

PART V

SUPREME COURT OF THE
STATE OF NEW YORK

CRIMINAL DIVISION

THE PEOPLE OF THE)
STATE OF NEW YORK)
)
versus) Ind. No. MT-98
)
JOSIE WINTERS, DEFENDANT)

STATEMENT OF STIPULATED FACTS*

On the evening of September 28, 1997, three teenagers carrying backpacks disembarked from the 8:05 train in Kingsport, New York. The three were Josie Winters, Alex McHale, and Billie Rodriguez, returning from a weekend trip to visit Josie and Billie's grandparents, who lived just outside New York City. The invitation had included their mutual friend, Alex; the three had similarly traveled to visit the grandparents on two previous occasions. The trio had traveled south on Friday, the 26th, and had enjoyed outings at Shea Stadium and the Metropolitan Museum of Art.

Upon arriving in the train station, the three travelers expected to be met by Josie Winters' parents, for a ride back to Riverview, some 15 miles away. However, no one was present to meet them at the station. Josie, Alex, and Billie found seats approximately 20 feet from the main door and about as far from the ticket counter. After 10 minutes, Josie went to the bank of phones to call home, while Billie stopped writing, put away a pad of paper, and went to look out the window. Failing to get an answer, either at home or on the car phone, Josie asked cousin Billie to make a call home; this also went unanswered except for the answering machine. Josie and Billie were now concerned and speculated that something had to be amiss for none of their parents to be there. Alex, usually calm regardless of events, was very nervous and suggested that they grab a cab home, an idea the others rejected for fear of passing their parents in transit and because of being short on money.

While Josie and Billie continued, at intervals, to call home and look out into the parking lot, Alex offered to stay with the backpacks, as Alex's own parents were away on a trip.

After about 35 minutes of waiting, the three were approached by plainclothes police officer Bobbie Chang. The officer showed a police badge and asked the three if they could provide identification. Taken by surprise, the three fumbled for their drivers' licenses and student ID cards as the officer asked first, where they were coming from and, second, where they were heading. Each answered, in turn, New York City and either "Riverview" or "home" as a destination, with Billie pointedly noting that

each wore a high school "letter" jacket identifying them as students at Riverview Unified Senior High School. Officer Chang remarked that they were "traveling heavy for a short weekend trip." Josie replied that it was always hard to pack for a fall trip given the uneven weather. Chang then asked where Josie and Billie had gotten the identical fancy packs they were using; Billie said that they had been a gift from grandparents in New York City. The officer turned to withdraw, but then spun back around and asked why they were in the station so long. Alex stammered that their ride hadn't shown up, they were short on cash, and they were wondering what had happened to their parents.

Following the close encounter with the police, Billie suggested that maybe a cab wasn't such a bad idea and insisted on stepping outside to check the price; meanwhile Josie returned to give the phones another try.

As Billie walked to the taxi stand, a Ford Explorer pulled up next to him, driven by Sonny Ray, a neighborhood acquaintance of Billie's older sibling, Rudi. Horn honking, Sonny rolled down the window and shouted, "Hey kid—you look lost. I couldn't miss that "RUSH" jacket or your ugly mug. Does your brother know that you're wandering around alone in the dark?" Startled, Billie finally focused on who was driving, half expecting that the car was a ride sent for them. Billie briefly explained their situation. Sonny told Billie to get the others. Sonny was heading back to Riverview, but "I've got people to see and we're burnin' moonlight, so make it quick."

Billie turned and ran back into the station, whispering to the others, "We've got a ride—let's go." As they hustled toward the door, Josie asked whose parent had shown up; Billie said, "None—I ran into Sonny Ray and we're laying tracks for Riverview." Josie stopped instantly, short of the door, and exclaimed sarcastically, "Sonny Ray! I didn't know Sonny got paroled! Oh man, do we get to ride with a convicted felon? Are you crazy?" Billie, finally catching Josie's sarcasm answered, "I've waited long enough and I'm not staying here waiting for that cop to give us a hard time again. Are you coming or not?" Alex piped in, "We'll be okay—it's only 15 miles—what can happen?" Josie reluctantly agreed, but told Alex that the front seat was reserved for Alex, "because Sonny's vehicular manslaughter conviction doesn't seem to bother you!"

As the three approached the Explorer, Sonny got out to help them put their backpacks in the back, telling them to watch the luggage cover. Upon opening the rear end door, Alex, whose parents also owned an Explorer, unhooked the webbed netting stretched across the luggage area and then loaded the three backpacks, recovering them with the netting at the end. Sonny, noticing the two fancy backpacks said, "Man, that looks like good stuff."

The rapid movements of Billie, Josie, and Alex had caught the attention of Officer Chang, who followed them out the door and watched as they climbed into the vehicle with Sonny Ray, a known local troublemaker. Chang's partner, Officer Carmen Garcia, had watched for several minutes

as Sonny Ray circled the parking lot. Once the Explorer pulled away, Chang ran to the unmarked police car in which Garcia sat, determined to follow Ray and the three teenagers who Chang told Garcia “had lied to me about who they were waiting for.” Following at a distance several cars behind the Explorer, the officers decided to see where Ray was going.

It soon became clear that Ray was heading towards Riverview. Once outside Kingsport’s city limits, a County Sheriff’s Department (CSD) Deputy Sheriff on highway patrol, at a red light, pulled in behind Sonny Ray’s Explorer. Sonny, who had opened a beer can a couple of miles into the ride—reassuring the passengers, “Don’t worry, it’s my first since breakfast”—saw the CSD cop following and took care not to raise the can to drink. At the next red light, some four miles after being joined by the CSD, Sonny carefully bent down and jammed the half-empty can, upright, under the front seat. As the light turned green and Sonny began to accelerate, the Deputy Sheriff flipped on the police lights and briefly hit the siren.

Sonny, hoping that the officer was going after someone else in oncoming traffic, continued to accelerate. It quickly became apparent that Sonny was the target of the Deputy Sheriff’s attention. Slowing down, Sonny said “I’m like Velcro to every “fuzz” ball out here. Kids, now you know why old Sonny never plays the lottery—all my luck is bad. Just keep quiet and let me deal with the cop. I’ve got some experience in this department.”

Officer Whitney “Chipper” Johnson, on routine motor patrol, pulled up behind Sonny’s Explorer, called in the stop and license plate number, and waited for a reply. Officer Johnson’s computer screen showed that the car was registered to one John Lee Ray of 1212 Rolling Lane in Riverview, New York. Officer Johnson approached the car on the driver’s side, after directing his car spotlight into the sport utility vehicle’s interior. As Johnson approached, Sonny rolled down his window. The officer turned his flashlight into Sonny’s face and quickly scanned the passengers in the same manner. Johnson then asked if Sonny knew it was against the law to drive without a seat belt on. Sonny moaned and exclaimed, “This is a first: I’m getting stopped for a seat belt ticket!”

Johnson then asked Sonny for his driver’s license, registration, and insurance card. Sonny replied that, unfortunately, the license was at home, but the insurance card, registration, and some ID were in the glove box. Shining the flashlight on Alex, Officer Johnson asked Alex to slowly open the glove compartment and retrieve any papers found there. Alex, desperately nervous, and unsure what would be found in the glove box, hesitated—and then slowly retrieved the sole envelope that sat on top of the car owner’s manual, and which was held down by two unopened beer cans. Sonny laughed, opened the envelope and retrieved the two registration items, a health club picture ID, and an old high school picture ID which were quickly given to Deputy Johnson.

Johnson, who thought that there was a distinct odor of beer from Sonny, now requested information from CSD command on the driver and was rewarded with identification on Sonny Ray, as having a suspended license, and as a parolee who had served time for vehicular manslaughter and resisting arrest. Johnson had heard of Sonny Ray from Officers who had tried to arrest Sonny years before.

Armed with this information, Johnson was about to step back out of the patrol car, when a second, unmarked police car, with a red light stuck on its roof, pulled up in front of the Explorer. Two Officers got out, Bobbie Chang and Carmen Garcia, both known to Officer Johnson, and walked to Johnson's car. They greeted Johnson, "Hey Chipper, what are you doing stopping a car we were following?" Johnson replied "I didn't know that you city types ever came this far out in the country! If you're here for a suspended license, things must be way too slow in Kingsport!"

Bobbie Chang then told Johnson that Chang had been watching three teenagers who were acting nervous, who had hung around the train station too long, were traveling heavy, claimed to be low on cash, who had lied about waiting for a ride from a parent, and that Garcia had been watching Sonny's Explorer repeatedly circle the station parking lot. Chang asked Johnson if the Officer had searched their backpacks yet, as they were following Sonny Ray to see where they might end up, and wanted to get a look into those packs. Johnson replied "No. Until the last 60 seconds I had no reason to look. Stick around. Maybe we'll both get lucky. Sonny Ray and these kids together doesn't feel good to me."

Officer Johnson walked to the Explorer and to the driver's window. Shining the flashlight in Sonny's face, Johnson asked "what did you put under the seat back at the red light?" Sonny smiled and said "Just a can of soda pop—those beers in the glove compartment are my old man's."

Officer Johnson replied "I hope you have better sense than to be drinking and driving while on parole—but it doesn't matter much because your license is suspended." Sonny Ray exploded, "What?! That can't be right!"

Johnson sternly told Sonny to calm down, then asked for Sonny's consent to a search of any bags in the back of the vehicle. Sonny told Johnson "No can do. If I had a bag back there you'd have to go through my lawyer to open it up—but I don't. All that's back there are these kid's stuff." Johnson now lit up Alex's face with the flashlight and asked, "What's your name" and "Do you object to my looking in your backpacks?" Alex, blinking from the brightness and shaking slightly, blurted out, "Alex. Alex McHale. No, you can look—but mine's locked. Do you want the key?" Johnson said yes, took the key from Alex, and immediately told Sonny to step slowly out of the car.

Johnson placed Sonny under arrest for driving with a suspended license and suspicion of driving while intoxicated and ticketed Ray for not wearing a seatbelt while operating a vehicle. With Officers Chang and

Garcia standing nearby, Johnson frisked and handcuffed Sonny, read the Miranda rights and then placed Sonny in the rear seat of the CSD cruiser.

