and most of your operating expenses come from dues, is that right?

A: Well, we still have the dues structure that varies depending on the size of the business, but that's not our only revenue.

Q: Okay. Why don't you fill me in on your other sources of revenue, to the extent you can.

A: Sure. I can give you a general idea. As I already mentioned, the festival

itself brings in some money, because we sponsor several of the booths ourselves, and we also charge a fee to the other exhibitors and vendors and so forth. And we've received some fairly large donations, over and above dues, from certain businesses that have an interest in the downtown area.

Q: Anything else?

A: Some grants for specific activities, like the project we had to help some of the smaller businesses with wheelchair accessibility and the like.

Q: These are foundation grants?

A: A couple of them were. We got a fairly sizable grant from the state for the Main Street restoration project--you know, when we stripped off some of the false fronts that had been put up during the forties and fifties and changed the street lights and all. Association dues won't cover a big project like that.

Q: This was part of some state program?

A: Yeah. The Columbia Heritage Council gives grants for historical districts or historical building restoration--something like that. We got about $500,000, which went a long way toward paying for the work we did on City Center Mall--you know, that two-block stretch along Main Street.

Q: That's the stretch that's now closed to traffic?

A: Right. The pedestrian mall with the benches and planters and such. I don't know if you've been down there lately, but it has a real turn-of-the-century look to it now. That's what we use for the Great Pumpkin Festival, incidentally--that and a small area of the parking lot that runs between Main and First Streets.

Q: I may seem to be getting into areas that strike you as marginal, here, but the funding especially could be important in deciding what your legal options are. If you were a purely private entity, with all your funding coming from private sources, you could probably run the festival any way you chose. But the receipt of state money might change things, and the fact that you're using what was or may still be a public street might make a difference, too.

A: Really? We have a twenty-year lease on two blocks of Main Street and half a block of Harrison Street. The city has kept an easement for pedestrian access on both sides. I mean, we couldn't wall it off or anything. But the city required us to take legal possession before we put in the cobblestone paving, and the lease was also a condition for allowing our private security company to patrol the area. I thought the whole idea was to get the city off the hook, legally.

Q: It may have been, for some purposes, and the fact that you lease and maintain that area might relieve the city of liability if somebody tripped on a loose cobblestone or whatever. But when somebody asserts that they have free speech rights in a certain location the analysis could be totally different. The question might be whether you're substituting for the city, somehow, or you and the city are acting in concert.

A: Well, not in this case. The festival was our idea. The city didn't have anything to do with it. They don't tell us where or when to stage the festival. We don't even give the city a booth.

Q: That may be important. I'm going to have somebody do some research on this, because I haven't looked at free speech cases for awhile, and I'm not sure how the courts would look at this situation. But I can tell you they would look at any public funding you receive, as well as your relationship to city government.

A: And if they find we're substituting for the city or whatever?

Q: Well, that means the First Amendment of the constitution would apply, and you would have to allow some type of access, probably. As I said, we'll have to do some research on it and get back to you. And I should get some more facts from you, while you're here. Does CDIA receive any other public funding?

A: We have gotten some small neighborhood beautification grants. Some of our individual members have, too, but when it involves a common area we apply in the name of the association. And there are some other minor things--more like in-kind contributions. For example, the city still pays for street lighting, even though we now lease that part of Main Street. We were already hooked into the main lighting system, and it was just too complicated to change things. And we get an extra police detail during the festival--things like that.

Q: I saw in the file that you have an Ix officio slot on the board for someone from city government. Was it the Director of Planning and Development?

A: Right. That's mainly a liaison thing. You know, the whole idea is to revitalize downtown, and decisions the city makes can affect that too. We like to know what they're planning and visa versa.

Q: Sure, that makes sense. Let's see**.** Can you think of other ways you are involved with the city or state?

A: I don't think it's all that significant, really. I mean, the association was set up as a way for businesses in the area to get together to improve things for

everybody. The city didn't come up with the original idea; we did. And sure, we've gotten some financial support, but lots of other businesses and neighborhoods get grants from the same programs.

Q: I understand that, but you're kind of unique because you're doing something that directly benefits the city, in terms of the economy and tax revenues, so they have every reason to give you all the support and encouragement they can.

A: We do benefit the City and it's starting to show up in the increased sales taxes paid to the city by downtown business and in more revenues from real property taxes too. The city would be hurting financially if it wasn't for the turn around in the downtown business area.

Q: Another unique aspect of this situation is your location, or at least the location of the festival. If you were a self-contained, suburban mall there wouldn't be a problem, but here we're talking about a city street that's still open to the general public, even if traffic has been blocked off.

A: And the parking lot. We use a portion of the municipal lot at Main and Harrison. That's where they set up the mini ferris wheel and other rides.

Q: Right, you mentioned that. Look, it would be helpful if you could give me a sketch, showing where the booths are located and how much of the parking lot is used and so forth. I think the specifics are going to be important.

A: Yeah, that's easy. One of my clerks is great at drawing layouts and maps and such. I could send it over this afternoon.

Q: Great. And could you indicate which areas are private and which public, or formerly public?

A: Sure, no problem.

Coates, Hildebrand and Shull
101 Riverfront Plaza, Suite 1150
Cranfield, Columbia

MEMORANDUM

TO: File

FROM: D. Hildebrand

RE: Discussions with CDIA leadership

DATE: May 30, 1994

Met with Wooley, Meacham, and Richards regarding the options for downtown improvement efforts and they decided to go with a nonprofit corporation with voluntary, dues paying members, rather than the special assessment district authorized by state law. Since latter requires signatures of more than 50% of the businesses and involves a mandatory assessment collected by the city, they felt there was too big a chance someone would block it. They just want to get started whether everyone agrees or not, believe others will join if they are successful in turning the downtown area around.

The name of the entity will be the Cranfield Downtown Improvement Association. I told them we would draw up the incorporation papers in the next two weeks, and also get the application for tax exempt status underway.

They agreed on a nine-member board with staggered three-year terms, two-term limit. Wooley is going to talk to the director of Planning and Development to see if she is willing to serve ex officio. CDIA believes the city should be doing this anyway, and should at least have a representative present at board meetings to share information.

There will be an initial membership fee of $100, with dues to be on a sliding scale depending on the size of the business. There was lots of discussion about how to measure size, and they finally agreed on gross revenues, without looking at profits. The sliding scale principle will be part of the bylaws, but I told them the method of measurement was too specific, and also subject to change.

We came up with the following for the statement of corporate purpose:

> To foster revitalization and improvement of the downtown Cranfield area, in a manner consistent with the area's unique cultural heritage and aesthetic appeal, by providing financial and technical assistance to members, disseminating information, sponsoring promotional activities, providing for collective security, engaging in beautification efforts and seeking funding for historical restoration and related projects.

I told them this was more detailed than we needed, but they wanted to reach consensus on exactly what the organization will do, whether or not it winds up in the incorporation papers.

(THIS PAGE INTENTIONALLY LEFT BLANK)

THURSDAY AFTERNOON
JULY 30, 1998

California
Bar
Examination

Performance Test B

LIBRARY

Cranfield Downtown Improvement Association

LIBRARY

(THIS PAGE INTENTIONALLY LEFT BLANK)

United Auto Workers Local 5285 v. Gaston Festivals, Inc.
U.S. Court of Appeals (4th Circuit, 1995)

The United Auto Workers, Local 5285 (UAW), appeals the dismissal of its suit under 42 U.S.C. Sec. 1983 alleging that its First Amendment rights were violated when it was denied an information booth at an annual festival organized by a private corporation in Gastonia, North Carolina. The district court dismissed the suit after holding that the festival's organizer, Gaston Festivals, Inc. (GFI), is not a state actor and thus is not subject to the requirements of section 1983.

