The fourth amendment guarantees to the people freedom from unreasonable searches and seizures.1 "Mindful of the abuses English citizens had at earlier times received at the hands of their government, the founding fathers sought to bestow upon private individuals on American soil a guarantee against unreasonable governmental intrusion into their lives."2 Subject to a few carefully defined exceptions to the warrant requirement of the fourth amendment,3 a warrantless search and seizure has been held to be per se unreasonable.4 If and when a warrant is issued, it must be based "upon probable cause, supported by oath or affirmation. . . ."5 The purpose of the search warrant is to require that a decision to invade a person's privacy be made by a "neutral and detached magistrate."6

The Eighth Circuit this term decided two cases in which the court focused upon these guarantees embodied in the fourth amendment. In United States v. Roberts7 the court dealt with the characterization of a private search and seizure. In United States v Deggendorf8 the court focused upon the effect of voluntariness in a detention for custodial interrogation based on less than probable cause. The Eighth Circuit seems to have expanded the scope of lawful police conduct in the area of search and seizure while at the same time severely limiting the protections afforded to an individual by the fourth amendment.

1. U.S. Const. amend IV. This amendment provides: "The right of 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." Id.
5. U.S. Const. amend IV.
7. No. 79-1396 (8th Cir. March 12, 1980).
8. 626 F.2d 47 (8th Cir. 1980).
GOVERNMENTAL VS. PRIVATE ACTION IN FOURTH AMENDMENT ADJUDICATIONS

INTRODUCTION

In *United States v. Roberts*\(^9\) the Eighth Circuit concluded that private individuals, when they effectively barred the defendant from retrieving possession of his property, had completed a search and seizure of defendant's property without any governmental involvement and that a subsequent police seizure was not protected by the fourth amendment.\(^10\) As the following discussion will show, this decision is a departure from Supreme Court decisions which have defined the scope of the fourth amendment in terms of an individual's legitimate expectation of privacy in the items searched or seized. This article will explore the issues involved in determining when governmental participation is sufficient to trigger the application of the fourth amendment and when such governmental action constitutes a search and seizure within the meaning of the fourth amendment. These issues will be discussed with respect to the impact which recent case law has had in redefining the scope of the fourth amendment.

FACTS

In *United States v. Roberts*\(^11\) the defendant leased storage units from Stor-All in the cities of Independence, Missouri and Gladstone, Missouri. He provided his own padlocks to secure these rented locker units. On the evening of November 29, 1978, employees at the Stor-All of Independence and at the Stor-All of Gladstone notified the general manager that they had discovered several unlocked storage units at both locations.\(^12\) The general manager and a private investigator who worked for the company went to Gladstone to investigate the unlocked units.\(^13\) The two men discovered broken padlocks near several of the unlocked units. Upon entering one of the unlocked units, they discovered what appeared to be a large bag of marijuana. The general manager closed the door to the storage unit.\(^14\) Before leaving the Gladstone facility, the men secured the premises by bolting an exterior door. It was conceded that this practice was simply routine and not designed particularly to prevent the defendant from reacquir-

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9. No. 79-1396 (8th Cir. March 12, 1980).
10. *Id.* at 11.
11. No. 79-1396 (8th Cir. March 12, 1980).
12. *Id.* at 3.
13. *Id.* at 3-4.
14. *Id.* at 4.
ing possession of his property.\textsuperscript{15}

At the Independence Stor-All, the two men again found several unlocked units. Upon looking into one of these units they discovered boxes containing what appeared to be marijuana. The general manager called the Kansas City police department and reported what he had discovered.\textsuperscript{16} He left the apparent contraband in the locker unit until the police arrived.\textsuperscript{17} While awaiting the arrival of the police, they closed the doors to the unlocked unit and mounted a guard over the storage facility. Therefore, between the time the marijuana was discovered in the locker unit and the time of the arrival of the law enforcement authorities, the defendant would have been unable to pick up, destroy, or take away the marijuana.\textsuperscript{18} At approximately 9:00 p.m. officers, including a D.E.A. Task Force Officer, arrived at the Independence Stor-All location, and without a search warrant, entered the locker unit and seized what was later identified as marijuana.\textsuperscript{19}