Meanwhile, Chang had reached into the Explorer to remove the keys from the ignition, and noticed a three foot long black metal crowbar on the floor between the front seats, which was also then removed. Chang also reached under the seat and removed two cans—one a half empty beer can and the other an empty diet cola can. Chang told Johnson what had been found and then Chang and Garcia stood on either side of the Explorer. Johnson opened up the Explorer's rear end door, quickly found the small lock attached to Alex's backpack and, using the key, opened it. Johnson felt around the outside of the bag and then reached inside, feeling for any weapons or other contraband. Johnson felt a plastic bag filled with small bottles, and pulled this out. Using the flashlight, Johnson saw that it had several pharmaceutical prescriptions, all made out in the name of Alex McHale. Johnson called to Alex—"is this drug store back here yours?" Alex, ashen, meekly asked, "Drug store? Do you mean my allergy medicines and inhalers?" Johnson placed the plastic bag down and proceeded to first feel the outside pockets and sides of both of the other bags, the two which were identical. Johnson then opened the bags in turn, again feeling for weapons and contraband. While the first bag had several books and an eight pound scaled replica hunk of metal "modern art," the second bag yielded a small plastic bag, mixed in among the clothes, filled with a moderate amount of white powder, which Officer Johnson believed to be cocaine. Johnson called Chang over for a look, who smiled and said, "My gut told me we'd find something on them."

Johnson, Chang, and Garcia then proceeded to place Josie Winters, Billie Rodriguez, and Alex McHale under arrest for criminal possession of a controlled substance. As they were removed from the car, the police officers frisked, handcuffed, and read them their Miranda rights.

Once secured, Officer Johnson returned to the backpack where the illegal drugs were found and emptied it's contents item by item. Toward the bottom Johnson found a daily diary-like journal, a report card from June 1997, a partially written love letter beginning "Dear Jamie,...", and three pages of a newspaper's "personal" ads marked with a highlighter. The journal and report card identified the backpack as belonging to Josie Winters.

Josie Winters, Billie Rodriguez, and Alex McHale were charged with Criminal Possession of a Controlled Substance in the Second Degree, a Class A Felony. Alex McHale was offered a plea bargain and agreed to testify against Josie and Billie in exchange for reduced charges and a District Attorney's recommendation of no more time to be served in jail. Sonny Ray was also charged with Criminal Possession of a Controlled Substance in the Second Degree and further charged with driving with a suspended license. The § 1192 charge of DWI was dropped as Sonny's subsequent chemical blood test showed no illegal alcohol levels. Sonny's parole status awaits the outcome of Sonny's trial.

Given the criminal history of Sonny Ray, and the family ties between Josie and Billie, each trial has been severed from all others.

The Defense Motion requesting a Hearing to Suppress has been granted. The present case consists of a Hearing to Suppress the cocaine evidence found in Josie Winters' backpack.

The defense claims that Officer Chang overstepped proper police powers in Chang's initial questioning in the train station; that Officer Johnson, given the reasons for the stop of Sonny Ray's car, had no legal basis upon which to search the luggage compartment of the vehicle or the personal belongings of the defendant in that compartment; that Deputy Johnson improperly was influenced by the mistaken belief that Deputy Chang had probable cause to effect a search of the teenager's backpack; that Deputy Johnson never asked for and did not receive Josie Winters' consent to search a private backpack; that Josie Winters had a proper expectation of privacy in relation to the contents of the backpack, which included many personal and private papers; that Deputy Johnson improperly used the consent coerced from Alex McHale to open Josie Winter's backpack; and that as the police search was unconstitutional under the Fourth Amendment to the U.S. Constitution and Article 12 of the New York State Constitution, the evidence seized is therefore inadmissible.

The State denies these assertions and claims that Deputy Chang's brief questioning of Josie Winters and companions was proper under the U.S. Constitution's Fourth Amendment and Article 12 of the New York State Constitution; that Deputy Chang reasonably believed that the teenagers had lied about who they were waiting for, were possibly attempting to deceive regarding a criminal purpose, and therefore had probable cause to search the backpacks; that Deputy Johnson, upon learning of Sonny Ray's criminal record, parole status, and conviction for resisting arrest, had reasonable grounds for fearing for the safety for all three police officers, thus supporting the need to immediately search the entire passenger compartment, which included the area where the backpacks lay; that the lawful custodial arrest of Sonny Ray allowed the subsequent search of the passenger compartment and its contents; that the Defendant had reduced privacy rights under the automobile exception and therefore no reasonable expectation of privacy; that the search was consented to; that strong public policy interests support the detection and arrest of criminals and the curtailment of the flow of illegal drugs; that the legal presumption is that all passengers possess any drugs found in the passenger compartment and that the drugs in question were actually in the Defendant's backpack; and that, therefore, the search was lawful and the seized drugs should be admissible as evidence.

The Prosecution has the burden to proceed in order to show the propriety of the search while the Defense will attempt to show that the search was improper.

STIPULATIONS

- 1) Fayette County, for the purpose of this mock trial, is a County in New York State.
- 2) As regards the drug evidence in this packet, while only providing the initial police report to the New York State Forensics Lab and the Forensics Lab Report itself, the chain of custody of the cocaine was properly followed, and the evidence cannot be challenged on that grounds. Also note that the date of the lab results is not an issue in this case. Special thanks to Lt. Col. James Young of the New York State Police for providing an actual form of a cocaine lab report, generated by the State Police Forensics Lab, for use in this mock trial.
- 3) Witness statements are sworn and notarized.
- 4) All items of evidence are eligible for use at trial, following proper procedure for identification and submission.
- 5) No other physical exhibits, aside from those provided, can be introduced at trial.
- 5) All witnesses may be portrayed by either sex.
- 6) The "Kingsport Train Station" diagram is an accurate representation of:
 - 1) the general layout of the station and a portion of its parking lot;
 - 2) the relative location of the three teenagers' seats (three • chairs), in relation to the ticket counter, phones, door, windows, etc.; and
 - 3) note that Deputy Bobbie Chang's relative position changes during the course of the teenagers' time in the station, and that Chang's position is therefore represented by two different • symbols.

WITNESSES

FOR THE PROSECUTION

Whitney Johnson
Deputy Sheriff
Fayette County Sherriff's
Department

Bobbie Chang
Deputy Sheriff
Fayette County Sheriff's
Department

Alex McHale
Companion of Josie Winters

FOR THE DEFENDANTS

Nicky Ortiz
Railroad Customer Service
Representative

Sonny Ray
Driver of Car

Josie Winters
Defendant

* This case is hypothetical. Any resemblance between the fictitious persons, facts and circumstances described in this mock trial and real persons, facts, and circumstances is coincidental.

All witnesses may be portrayed by either sex. All names are meant to be gender non-specific. It is stipulated that any enactment of this case is conducted after the named dates in the fact pattern and witness statements.

Affidavit of Bobbie Chang
Witness for the Prosecution

My name is Officer Bobbie Chang and I'm a Deputy Sheriff on Special Assignment with the Fayette County Sheriff's Department. I've been a police officer for ten years and have worked in Sheriff Donnelly's Drug Interdiction Unit for the past two years. On the evening of September 28, 1997, my partner Carmen Garcia and I were at the Kingsport Train Station as part of an ongoing investigation into drug hauling using the railroad and bus passenger lines. The same pattern observed by police in smaller metropolitan areas around the nation was also true for Fayette County: drug "mules" regularly used passenger trains and bus lines to move drugs from urban centers to small cities and rural areas. Over the course of the past two years, since Sheriff Donnelly was elected on a campaign promise to turn back the rising tide of drugs streaming up the Hudson River—remember his "It's high noon for the drug tide" slogan—we've arrested 100 suspected mules, cut the supply of drugs 50 percent and convicted 60 people of various drug trafficking crimes.

In recent months, we've been trying to find the leader of a new, seemingly local network of drug couriers and drug dealers that has sprung up. The thing about this network is that all of the low- and mid-level people we've arrested have been home grown, local residents, many in the 15-25 age range. Whoever is behind this ring is pretty sophisticated—it's much more difficult for us to filter through the local population than it is when some new people, from outside the county, show up, spend lots of money, but don't seem to have any obvious employment or source of income.

We had been at the train station to meet the 7:25 "Erie Flyer," coming east from Buffalo and decided to stick around to catch the traffic from the 8:05 from New York City. My partner, also on special assignment and actually employed by the Kingsport Police Department as part of a Federal Drug Interdiction Program meant to encourage cross departmental cooperation, was positioned in the parking lot in an unmarked car. As is usually the case, most passengers coming through are business people or normal folks, a bit haggard from a long day or trip, but evincing no suspicious behavior.

What originally struck me about the three teenagers who turned out to be Josie Winters, Alex McHale, and Billie Rodriguez was that they were obviously local high schoolers, given the RUSH school jackets they were wearing. What was odd was that two of them were carrying such big backpacks, given the fact that the previous Friday was a school day, so they couldn't have gone too far or been gone too long. As I observed from the last row of seats in the waiting room, up against the newspaper stand, I could see the three at first sit down, for about 10 minutes. After that, two of the three were constantly in motion, going back and forth to the phones and the front windows, clear evidence of nervousness.

After about 15 minutes of watching, I decided to move to where I could get a better look, and took up position about 15 seats away on the far end of a row behind them, in a group of seats which were situated perpendicular to the teenagers' row. From that angle I could see that the one kid, the one who turned out to be Alex McHale, appeared extremely nervous, even agitated. The other two conferred often and appeared unable to sit for more than a minute at a time.

After 10 more minutes of this, I had seen enough to know that something was up with those three. When I approached them I could see that they were very ill at ease over my arrival. While their IDs and driver's licenses seemed to be in order, and they were locals from Riverview, those large backpacks stuck out as just the type of thing that would be ideal for hauling drugs. When I casually noted that they were "traveling on the heavy side" for a weekend jaunt, Josie Winters gave an unconvincing answer about packing for uncertain weather. As it had been a warm, dry weekend in the Northeast, his answer raised my level of suspicion. I then asked why they were hanging around so long without a ride or taking a cab; I was told that a parent hadn't shown up as scheduled and that they were low on money. Of course the latter was consistent with having spent too much on drugs, while it seemed very odd that none of the parents of three separate kids could remember to get them.

