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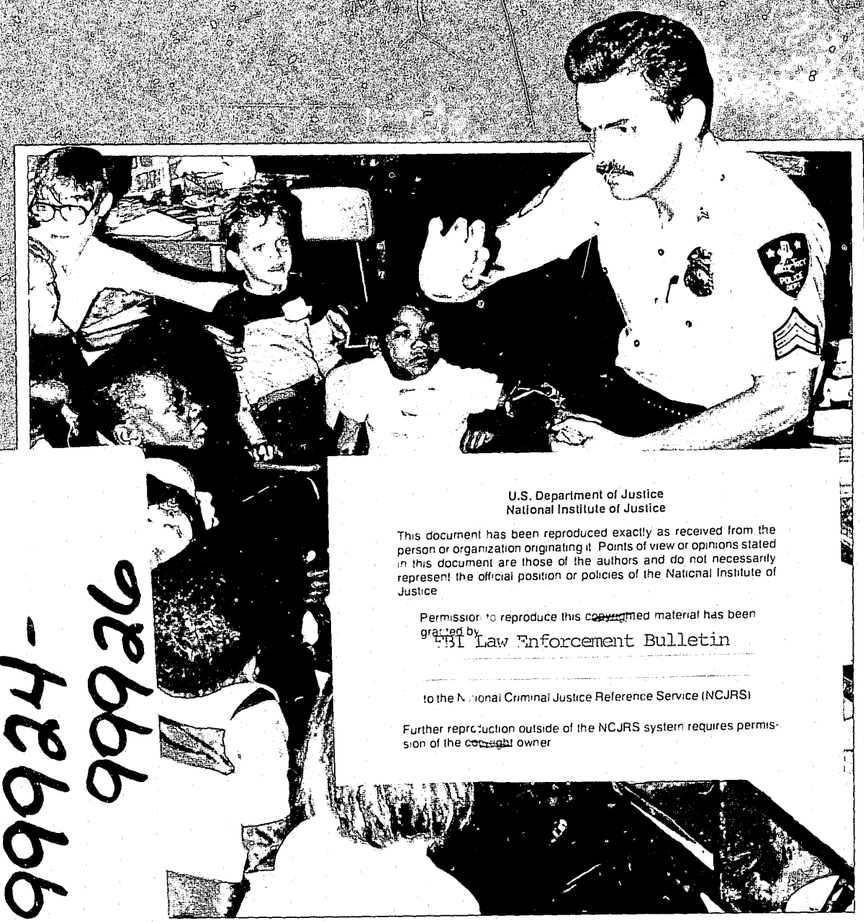

Building Bridges Between Police and Public

Investigative Detention

An Intermediate Response (Part I)

"... there is a legitimate law enforcement function in the investigation of criminal activity where an officer may detain an individual short of making an arrest."

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

In the landmark 1968 decision of *Terry* v. *Ohio*,[1] the U.S. Supreme Court noted that a law enforcement officer "may in appropriate circumstances and in an appropriate manner approach a person for the purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."[2] The Court noted that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person"[3] within the meaning of the fourth amendment to the U.S. Constitution.

Rejecting the notion that every seizure of a person is an arrest requiring probably cause, the Court recognized that there is a legitimate law enforcement function in the investigation of criminal activity where an officer may detain an individual short of making an arrest. Moreover, the Court noted that as a practical matter, this police function cannot be governed by either the warrant or probable cause standards of the fourth amendment, but must be measured against that amendment's general proscription against unreasonable searches and seizures.[4]

In the 1972 case of *Adams* v. *Williams*,[5] the Court explained its rationale in allowing the limited seizure of a person for investigative purposes, in the absence of probable cause to make an arrest:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an *intermediate response*. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."[6] (emphasis added)

This article examines factors which justify this intermediate response—the investigative stop—and reviews the relevant cases which provide some guidance as to its permissible scope. It should be emphasized at the outset that not every encounter between the police and citizens is a seizure. Determining precisely when police action restrains a person's freedom to walk away depends on the