The following morning, the officers met the general manager at the Gladstone Stor-All facility. He took the officers to the locker unit where he had seen the large bag on the prior evening. Without a search warrant, the officers entered the locker unit and seized the bag containing marijuana.\textsuperscript{20}

Roberts was subsequently indicted for two counts of possession with intent to distribute marijuana.\textsuperscript{21} He moved to suppress the evidence contending that the seizure by the law enforcement authorities was made without a warrant and therefore violated his rights under the fourth amendment.\textsuperscript{22}

The district court held that the fourth amendment required the suppression of the two lots of marijuana.\textsuperscript{23} The Eighth Circuit Court held that the seizure of marijuana at the Gladstone facility was an unjustified warrantless seizure by law enforcement officers, and affirmed the district court's suppression order. However, with respect to the seizure of the marijuana at the Independence location, the court held that the marijuana had been privately seized prior to the arrival of the law enforcement authorities. Therefore, the appellate court held that the district court had erred in sup-

\begin{itemize}
\item \textsuperscript{15} Id. at 10.
\item \textsuperscript{16} Id. at 4.
\item \textsuperscript{17} Id. at 12.
\item \textsuperscript{18} Id. at 11.
\item \textsuperscript{19} Id. at 4.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 5.
\item \textsuperscript{22} Id. at 2.
\item \textsuperscript{23} Id. at 1.
\end{itemize}
pressing evidence based on that seizure.24

BACKGROUND

An analysis of any search and seizure case must begin with a determination of whether the fourth amendment is implicated at all.25 Two issues must be considered in making this determination: whether the search and seizure is the product of governmental action; and whether the victim of such action possessed a reasonable expectation of privacy in the items searched or seized.26 If governmental action is involved and the victim had a reasonable expectation of privacy in the item searched or seized, then the fourth amendment requires that the search be reasonable.27

Public Or Governmental Seizure?

In Burdeau v. McDowell,28 the rule was established that a search and seizure conducted solely by a private individual falls outside the scope of the fourth amendment.29 The Supreme Court noted that the fourth amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . ."30 Therefore, the fourth amendment's exclusionary rule is inapplicable when the evidence used in a criminal proceeding was obtained pursuant to a solely private search and seizure.31 While the Burdeau doctrine has retained its validity to the present day,32 state involvement with the individual activity may trigger the exclusionary rule's application.33 The question, therefore, arises whether there was sufficient governmental action to require the protection of the fourth amendment.34

24. Id. at 11.
26. Id. § 4.02 at 85.
27. See C. Whitebread, supra note 25, at § 4.01.
29. Id. at 475.
30. Id.
31. C. Whitebread, supra note 25, § 4.02(a) at 85-86.
32. Id. § 4.02(a) at 86.
33. See 1 W. LaFave, Search and Seizure § 1.6(b) (1978); C. Whitebread, supra note 25, § 4.02(a) at 89.
34. W. LaFave, supra note 33, at § 1.6(b); C. Whitebread, supra note 25, § 4.02(a) at 89-90.
The analysis used to make this determination goes back to a line of cases which date from the period when the exclusionary rule applied only to federal agents and courts. During this period evidence procured by state officials pursuant to unreasonable searches and seizures could be turned over to federal agents who would then be allowed to use the tainted evidence in a federal court proceeding. Courts were required to make the analogous determination of when the degree of federal involvement in a state search was sufficient to mandate the application of the fourth amendment exclusionary rule.