I

GFI is a private, non-profit corporation that organizes and promotes the Fish Camp Jam, an annual festival held in downtown Gastonia, North Carolina. The festival's name derives from Gaston County's unique restaurants, called "Fish Camps," which were built along the banks of the county's two rivers to serve the local fishermen's catch. Visitors to the festival are treated to musical acts, games and contests, and can even go fishing at the festival's fishing hole. There are also two designated food areas where volunteers fry over four tons of fish and "countless hushpuppies" in eight hours. The Fish Camp Jam, in short, is a one day "community celebration" to build civic pride, showcase local talent, food, and culture, and provide entertainment for the local community. Its purpose is to provide a day of good, clean fun for the citizens of Gaston County.

The Jam is held on public streets and sidewalks and on private property in Gastonia's downtown area. GFI, as any other entity that wishes to use the City's land, must obtain a permit in order to use the public property during the festival. In addition to approving the permit, the City provides police protection, traffic department assistance, and sanitation services during the nine-hour event. In most respects, however, the Fish Camp Jam is conducted independent of the City of Gastonia. The event is staffed by a crew of approximately 500 volunteers. Although the City historically makes a $10,000 annual donation to the festival, local businesses provide much of the financing for the event. All of the festival's proceeds go either to local charities or businesses, or to GFI. And the City plays no active role in planning or managing the festival. GFI alone decides which individuals and organizations will participate in the Fish Camp Jam.

During the festival, GFI allows local civic organizations to distribute literature from information booths in an effort to educate festival guests about community service and civic projects. According to appellees, the purpose of having these booths, like the purpose of the festival in general, is to "promote civic pride and awareness . . . not to provide an advocacy forum for all those who wish to put their message before the public." As the event's organizers explained, "political, ideological, and controversial issues are basically inconsistent with the purpose of the Fish Camp Jam."

To ensure that information booths are allotted only to organizations promoting civic pride and awareness and that there is at least a limited respite from political and other controversial activities, GFI adopted a booth approval policy which denies booth space to organizations whose "issues are likely to foster confrontation or argument." Booth access is also strictly limited to non-profit organizations. Pursuant to the booth approval policy, GFI has denied booth space to the Republican, Democratic, and Libertarian parties, and to Planned Parenthood. Groups that have been offered booth space include Mothers Against Drunk Driving, the Humane Society, and local bond-issue groups.

In September, 1993, the UAW applied for booth space to distribute literature on its "Buy American" campaign. The pamphlets that were proposed for distribution advocated various political positions of interest to the union. One brochure encouraged the boycott of toys made in China; another opposed the North America Free Trade Agreement; and a third entreated consumers to boycott Nike products because Nike had moved many of its jobs abroad. GFI found UAW's messages to be inconsistent with the recreational purposes of the Fish Camp Jam and denied its application for a booth. However, even without a booth, UAW members were still free to attend the festival, hand out pamphlets at festival entrances, and discuss their views with patrons of the Fish Camp Jam.

II

The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described "in all fairness" as a state actor. One of the paradigmatic means by which a private party becomes subject to section 1983 is through the government's conferral upon that party of what is, at core, sovereign power. UAW's primary contention is that Gastonia conferred upon GFI such sovereign power and therefore that under the "government function" strand of the state action doctrine GFI must be held accountable as a state actor.

The mere fact that a private entity performs a function which serves the public does not make its acts governmental action. Rather, under the "government function" standard, the function performed must be traditionally the exclusive prerogative of the state. Only those undertakings that are uniquely sovereign in character qualify as traditional and exclusive state functions. The organization, management, and promotion of events such as the Fish Camp do not fall within this limited domain. The government has not traditionally been the sole provider of community entertainment. Nor has it been the exclusive organizer of festivals, parades, or fairs. Fairs and festivals such as the Fish Camp Jam have traditionally been administered primarily by private organizations, like churches, civic groups, or local business consortiums.

UAW relies principally on Evans v. Newton (U.S. Supreme Court, 1966) to assert that the provision of amusement or recreation is an exclusive government function. In holding that the private trustees' operation of the public park in Newton constituted state action, the Court did say that a park is an entity that "traditionally serves the community," and that "mass recreation through the use of parks is plainly in the public domain."

In Newton, however, the challenged decisions were imputable to the city because the city remained "entwined in the management or control of the park." Even assuming that the one-day Fish Camp Jam festival could be compared analytically to the ongoing management and operation of a public park, there is no state participation in the Fish Camp Jam comparable to that in Newton. UAW does not allege that Gastonia played any role in the festival's management. Nor does it allege that the City played any role in deciding which organizations could occupy festival booths.

III

UAW alternatively contends that Gastonia has "ceded control of its town center to GFI," and that the city has "turned over the running of its downtown area to a private corporation," to such an extent that the downtown area is essentially GFI's private property. By characterizing GFI's authority in this way, UAW attempts to come within the ambit of Marsh v. Alabama (U.S. Supreme Court, 1946), which held that a corporation that operated a privately owned **company town was** a state actor. This effort is strained at best, even conceding for present purposes that the underlying rationale of Marsh could be extended to the context where the property in question is in fact publicly owned.

The Supreme Court has held that state action can only be found under the authority of Marsh where "a private enterprise [assumes] all of the attributes of a state-created municipality" and performs "the full spectrum of municipal powers." Hudgens v. NLRB f 1976). It is not enough to establish state action, contrary to UAW's argument, that facilities be devoted to a "public function," or that an owner "opens up his property for use by the public in general." A private actor must assume plenary control and complete governmental power over the property in question.

It is plain from the record before us that, while GFI plays a significant role in organizing and directing the entertainment activities in the downtown area during the daylong Fish Camp Jam, GFI has not been afforded and has not otherwise assumed the requisite amount of governmental control over even a single municipal power, much less sufficient power to qualify as a state actor under Marsh and Hudgens.

To begin with, the very existence of a permit system for approval of private functions on public property demonstrates that the City of Gastonia, and not GFI, exercises ultimate control over the use of the public property and facilities. The City also provides essential police, fire, and other services to support the festival, further confirming that GFI has not assumed plenary control over Gastonia. At the same time GFI, in exercising the limited authority that has been conferred upon it, has not sought to assert the full extent of the City's sovereign power. UAW has virtually complete freedom to spread its message in Gastonia; its only restriction is that, on the single day of the year on which GFI holds the Fish Camp Jam, UAW may not obtain a booth to distribute literature in the particular downtown area of Gastonia permitted for use by the festival. Union members may freely distribute their literature and advocate political positions with the patrons of the Fish Camp Jam, or they can seek a permit from Gastonia to hold their own festival celebrating organized labor. UAW is presented with a far wider number of choices for disseminating its message in Gastonia than was the member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Alabama, at the time Marsh was decided.

That GFI obtains a permit from the City of Gastonia in order to conduct its festival in part on public property does not in any way alter our conclusion that GFI acts solely in a private capacity when it holds the Fish Camp Jam festival. We have long adhered to the principle that the actions of a private organization temporarily using private property are not

actions that can be fairly attributed to the state. Private organizations like GFI that wish to use public property to organize festivals, fairs, rallies, parades or meetings, are not chilled from doing so by the possibility that they will be subject to liability as if they were agents of the government.

In the course of using the streets and sidewalks during the festival, GFI does exercise a power to decide who may operate booths at the Fish Camp Jam, and exercise of this power does have the incidental effect of restricting at least the manner in which UAW members are able to speak in the area of the festival during the day in question. That these purely private decisions have the incidental effect of restricting others in their use of the property, however, does not transform that which is not a traditional and exclusive state function into one that is. If a party obtaining a permit to use public property for a specific event was constitutionally required to admit unconditionally everyone seeking admission, it would be virtually impossible to hold the event for which the permit was obtained.