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facts and circumstances of each case, and the Supreme Court has indicated that there is no "litmus paper" test[7] which can make the task easier. The issue turns on neither the subjective intentions of the police nor the subjective view of the person encountered. The standard is an objective one, based on what a "reasonable person" would believe in a given case. In other words, if the show of authority is such that it would cause a reasonable person to believe that he is not free to leave, then a seizure has occurred.[8]

Once a stop has occurred, the Supreme Court has identified two important questions to be addressed: (1) Whether the stop was justified at its inception, and (2) whether the intrusion was reasonably related in scope to the circumstances which justified the interference in the first place.

LEGAL JUSTIFICATION: REASONABLE SUSPICION

Even though an investigative detention of a person is not an arrest within the meaning of the fourth amendment, it is nevertheless "a serious intrusion ... and is not to be taken lightly."[9] The Supreme Court has adopted a balancing test in which the governmental interests in making the intrusion are weighed against the privacy interests of the individual. The burden rests with the law enforcement officer to justify the intrusion by pointing to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[10] Thus, the concept of "reasonable suspicion" has been established as the standard of justification for an investigative detention. It is an objective standard, subject to later scrutiny by a neutral magistrate—less than the standard of probable cause necessary to justify an arrest, but more than a mere hunch. Much like probable cause, it may be based upon the firsthand knowledge of an officer or upon secondhand information derived from other sources. Also, like probable cause, it may be more helpful to describe it than to simply define it. Several Supreme Court cases, beginning with *Terry*, provide useful illustrations.

Firsthand Knowledge

As the facts of *Terry* v. *Ohio* are well known to most law enforcement officers by now, a brief summary should suffice to illustrate the use of firsthand knowledge, gained through an officer's observations. In *Terry*, an experienced officer, familiar with the business area to which he had been assigned, observed two men on a street corner over a period of several minutes alternately walk by a store window, peer inside, and return to the corner. When they were joined by a third individual, the officer intervened, made some inquiries, and finally arrested the individuals when a patdown of their clothing disclosed weapons on two of them (including Terry).

In assessing the officer's actions, the Supreme Court stated that they were part of a "legitimate investigative function"[11] and concluded that it would have been "poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."[12] The officer's observations aroused his suspicions, and those suspicions were objectively reasonable.

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In a recent airport stop case, *United States* v. *Rodriguez*,[13] police officers experienced in narcotics investigations observed three men at the Miami airport acting in an "unusual manner" as they left the ticket counter. The two plainclothes officers followed the three men to the airport concourse. When one of the men turned and saw the detectives behind them on the escalator, he quickly spoke to one of the others in a low voice. The second man turned, looked at the detectives, and quickly turned his head back. As the three stepped from the escalator, the officers overheard one of them say, "Let's get out of here," and then again in a lower voice, "Get out of here." One of the officers subsequently testified that as the defendant, Rodriguez, tried to leave, "his legs were pumping up and down very fast and not covering much ground, but his legs were as if the person were running in place."[14] The officers then identified themselves and asked Rodriguez if he would talk to them. Rodriguez agreed to talk with the officers and to move about 15 feet to where the other two suspects were now standing. The suspects gave conflicting information regarding their identities. A consent search of the defendant's luggage revealed three bags of cocaine, and the three men were arrested. A Florida court suppressed the evidence, in part, on the ground that there was no reasonable basis for the initial stop of the suspects.

The Supreme Court reversed. The Court declared that the initial contact between the officers and the suspect Rodriguez was nothing more than a consensual encounter with no fourth amendment implications. Furthermore, assuming (without deciding) that a "seizure" did develop sometime after the initial contact and before the consent to search was given, the Court held that "any such seizure was justified by 'articulate suspicion.'"[15] The Court summarized the salient facts as follows: (1) The suspect's furtive movements, (2) the overheard statements to "get out of here," (3) Rodriguez' strange movements in his attempt to evade the officers, (4) the contradictory statements regarding their identities, and (5) the training and experience of the officers.