By that point, much of what I had seen and heard convinced me that the teenagers' story just didn't add up. The thought crossed my mind to call in my partner and search their backpacks, but I quickly decided that, while I had increased suspicion, I might still fall short of the needed standard of "probable cause" and, regardless, would rather see how far up the food chain these small fish might swim.

The probable cause threshold was crossed, or you might say shattered, when the three kids ran out and got into Sonny Ray's Explorer. I knew I had been lied to about the missing ride and Sonny Ray was just the kind of local scum that we had been picking up in connection with the new drug ring. When I got to my partner's car, Garcia told me that Ray had made several trips around the parking lot and that when Ray went to open the trunk door, Garcia distinctly heard Ray say, "Man, that looks like great stuff."

We now knew we had enough reason to stop and search those backpacks, but we decided to follow Ray and see where they ended up. We headed out of town on Route 412, Riverview Road, for about 3 miles. At an intersection a County Sheriff's Deputy's car pulled in behind Ray's Explorer. Garcia and I followed, hoping that Ray didn't get stopped. At the next traffic light, when it turned green, the policeman hit the lights and siren. We knew that he must have seen something that we couldn't and thought it best to hang back while the deputy made an initial contact.

By the time we saw that it was Chipper Johnson walking back to the cruiser, we decided to pull up in front of Ray's Explorer. Garcia and I kidded Deputy Johnson about stopping our suspect; Chip, who is still

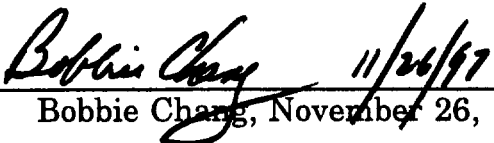
considered a "rookie" after five years on the force, gave it right back to us, calling us "drug hounds" and saying he had never seen us so far from a doughnut shop. We recounted our observations of the three teenagers and Sonny Ray to Johnson, and told Chip that they fit the profile of the new drug network which we were trying to crack. We made it clear that we already had probable cause to search the backpacks; Johnson told us that no search had taken place. Deputy Johnson requested our assistance and asked that we stay at the scene, as this could turn out to be a very dangerous stop, if drug mules were involved.

Johnson took the lead, as it was Chip's stop, and did everything by the book. Chipper asked for permission to search, which, if granted, always strengthens your hand. While Sonny claimed no ownership of the backpacks, the kid in the front seat, Alex McHale, was very cooperative and gave permission for the backpacks to be searched, even handing over the key to one.

After Johnson had arrested Sonny for DWI and driving with a suspended license, handcuffing and securing Ray in the Sheriff's cruiser. I had already reached into the driver's side, removed the car keys, found a three foot long crow bar—a potentially dangerous weapon, and retrieved a half-full beer can and empty soda can from under Sonny's seat. After I told Chip what I had found, Garcia and I stood nearby, on either side of the car, as Chip opened the back up, and proceeded to search the backpacks. I was expecting that the kids would either try to flee or get at their backpacks, either for a gun or to destroy drug evidence. Experience has taught me that you've got to expect the worst and take control of all the potentially dangerous variables that you can. Your life, your partner's, and in this case a young deputy's can be put at risk in a split second of laxity.

Johnson followed proper procedures, first looking for weapons and then contraband. My head snapped around when I heard Chip say "drug store" and the guilty reaction of Alex led me to believe even more strongly that something was hidden in the packs. So I wasn't at all surprised when Johnson found the bag of cocaine, only that it wasn't a bigger amount.

We do important work and the courts try to lay down clear standards for us to follow in our interactions with citizens. The last thing a cop wants is to put somebody back in circulation because we've been sloppy and searched illegally. This one's a no brainer—from either Garcia and my observations or Chip Johnson's perspective, which allowed a search of the passenger compartment following a lawful arrest and which was bolstered by the kids' consent, our search of those backpacks was absolutely proper.

 11/26/97
Bobbie Chang, November 26, 1997

Affidavit of Whitney Johnson
Witness for the Prosecution

My name is Whitney Johnson and I'm a Deputy Sheriff in the Fayette County Sheriff's Department. I've been a Deputy for over five years; my father A.B. "Blocker" Johnson was a County Sheriff for 16 years in the 1970s and 1980s.

On the evening of September 28, 1997 I was on routine motor patrol. I was parked about three miles outside of Kingsport on the corner of Mill Road and Route 412, just having finished my dinner at the "Barbecue Pit Stop." As I waited to pull out onto Route 412, the light changed to red and an Explorer slowed down to stop at the light. I hadn't caught the whole motion, but peripherally I thought I had seen the driver, head back, drinking from a can—always an alarm bell—the more so when you see that the car is full of teenagers. I quickly pulled into position behind that car, and decided to follow it and watch the driver closely.

I followed for the next four miles, without observing any unusual behavior; however, at the traffic light at Middle Falls Road, I noticed the driver lean far forward, down, and slightly to the right, the kind of motion you would make if you were putting or retrieving something under the seat. I instantly realized that the driver could not have a seatbelt on and make that motion and so I decided to pull the Explorer over.

At first, it appeared that the driver was not going to pay attention to my lights and siren. When I came right up behind the vehicle, the driver finally started to slow down and then pulled off the road, conveniently in a well lit pulloff overlooking Watson's Gorge. I quickly called in the make and license number of the Explorer and received a response: the car was registered to John Lee Ray of 1212 Rolling Lane in Riverview.

I try to follow the book to the letter when I'm on patrol alone. "Routine" stops are definitely mislabeled; every one is potentially very dangerous. I grew up hearing all kinds of stories from my father about cops who made small mistakes that turned out to be fatal and "routine" stops that just ended up absolutely weird.

When I had the vehicle pulled over I checked my weapons and threw the spotlight on the interior of the Explorer, which allowed me to see any quick moves by the passengers. As I approached the driver's side window, I scanned the driver and passengers with my hand held flashlight. When I told the driver I was pulling the car over for a seatbelt violation, the driver made a loud moan and a sarcastic remark along the lines of, "Now that's a first: me getting a seatbelt ticket." To my ears, the driver's demeanor, and the odor of beer I smelled, heightened my suspicion that this stop could be dangerous.

My request for license, registration, and proof of insurance resulted in the driver claiming that the license was at home, but that ID and the

other two items were in the glove box. I directed the front seat passenger, who appeared extremely nervous and was perspiring and shaking, to slowly open the glove compartment—which I focused my light on, and which at first reflected light off metal—this time two beer cans, not a gun. I had been watching intently, trying to make sure that there wasn't a weapon in that area. There was an envelope with the promised ID cards in the name of "Sonny Ray," registration, and insurance information, which I took back to my cruiser to call in.

The call back from command informed me that Sonny Ray's license had been suspended and that Ray was on parole for vehicular manslaughter and resisting arrest. Naturally the combination of those two crimes gave me pause, as I was about to walk back up to a car whose driver had already killed once using a vehicle and to whom a parole violation could lead to a quick return trip to prison.

At that point I was surprised, and pleased, to be joined by two other police officers, partners Bobbie Chang of the Fayette County Sheriff's Department and Carmen Garcia, from Kingsport. After some banter, they informed me that they had observed the three teenagers in the car—Josie Winters, Alex McHale, and Billie Rodriguez—in the train station, had questioned them, and had good reason to believe that they might be involved in a local drug gang, so that a search of their backpacks was justified. I asked Bobbie and Carmen to stick around, expecting that things could get ugly fast, given Sonny Ray's history and the presence of possible drug couriers.

I've learned that it's useful to keep a potential antagonist off guard, so upon my return to the Explorer, I focused my question on what the driver had put under the seat. Sonny Ray said, "just a soda;" a claim I didn't believe given the two beers in the glove box and the beer smell emanating from the car. When I remarked that Ray's license had been suspended, Ray acted surprised and angry—I warned Ray, in my best command voice, to calm down.


Even with Chang and Garcia's assurance that they had probable cause, I've been around long enough to know that getting consent is a cop's best friend. I knew I was about to make a lawful arrest, and could, therefore, search anything located in the passenger compartment. But I still asked Ray for permission to search the backpacks. Ray denied ownership of the bags in the back. I then asked all three teenagers, "Do you object to my looking in your backpacks?" The front seat passenger, Alex McHale, replied negatively, even offering a key to the backpack. The two backseat teenagers said nothing.

Naturally, prior to the search, I arrested Sonny Ray for driving with a suspended license and suspicion of DWI. While I did that and secured Ray in my cruiser, Chang removed the car keys from Ray's vehicle, removed a steel crow bar, and removed a beer can from under the front seat.

Even with two other police officers at the scene, the possibility of danger was substantial. If anyone tried to run, at night and overlooking Watson's Gorge, there would be a good chance that one or more of the teenagers or an officer could be badly injured or worse, given the terrain. That's why I decided to keep the teenagers in the car rather than distance them from the backpacks, which could easily contain weapons (especially if they were hauling drugs, as Chang suspected). Thus I had the right and responsibility, to myself and the other officers, to ensure that no weapons were within reach of the teenagers.

My search of McHale's bag was uneventful, except for a bunch of prescription drugs. McHale nearly lost it when I asked if the "drug store" was McHale's. When I saw that the other two bags were twins, I was very careful to first pat them and do a quick internal search by putting my hands inside the backpacks, rather than empty their contents. While I was thus searching for a weapon in the second bag, my hand felt a small plastic bag, which I could tell was full of powder. Close observation led me to believe that it was cocaine. Acting upon that belief, I removed all the items from that backpack and found identifying documents in Josie Winters' name at the bottom of the bag. We thus arrested all three teenagers on the charge of Criminal Possession of a Controlled Substance in the Second Degree.

Not every warrantless search is perfect and some cops overdo it. *This* stop was good, basic law enforcement, which just happened to piggyback on the earlier observations of Chang; and I relied on my observations, their report, my arrest of Ray, and the teenagers' consent to justify my search. Warrantless searches don't violate the Fourth Amendment when done correctly and this one is about as airtight as you'll ever find. Police can't be too timid and shouldn't be hamstrung when their lives are on the line. I did my job, I got some illegal, deadly drugs off the street—just the way my old man would have wanted.