In Byars v. United States, the Supreme Court first articulated this standard. The Supreme Court stated that the fourth amendment must be given a generous interpretation so that its protections were not violated by "circuitous and indirect methods." When the search or seizure in substance and effect was found to be the joint operation of state and federal authorities, the federal agent was deemed to have "engaged in the undertaking as one exclusively his own." The Supreme Court affirmed the Byars doctrine in Lustig v. United States by stating that it was "immaterial" whether a governmental official "originated the idea or joined in it while the search was in progress." It was sufficient that the official had joined in the search "before the object of the search was completely accomplished. . . ." Applying the reasoning of these cases, the courts today find that when governmental authorities have actively participated in a search or seizure con-

35. See United States v. Mekjian, 505 F.2d 1320, 1327-28 (5th Cir. 1975); 7 TOL. L. REV. 589, 594-95 (1976).
37. 7 TOL. L. REV. 589, 595 (1976). This procedure was sanctioned under the "silver platter doctrine." Id. In Elkins v. United States, 364 U.S. 206 (1960), the Supreme Court discarded the "silver platter doctrine" and denied the use in federal courts of evidence illegally seized by state officials. 364 U.S. at 208. Not until its decision in Mapp v. Ohio, 367 U.S. 643 (1961), did the Supreme Court recognize that the fourth amendment's guarantee against unreasonable governmental intrusion was enforceable against the state through the Due Process Clause of the Fourteenth Amendment. 367 U.S. at 655. This decision "[closed] the only courtroom door remaining open to evidence secured" through a search or seizure in violation of the fourth amendment. Id. at 654-55.
40. 7 TOL. L. REV. 589, 595 (1976).
42. Id. at 33.
43. 338 U.S. 74 (1949).
44. Id. at 79.
45. Id.
ducted by private individuals, the search or seizure must comport with fourth amendment requirements.  

Interest Afforded Protection Under The Fourth Amendment

After determining that there is governmental action, it is necessary, under fourth amendment analysis to decide whether the defendant's interest in the item searched or seized is protected by the fourth amendment. Initially the Supreme Court relied upon property concepts and the law of trespass to determine when governmental action constitutes a search or seizure within the meaning of the fourth amendment. Police conduct was characterized as an unlawful search only if there had been a physical trespass into a “constitutionally protected area.” Based upon a literal interpretation of the fourth amendment’s language, certain places were characterized as protected areas of privacy. The courts followed an area-by-area approach in making this determination of which areas were “constitutionally protected.” Generally these areas were privately owned and under an individual's close personal dominion.

In Olmstead v. United States Justice Brandeis dissented from the majority's strict adherence to property concepts in defin-

46. See United States v. Mekjian, 505 F.2d 1320, 1327 (5th Cir. 1975); United States v. Newton, 510 F.2d 1149, 1153-54 (7th Cir. 1975); 1 W. LaFave, SEARCH AND SEIZURE § 1.6(b) (1978); C. Whitebread, CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 4.02(a) (1980). United States v. Newton, 510 F.2d 1149 (7th Cir. 1975) (employee assisted by customs agent opened bag in presence of federal agents); Cash v. Williams, 455 F.2d 1227 (6th Cir. 1972) (police were called to assist in and to complete the search with private individual); United States v. Payne, 429 F.2d 169 (9th Cir. 1970) (seconal tablets found by the policeman outside his jurisdiction in search of the vehicle with park ranger having authority); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (custom agents and airlines employees engaged in a joint operation) are all cases involving some mixture of private and governmental actions in which the various courts found the governmental involvement sufficient to demand application of the fourth amendment.

47. C. Whitebread, supra note 25, § 4.02 at 85.

48. See 1 W. LaFave, supra note 33, § 2.1(a) at 223; J. Varon, SEARCHES, SEIZURES AND IMMUNITIES 9-10 (2d ed. 1974); Note, Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort, 23 CLEV. ST. L. REV. 63, 64 (1974) [hereinafter cited as Katz and the Fourth Amendment].


50. 1 W. LaFave, supra note 33, § 2.1(a) at 223-24. Areas characterized as "constitutionally protected" included "persons" their bodies and clothing; "houses" including apartments, hotel rooms, business offices, warehouses; "papers" such as letters; and "effects" such as automobiles. Id.

51. Note, Katz and the Fourth Amendment, supra note 48, at 64-65.

52. 43 N.Y.U. L. REV. 968, 971 (1968).