As the Court noted in *Terry*, a series of actions observed by an officer may be innocent in themselves, but when taken together can justify further investigation.[16]

Both *Terry* and *Rodriguez* illustrate that personal observations of a law enforcement officer must be interpreted in light of the officer's overall training and experience. The mission of the officer, as well as the knowledge of unique patterns of criminal behavior acquired through training and experience, become very important in the assessment of reasonable suspicion.

Secondhand Information (Hearsay)

Just as probable cause to arrest or search may be based on secondhand information, so may reasonable suspicion to conduct an investigative stop. For example, in *Adams* v. *Williams*,[17] a police officer on patrol in a high-crime area received a tip from a person known to the officer that Williams was carrying narcotics and had a gun. The officer approached Williams' parked automobile and ordered him to step out. When he responded by rolling down his window, the officer reached into the car and removed a loaded revolver from his waistband. Williams was then arrested, and the subsequent search of his car uncovered additional weapons, as well as substantial quantities of heroin.

The Court apparently assumed that Williams was seized the moment the officer ordered him to exit the car. In evaluating the officer's justification in seizing Williams, the Court rejected the defense argument that a stop and frisk can be based only on an officer's personal observations. Rather, the information from the known informant "carried enough indicia of reliability to justify the officer's forcible stop of Williams."[18] Recognizing that informant tips vary greatly in their reliability, the Court, nonetheless, declined to preclude their use by police. The Court suggested that some, completely lacking any indicia of reliability, "would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response."[19]

In *Adams*, the secondhand information came from a reliable informant whose identity was known to the officer. Lower Federal court cases have also found reasonable suspicion to exist when the intitial information was provided by an anonymous tip and then corroborated by an officer's firsthand observations. For example, in *United States* v. *Aldridge*,[20] a police officer responded to a radio call at approximately 3:00 a.m. that suspicious persons were in the vicinity of a construction site tampering with vehicles.

" '... the totality of the circumstances—the whole picture—must be taken into account' when assessing the information necessary to authorize police to conduct an investigative stop."

The information originated from an anonymous source who gave a detailed description of a suspect vehicle, including the fact that it had a broken tail light. While heading toward the location of the construction site, the officer observed a vehicle with a broken tail light going in the opposite direction which matched the description. The officer stopped the car and arrested the occupants after discovering a weapon in plain view inside the vehicle.

One of the issues the defendant raised on the appeal of his conviction was the legality of the stop which led to the discovery of the weapon. The defendant contended that the officer observed nothing suspicious prior to the stop and was acting solely on the information from the anonymous tipster. The Federal appellate court reviewing the case concluded that based on the totality of circumstances, the stop was justified. Even though the officer did not actually observe any suspicious behavior, the court held that an investigative stop will by upheld "if the officer observes facts corroborating even the innocent details of tips from informers.... This is true even when the informant is anonymous."[21] In this case, what the officer did observe coincided in detail with the description given by the anonymous tipster and was sufficient to justify the stop of the vehicle.

Collective Knowledge

Recently, the Supreme Court applied the principles of the "collective knowledge" rule to the concept of reasonable suspicion. "Collective knowledge" is the term used to describe the process by which the courts impute the knowledge possessed by one officer to another. For example, one officer may make an arrest or conduct a search at the request of another officer or agency, without having full knowledge of all of the facts which prompted the request. The information possessed by the requesting officer or agency would be imputed to the second officer who acted upon it and would be considered on the issue of probable cause.[22]

In *Whiteley* v. *Warden*,[23] the Court considered the arrest of burglary suspects based on a police radio bulletin that a warrant had been issued. Although the warrant was held invalid for lack of probable cause, the Court suggested that if the sheriff who issued the radio bulletin had possessed probable cause for arrest, then the arresting officers could have properly arrested the suspects, even though they were unaware of the specific facts that established the probable cause. The question is whether those issuing the bulletin possess the probable cause, not whether those relying on the bulletin are aware of the specific facts which led their colleagues to seek their assistance.