The consequences of finding state action in this case would be difficult to overstate. Were we to hold that the incidental power to exclude others from public property during the course of a limited, permitted use transformed the permit holder into a state actor, softball teams on the Mall in Washington, D.C., would be constitutionally obliged to afford due process to those not allowed to play on the particular field at the same time. Every family that barbecues at a public park would theoretically be barred from excluding uninvited guests on constitutionally suspect grounds. The local church could no longer use public facilities to hold events for fear of violating the Establishment Clause. Every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny. Such a rule is untenable, and is in no way required by the decisions of the Supreme Court and of this circuit.

The judgment of the district court is affirmed.

Citizens to End Animal Suffering and Exploitation
v. Faneuil Hall Marketplace
United States District Court (D. Mass. 1990)

Plaintiffs are a non-profit corporation, Citizens to End Animal Suffering and Exploitation ("CEASE"), and two of its members. They allege that defendant, Faneuil Hall Marketplace, infringed their First Amendment right of free expression when it arrested the individual plaintiffs on grounds of criminal trespass for distributing literature on land leased by defendant from the City of Boston. Based upon that past action, and defendant's representation that it would arrest plaintiffs again under similar circumstances, plaintiffs seek to enjoin future interference with their freedom of expression.

Defendant Faneuil Hall Marketplace ("the Marketplace"), one of the nation's foremost tourist attractions, is a commercial development of restaurants, food stands, cocktail bars, boutique shops, and pushcarts offering sundry arts and crafts. It has wide, open cobblestoned lanes separating three buildings that house these commercial enterprises. These lanes were formerly public streets known as North and South Market Streets which, in coordination with the Marketplace development, were decommissioned and closed to vehicular traffic. There is also a large public outdoor seating area. The Faneuil Hall Marketplace corporation holds a ninety-nine year lease for the three buildings and the cobblestoned lanes between them and to the west of them.

On June 23, 1989, the individual plaintiffs, along with others, gathered at the Marketplace to distribute leaflets and protest the inhumane treatment of calves used for veal. They urged passersby not to consume veal at the establishments located in the Marketplace. Plaintiffs claim that, as they and their fellow protesters were walking in a single line with pedestrian traffic on North and South Market Streets, they were stopped by defendant's security officers who allegedly had received complaints from a commercial tenant. The officers told the protesters that they could not picket or display signs on "private property."

After the protesters refused to disperse, defendant's security officers arrested the individual plaintiffs for criminal trespass. They were handcuffed and taken to defendant's security offices, where they were detained until the Boston Police arrived. Defendant swore

out criminal complaints against these plaintiffs in the Boston Municipal Court. These criminal proceedings were ultimately dismissed for lack of prosecution. As a result of this incident, plaintiffs filed a complaint alleging a violation of 42 U.S.C. Sec. 1983 and by this motion seek preliminary injunctive relief.

Before deciding whether defendant can be enjoined from prohibiting speech on its premises, the court must undertake a two-step inquiry. First, the court must determine whether this defendant, an ostensibly private party, may be held to constitutional standards when it attempts to regulate activity on its premises. If so, the court must then characterize the forum at issue, thereby setting the constitutional standards by which defendant's regulations are to be judged.

Plaintiffs contend that the public nature of the Marketplace makes the protections of the First Amendment applicable. Defendant, on the other hand, argues that the Marketplace is private property to which the First Amendment does not apply.

I

The Constitution clearly restricts the power of government to regulate speech. Under certain circumstances, private parties may also be subject to these same constitutional standards. The issue, therefore, is whether defendant's actions here may be "fairly attributable to the state." Such a determination is necessarily fact-bound, for only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.

The Supreme Court has identified several factors for courts to consider in determining whether a party is a "state actor." Specifically, two of these areas of inquiry are relevant here: 1) whether the private actor has assumed a traditionally public function; and 2) whether there is a sufficient "symbiotic relationship" between the state and the private actor so that the state may be recognized as a joint participant in the challenged activity. While only one of these areas of inquiry need be satisfied in order to find state action, this case involves, as shown below, both a private assumption of a traditional public function and a symbiotic relationship between defendant and the City of Boston.

A. Public Function Analysis

In determining whether the Marketplace is a state actor because it performs a public function, the relevant inquiry is not simply whether a private group is serving a public function. Rather, the question is whether the function performed has been traditionally the exclusive prerogative of the state.

Notwithstanding the narrowness of this inquiry, defendant's conduct here is fairly construed as the performance of a public function. As defense counsel conceded at oral argument, the lanes on which the plaintiffs wish to protest are encumbered by an easement for public access. Many pedestrians wholly uninterested in the Marketplace's offerings cross its lanes daily in traveling to the waterfront. Others simply stroll about the Marketplace, enjoying various shops and pushcarts, as well as the adjacent Faneuil Hall and Faneuil Hall Square. As such, the open lanes of the Marketplace are not unlike a public park, which, as the Supreme Court held in Evans v. Newton (1966), must be "treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."

Moreover, the pedestrian walkways here are similar to public streets, the regulation of which is a public function. Were this a case in which the city has simply authorized the Marketplace to maintain the public walkways, defendant's discharge of this duty might not be state action. But here, the Marketplace is acting as more than a private contractor. Its function goes beyond the mere maintenance of a public way. By prohibiting protesters from assembling in the lanes, the Marketplace is deciding who can use the public easement, and under what circumstances they can use it. Rather than acting as a private contractor, therefore, the function performed by the Marketplace is more akin to that of a policeman. This, it seems, is a function that has traditionally been the exclusive domain of the state.

Indeed, the power to decide who can use a public easement goes beyond even that of a policeman. Unlike the policeman, who merely executes decisions of policy, defendant here is actually making those policy decisions. Defendant's role is thus more like that of a legislature, which is even more clearly an exclusive state function. The essential purpose of the easement here is to ensure public access to the Marketplace. The exercise of control over the public's right to use the easement is subject to constitutional scrutiny, whether

employed directly by the state or through delegation to a private party.

B. Symbiotic Relationship Analysis

Under the "symbiotic relationship" test, actions of a private party are attributable to the state only where the state "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." Burton v Wilmington Parking Authority (U.S. Supreme Court, 1961). In Burton, the Court attributed state action to a private restaurant, located in a public parking garage, that discriminated against black customers. In reaching its conclusion, the Court placed great emphasis on the fact that the restaurant leased its land from the state and was located in a public facility "dedicated to public uses," and that the rent from the restaurant contributed to the support of the public facility.

This case involves many of these same indicia. First, as in Burton , defendant leases its property from the city. The city continues to own the land in fee simple, having acquired it by eminent domain.

Second, the lanes between the three buildings are "dedicated to public uses." As noted above, the City of Boston reserved an easement over the Marketplace's lanes for the public's access and passage. Indeed, the city's overall purpose in leasing the premises to defendant was the rejuvenation of the downtown area, all for the benefit of the community.

Third, and most important, the city derives an economic benefit from defendant's policy of restrictions, at least as directly as that found in Burton. In Burton, the Court concluded that the state profited from the restaurant's policy of discrimination, because the state's financial position was directly influenced by the restaurant's profits. These profits, in turn, were enhanced by the policy of discrimination because, according to the restaurant's own argument, the restaurant would lose business if it did not discriminate.

Like the restaurant in Burton, defendant here argues that its business would suffer if it were to permit plaintiffs to demonstrate on the premises. Perhaps even more so than in Burton, this downturn in business directly affects the city's economic goals, as the Marketplace is clearly an indispensable part of the city's plan. The city's primary purpose in

leasing the property to defendant was to revitalize the downtown area. To this end, the city depends on the ability of the Marketplace to attract business to the area. Consequently, to the extent that the Marketplace fails to attract business, the city's goal of revitalizing the downtown area is frustrated. As in Burton, therefore, the city derives a direct economic benefit from defendant's policy of restricting access to the premises. Accordingly, the relationship between defendant and the city is sufficiently interdependent to be considered "symbiotic."

For these reasons--namely, that defendant performs a "public function" and is involved in a "symbiotic relationship" with the city--it is fair to attribute defendant's action to the state and, accordingly, to examine defendant's conduct with constitutional scrutiny.