53. 277 U.S. 438 (1928).
ing the scope of fourth amendment protection.\textsuperscript{54} Instead, he stated that the scope of the fourth amendment’s protection should be defined in terms of an individual’s “right to privacy.”\textsuperscript{55} His view eventually found acceptance in \textit{Katz v. United States}\textsuperscript{56} when the Supreme Court introduced the “reasonable expectation of privacy” concept.\textsuperscript{57} Personal rights rather than property rights are stressed under this concept.\textsuperscript{58} The Court discarded the notion that a physical invasion of a constitutionally protected area was a precondition to the finding of a fourth amendment search or seizure\textsuperscript{59} and thereby unbound the substantive protection of the fourth amendment from property law principles.\textsuperscript{60} Since the govern-
ment's eavesdropping activities in *Katz* had violated the privacy upon which the defendant had justifiably relied, the government's actions constituted a search and seizure within the meaning of the fourth amendment. 61 *Katz* marked a "watershed" in fourth amendment jurisprudence. ... 62

In his concurring opinion, Justice Harlan enunciated his understanding of the majority's holding. 63 He stated that the expectation of privacy test consisted of two requirements: that a person have exhibited an actual expectation of privacy; 64 and that this expectation be one that society is prepared to recognize as "reasonable." 65 This test, which has been relied upon by the lower courts, 66 is applied on a case-by-case basis. 67 While in some instances it has produced conflicting views as to whether a particular type of conduct has infringed upon one's reasonable expectation of privacy, an analysis of the case law since *Katz* reveals that certain expectations of privacy are justifiable. 68

The Supreme Court's shift in fourth amendment analysis from a "constitutionally protected area" concept to an "expectation of privacy" concept has been reaffirmed in the Court's recent decisions. 69 In *United States v. Chadwick*, 70 the court faced the issue...
of whether a search warrant was required before governemnt agents could search the contents of a double-locked footlocker which had been seized pursuant to a lawful arrest, when there was probable cause to believe that the footlocker contained evidence of a crime.\footnote{1981}{71} After the police had seized the defendant's footlocker, there was not the slightest danger that the defendant would be able to repossess the footlocker or take away or destroy its contents.\footnote{1981}{72} The Supreme Court stated that the fourth amendment's focus was upon the defendant's legitimate expectation of privacy and not upon his inability to retrieve the contents of the footlocker.\footnote{1981}{73} Furthermore, the Court noted that the defendant's principal privacy interest in the footlocker was in its contents and not in the container itself.\footnote{1981}{74} Therefore, with the footlocker safely immobilized, the Court concluded that the governmental search of its interior was an "additional and greater intrusion" of the defendant's legitimate expectation of privacy, and unreasonable under the fourth amendment.\footnote{1981}{75}

In \textit{Walter v. United States}\footnote{1981}{76} the Supreme Court once again had the opportunity to discuss the issue of the legitimacy of an expectation of privacy associated with the contents of property lawfully within the possession of governmental authorities.\footnote{1981}{77} The Court reaffirmed the well established principle "that an officer's authority to possess a package is distinct from his authority to examine its contents."\footnote{1981}{78} In \textit{Walter}, an interstate shipment of several securely sealed packages containing obscene films was misdelivered to a third party.\footnote{1981}{79} The employees of the third party opened each of the packages and found film boxes which depicted suggestive drawings and explicit descriptions of the films.\footnote{1981}{80} By holding it up to the light, an attempt was made by one of the employees to view a portion of the film.\footnote{1981}{81} The FBI was notified and upon their arrival viewed the films with a projector without first attempting to obtain a search warrant or consent form the consignor or consignee.\footnote{1981}{82} Rejecting the government's claim that the consignor no longer pos-