Similarly, in *United States* v. *Hensley*,[24] police officers in Kentucky, acting on a "wanted flyer" issued by a police department in Ohio, stopped Hensley's car while attempting to determine if a warrant has been issued for his arrest. The flyer stated that Hensley was wanted for investigation of an aggravated robbery and included some details of the crime, but gave no reasons for suspecting Hensley. When the car was stopped, one officer recognized the passenger as a convicted felon and observed the butt of a revolver protruding from beneath the seat. Following the passenger's arrest, a search of the car uncovered two other weapons, resulting in Hensley's arrest and subsequent conviction for being a convicted felon in possession of firearms.

Because the discovery of the weapons attributed to Hensley hinged upon the plain view discovery of the gun protruding from beneath the car seat, the defense challenged the initial stop of the car. A Federal appellate court reversed the conviction, based in part on the contention that the Kentucky officers lacked specific information which led the Ohio department to issue the flyer, and therefore, lacked a reasonable suspicion sufficient to justify the stop.

The Supreme Court reversed. Noting the importance of police being able to act promptly in reliance on information from another jurisdiction, the Court held:

> "... if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop. ..."[25]

The Court made clear that this rule would not validate an otherwise unconstitutional stop:

> "If the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment. In such a situation, of course, the officers making the stop may have a good-faith defense to any civil suit ... (cites omitted). It is the objective reading of the flyer or bulletin that determines whether other police officers can defensibly act in reliance on it."[26]

Applying these principles to the facts of the case, the Court concluded that the police department issuing the flyer possessed a reasonable suspicion—based on specific and articulable facts—that Hensley was involved in an armed robbery. Noting that the facts included information from an informant that Hensley had driven the getaway car, the Court reasoned that "the wealth of detail concerning the robbery revealed by the informer, coupled with her admission of tangential participation in the robbery, established that the informer was sufficiently reliable and credible" to justify an investigatory stop of Hensley.[27]

The flyer twice stated that Hensley was wanted for investigation of an aggravated robbery; it described Hensley as well as the date and location of the robbery; and it warned other departments to consider Hensley armed and dangerous. The Court concluded:

> "An objective reading of the entire flyer would lead an experienced officer to conclude that Thomas Hensley was at least wanted for questioning and investigation ... this objective reading would justify a brief stop to check Hensley's identification, pose questions, and inform the suspect the St. Bernard Police wished to question him."[28]

Hensley is an important case for law enforcement in that it recognizes the interdependence of law enforcement agencies and the need for rapid communication and cooperation. That recognition is best illustrated by the language of the Court itself:

> "In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction."[29]

"The Whole Picture"

In assessing whether reasonable suspicion exists to justify an investigative stop, the courts should consider the totality of circumstances. Isolated facts which suggest only innocent behavior may create an entirely different impression when combined with other also seemingly innocent facts. *United States* v. *Cortez*[30] provides a good example.

On several occasions, border patrol officers in Arizona discovered several sets of footprints in a sparsely populated area near the Mexican border known to the officers as an area heavily trafficked by aliens illegally entering the country. From the number and location of the prints, the officers deduced that groups of from 8 to 20 persons had walked north from the Mexican border to an east-west highway, turned eastward, and continued along the highway to milespost 122 where they disappeared. One of the recurring shoeprints bore a distinctive V-shaped or chevron design. The officers surmised that a person—nicknamed "Chevron" by the officers—was guiding aliens illegally into the United States from Mexico to a point near milepost 122 where they were picked up by a vehicle.