II

Under the First Amendment, a state actor may not restrict access to a forum without an appropriate governmental justification. The degree of interest a state must show to justify its restriction depends on the type of forum it is regulating. There are three types of fora: 1) traditional or "quintessentially" public; 2) limited public; and 3) nonpublic. The more a forum resembles a traditional public forum, the greater an interest the state must show to justify restricting access.

If the Marketplace were either a traditional or limited public forum, defendant's restriction would have to be valid at least in terms of time, place and manner. To be a valid regulation of time, place, and manner, the restriction must be content-neutral, narrowly tailored to serve a significant government interest, and offer ample alternative channels of communication.

Defendant's restriction does not satisfy these requirements. First, it is not narrowly tailored. The only content-neutral interest proffered by defendant in support of its restriction is that "protests by groups of the size here involved, during crowded periods, obstruct passage by patrons of the Marketplace." Leaving aside the question of whether this is a "significant" governmental interest, defendant's policy of arresting demonstrators is not narrowly tailored to this end. There is no suggestion that defendant attempted to reduce the bulk of the demonstration by, for example, requesting that the group break up

into smaller segments and spread out through other parts of the area in order to remove obstructions to the patrons' access. Nor did defendant suggest that plaintiffs could resume their demonstration during a less-crowded period. Instead, defendant simply gave plaintiffs the choice of either leaving, or being arrested.

Second, defendant's restriction is not entirely content-neutral. While defendant does offer as a justification for the restriction the removal of obstructions to passage, it also stresses the harmful effects of the particular message of plaintiffs' protest. Specifically, defendant argues that picketing at specific Marketplace lessees injures their business. Presumably, then, if plaintiffs were protesting with regard to some other issue unrelated to the businesses in the Marketplace, defendant would see less reason to remove them from the premises. Defendant's justification for the restriction is thus, at least in part, tied directly to the content of the protest and therefore is not content-neutral.

Although restrictions in a nonpublic forum need only be reasonable to be valid, the Marketplace is more than a nonpublic forum. A nonpublic forum is one which is not by tradition or designation a forum for public communication. Here, however, the Marketplace has both traditional and designated characteristics of a public forum.

For example, the entire Faneuil Hall area has long been a center for public debate and expression. And, while the lanes at issue were taken by eminent domain and leased to defendant, that was done under the express condition that they maintain their historic public character.

Moreover, as noted above, the city reserved a public easement over the lanes. The lanes are used for access, for strolling about the Marketplace, and as "a historic pedestrian connection" to the purely and traditionally public adjoining areas. These lanes thus resemble public sidewalks. Although sidewalks are not public fora per se, the facts here establish that these lanes must be considered, at the least, as limited public fora. The location and purpose of a publicly-owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum. Because the Marketplace is at least a limited public forum, therefore, it is unnecessary to determine whether defendant's restrictions would satisfy the reasonableness standard applied to nonpublic fora.

The Faneuil Hall area is no mere commercial shopping mall with a Colonial theme. Rather, it is a marketplace of ideas, expression, and community, providing a unique monument to one of this nation's most cherished centers for public debate. While the private interests of the participating entrepreneurs are important, and must be respected and protected, they can never be permitted to overshadow the fundamental purpose of this special landmark.

Accordingly, and for all the foregoing reasons, plaintiffs' motion for a preliminary injunction is hereby granted.

Irish Subcommittee v. Rhode Island Heritage Commission

United States District Court (D.R.I. 1986)

The plaintiffs brought this action in December, 1985, seeking a declaratory judgment invalidating all rules, regulations and guidelines of the Rhode Island Heritage Commission ("the Commission") that prohibit the display or distribution of any political paraphernalia, including political buttons, hats, pins and pamphlets at the Rhode Island Heritage Day festivities. The plaintiffs also seek a permanent injunction barring the defendants, their agents, employees, officers and attorneys from restricting the plaintiff Irish Northern Aid's participation in the Heritage Day activities.

The plaintiffs allege that the Commission has deprived them of their rights of free speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. They claim a cause of action pursuant to 42 U.S.C. Sec. 1983 to redress this alleged deprivation of their civil rights.

I

The facts in this case are relatively simple and undisputed. The defendant Commission is a state commission within the executive branch of the Rhode Island state government. It was established to promote cultural activities and does much of its work through twenty-three ethnic subcommittees who organize activities relating to their particular ethnic heritage.

The plaintiff Irish Subcommittee is endowed with responsibility for the organization and sponsorship of activities and events commemorating the heritage of Rhode Islanders of Irish descent, and is authorized to involve outside groups and individuals in those activities. The plaintiff Irish Northern Aid (NORAID) is a private organization based in Rhode Island and primarily composed of Rhode Islanders. NORAID's principal purpose is to provide relief to the families of individuals affected by the Northern Irish government actions related to the current political strife in that country.

Each year since 1977, the Commission has sponsored a Rhode Island Heritage Day, an ethnic festival hosted by the twenty-three subcommittees. The event is held for one day

each fall on the State House lawn. Each subcommittee is assigned an area of the lawn upon which it may set up booths and tables for the display and sale of ethnic food and artifacts. The booths and tables are arranged along the lawn's walkways. The walkways lead to the State House steps, which are used as a stage area for presentations of ethnic song and dance. The displays in the booths are typically the work of outside organizations who participate in the festival at the invitation of the subcommittees. The Commission has traditionally allotted seven booths for the Irish Subcommittee's use on Heritage Day.

Since 1977, the Commission has enforced a Heritage Day rule against groups connected with the ethnic subcommittee booths which reads as follows: "No political paraphernalia--buttons, hats, pins, pamphlets, etc. will be allowed to be displayed or distributed." The Commission has enforced this ban because it believes that political discourse and the dissemination of political paraphernalia will interfere with one objective of Heritage Day: to promote brotherhood among the various ethnic groups of Rhode Island.

In 1985 the Irish Subcommittee intended that NORAID participate in the subcommittee's booths; NORAID intended to distribute its literature from the booth. Upon learning of these plans, the Commission advised the Irish Subcommittee that NORAID would not be permitted official participation in Heritage Day 1985. The Executive Committee expressed its belief that NORAID's activities were political and therefore ran afoul of the Commission's rules. The Irish Subcommittee declined participation in the festivities of 1985 and instead organized an "informational picket" at the festival. The demonstration lasted approximately twenty minutes before disbanding. The rule banning all political paraphernalia remains in place for the 1986 Heritage Festival, and the plaintiffs filed suit seeking declaratory and injunctive relief. Both sides have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Analysis of First Amendment questions concerning abridgement of the freedom of speech requires a three-part inquiry. First, the speech must be identified as protected under the First Amendment. Second, the court must consider the nature of the forum, because the degree to which the state may limit access depends upon whether the forum is public or nonpublic. Third, the court must determine whether the state's proffered justifications for

the restrictions on speech satisfy the standards applicable in the particular forum.

A. Protected Speech

This aspect of First Amendment analysis needs little discussion here since it is beyond dispute that political speech deserves stringent constitutional protection unless it is directed to inciting or producing imminent unlawful action and is likely to incite or produce such action. There is no question that the speech in question here is entitled to First Amendment Protection.

B. Characterization of the Forum

Neither party to this action disputes that the State House lawn is a public forum. The defendants concede that they could not under any circumstances exclude the plaintiffs from the greater lawn surrounding the festival. In defining a forum, however, the court must focus on the access sought by the speaker. The real forum at issue here is the Irish Subcommittee booth within the confines of the festival.

The Heritage Day festival is a public ethnic festival. It is held on public property and the public is openly invited. It is not a private celebration. The festival is held upon grounds indisputably characterized as a public forum. It is my view that the Heritage Day booths are no less a public forum than the grounds upon which they rest. The state does not change the character of a public forum by prescribing a limited use.