 11/26/97
Whitney Johnson, November 26, 1997

Affidavit of Alex McHale
Witness for the Prosecution

My name is Alex McHale, I'm eighteen years old, and a senior at Riverview Senior High School. I live with my parents, Becky and George McHale, at 300 East Ridge Road in Riverview. I've had a very good record of achievement in school and have never been in any trouble with the law. I'm captain of the school chess club, vice-president of the Young Entrepreneurs Association—by which I was honored with the prestigious "Most Likely to Succeed in Business Award" as a junior—and plan to pursue a career in business finance.

I find myself in the difficult position of testifying against Josie and Billie, who had been two of my best friends. I think its remarkable that some people consider me in the wrong for what I am doing. But accepting a weekend trip with friends doesn't mean that you have to take the fall when they go off and do something stupid and illegal like buying cocaine. What kind of friend puts another friend at risk by transporting illegal drugs when you're together? Had I known, you can be sure I would have been somewhere else.

I made clear to the authorities that I do not have direct knowledge of who bought the cocaine, except that it wasn't me. I do know that when we went to Shea Stadium for the last game of the regular season on the 28th, the Mets-Braves game, Josie disappeared for over one hour. Billie and I went to look for Josie after about 35 minutes, but Josie came back before we did. It was a great day, about 70 degrees with just under 30,000 in attendance to see the Mets win 8-2. The only explanation given was that it was such a nice day Josie just decided to stroll around in the sun. It hit me at the time as an odd way to act when your grandfather takes you to a ballgame.

Aside from that instance I think the three of us were together almost all the time. I have to say that it was comical watching how the two of them couldn't keep their identical backpacks straight—I mean Billie even had Josie's toothbrush at one point. But no one has any stories to tell about me going into the identical backpacks. Mine was smaller and I had a small lock that could secure the zippers together, which just seemed like a prudent precaution when traveling.

Everybody who says that I was nervous at the train station and afterwards is right. But no one knows why, and it sure isn't because I had anything to hide from the police. When no one showed up, and no one was at home, I became a nervous wreck even though I knew my parents weren't the ones missing, as they were supposed to be out of town until Monday on a business trip to Columbia, South America. You see, years ago, when I was nine and at summer camp for the first time, my parents had a terrible car accident coming to get me on the final day. When Josie and Billie started worrying about an accident as the cause of no parent having showed up, it brought back a flood of bad memories to me, things I hadn't felt in years. I did get very upset, but it wasn't the time nor place to

share horrible memories of how close I had come to losing my parents. The ticket agent was right when claiming that I was bending over my bag a couple of times. I've got allergies galore, hay fever which is at its peak in late September, and bad asthma, the latter of which can be set off by stress. I went in my bag twice to get my inhalers; the first time I held off on using them, but the second time I used them. What I want to know is, if that ticket agent was so observant, why didn't Ortiz see me using my medicine? And as any kid who uses inhalers can tell you, they often make you light-headed and dizzy. The combination of the bad memories and the drugs certainly made me as edgy as a caged tiger.

I thought, given my anxiety, that I had a good idea when I suggested grabbing a taxi ride home. The other two were adamant at first that they would not risk missing their parents and that they did not want to spend money on a cab. I really couldn't understand the money concern, as almost everywhere we went the grandparents insisted on paying for all three of us. It makes me wonder what their cash really was spent on.

I don't buy all this nonsense about cops not having a right to search someone and their things. If we had our heads screwed on straight, we'd give the police broader power to root out criminals and stop drug traffickers from killing people. I just don't think the Founders were trying to protect criminal activity when they wrote the Constitution and Bill of Rights. So I wasn't overly concerned when the first cop, Deputy Chang, came up to us. I was certainly surprised, and already nervous, but I didn't think the questions asked were intrusive or any problem for three "good" kids heading home. All that surprised me was how fast Billie wanted to find a cab after the cop left.

Billie's running into Sonny Ray seemed lucky at the time, but sure did lead to a real mess. Sonny's one of those characters who, my Dad used to say, goes out of the way to make and find bad luck. I thought of that, but dismissed it, when we first got into the car. I knew better what Dad meant when Sonny opened a beer and told us not to worry—I just got an uneasy feeling that Sonny was about to find some more bad luck, and might take us along for the ride.

I nearly freaked when the County Sheriff's car, with lights and siren on, pulled up behind us. I had never been in a car actually pulled over by a cop before, and Sonny's reassurance that we should let Sonny do the talking, coming from a convicted felon out of prison less than a year, did nothing for me. I was shocked when I ended up having to open the glove box to supposedly get Sonny's ID and registration. Who would choose to be in that situation, not knowing what was on the other side of that small door? I was almost relieved to see only a couple of beer cans.

I felt even worse when the cop from the train station pulled up in front of us. I was hoping it was coincidental, but my gut told me that we had just gotten into a car that those cops had been watching.

When Deputy Johnson came back to the car and asked Sonny for permission to search our stuff, I was very surprised. When Johnson then asked, in a loud, clear voice, if we objected to Johnson's searching our backpacks, and directly asked me my name, I answered with my name and said it was okay to look, but that mine had a key. I certainly was surprised at the turn of events, but didn't feel at all intimidated by Deputy Johnson. My consent was real and freely given. I never suspected that anything bad was hidden in the other backpacks and didn't even know about any "presumption of possession" law that put me at risk.

When the Deputy asked about my "drug store" I was taken aback; understand that I never go anywhere without all of my medicine. The thought flashed through my mind that the inhalers might be confiscated and I already needed to use them earlier that evening. Nothing that happened that evening, or in my life, compares to my shock upon hearing Johnson say that there was cocaine in one of the other backpacks. My mind raced and I couldn't believe that either of my friends used drugs.

That surprise turned to anger when I got arrested for possessing the drugs, too. This was becoming a nightmare and I couldn't wake up—my future was going down the drain. I thought my locked backpack made it clear that the drugs could not be mine. This whole thing sure has been an education to me, about judging friends, about avoiding known troublemakers, about the realities of the law and how you can be charged with having possessed something you didn't even know existed. I wish I could have learned it all in a different way. I guess that's what Grandma means when she says "you can't put old heads on young shoulders." We all have to make our own mistakes and learn from them.

Alex McHale 11/28/97
Alex McHale, November 28, 1997

Affidavit of Nicky Ortiz
Witness for the Defense

My name is Nicky Ortiz and I work as a customer service representative for the national passenger rail service. I live at 1600 Washington Avenue in Kingsport, New York. I've worked at and around ticket counters at a couple locations in upstate New York stations for the past ten years.

I'm glad to be here as a witness for Josie Winters, one of the two kids arrested for possession of cocaine. I had a bad feeling that those kids were going to find themselves in trouble, once that undercover cop questioned them.

Don't get me wrong, I want the drugs off the streets as much as anybody—and it worries me to know that my station, at any given time, may be the drop off point for drugs carried by some "mule" who may well be armed. You think you work in a relatively safe place, but then the reality of drug trafficking exposes you to possibilities of violence that you spend the rest of your life avoiding. So I'm happy to see the undercover cops around, and I've worked here so long that I know most of them and can spot new ones in a minute. I see them focus on the likely sort—I don't know if they use some profile or what—but it's not that hard to do. They also seem to single out young high school and college age types. Sometimes I stand in amazement as they make some teenage traveler unload a large hiking-type backpack—you know, and the kid is a little ruffled looking from traveling, but is just trying to get home for the holidays with three weeks of dirty laundry stuffed in the sack.

I was a Military Policeman (MP) in the service for eight years and from experience, I know you get a good feel about when people are nervous or acting suspiciously. The ticket counter was slow, as it was mid-evening, so I had a front row view of these kids for the forty-five minutes or so that they were in the train station. Their appearance and their actions were normal, and anyone listening to any of their conversations would know that they were disturbed by the fact that no one had shown up to get them. Josie Winters came over and very politely asked for change for the phone and two of them went back and forth to the phones and over to the window, looking out, a number of times, and kind of paced back and forth for minutes at a time—but that was completely reasonable given the situation.

When I saw the officer approach the kids, I thought to myself that the cop was just on a fishing expedition. The officer wasn't intimidating and didn't ask the kids to open their backpacks—which surprised me. I had seen cops make kids who were just sitting, reading in the waiting room, open up their luggage. I don't think kids have a good sense of their rights and most would oblige an officer, even if the request really wasn't reasonable.

That's why I'm willing to stand up for these kids. I saw the way they acted and heard their conversation—they were just upset that the parent who was supposed to show up wasn't there. I heard them talking about how it must have been an accident or something bad going on, because certainly one of their parents would be able to get them.

Obviously, it's likely that one of those three kids or Sonny Ray did have cocaine. But from my vantage point, the two who were charged weren't as nervous as the other kid, who always stayed with the backpacks. In fact, I did see the third kid bending over the bags a couple of times. I'm not saying the drugs were planted by the kid who kept to the bags, but stranger things have happened. And I think most people around here would expect strange things from Sonny Ray.

What I do know is that if the undercover cop is claiming that the kids were acting so suspiciously that a search of the bags was justified at the train station, I don't buy it. Besides, if they really had a reason to search at the station, why didn't they? Sometimes I just don't understand cops. These were normal, clean cut kids, whose only crime was not having their ride show up.

Nicky Ortiz 11/21/97
Nicky Ortiz, November 21, 1997

Affidavit of Sonny Ray
Witness for the Defense

My name is Sonny Ray and I live at 1212 Rolling Lane, my parents home, in Riverview, New York. On Sunday, September 28, 1997, I drove down to the train station in Kingsport, looking to pick up a friend due in on an evening train. I stayed in my dad's Explorer, instead of sitting in the train station, mostly because I know those places are often being watched by cops, many of whom find me irresistible. As a parolee, I try to stay out of public places where I might run into some other ex-con or some current street guy—it's just too hard to convince my parole officer that my contact was just accidental.

When I was younger I had some crazy days and more often than not got caught, at home by parents, at school by teachers, and out on the streets by the cops. I've made some bad mistakes and got other people hurt because of me. But—even though I've got some rough edges, like in the way I talk—I'm not the same out-of-control punk who got sent to prison for vehicular manslaughter.