Based on their observations, the officers made the following additional deductions:

(1) Because the tracks led over obstacles which would have ordinarily been avoided in daylight, the activity was probably occurring at night, beginning sometime after 6:00 p.m. at that time of year;

(2) Based upon the days of the week when the prints were observed, the activity probably occurred during or near weekends when the weather was clear;

(3) Because the footprints turned east at the highway, the vehicle which picked them up probably came from the east;

(4) Because it was unlikely that the groups would be walking away from their ultimate destination, the vehicle probably returned to the east after a group was picked up;

(5) Considering the distances involved and the normal speed of such groups traveling on foot, the trip would probably take from 8 to 12 hours, and the groups would arrive at the highway between 2:00 a.m. and 6:00 a.m.; and

(6) Because of the number of footprints observed each time, the pickup vehicle would have to be large enough to accommodate sizeable groups.

Armed with the above facts and deductions, the officers set up a surveillance of the highway on a clear weekend night at a point some 27 miles east of milepost 122. Estimating that it would take about an hour and a half to make the round trip from their vantage point to milepost 122, the officers watched for suitable vehicles traveling west and returning within that time frame. At 4:30 a.m., a pickup truck with a camper shell passed them heading west. One officer recorded a partial license number. When the same vehicle returned almost exactly an hour and a half later heading east, the officers stopped it, advised the two occupants of the truck cab that they

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were conducting an immigration check, and asked if they were carrying any passengers in the camper. (The officers observed that the passenger in the truck was wearing shoes with a distinctive "chevron" design on the soles.) Cortez, the driver, told them he had just picked up some hitchhikers and proceeded to open the back of the camper where the officers discovered six illegal aliens.

The two men were arrested and charged with transporting illegal aliens. A Federal appellate court reversed their convictions on the grounds that the officers lacked a sufficient basis to justify the initial stop of the pickup, because the circumstances admitted "far too many inferences to make the officer's suspicions reasonably warranted...."[31]

The Supreme Court reversed the appellate court, stating that "the totality of the circumstances—the whole picture—must be taken into account"[32] when assessing the information necessary to authorize police to conduct an investigative stop. The Court explained that the whole picture begins with "objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers."[33] but includes the inferences and deductions drawn by a trained officer—"inferences and deductions that might well elude an untrained person."[34]

Articulating a standard for the lower courts to follow, the Court stated:

> "... when used by trained law enforcement officers, *objective facts*, meaningless to the untrained, can be combined with *permissible deductions* from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion."[35] (emphasis added)

Applying the principle to the facts, the Court concluded:

> "We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement. Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on 'chevron.' "[36]

The ability or willingness of the courts to look at the whole picture in assessing the justification for an investigative stop depends largely upon the law enforcement officer's ability and willingness to draw the picture accurately and in sufficient detail. The law does not recognize an officer's "instincts" or "sixth sense" or "hunch." It does, however, recognize facts and the logical inferences which can be drawn from those facts by a trained law enforcement officer. The Supreme Court explained this practical concept as follows:

> "Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers."[37]

A case decided in a recent term of the Supreme Court provides an excellent example of how the personal observations of an officer, combined with the logical inferences which his experience and training suggested, can provide the requisite reasonable suspicion to conduct an investigative stop.

In *United States* v. *Sharpe*,[38] an agent of the Drug Enforcement Administration (DEA) observed a pickup truck with camper shell traveling in tandem with a car in an area near the coast in North Carolina which was under surveillance for suspected drug trafficking. The agent noticed that the truck was riding low in the rear and appeared to be heavily laden. In addition, the rear and side windows of the camper were covered with a quilted material. After following the two vehicles for about 20 miles, the agent decided to make an investigative stop and called for assistance from the State highway patrol. When a marked patrol car caught up to the procession, the two suspect vehicles appeared to take evasive action by turning off the highway onto a campground and then continuing at a high rate of speed back onto the highway. Both vehicles were eventually brought to a halt, and when marijuana was discovered, the occupants were charged with possession of a controlled substance with intent to distribute.