A public forum exists in two ways. First, property may be a public forum because its traditional use is inexpressibly linked with expressive activities. Streets, parks, and sidewalks are examples of traditional public forums. A public forum may also be created when the government opens its property to the public for the exercise of expressive activities. Once the property has been opened for communicative activities, the authority of the government to limit those activities is sharply curtailed; the government must abide by the near absolute protection afforded speech in a public forum. Just as the government may not restrict access to a previously closed forum once it has been open to the public, the government may not restrict access or change the character of the forum by the mere placement of booths upon it.

C. The First Amendment in the Public Forum

Once a court has determined that a particular place is a public forum, it must

invalidate any content-based abridgement of the right to speak unless the restriction is supported by a compelling state interest, and the means used are narrowly tailored to that end. In the public forum, the state may also impose reasonable time, place, and manner restrictions so long as they are content-neutral, supported by a substantial state interest and narrowly tailored to that end.

Content Neutrality. The Heritage Commission's rule prohibiting the display of political paraphernalia is clearly a content-based restriction of expression. The rule prohibits the display of political, but not other types of, paraphernalia. A ban on an entire subject matter is no less a content-based restriction than a ban on expression of a particular viewpoint, and both kinds of restrictions are antithetical to the goals of the First Amendment in the public forum.

Compelling State Interests. Because I have found that its regulation is a content based restriction of speech, the Commission must offer compelling state interests for its support. The Commission must also demonstrate that the complete proscription of political paraphernalia is narrowly tailored to meet those ends. The Commission defends its regulation on the grounds that the prohibition is necessary to avoid divisiveness and to promote ethnic brotherhood on Heritage Day. The Executive Director of the Commission has stated:

> The goal of the Heritage Festival is to foster brotherhood and understanding among the people of Rhode Island. We do that through the exchanging of ideas, customs and traditions that exist amongst groups in Rhode Island. We have 23 ethnic subcommittees that are part of the Rhode Island Heritage Commission, and we asked them, once a year, to put on a Heritage Festival on the State House lawn. We asked for an atmosphere that fosters this brotherhood and understanding amongst the groups. Our purpose in not allowing political activity is that this would not be a way of fostering brotherhood in the State of Rhode Island.

The Commission fears that if they are compelled to allow NORAID to occupy a booth, then equally political groups of differing viewpoints will also demand access, thus embroiling the subcommittees and the Commission in an "international donnybrook." The Commission would like to avoid the political dissension which might arise if ethnic groups with competing political ideologies occupied the same area at the Festival. The defendants seek to demonstrate that any policy of permitting political groups equal access to the booths would be disruptive of the Festival's atmosphere of ethnic harmony.

However laudable the Commission's goal of preventing dissent and promoting brotherhood may be, avoidance of dissent has never been found to justify a content-based regulation of speech, unless the words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." To the contrary, one of the vital functions of freedom of speech is to invite dispute. Public inconvenience, annoyance, or even unrest can never justify a curtailment of speech in the public forum. In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.

While recognizing that a public forum requires a state to provide equal access to all groups, the Commission next argues that public forum jurisprudence would not require that a forum be open to different groups for different purposes at the same time. As a general proposition, the defendant's argument is correct. The First Amendment does not require that a government open a public forum to conflicting groups for conflicting purposes at the same time. The Supreme Court has noted that two parades cannot march on the same street at the same time and the government may deny permission to one parade without running afoul of the First Amendment. I can find, however, no incompatibility between the informational activities of NORAID and the cultural exchange proposed by the Heritage Commission that would warrant finding that NORAID's inclusion in the festival would force the commingling of two separate events in the same forum. The Heritage Festival is, at heart, an informational exchange.

Finally, the defendants argue that NORAID's exclusion from the booths is a minimal infringement on the plaintiff's First Amendment freedoms, and that because the lawn area outside the Festival is open to the plaintiffs for their political discourse, this restriction should survive constitutional scrutiny. The availability of alternative forums for expressive activities will not, however, cure an otherwise defective content-based regulation. The freedom to express oneself in appropriate places may not be abridged on the ground that it may be exercised in some other place.

The Commission's regulation must fail for the additional reason that it is entirely unenforceable and leaves tremendous discretion in the hands of the Executive Board to decide what is and is not political. I note that the Heritage Day regulations do not define "political." It is a subject upon which reasonable minds may differ and the possibility of discriminatory enforcement is very real.

The Commission regulation suffers from the potential for covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space for example is not a straightforward first-come, first-served system.

Determining what is political is particularly difficult in the area of ethnic heritage since much of what we now consider our ethnic heritage derives from the political struggles of the past. The Commission's attempts to exclude political groups from Heritage Day amount to little more than a licensing requirement based on an undefined notion of what is political. In the absence of narrowly drawn, reasonable and definite standards for the officials to follow, this kind of participation requirement must be condemned as a naked prior restraint on speech in the public forum.

III

For the foregoing reasons, I find that the plaintiffs are entitled to summary judgment as a matter of law.

ANSWER 1 TO PERFORMANCE TEST B

I. Memo to Rebecca Newell

A determination of state action will necessarily be a fact-bound inquiry (Faneuil case). The court can use three different tests when weighing the facts of our client: (1) public function test (2) Symbiotic Relationship test (3) privately owned company town inquiry. Based upon the facts in our case as compared with the Gaston Case and the Faneuil Case, the court could likely find that there is state action in our case. The court only needs to find state action under one of the tests.

A) Public Function Test

Under the public function test, the court will examine the facts to determine whether the function performed has been traditionally the exclusive prerogative of the state. (Faneuil Case). Only those undertakings that are uniquely sovereign in character qualify as exclusive state functions.

Two specific facts will help our client in arguing that it was not performing a public function. First, the Gaston Court specifically stated that the government has not traditionally been the sole provider of community entertainment or the exclusive organizer of festival and parades. The Gaston court noted that fairs and festivals have traditionally been organized by private organizations. Thus, the fact that CDIA is organizing a Halloween Festival does not mean that it is performing a traditional state function.

Second, CDIA alone decides who may have access to the booths and the city is not involved in this decision. The Gaston Court pointed to the fact that the city in that case played no role in deciding who could occupy a booth.

However, CDIA also has several facts that may lead the court to view it as performing a public function. First, the city leased the two blocks of Main St and half of Harrison street to CDIA while keeping an easement for public pedestrian access. In the Faneuil case, the court noted the fact that the private marketplace was encumbered by an easement for public access because the easement made the marketplace more like a public sidewalk or park. The Gaston court noted that regulation of these "public sidewalks" is a public function.

The Gaston court also used the fact that the private group with no assistance from the city decided who could have access to the public easement as a fact supporting a showing of public function. The private group is playing the public role of either a policeman or legislator by uniformly deciding who may have access to a public easement.

Mr. Richards had already told you that the area of the festival is "basically open to the public" (p.3 line 19). The area of the booth is on or near the public easement and part of the ferris wheel encroaches onto a public municipal parking lot. By attempting to regulate these public areas, the court could find that CDIA is performing a public function.

B) Symbiotic Relationship Test

Under the symbiotic relationship test, private parties may be deemed state actors where the state has so far insinuated itself into a position of interdependence with the private group that the state must be recognized as a joint participant in the activity (Faneuil case).

CDIA can argue that several facts show that the city is not intertwined with CDIA in operating the Great Pumpkin festival. First, the idea for the festival was completely CDIA's with no input from the city.

Second, the city did not issue any kind of license or permit to CDIA to run the festival. Third, CDIA alone decided when and where to stage the festival without any consultation from the city. Fourth, the city is not given a booth at the festival.

However, the court will also examine other factors that do indicate that there is a relationship between CDIA and the city.

First, the fact that CDIA leases its property from the city is a very harmful fact. The Gaston court first pointed to the fact that the private marketplace had leased its land from the city. The fact that CDIA has a 20 year lease of Main St will indicate to the court that there is a symbiotic relationship. Also, the fact that the city still owns an easement over both sides of the street is harmful.