I've had more than my share of run-ins with cops, some I deserved, alot I didn't. I'm testifying for this kid, Josie, because I think those cops from the train station targeted them for no good reason and convinced the cop who stopped me to join their fishing expedition.

Josie's only mistake was taking a ride with me. My only mistake was ever offering those kids a ride. Even though I've been out of jail for eight months, and haven't so much as sneezed in public, and I'm employed as a physical fitness trainer at a health spa, cops still think it's open season on Sonny Lee Ray. I was stupid to think that I could do a good turn for three Riverview kids, and not to realize that being with me put them at risk.

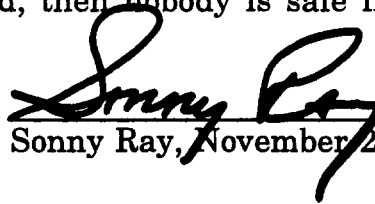
I was fooling with the kids when I told them I was drinking my first beer since breakfast—it was really a can of diet cola. When I saw the cop following me I knew that anybody seeing me with a can would automatically think the worst. Probation ain't no picnic—but it's so much better than prison—well, I'm just not going to do anything to put me back there.

It's true that I didn't have my seatbelt on, but I never knew that my license had been suspended. I've been "away" for a few years, and this child support—license deal was news to me. I don't understand what child support has to do with driving. I thought a driver's license was a right. I do have a kid and I'd love to see him and support him—but I lost custody and my ex makes visits so impossible, well, I just won't send money if I can't see my kid and keep getting treated like dirt everytime I show up. Sometimes when you mess your life up you have to keep paying a price, and you lose more than you knew you had.

I knew I was in for it, and the kids too, when the cop came back and started asking me about searching the back of my Explorer and the kid's

backpacks. I've been down this road before; I knew they'd find something even before they found it. Sometimes things just appear, like magic. I mean there were three cops, me, and three teenage kids—who's not going to believe the cops? And who would believe that my lack of a seatbelt, even with a suspended license, would justify looking through three backpacks that had only been in my car for about 15 minutes? And an Explorer ain't no little hatchback; those backpacks were a long way from me in the trunk area and held down by the nylon netting. The cop even arrested and cuffed me before going into the back—how could they claim that their safety was in danger from three scared teenage kids?

I'm surprised these kids are charged with possession of drugs. I don't know if they had it or didn't have it or if the cops planted it. But I do know that I wouldn't have gone near them if I had a hint of trouble. Even if the kids did have something on them, the search was bogus from the start. If those kid's stuff could be searched, then nobody is safe from arbitrary cop searches in their car.

 11.24.97
Sonny Ray, November 24, 1997

Affidavit of Josie Winters
Witness for the Defense

My name is Josie Winters and I live with my parents at 320 Shady Lane in Riverview, New York. I'm 18 years old and a senior at Riverview Unified Senior High.

This is beyond the worse nightmare I could ever imagine. I go off with my two best friends, my cousin Billie Rodriguez, and Alex McHale, spend a great weekend with my grandparents near New York City, and end up facing a felony drug charge, all because of some bad luck in getting a ride back home.

I've always thought that citizens in this country were safe from random, unjustified police searches of their persons, property, and possessions. When we studied the American Revolution and early new nation in eleventh grade, I came to understand how much the revolutionary generation distrusted unfettered power in the hands of government and its officials, including police. The Fourth Amendment was no minor afterthought—it was meant to really protect people from the kind of harassment that British officials had used in the 1760s and 1770s. If this search of my stuff was legal, then we've lost a basic constitutional protection that supposedly makes us free.

I guess my trial will show whether my belief in personal freedom was naive or real. Imagine—I'm traveling with a full backpack, identical to one Billie also received from our grandparents, and I've got all kinds of very personal, private things inside. I do nothing illegal, but the fact that my ride doesn't show up at the train station allows a cop to stop and question us. I can see the basic identification questions as being okay, but when Officer Chang started asking about our backpacks, well, alarm bells went off in my head. How can three kids, sitting in a train station, trying to get a ride home, arouse enough suspicion of illegality to even suggest to a cop that a search is justified. It is totally bogus.

I understand the officer stopping Sonny for the seatbelt, and in the normal course of things finding out that Sonny's license was suspended. Sonny's got all the problems that go with a bad reputation, even if the cops are overly eager when it comes to checking Sonny out. The thing is, Officer Johnson came back from talking with the other two cops and immediately asked Sonny and then Alex about searching the back of the Explorer and the backpacks. I get it that Sonny has a record and the cop is going to be concerned about what might happen next, so that if Sonny stays in the car, maybe Johnson needs to do a quick check for weapons. But Johnson was looking for *permission* to search and arrested Sonny *before* searching our stuff. I know Alex was real scared and intimidated by the cop—who wasn't? But Alex only gave permission to search one backpack, the locked one, that the key fit. Officer Johnson didn't even ask Billie or me for permission.

Mind you, Officer Johnson didn't ask us for ID or call our names in prior to the search. I mean, it would be another thing if one of us was on the FBI's Most Wanted List or a regular on one of those "Wanted" TV shows. But three local high school kids in school jackets? It defies belief that Johnson could see us as a threat.

The identical backpacks were a nice gift from our grandparents, but they've caused confusion time after time. At my grandparents' two bedroom apartment, all three of our backpacks stayed in the spare room, where two of us slept, with the third sleeping in the living room. On that Friday night in September, I found Billie with my toothbrush in hand, having confused the backpacks. On Saturday, Billie had on a pair of my socks, having made the same mistake again. And that "love letter" on the inventory of my backpack—well, I don't have a steady date, but Billie does—whose name happens to be Jamie. I don't know that the cocaine came from Billie—really I can't imagine that. But I've wanted to become a pharmacist for years and I would never jeopardize my career choice by fooling around with any drugs.

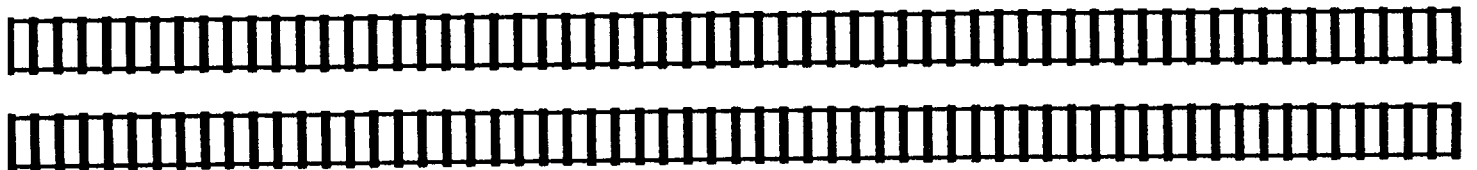
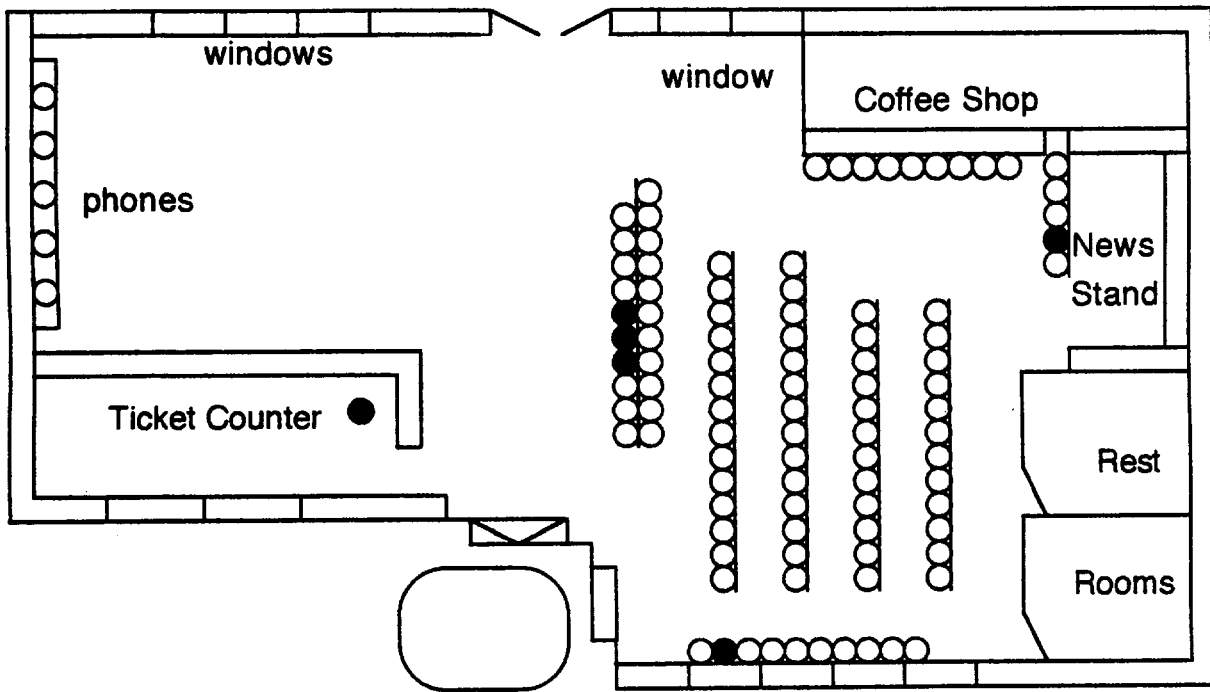
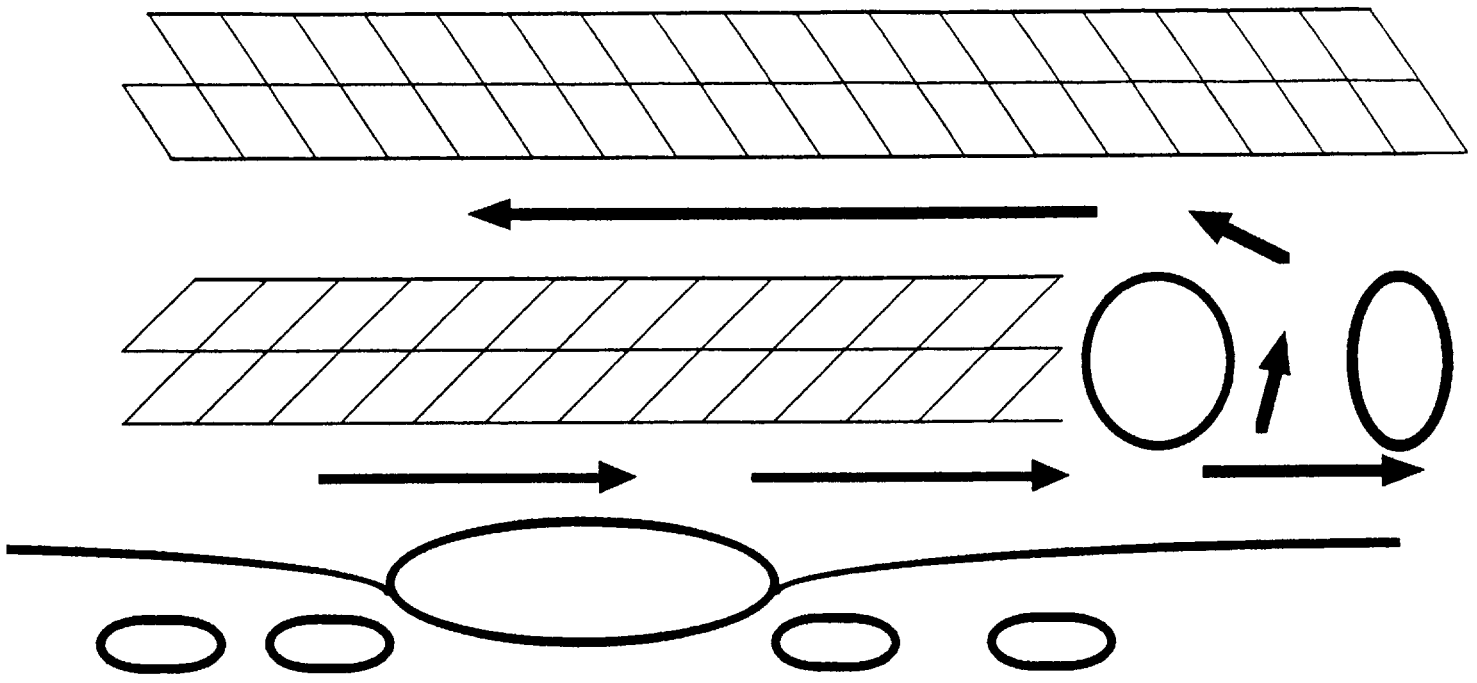
As far as Alex is concerned, I don't believe that a good friend would agree to testify against me—I mean, what does Alex know that proves anything about the cocaine? Alex had the same access to the backpacks as Billie and me, stayed with them the whole time in the train station, and was the one of us who was, by far, the most nervous. I wouldn't have believed it before that Sunday night, but in my mind if anyone had drugs, it had to be Alex, and I still don't believe it. But if that is the case, what a situation—you buy drugs, get scared, hide them in somebody else's stuff, and then get out of the trouble you caused by copping a plea with the D.A. A real model citizen, huh?