\begin{thebibliography}{99}
\footnotetext{70}{433 U.S. 1 (1977).}
\footnotetext{71}{\textit{Id.} at 5-6. \textit{Accord}, Arkansas v. Sanders, 442 U.S. 753 (1979).}
\footnotetext{72}{\textit{Id.} at 4.}
\footnotetext{73}{\textit{Id.} at 13-14 n.8.}
\footnotetext{74}{\textit{Id.}}
\footnotetext{75}{\textit{Id.} at 13.}
\footnotetext{76}{100 S. Ct. 2395 (1980).}
\footnotetext{77}{\textit{Id.} at 2397-98.}
\footnotetext{78}{\textit{Id.} at 2398. \textit{See Ex Parte} Jackson, 96 U.S. 727, 732-33 (1877).}
\footnotetext{79}{100 S. Ct. 2395 (1980).}
\footnotetext{80}{\textit{Id.}}
\footnotetext{81}{\textit{Id.} at 2397.}
\footnotetext{82}{\textit{Id.}}
\end{thebibliography}
sessed a reasonable expectation of privacy in the films after the boxes were opened by the private individuals, the court held that the government's unauthorized screening of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. While the private search of the boxes had frustrated the consignor's expectation of privacy in part, it did not alter his expectation associated with the contents of the films themselves. The Court noted that "[a] partial invasion of privacy cannot automatically justify a total invasion." The warrantless search therefore violated the fourth amendment.

ANALYSIS

In United States v. Roberts, the Eighth Circuit failed to examine closely (1) the degree of governmental involvement in the ultimate seizure of the marijuana and (2) the defendant's reasonable expectation of privacy in the locker unit and its contents. It appears that this failure has expanded the scope of the Burdeau private search and seizure doctrine, and has further chipped away at the protections afforded by the fourth amendment. Under the Eighth Circuit's decision in Roberts, a seizure will be characterized as private in nature and beyond the scope of the fourth amendment when a private individual, without government participation, has deprived the owner of property of his possessory or proprietary interest in such property although governmental authorities ultimately conduct the seizure of the property.

While the fourth amendment does not protect people from private searches and seizures, it should be given a generous interpretation so that its protections are not violated by "circuitous and indirect methods." In order to preserve the amendment's guarantees against governmental intrusion, courts should examine the facts closely before characterizing a search or seizure as private.

When analyzing an allegedly private search, the Eighth Circuit

83. Id.
84. Id. at 2398.
85. Id. at 2403 n.13.
86. Id. at 2398.
87. No. 79-1396 (8th Cir. March 12, 1980).
88. See No. 79-1396, slip op. at 9.
89. Id. at 13 (Bright, J., dissenting in part).
90. See notes 28-34 and accompanying text supra.
92. See No. 79-1396, slip op. at 11.
94. 273 U.S. at 32. See Stonehill v. United States, 405 F.2d 738, 745 (1968) (dis-
stated in *United States v. Haes* that courts must examine the facts surrounding the search apart from those facts surrounding the actual seizure. The court's analysis should therefore focus upon a determination of whether there was sufficient governmental involvement in either the search or seizure. In *Roberts*, the court followed this two-part analysis and concluded that the discovery of the marijuana at the Independence Stor-All was private. In analyzing the facts surrounding the seizure, the court considered the controlling issue to be whether the defendant retained a possessory or proprietary interest in the locker unit and its contents after the Stor-All employees had seized it and mounted guard over the storage facility pending the arrival of the police. Because the defendant would have been unable to take possession of the marijuana after the employees mounted the guard, the court concluded that the marijuana had been seized without any governmental involvement.

The Eighth Circuit's analysis seems to indicate a belief that an individual's right to be free from an unreasonable governmental seizure of his possessions rests upon his ability to retrieve his property. Thus, the court's characterization of the seizure as private appears to rest upon the assumption that the primary purpose of the fourth amendment is to protect property interests. However, the controlling issue should be whether there has been a governmental interference with the "privacy" upon which an individual has justifiably relied. This being the issue, the Eighth Circuit should not have ceased its search for governmental action until the defendant's justifiable expectation of privacy had ceased. In this light, the decisive issues never addressed by the court seem to be as follows: (1) whether the defendant possessed a reasonable expectation of privacy in the locker unit; (2) whether

96. *Id.* at 770.
97. *Id.*
98. No. 79-1396, slip op. at 10-11.
99. *See id.* at 11.
100. *Id.*
101. *Id.* *But see id.* at 13 (Bright, J., dissenting in part).
102. *See generally* notes 48-52 and accompanying text *supra*.
104. See *Walter v. United States*, 100 S. Ct. 2395, 2402-03 (1980); *United States v. Chadwick*, 433 U.S. 1, 13-14 (1977). These cases reaffirm the well-established principle recognized in *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), "that an officer's authority to possess a package is distinct from his authority to examine its contents." *Id.*
the defendant retained an expectation of privacy after the initial seizure of the locker unit by the Stor-All employees; (3) whether the law enforcement authorities' ultimate seizure of the marijuana constituted sufficient governmental participation; and (4) whether such governmental participation infringed any retained expectation of privacy.