Second, the Gaston court looked at the fact that the city's purpose in leasing the property to the private group was to rejuvenate the downtown area for the benefit of the community. Similarly, the CDIA articles of incorporation clearly state that the purpose of CDIA is to "foster revitalization and improvement of the downtown Cranfield area."

Third, the court will see that the city derives a direct economic benefit from the private groups' activities. The Gaston court noted that the city received a direct economic benefit from the private group through the improvement of the downtown area and the increase in business and people. Similarly, Richards has several times mentioned that CDIA's activities directly benefit the city through increased sales tax and revenue. Mr. Green even states that the city would be hurting financially if not for CDIA's efforts to revitalize the downtown area.

Fourth, the fact that CDIA receives some grant funding from the state to perform its downtown restoration project shows a symbiotic relationship. The city also pays for the street lighting on CDIA's main street property and provides extra police during the festival.

Fifth, the fact that an ex-officio slot is given on the Board to a city official indicates a symbiotic relationship. The Director of Planning and Development for the city serves on CDIA's board as a liaison between the city and CDIA.

All these facts combined may likely induce a court to rule that there is a symbiotic relationship between the city and CDIA, which will establish state action.

C) Privately-Owned Company Test

One final test for state action holds that a corporation that operated a privately owned company town was a state actor. This situation only exists when the corporation assumes all the attributes of a state-centered municipality and performs the full spectrum of municipal powers.

CDIA can show that it is not a state actor under this test because it has not assumed all the attributes of a municipality. The city still provides police and fire service to CDIA's property. Also the city even provides and pays for the street lights on main street.

II. Letter to CDIA

Dear CDIA Board,

This letter will explain to you the legal problems that you are currently facing and the various options available to you at this time. This letter will explain the (1) limitations that the constitution places on you if you are declared a state actor, (2) the effect these constitutional limits will have on your ability to exclude certain groups, and (3) the options that are available to you in dealing with these issues.

(1) Constitutional Limitations

As you probably know, the Constitution protects an individuals right to the freedom of speech under the First Amendment. If you are considered a state actor, then you will not be able to interfere with an individual's right to speak unless you have a strong justification for doing so.

The restrictions placed on your ability to limit or restrict the freedom of speech of others at the festival will be determined by how the festival is classified. Property has three classifications under the First Amendment and these classifications will determine how much authority you have to exclude some groups from the booths.

The first, classification is a traditional public forum, which is property that is generally open to the public for access and for making speeches. Sidewalks and public parks are examples of public forums. If your festival is classified a traditional public forum because it occurs on property open to the public, then you can only regulate speech if (1) you do not restrict speech on the basis of its contents (2) you narrowly limit your restriction to serve a significant interest of yours and (3) you offer other places of communication to the restricted group.

The second property classification is a limited public forum, which is property that the state opens to the public for access even though it does not have to. The limited public forum is the same as a traditional public forum in terms of your ability to restrict speech.

Finally, some property is classified as a non-public forum, where the public is not granted general access to communicate. In a non-public forum, you can restrict speech as long as you do not favor or allow one viewpoint over an opposing viewpoint.

(2) The Effect of the Constitutional Limitations on CDIA's Decision Making Power.

Most likely, the Great Pumpkin festival will be classified as a traditional public forum or a limited public forum. Either way, you face the same restrictions in your ability to exclude some groups from the booths. The courts have held that festival booths are no less a public forum than the grounds on which they rest.

You will not be able to exclude a group from the booth just because they wish to talk about abortion. To exclude a group just because they want to discuss a controversial issue like abortion is not allowed by the First Amendment because you are making a judgment based on the content of their speech.

I know that you wish to exclude these groups because people have complained and because you want this to be a friendly family-oriented festival, but these justifications are not enough. The court has stated that the avoidance of dissent and controversy is not enough to justify excluding a group based on the content of their message.

Also, the fact that you would allow these groups to hand out literature generally throughout the festival is not enough because you have denied them

access to the booths.

In order to remain within the limitations of the Constitution, you must not exclude any group solely based on the message they want to express. You will need to find an alternative system of deciding which groups can have access to the booths.

(3)Other Possible Options

You have several different options available to you at this time, but not all will accomplish your desire of excluding the groups discussing abortion.

First, you could simply give access to the booths on a first come, first served basis. This would be constitutional, but you would have no control over which groups get in.

Second, you could restrict the booths to only those groups that have a Halloween related activity or theme and deny access to all groups that simply want to advance their own agenda. This would probably be constitutional and would allow you to ensure that all booths have Halloween related activities. However, the abortion groups could still get access if they incorporated some Halloween related activities.

Third, you could give priority to those groups that have a Halloween related activity or theme. This is similar to option #2 and would be more clearly constitutional. It might be effective since you have told me that you are "getting close to the point of filling the booths" with just those Halloween related groups.

Fourth, you could give priority or limit access only to those groups that had booths in the 1st "Great Pumpkin Festival." This priority would be constitutional because it is not based on the content of the speech and it would likely exclude the abortion groups who weren't in the booths the first year. However, this would also exclude many other groups that joined-in last year. It would also limit the size of the festival which you may not like.

Fifth, you could attempt to deny access to groups whose issues are likely to foster confrontation or argument. This was attempted by a previous group in a case. However, this policy would likely be unconstitutional because you are denying access based on the content of a group's speech.

Sixth, you could offer the abortion groups the opportunity to adjacent booths in one corner of the street so that if people wanted to avoid this "issue" they could do so easily. This may not be constitutional because you are treating abortion related groups and booths differently by limiting which booths they may occupy.

Seventh, you could offer the abortion groups free access throughout the festival. This is not going to be constitutional if the groups challenge you.

ANSWER 2 TO PERFORMANCE TEST B

MEMORANDUM

To: Rebecca Newell
From: Applicant
Re: CDIA's Interaction With State and State Action Issue for Halloween Festival
Date: July 30, 1998

As you requested, I reviewed the file and the caselaw with which you provided me in an effort to determine whether CDIA would be deemed a state actor relative to its Halloween festival and its use of the downtown area and the municipal parking lot for that festival.

There are two different ways in which an entity that is not a government entity can nevertheless be deemed to be a state actor, and therefore bound by the Constitution. First, if the entity is performing a traditional public function, a government function, it can be deemed to be a state actor. Second, if there is a symbiotic relationship between the government and the entity, such that the government and the entity benefit from the relationship, the entity can be deemed to be a state actor.

Although the facts here suggest that CDIA would not be deemed a state actor under the government function strand of the state action doctrine, as will be discussed below, it is possible that it could be found to be state actor under the symbiotic relationship strand.

Government Function

Determining whether a private entity is a state actor should be based on whether the party can be described "in all fairness" to be a state actor. See UAW. Under this test, a private party becomes a state actor if the government confers upon the party a sovereign power.

In UAW, the court found that a private entity that held an annual festival on public grounds, after having obtained a permit from the city, was not a state actor. The court found that merely serving the public cannot be deemed a government function, but rather, to be a state action, the activity must be one that is exclusively the prerogative of the state.

UAW would thus be very helpful to CDIA, because the issues are similar in many respects. The festival was one that was held in the downtown area, and was designed both to serve the public and to promote the downtown area and encourage civic pride. Similarly, here, the festival at issue is downtown, and its purpose is to promote downtown business and community pride.

Another similarity between UAW and the CDIA situation is the fact that the city financially promotes the activities of both organizations in some way. In UAW, The City paid the organization approximately $10,000.00 each festival, but most of the funding came from the festival proceeds and private contributions. Here, as in UAW, The City has provided some funding, but most of the funding comes from the festival and from businesses in the downtown area and grants.