By the way, I think the only time I was away from Billie and Alex the whole weekend was at the baseball game on Sunday. I wasn't feeling too good and hung out nearer to a restroom for a couple of innings. Aside from that I was never without my two "friends."

It's bad enough that Billie couldn't keep our packs straight and took my stuff out at times. But a cop, exposing my own private journal and report card—well something's wrong if the law protects the confidentiality of my school records, because I'm 18, but allows a cop to search through my private belongings without good cause. I never really understood before why high courts sometimes overturn convictions because of illegal searches—but I sure do now.

Josie Winters 11/25/97
Josie Winters, November 25, 1997

Kingsport Train Station



Scale: 1 inch = 12 ft

Seating Location of Witnesses marked with a blackened seat ●

**Fayette County Sheriffs Department
Police Photograph, taken 9/29/97**

**Backpack seized from
Josie Winters 9/28/97**



PROPERTY CLERK'S INVOICE
Fayette County Sheriff's Department

Arresting Officer Deputy Whitney Johnson		Shield No. 124	Command FCSD
Prisoner's Last Name Winters	First Josie	Age 18	Address 320 Shady Lane Riverview
Date of Arrest 9/28/97	Charge: Offense Under Investigation CPCS 2	Fel X	Misd JO Viol
Owner's Name Same	Address	Telephone No.	
Complaining Officer Whitney Johnson	Address	Telephone No. 885-3019	

Item No. Quantity Article

1	4 pair	white socks
2	1 pair	blue jeans
3	2 pair	blue socks
4	1 pair	tan slacks
5	4 pair	colored briefs
6	1 pair	brown leather shoes
7	4	white undershirts
8	4	pullover t-shirt tops
9	2	short sleeved button shirts
10	1	long sleeved button shirt
11	1	heavy weight sweatshirt with logo "Ski the Powder" on front and "Whiteface is For Me" on back
12	1 pair	athletic shorts
13	1	grey-covered "Daily Journal"—embossed with name "Josie Winters"
14	1	Final Report Card, dated June 1997, of Josie Winters'
15	1	letter, unsigned, addressed to "Dear Jamie"
16	1	case filled with toiletries (toothbrush, toothpaste, floss, unisex fragrance "Whatsthat?", deodorant, comb, brush, small mirror, razor, shampoo)
17	1	small clear plastic bag filled with white powder, appearing to be 2 or more ounces, believed to be cocaine
18	1	book entitled: <i>What Your Doctor Won't Tell You: The Truth about Drugs and Prescription Medicines</i>
19	2	ticket stubs, dated 9/28, to Shea Stadium
20	3	tickets stubs, dated 9/27, to Metropolitan Museum of Art
21	1	souvenir baseball, "Limited Edition," 1969 Mets

Inventory Signature/Date 	9/28/97
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NEW YORK STATE POLICE
SCIENTIFIC LABORATORY

EVIDENCE SUBMISSION FORM

(PRINT OR TYPE ONLY)

FOR LABORATORY USE ONLY	
CASE #	<u>97H-000000</u>
METHOD OF TRANSMITTAL:	
<input checked="" type="checkbox"/> IN PERSON	<u>Sheriff Joseph Donnelly</u>
<input type="checkbox"/> CERTIFIED MAIL #	_____
<input type="checkbox"/> REGISTERED MAIL #	_____
<input type="checkbox"/> OTHER	_____

FOR USE BY AGENCIES OTHER THAN STATE POLICE	
NAME OF CHIEF, SHERIFF, DIRECTOR	<u>Sheriff Joseph Donnelly</u>
AGENCY NAME	<u>Fayette County Sheriff's Department</u>
CASE #	<u>FCSD-1313</u>
AGENCY ADDRESS	<u>412 Main Street</u> <u>Pine Bluff, New York</u>
SUBMITTED BY	<u>Deputy Sheriff Whitney Johnson</u> Name & Rank

NAME OF DEFENDANT, DECEASED, VICTIM,
COMPLAINANT (CIRCLE ONE) Josie Winters

ADDRESS 320 Shady Lane

NATURE OF COMPLAINT
OR NAME OF CRIME Criminal Possession of a Controlled Substance
in the Second Degree

PLACE & DATE OF OCCURRENCE Nicholas Fayette 09/28/97
C-V-T COUNTY DATE

BRIEF DESCRIPTION OF EVENTS During a routine traffic stop, the driver was found to be driving with a suspended license, believed to be DUI, and a convicted felon on parole. The subsequent search for weapons and other contraband in the passenger compartment resulted in finding a small bag of what is believed to be cocaine in a passenger's backpack.

<u>ITEMS SUBMITTED (ONLY ONE ITEM PER LINE)</u>	<u>EXAMINATION REQUESTED</u>
ITEM # 1 <u>Plastic Bag, containing white powder</u>	<u>Cocaine Analysis</u>
ITEM # 2 _____	_____

LIST REMAINING ITEMS ON THE REVERSE SIDE OF THIS FORM)

STATE OF NEW YORK:

CERTIFICATION

COUNTY OF ALBANY: ss.

(Criminal Procedure Law,

CITY OF ALBANY:

Section 190.30, subdivision 2)

I, *Wilmer Johnson, Forensic Scientist III*

being duly sworn, depose and say that I am a public officer in the employ of the New York State Police Headquarters Crime Laboratory, and that I made an examination on or concerning certain evidence. That the attached report, entitled

Lab Case #97H-000000

November 24, 1997

contains the results of such examination and is a true and full copy of my report thereon.

Wilmer Johnson

Wilmer Johnson
Forensic Scientist III

Signed and sworn to before me

this *24th* day of

November 1997

Dawn M. Charles

Notary Public

Dawn M. Charles
Notary Public, State of New York
Qualified in Albany County
No. 72A153456789
Commission Expires Feb 1, 1998

I, *Stephen Christiansen, Captain, Assistant Director*, New York State Police Laboratories, do hereby certify that *Wilmer Johnson* is a *Forensic Scientist III* on the staff of the said Laboratory and performed the examination or other procedure set out in the attached report.

Captain Stephen Christiansen

Captain Stephen Christiansen
Assistant Director



NEW YORK STATE POLICE
FORENSIC INVESTIGATION CENTER
Building 30
1220 Washington Ave.
Albany, New York 12226-3000
(518) 457-1208

TO: Sheriff Joseph Donnelly
Fayette County Sheriff's Dept.
P.O. Box 241
Fayette, New York 10947

November 24, 1997
Lab Case #97H-000000

SUBJECT: *JOSIE WINTERS*
September 28, 1997

EVIDENCE:

Delivered by: Deputy Whitney Johnson on September 29, 1997

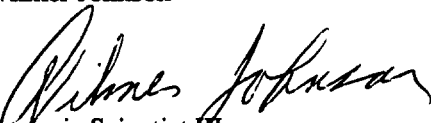
Submitted by: Deputy Johnson

EXAMINATION:

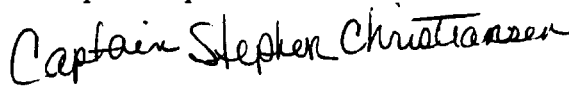
One (1) clear plastic bag containing *55.63 grams* of compressed powder (more than 2 ounces).