The defendants appealed their convictions on several fourth amendment issues, including the original basis for the stop. The Federal appellate court which reviewed the case "assumed" that there was an articulable and reasonable suspicion to justify the stop, an assumption which the Supreme Court agreed was "abundantly supported by the record."[39] The Supreme Court noted the following facts as being significant:

(1) The agent's observation of the two vehicles traveling in tandem for 20 miles in an area known to be frequented by drug traffickers;

(2) The agent's knowledge that pickup trucks with camper shells are often used to transport large quantities of marijuana;

(3) The pickup truck appeared to be heavily loaded;

(4) The windows of the camper were covered with a quilted material rather than curtains; and

(5) Both vehicles took evasive action and started speeding when they saw the marked patrol car.

The Court explained that while perhaps none of the facts standing alone would give rise to a reasonable suspicion, "taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation."[40]

The Supreme Court cases provide positive illustrations of the level of information a law enforcement officer must have to justify an investigative stop. That information may be obtained through firsthand observations or through secondhand (hearsay) sources. In addition, law enforcement officers may rely and act upon requests from other law enforcement officers and agencies, e.g., police bulletins and flyers, even though the acting officers do not possess the underlying facts which prompted those requests. Finally, the officers who act, and the courts which review those actions, must consider the "whole picture" or totality of the circumstances.

In *Terry*, the Court emphasized that the officer who conducts an investigative stop must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[41] It is not sufficient that the police officer was "suspicious." The suspicions must be objectively reasonable, based on facts capable of withstanding the scrutiny of a neutral, detached magistrate, and supporting a reasonable belief that the person to be stopped has been, is, or is about to be engaged in criminal activity.

Once a valid stop has occurred, the degree of the intrusion must be tailored to the reasons for its inception. If the intrusion exceeds the permissible scope for an investigative stop with respect to duration or degree of control exercised by the officers, it will be measured against the higher standard necessary to justify an arrest. Furthermore, if the police frisk the detainee for weapons, they must be prepared to justify their action both with respect to its initiation and its scope.

Parts II and III of this article will consider these issues.

(To be continued)

Footnotes

[1] 392 U.S. 1 (1968).
[2] *Id.* at 22.
[3] *Id.* at 30.
[4] *Id.* at 20.
[5] 407 U.S. 143 (1972).
[6] *Id.* at 145, 146.
[7] *See Florida* v. *Royer*, 460 U.S. 491 (1983).
[8] *See, e.g., INS* v. *Delgado*, 80 L.Ed. 2d 247 (1984).
[9] *Supra* note 1, at 17.
[10] *Id.* at 21.
[11] *Id.* at 22.
[12] *Id.* at 23.
[13] 83 L.Ed.2d 165 (1984).
[14] *Id.* at 169.
[15] *Id.* at 171.
[16] *Supra* note 1, at 22.
[17] *Supra* note 5.
[18] *Id.* at 147.
[19] *Id.*
[20] 719 F.2d 368 (11th Cir. 1983).
[21] *Id.* at 371.
[22] For a thorough discussion of the collective knowledge rule and its application in the establishment of probable cause, see Jeffrey Higginbotham, "The Collective Knowledge Rule," *FBI Law Enforcement Bulletin*, vol. 53, No. 10, October 1984, pp. 25-31.
[23] 401 U.S. 560 (1971).
[24] 83 L.Ed.2d 604 (1985).
[25] *Id.* at 614.
[26] *Id.*
[27] *Id.* at 615.
[28] *Id.* at 616.
[29] *Id.* at 614.
[30] 449 U.S. 411 (1980).
[31] 596 F.2d 605, at 608 (5th Cir. 1979).
[32] *Supra* note 30, at 417.
[33] *Id.* at 418.
[34] *Id.*
[35] *Id.* at 419.
[36] *Id.*
[37] *Id.* at 418.
[38] 84 L.Ed.2d 605 (1985).
[39] *Id.* at 613.
[40] *Id.* at 614, note 3.
[41] *Supra* note 1, at 21.

END