However, there are some differences that could be significant. First, the UAW festival was one that was under the authority of the city, because the city had to authorize a permit for the festival. Thus, the city maintained some control over the facilities and the decision whether to have a festival at all. Here, alternatively, the city has no control over the area in question. As will be discussed below, in the section discussing the symbiotic relationship between the city and CDIA, this could be significant, because an argument

could be made that by completely ceding control of the area to CDIA, CDIA has become a government actor.

Indeed, this was a significant aspect of the court's decision in CEASE, which held that the entity that held a lease to a portion of the city's downtown property was a government actor and therefore could not unilaterally restrict speech on the grounds. The CEASE court found that the city had abrogated control of the area to the private entity, and that as such the private entity had control over the area in the same way that a government would maintain control. This control led the CEASE court to conclude that the private entity was a government actor.

However, this can be distinguished in two ways. First, as the UAW court noted, to be a government actor, the private entity must exercise traditionally governmental power over the area. Thus, in UAW, the entity was deemed not to be a public actor because the city provided essential police, fire, and other services to support the festival. Here, similarly, the City is the entity that monitors the activities, and it provides the police to ensure that the festival remains safe. The city thus maintains the control over that aspect of government functions.

In addition, in CEASE, the private entity had given the City an easement over the entire property, so that there was guaranteed public access to the property. This was very significant to the court's decision, because it was clear that the City wanted to maintain complete public access to the property.

Here, alternatively, the easement held by the city extends only to the sidewalks, not to the entire property. CDIA thus has an argument that the City intended to give CDIA the right to control the street portion of the property, thereby giving it the right to decide how to conduct the activities on that portion of the property. While there is evidence that the city anticipated that the property would remain open to the public (Mr. Richards indicated that CDIA could not wall off the property from public access), the property is nevertheless under the control of CDIA. Indeed, CDIA has a private security company that monitors the property to ensure the safety of the visitors.

In addition, an argument can be made that CDIA is not acting like the government because it, like the entity in UAW, has not sought to assert the full extent of the City's sovereign power. In UAW, the court found it significant that the entity was not trying to stop the UAW's speech in the facility; rather, it was merely denying the UAW a booth at the festival.

Similarly, CDIA is not trying to stop the speech of the entities at issue. Rather, it merely wishes to deny them a booth at the festival. Mr. Richards has acknowledged that the entities will still be allowed to be at the festival and distribute their literature and speak to visitors. CDIA merely is trying to deny them the right to have a booth.

However, this argument could also go against CDIA, as it did in CEASE. There, the court found it significant that the entity was exercising policy functions, asserting that the entity was acting like a legislature, which was an exclusive state function. The court asserted that deciding who can speak and who cannot is an exercise of control that constitutes state action. CEASE can be distinguished, however, because the entity was trying to stop all speech, not just to stop the organizations from having a booth. In CEASE, the private actor had speakers arrested for being there (trespassing) after having been warned to leave. Thus, because the entity was prohibiting the protestors from assembling in an area to which the public had an easement, the entity was exercising a state function and the court found it to be a state actor.

Based on the above, it would appear that the reasoning of CEASE would not control for two reasons. First, the city had an easement over the entire property, not just a portion of it. Thus, the city had guaranteed public access to the entire property, and apparently intended it to be a public forum. Second, the entity was trying to stop all

speech, not just limiting the entities that could get a booth at a festival. Here, CDIA is not trying to make such a blanket prohibition.

UAW is probably more persuasive, because of the similarity of the situations, despite the fact that it involved a permit system, while we have control over the property. As such, the court would probably find that CDIA was not a state actor under the government function strand of the state action test.

Symbiotic Relationship

The next issue is whether the city and CDIA have a symbiotic relationship, such that CDIA could be deemed a state actor under that strand of the test. According to the Supreme Court in Burton, the question is whether the state "has so far insinuated itself into a position of interdependence with (the private entity) that it must be recognized as a joint participant in the challenged activity." In Burton, the court found such a relationship to exist where the city leased space in a public building to a restaurant that discriminated against black customers. It was significant to the court there that the proceeds from the restaurant helped support the public facility.

Similarly, in CEASE, the Court found a symbiotic relationship where the city benefited from the activities of the private entity. There, the city leased the space to the private entity primarily to revitalize the downtown area, and it received a direct benefit from the lease.

Under the rationale of CEASE, CDIA would probably be deemed a state actor, because CDIA was created to benefit the city, as well as its citizens, and there is little question that the city has directly benefited both from CDIA and from its festival.

Mr. Richards indicated in your telephone interview with him that the city has directly benefited from CDIA in a number of ways, and that the city would be in financial troubles were it not for CDIA's activities. This has come both in the face-lifting that the downtown area under went and in the other ways in which CDIA has promoted the downtown area.

In addition, the city has directly benefited from the festival. Mr. Richards asserted that the family theme of the festival has drawn people to downtown and exposed them to the area, to the direct benefit of the area's businesses, and the city.

Of course, an argument could be made that the city is only the incidental beneficiary of the activities, because they primarily benefit the downtown businesses. Indeed, the entity was developed not by the city but by the businesses themselves, and its goals are to benefit the businesses. However, CDIA's goals also are to improve the city itself, by beautifying the city, and obtaining funding for the historical restoration and other projects. This is something that benefits the city directly, rather than just incidentally.

Furthermore, the CEASE court found it significant that the city benefited directly from the discrimination at issue. The restaurant owner asserted that his business would suffer were he forced to serve blacks, and thus the discrimination indirectly benefited the city.

Here, similarly, Mr. Richards has asserted that the policies CDIA has adopted, namely to avoid controversial subjects and promote the family atmosphere, further both its goals and the city's goals of improving the downtown area and increasing civic pride. CDIA is trying to make the participants happy by avoiding controversial or offensive topics. In doing so, it is trying to promote the festival and its basic goals. To the extent that this does so, it also promotes the city's goals. As such, the city is arguably benefiting from the speech restrictions.

For these reasons, it appears likely that the court would find that a symbiotic relationship exists between CDIA and the City, and therefore that CDIA is a state actor.

REBECCA NEWELL

July 30, 1998

Brent Richards
CDIA

Re: Restrictions on Activities if CDIA is State Actor

Dear Mr. Richards:

Pursuant to our discussion and your request, we have researched the issue of whether CDIA would be deemed to be a state actor for the purposes of its activities at the Halloween festival and, if so, what limits will be imposed on it as a result. As I previously advised you, it is possible that CDIA would be deemed to be a state actor. This letter is therefore intended to do three things: (1) explain the limitations the Constitution places on CDIA's actions and decisions in operating the Great Pumpkin Festival if it is a state actor; (2) explain whether CDIA can allocate space the way it wants and still be consistent with constitutional requirements; and, (3) set forth your options regarding how to allocate booth space, and whether these options would be consistent with constitutional requirements.

1. Limitations Constitution Places on CDIA's Actions and Decisions in 0r)eratina Festival

In deciding what types of limits are imposed on CDIA, the court will first ascertain whether the area is a "public forum" or a "nonpublic forum." A public forum is one, like streets, sidewalks, parks and other open areas, which have traditionally been dedicated to speech activities. A nonpublic forum is an area like public buildings, military bases, and other traditionally closed sites, where the public has not traditionally been allowed to congregate and speak. As you would expect, the government has more control over the latter than the former.

In determining whether the area is a public forum, a non-public forum, or something in between, the court will look at the traditional use of the area. Thus, it may be significant to the court that the area has been traditionally used for speech and gathering by the public.

If the area is one deemed to be a public forum, then the government is restricted to imposing valid time, place, and manner restrictions. These restrictions, to be valid, must be content neutral, narrowly tailored to serve a significant government interest, and leave open alternative channels of communication. This means, first, that you cannot restrict participants based on the content of their speech. CDIA cannot unilaterally decide that it will allow some speakers to participate but not others, because it prefers the message being delivered by the former.

In addition, for something to be narrowly tailored to serve a significant government interest means that the government must be able to enunciate what it is trying to accomplish by restricting speech within the public forum, and it must show that the means it has chosen is a direct and narrow means of accomplishing this purpose.