COCAINE, Narcotic Drug

Wilmer Johnson


Forensic Scientist *MI*
Drug Chemistry

Captain Stephen Christiansen


Assistant Director
SP Laboratories

cc: 1 - Sheriff Donnelly
(Certified Copy)

SC/dmf

PART VI
PERTINENT LAW AND INFORMATION

Search and Seizure—Constitutional Protections

U.S. Const. Amend. IV*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*as extended to the States under the due process clause of the Fourteenth Amendment (U.S. Const. Amend. 14 § 1)

N.Y. Const. Art. 1, § 12

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized....

Search and Seizure Case Law—Warrantless Search of Vehicle

New York v. Belton, 453 US 454 (1981)

An automobile in which defendant was one of four male occupants was stopped on the NYS Thruway by a New York State policeman for speeding. Upon requesting the driver's license and registration, the officer determined that none of the occupants owned the car or were related to the owner. The officer also smelled burnt marijuana and saw an envelope marked "Supergold" on the floor of the car that he suspected contained marijuana. The officer directed the men to get out of the car, placed them under arrest for unlawful possession of marijuana, patted down and separated each of the occupants, picked up the envelope, which was found to contain marijuana, gave the men their "Miranda warnings," searched each man, and then searched the passenger compartment of the car. The officer found a coat belonging to Belton on the back seat, unzipped one of the coat pockets, discovered cocaine, placed the jacket in his unmarked car, and drove the four arrestees to a nearby police station.

Belton was charged with criminal possession of a controlled substance and his motion to suppress the cocaine was denied. Belton pleaded to a lesser included offense and preserved his claim that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. The Appellate Division of the New York State Supreme Court upheld the constitutionality of the search and seizure holding that "once defendant was validly arrested for possession of marijuana, the officer was justified in searching the immediate area for other contraband." The New York Court of Appeals reversed, reasoning that "[a] warrantless search of the zipped pockets of an inaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article."

The United States Supreme Court granted certiorari “to consider the constitutionally permissible scope of a search in circumstances such as these” and reversed the judgment of the New York Court of Appeals, holding that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” The Court stated that “it follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.... Such a container may, of course, be searched whether it is opened or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.” The Court noted that the validity of Belton’s custodial arrest was not questioned and that a “container” is any object capable of holding another object including glove compartments, consoles or other receptacles in the passenger compartment in addition to luggage, boxes and clothing. However, the Court pointed out that the “holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.”

In reaching its decision, the United States Supreme Court relied on their holding in *Chimel v. California*, 395 US 752, “that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediate surrounding area. Such searches have long been considered valid because of the need ‘to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape’ and the need to prevent the concealment or destruction of evidence.” The Court went on to point out that *Chimel* emphasized the principle set out in *Terry v. Ohio*, 392 US 1, that “[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”

Noting that “when a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority,” the Court expanded on the *Chimel* holding by defining “the area within the immediate control of the arrestee,” stating that “articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within “the area into which an arrestee might reach in order to grab a weapon or evidentiary item.”

People v. Belton, 55 NY2d 49 (1982)

“The United States Supreme Court having disagreed with our perception of the requirements of the Fourth Amendment to the United States Constitution and reversed our earlier decision, this case comes once again to this court.... We do not find it necessary to consider the Supreme Court’s rationale as applied to our Constitution, however, for we now hold on a different rationale that the search and seizure were not improper under the State Constitution. The evidence sought to be suppressed was, therefore, admissible and defendant’s conviction should, in consequence, be affirmed....”

A majority of the Court concluded “that the search which followed defendant’s lawful arrest was permissible under the State Constitution under the automobile exception to the warrant requirement.” The Court noted that the State’s constitutional proscription against “unreasonable searches and seizures” has certain narrow exceptions including a search incident to an arrest, citing *Chimel v. California*, which is based on the need to protect the safety of the arresting officer and prevent the arrestee from destroying evidence.

The Court then described the exception to the warrant requirement recognized regarding automobiles, noting that it is based on a reduced expectation of privacy and the mobility associated with automobiles. The Court pointed to the fact that “automobiles ‘operate on public streets; they are serviced in public places; ... their interiors are highly visible; and they are subject to extensive regulation and inspection’ (citing *Rakas v. Illinois*, 439 US 128)” and that “the mobility of automobiles often makes it impracticable to obtain a warrant” (citing *United States v. Chadwick*, 433 US 1). Next, the Court determined that the considerations delineated above should apply to the passenger compartment and the containers therein. However, the Court pointed out that when the unique factor(s) giving rise to the exception are no longer a factor (e.g., mobility no longer a factor when vehicle seized and impounded by police), a warrantless search, after impoundment, of the vehicle or a closed container in the passenger compartment would only be justified if the “contents were by their nature sufficiently discernible to be said to be openly visible or some special exigency existed.”

Before concluding, the Court reasoned that “a valid arrest for a crime authorizes a warrantless search—for a reasonable time and to a reasonable extent—of a vehicle and of a closed container (noting that in this opinion they do not reach questions regarding a container which is closed and locked or a container in a vehicle’s trunk or baggage compartment) visible in the passenger compartment of the vehicle which the arrested person is driving or in which he is a passenger when the circumstances give reason to believe that the vehicle or its contents may be related to the crime for which the arrest is being made (as possibly containing contraband or as having been used in the commission of the crime) or there is reason to believe that a weapon may be discovered or access to means of escape thwarted.... In conclusion, then, we hold, that where police have validly arrested an occupant of an automobile, and they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein. The search of the defendant’s jacket as it lay on the back seat was therefore proper, and the evidence seized admissible.”

People v. Langen, 60 NY2d 170 (1983)

In this case, the Court determined that the police had reasonable grounds to stop the defendant and probable cause to break open and search, without a warrant, a piece of locked luggage located within the passenger compartment, behind the seat of defendant’s pickup truck, inasmuch as the police had observed a passenger in the vehicle holding under the defendant’s nose a paper cylinder which was inserted in a small envelope, and as defendant exited the vehicle they also observed a plastic vile containing a white powder protruding from defendant’s vest pocket, thus causing the police to believe the defendant was ingesting a controlled substance. The Court reasoned that “upon defendant’s arrest for drug possession, the police had probable cause to believe that contraband related to the crime was located somewhere in the truck. Therefore, they could search [within a reasonable time after the arrest] the entire truck, including any closed containers found therein [including those containers whose contents are not in plain view].”

People v. Torres, 74 NY2d 224 (1989)

“A police officer acting on reasonable suspicion that criminal activity is afoot and on an articulable basis to fear for his own safety may intrude upon the person or personal

effects of the suspect only to the extent that is actually necessary to protect himself from harm while he conducts the inquiry authorized by CPL 140.50 (1).” In this case, where two plain-clothes officers had effected the removal of two suspects from an automobile and frisked each suspect, the Court held that the officer’s subsequent reaching into the passenger compartment of the suspect’s automobile and the removal of a closed container, which in fact contained a gun, from the passenger compartment on the theory, accepted in a similar case by the U.S. Supreme Court (see, *Michigan v. Long*, 463 US 1032) that “if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and will have access to any weapons inside,” was deemed to be an unlawful intrusion under New York’s more protective State constitutional provisions.

In *Torres*, the Court determined that the police officers had a reasonable basis for *suspecting* the presence of a gun, but that their information did not rise to the level of probable cause so that their search of the closed container taken from the passenger compartment of the suspect’s vehicle could only be justified if the “expansive view of the *Terry v. Ohio* (392 US 1) ‘stop and frisk’ procedure that was adopted in *Michigan v. Long* (463 US 1032, *supra*) is determined to be consistent with the privacy rights guaranteed by our State Constitution (NY Const, art I, § 12). In concluding that it is not, we note that although the history and identical language of the State and Federal constitutional privacy guarantees (US Const 4th Amend; NY Const, art I, § 12) generally support a “policy of uniformity,” this court has demonstrated its willingness to adopt more protective standards under the State Constitution “when doing so best promotes ‘predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens....’ ”

The Court pointed out that entry into a citizen’s automobile and inspection of the personal effects therein are significant encroachments of the citizen’s privacy interests and that while there are legitimate law enforcement concerns that would justify such intrusions, “such intrusions must be both justified in their inception and reasonably related in scope and intensity to the circumstances which rendered their initiation permissible (citing, *People v. De Bour*, 40 NY2d 210, 215).” The Court then concluded that “the detective’s conduct in reaching into defendant’s car and removing his bag, conduct which revealed the presence of a gun, was not reasonably related to the need to protect the officers’ safety in this street encounter. The detective’s actions were thus improper under article I, § 12 of our Constitution, and the resulting evidence should have been suppressed.”

California v. Acevedo, 500 US 565 (1991)

Police observed the defendant exit an apartment known by the police to contain marijuana. The defendant left the apartment with a brown paper bag which appeared to be full and was the size of the marijuana packages the police had seen earlier in connection with this case. The police observed the defendant place the bag into the trunk of his car and then start to drive away. The police officers stopped the defendant, in order to prevent the loss of the evidence, opened the trunk and the bag, and found the marijuana. The defendant’s motion to suppress was initially denied and later upheld on appeal in State court.

On appeal to the United States Supreme Court, judgment was reversed and the case remanded to State court. The US Supreme Court held that as to searches of containers found in an automobile, “the police may search without a warrant if their search is supported by probable cause.” The Court went on to point out that in this case, “the police had probable cause to believe that the paper bag in the automobile’s trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts

in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.”

People v. Galak, 81 NY2d 463 (1993)

In connection with an ongoing investigation of the defendant begun earlier by the Auto Crime Division, police stopped the defendant, who was driving a panel truck [as it turned out, the truck was stolen], and arrested him for illegal possession of a vehicle identification number plate and failure to have a valid license. Police then searched the truck, without a warrant, and discovered vehicle parts and a price list for same. Defendant’s motion to suppress the evidence obtained during the search of the truck was denied and this ruling was affirmed.

The Court pointed out that in cases like this, the police must have probable cause to search the vehicle, that there must be a “connection” between the arrest and the probable cause to search, and that the “connection” requirement is flexible. The Court noted that “the proper inquiry in assessing the propriety of a *Belton* search is simply whether *the circumstances* gave the officer probable cause to search the vehicle.... A *Belton* search can be justified on grounds other than those that initially prompted police to stop the vehicle.... The evidence providing the basis for ... probable cause [in *Belton*] came to light only after the stop was made....” In this case, the earlier investigation of the defendant raised police suspicions and during a legal stop of the defendant’s truck, additional evidence of crime was apparent to the police. “Evidence during the stop contributed to the probable cause to search.... Because both probable cause and the required nexus were present, the search of the truck did not exceed permissible grounds.”

Search and Seizure Case Law—Warrantless “Canine Sniff” to Detect Drugs

United States v. Place, 462 US 696 (1983)

“When an officer’s observations lead him to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigation is properly limited in scope.” The Court went on to determine that the investigative procedure of exposing a person’s luggage to a narcotics detection dog is not a “search” under the 4th Amendment. This procedure “does not require opening the luggage [and] it does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.”

In this case, the defendant did not consent to the search of his luggage and the police, in turn, seized the luggage from the defendant to arrange a “canine sniff.” The police conduct intruded on the defendant’s possessory interest and his liberty to continue with his travel, although, technically, he was free to go. As such, “the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause.” On the facts of this case, a ninety-minute seizure of the defendant’s luggage was unreasonable, having

gone “beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.” As such, the seizure was unreasonable under the Fourth Amendment.

People v. Dunn, 77 NY2d 19 (1990)

In this case, involving a “canine sniff” for narcotics conducted from the exterior of an apartment, the New York Court of Appeals elected not to follow the holding in *United States v. Place*, 462 US 696, noting “that in the past this Court has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions.” Consequently, the “canine sniff” in this case was deemed to be a search under article I, § 12 of the State Constitution.

The Court reasoned that the analysis in these cases should focus on “whether there has been an intrusion into an area where an individual has a reasonable expectation of privacy.” In this case, a residence was deemed to be such an area. The Court concluded that “given the uniquely discriminate and nonintrusive nature of such an investigative device, as well as its significant utility to law enforcement authorities, we conclude that it may be used without a warrant or probable cause, provided that the police have a reasonable suspicion that a residence contains illicit contraband.”

Search and Seizure—Suppression of Evidence

Wong Sun v. United States, 371 US 471 (1963)

Among other things, this case is cited for the proposition, known as the “Fruit of the Poisonous Tree” Doctrine, that evidence seized in connection with an unlawful intrusion by police is inadmissible and cannot serve as proof against the defendant (victim of the search).

N.Y. Crim. Proc. Law § 710.20—Motion to suppress evidence; in general; grounds for

“Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, ... a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it: (1) Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant....

People v. Ponder, 54 NY2d 160 (1981)

Held, that a defendant has standing to challenge the validity of a warrantless search which led to the seizure of relevant evidence, which the defendant seeks to have suppressed, if the defendant can demonstrate a reasonable expectation of privacy in the premises or the particular area of the premises searched (i.e., defendant was the victim of an invasion of privacy).

People v. Millan, 69 NY2d 514 (1987)

Stands for the proposition that while the burden of establishing standing to challenge the search of the passenger compartment of an automobile is on the defendant, “the People may not predicate defendant’s guilt solely on the constructive possession of [in this case] the weapon attributed to him as a passenger in the [in this case] cab based [solely] on the [statutory] presumption ... and simultaneously deprive him of the right to challenge the search [and if he chooses to, the legality of the initial stop based on the fact that he was a passenger in the vehicle].”

Case and Statutory Law—Propriety of Police-Initiated Encounters

People v. Cantor, 36 NY2d 106 (1975)

In *Cantor*, the New York Court of Appeals stated that “street encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees. While the police should be accorded great latitude in dealing with those situations with which they are confronted it should not be at the expense of our most cherished and fundamental rights. To tolerate an abuse of the power to seize or arrest would be to abandon the law-abiding citizen to the police officer’s whim or caprice—and this we must not do. Whenever a street encounter amounts to a seizure it must pass constitutional muster.”

The Court also pointed out that “whether or not a particular search or seizure is to be considered reasonable requires weighing the government’s interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual’s right to privacy and personal security.... In conducting this inquiry we must consider whether or not the action of the police was justified at its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible.”

The Court pointed out that in connection with the interception of a person on the street by the police under the “stop-and-frisk law” (N.Y. Crim. Proc. Law § 140.50), “reasonable suspicion [that a person is committing, has committed or is about to commit a crime] is the quantum of knowledge sufficient to induce an ordinary prudent and cautious man under the circumstances to believe criminal activity is at hand.... To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice.... Nor will good faith on the part of the police be enough to validate an illegal interference with an individual.”

People v. Hollman, 79 NY2d 181 (1992)

“In *People v. DeBour* (40 NY2d 210, 223), we set out a four-tiered method for evaluating the propriety of encounters initiated by police officers in their criminal law enforcement capacity. [1] If a police officer seeks simply to request information from an individual, that request must be supported by an objective, credible reason, not necessarily indicative of criminality. [2] The common-law right of inquiry, a wholly separate level of contact, is ‘activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion’ (*People v. DeBour*, supra, at 223). [3] Where a police officer has reasonable suspicion that a particular person was involved in a felony or misdemeanor, the officer is authorized to formally stop and detain that person. [4] Finally, where the

officer has probable cause to believe that a person has committed a crime, an arrest is authorized.”

“We are convinced that the four-part *DeBour* analysis still has vitality. Each progressive level, however, authorizes a separate degree of police interference with the liberty of the person approached and consequently requires escalating suspicion on the part of the arresting officer. We conclude, as a general matter, that a request for information involves basic, non-threatening questions regarding, for instance, identity, address or destination. As we stated in *DeBour*, these questions need to be supported only by an objective credible reason not necessarily indicative of criminality. Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer’s investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.”

The Court went on to clarify aspects of its holding in *DeBour* indicating that it would continue to apply its holding when assessing the propriety of police-initiated encounters that do not rise to the level of a Fourth Amendment seizure. “We stated that ‘a policeman’s right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter.... Thus, *DeBour* suggests that even in their law enforcement capacity, police officers have fairly broad authority to approach individuals and ask questions relating to identity or destination, provided that the officers do not act on whim or caprice and have an articulable reason not necessarily related to criminality for making the approach.... *DeBour* also stands for the proposition that the brevity of the encounter and the absence of harassment or intimidation will be relevant in determining whether a police-initiated encounter is a mere request for information.”

“To that end, we emphasize that a request for information is a general, non-threatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area. If the individual is carrying something that would appear to a trained police officer to be unusual, the police officer can ask about that object.... Once the police officer’s questions become extended and accusatory and the officer’s inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. Where the person approached from the content of the officer’s questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer merely asking for information. The encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is afoot. No matter how calm the tone of narcotics officers may be, or how polite their phrasing, a request to search a bag is intrusive and intimidating and would cause reasonable people to believe that they were suspected of criminal conduct. These factors take the encounter past a simple request for information.... The four-tiered method for analyzing police encounters gives officers acting in their law enforcement capacity leeway in approaching individuals for information. It does not, however, permit police officers to ask intrusive, potentially incriminating questions unless they have founded suspicion that criminality is afoot.”

N.Y. Crim. Proc. Law § 140.50—Temporary questioning of persons in public places; search for weapons

1. ... a police officer may stop a person in a public place located within the geographical area of such officer’s employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a

misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct....

3. When upon stopping a person under circumstances prescribed in subdivision[] one ... a police officer ... reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

N.Y. Crim. Proc. Law § 140.10—Arrest without a warrant; by police officer; when and where authorized

1. ... a police officer may arrest a person for:
 - ... (b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise....

N.Y. Crim. Proc. Law § 70.10—Standards of proof; definition of terms

The following definition[] [is] applicable to this chapter:

... 2. “Reasonable cause to believe that a person has committed an offense” exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it....

Search and Seizure—Consent to Search

People v. Gonzalez, 39 NY2d 122 (1976)

This case sets out the factors to be considered in determining whether a defendant’s consent to search, “a relinquishment of constitutional protection under both the Federal and State Constitutions against unjustified official intrusion,” is voluntary and, in fact, “a free and unconstrained choice. Official coercion, even if deviously subtle, nullifies apparent consent. Whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstances.”

The Court pointed out that “one of the limited exceptions to the warrant requirement and, indeed, to the requirement of probable cause is voluntary consent to the search.” And, the prosecution has the burden of proving the voluntariness of the alleged consent(s). “Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice.”

Factors to be considered include: “[1] whether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest [including the number of police officers involved and whether the defendant was handcuffed; although the Court notes that a person in custody or under arrest may still voluntarily consent to a search], ... [2] the background of the consenter [the Court noting that ‘a consent to search by a case-hardened sophisticate in crime, calloused in dealing with police, is more likely to be the product of calculation than awe’], ... [3] whether the consenter has been, previously to the

giving of the consents, or for that matter even later, evasive or un-co-operative with the law enforcement authorities, ... [and] [4] whether a defendant was advised of his right to refuse to consent [here, the Court points out that giving that advice is not mandatory, but can be considered, in any event, when determining whether a consent was voluntary].”

Statutory Law—Controlled Substances

N.Y. Penal Law § 220.18—Criminal possession of a controlled substance in the second degree

A person is guilty of criminal possession of a controlled substance in the second degree when he knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of two ounces or more; ...

Criminal possession of a controlled substance in the second degree is a class A-II felony.

N.Y. Penal Law § 220.25—Criminal possession of a controlled substance; presumption

1. The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when he received possession thereof, or (c) when the controlled substance is concealed upon the person of one of the occupants....

Probable Cause—“Fellow Officer” Rule

People v. Ramirez, 88 NY2d 99 (1996)

“The ‘fellow officer’ rule provides that even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful if the officer ‘acts upon the direction of or as a result of communication with a superior or [fellow] officer or another police department provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest’ If the arrest is challenged by defendant in a motion to suppress, ... the people must therefore come forward with the evidence establishing probable cause to arrest.”