Finally, as discussed above, the government must leave open alternative avenues of communications. This means that the government must try to accommodate the speakers' needs, and ensure that they are able to get their message across.

Applying these factors to your situation, it appears that we may be faced with some problems, because each of the elements can arguably violate the constitutional restrictions.

First, some cases have held that the booths themselves, and not merely the areas as

a whole, should be viewed as the area open to the public. Thus, if the booths have been opened for speech, then the booths should be considered the public forum, and the government is restricted in its actions relative to those booths.

CDIA may argue here that the booths have not been opened to speech because the activities have revolved around Halloween and functions related to Halloween. That has been the goal of CDIA and the festival which demonstrates a lack of intent to open the area for speech.

However, the activities last year may pose a problem, because the booths were opened for speech, and many organizations used them to make a message to the visitors. This could mean that the booths have already been opened for speech-related activities, and that as such they are to be considered public forum. We can counter, however, that the speech was secondary to the festival's goals, and that it was not promoted by CDIA in any respect. Having discovered that many groups were using the booths for speech related activities, CDIA has chosen to distance itself from that, and ensure that the goals of the organization and its festival are met -- celebrating Halloween and exposing the public to the benefits of the downtown facilities.

Another problem may be that the speech CDIA is attempting to restrict could be deemed content-based. If CDIA limits the speech by some organizations but not others, and makes this decision based on the content of the speech, then it may be very limited in its efforts to do so. It is vitally important, therefore, that CDIA restrict all speech, not just certain speech.

Furthermore, CDIA may be unable to adequately enunciate a significant government interest for prohibiting the speech. As mentioned above, the downtown area could be deemed a traditional public forum, and it could be argued that many people come there for speech, as well as other things. While some people may be offended by the speech CDIA is trying to restrict, others may consider it beneficial and think that it contributes to the overall benefits of the festival. The government cannot assert a strong interest in limiting speech for the purpose of limiting speech, because this is a significant freedom in society.

Finally, there may be a problem in the absence of alternative avenues for communication. It is, of course, very helpful here that CDIA is not trying to restrict all speech, but rather is just limiting the entities to which it rents its booths. However, an argument could be made that the booths are the public fora at issue, and that within the booths there are no alternative avenues of communication. Thus, because the booths have a unique means for expressing a message, the alternative means are inadequate.

If the area is deemed to be a nonpublic forum, then CDIA is restricted to viewpoint neutral restrictions on speech, that further a legitimate government interest. This would be a much easier test to meet, so I will not discuss it at length. Basically, CDIA must show that it is not just keeping out the abortion protestors and letting in the abortion advocates; rather, CDIA must exclude or admit both views.

2. Can CDIA Allocate Sc)ace the Way it Wants and Still Be Consistent With Constitutional Requirements?

CDIA's goals are basically to preserve the family atmosphere of the festival, but excluding groups that it considers to be "too controversial.": However, as we discussed, CDIA is willing to make a broader exclusion in order to maintain the family oriented atmosphere that is so important to the success of the festival.

As discussed above, it is vital that CDIA make decision regarding allocation of space in a content-neutral manner. Thus, CDIA must choose to exclude all organizations whose purpose is speech, and make clear its goals in deciding who can and who cannot participate. Thus, CDIA's standards must be clearly defined, to include only those groups who have some activity to contribute, which must be related to the central theme of the

festival -- Halloween.

This does not, however, ensure that the restrictions will be constitutional. As discussed above, CDIA may already have created a public forum, by opening the festival to speech last year. It seems fairly clear that CDIA was ambivalent regarding the activities of the participants last year, and that booths allocated purely to speech were acceptable. As such, last year the festival served as a public forum.

However, it seems unlikely that the activities during a single year of the festival would set in stone the festival's activities and the limits on its decisional power. Rather, it is more likely that the festival would be allowed to control the decisions over who gets booths, and to exclude speech entirely, so long as it does so in a content and subject matter neutral way.

Please note the significance of clearly defining the criteria for obtaining a booth, as I mentioned above. It is important that the criteria be expressed in such a way that there is no discretion to allow some speech, while excluding others. If the court were to determine that the activities were conducted in a partial manner, they may be deemed to have been based on content or subject matter.

3. What are CDIA's Options for Allocating Booth Space, and are These Options Consistent with Constitutional Requirements?

CDIA of course now has a number of options available to it, in deciding how to allocate booth space.

First, CDIA can, as discussed above, limit the festival to wholly Halloween-related activities, precluding those groups that have chosen the festival as a means of expressing an idea, rather than for the purpose of participating in the Halloween festivities. This would probably be the safest course for CDIA, because it would be a content-neutral means of restricting the use of the booths. While as discussed above, there is no guarantee that this will pass Constitutional muster, it is CDIA's safest alternative because it puts the greatest distance between CDIA and decision-making based on the content of speech.

CDIA could continue what it has done, and allow certain speakers to have booths but not others, based on its opinion regarding whether the subject would be too controversial. There is no indication as yet that any of the groups that have sought access will pursue the matter and seek court assistance in getting space at the fair.

However, if any group did choose to go to court, CDIA would have to demonstrate a compelling interest for its decisions. Once CDIA begins making decisions based on the content of the speech, it is required to demonstrate that it had a compelling reason for making that decision. This is a very difficult test to meet, and probably could not be met here. As I mentioned above, speech is a highly protected right in society, and very few restrictions that limit it based on the discretion of some decision-maker are acceptable.

Another option would be to grant booth space, but to limit it to a portion of the festival. This might be an acceptable means of separating the objectionable speech activities from the remainder of the festival, and still give the groups a "home base" from which to operate. As I mentioned above, courts will accept valid "time, place and manner" restrictions if they are content neutral, narrowly tailored, and leave open alternative channels of communication.

Here, CDIA would be required to admit all groups seeking to speak at the festival, or choose some content neutral means of selecting from among the participants. This could be accomplished by taking the first twenty applicants, for example, so long as there was adequate notice of the requirements for getting a booth. Having chosen content neutral restrictions, CDIA would then just have to show that the restriction is narrowly tailored and that there are other places for speech. This would appear to be met. The restriction would

be narrowly tailored because it would be designed to limit the controversial speakers to a small area, rather than to allow the booths to be scattered throughout the park. This would meet CDIA's goal in a narrow way. In addition, because the speakers would have booths and be allowed to distribute their material or speak throughout the festival area, there would be other avenues of communication.

Another option might be time restrictions, perhaps limiting the periods during which the booths can be operated, to avoid a time when children would be expected to be there. This is perhaps a less viable option, because the festival is primarily a family event, and it seems likely that children would be there during most of the event.

Finally, CDIA might be able to restrict the manner of the speech. As you mentioned, one of the very objectionable means of furthering the message of the abortion protestors was to display fetuses in little baskets. This was, understandably, traumatic to children and an offensive way of expressing this message.

CDIA could limit the means by which the protestors express their messages by prohibiting graphic depictions or figures, such as the one you discussed.

However, such a restriction would be objectionable for a number of reasons. First, it would be too difficult to establish the standards without adopting either content or viewpoint based biases, which would probably be fatal to the restriction. Second, the drafting of the law would be subject to objections for vagueness or overbreadth, which are prohibited.

Under the constitution, if a regulation is too vague it will be prohibited, because it will be deemed to have given inadequate notice to interested parties of the activities being restricted. This is particularly fatal in speech related areas, because of the importance society places on speech.

In addition, if a restriction regulates protected as well as unprotected speech, it will be deemed to be overbroad and stricken on that basis. The regulation of manner could easily be overbroad, because of the difficulty of drafting the regulation.

Conclusion

Please consider these options carefully, and let me know what you think and how you would like to proceed.

Sincerely,

Rebecca Newell

(THIS PAGE INTENTIONALLY LEFT BLANK)