Applying the Harlan two-part expectation of privacy test, it is arguable that the defendant in Roberts possessed a reasonable expectation of privacy in the locker unit and its contents. Under the first part of the test, it is apparent that the defendant had an actual expectation of privacy. The unit had been secured with the defendant's own padlock, evidencing his expectation of exclusive use and possession of it. By thus securing the locker, the defendant had taken reasonable precautions to protect his expectation that its contents would remain concealed. In addition, the second part of the test, the "justifiable" requirement, was also satisfied. Recent case law supports the conclusion that the expectation of privacy associated with the use of a locker unit is justifiable. While arguably the defendant should have expected that the Stor-All employees would summon the police to investigate the possible burglary, he could justifiably expect that his locker would be secure against governmental intrusions for any other purposes.

Assuming that the defendant did possess a justifiable and legitimate expectation of privacy, the next issue to be considered is whether he retained that expectation in the contents against fu-

105. See notes 63-65 and accompanying text supra.
106. Id.
107. Id. at 79-1396, slip op. at 3.
108. See Chadwick v. United States, 433 U.S. 1, 11 (1977) ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination." Id.).
109. See notes 63-65 and accompanying text supra.
110. In United States v. Small, 297 F. Supp. 582 (D. Mass. 1969), the court focused upon the legitimacy of an expectation of privacy in a rental locker located in a subway station. Id. at 584-85. Relying upon the Katz decision, the district court stated that one could possess a constitutionally protected expectation of privacy in a rental locker located in a public place. Id. The very design of the locker served to conceal and safeguard its contents from the public. Id. The private use of the rental locker was held to be indistinguishable from the private use of the public telephone booth in Katz. Id. at 585. In United States v. Durkin, 355 F. Supp. 922 (S.D.N.Y. 1971), another court found that fourth amendment protection extended to the renter of a public locker. Id. at 924-25. The renter justifiably expects that it will be for his own private use. Id. at 924. The court noted that its decision was in accord with those decisions of other courts which have considered the issue of an expectation of privacy associated with the use of a public rental locker. Id. at 924-25.
111. See generally 1 W. LAFAVE, supra note 33, § 8.5(a) at 738-39.
t generous intrusions after the Stor-All employees began guarding the storage facility. It is arguable that he did. In Roberts, because of the defendant's inability to retrieve his property after the guard was posted, the majority held that the seizure was completed prior to the arrival of the police. However, while the Stor-All employees' seizure of the locker unit itself deprived the defendant of the use and possession of his property, it did not diminish his expectation that the locker's contents would remain free of unwarranted governmental intrusions.

Since the defendant arguably retained privacy interests in the contents of his locker when the police took control over the unit, the court should have examined closely the steps taken by the police upon their arrival at the storage facility. Furthermore, because a search is a functional, not merely a physical process, it is not completed until the object of the search is completely accomplished. Under this principle, the search process in Roberts was not completed until the marijuana was actually seized by the police. Although the initial search of the locker was conducted by the Stor-All employees it is not essential to a finding of governmental action that the government officials be involved in the search process from its inception. In Roberts the police joined in the search process before the object of the search was completely accomplished. Therefore, the search and seizure pro-

112. No. 79-1396, slip op. at 11.
113. See Walter v. United States, 100 S. Ct. 2395, 2402-03 (1980); United States v. Chadwick, 433 U.S. 1, 13-14 n.8 (1977). See also notes 70-74, 111 and accompanying text supra.

Based upon a comparison of the facts in Roberts to the facts in Chadwick it is apparent that the defendant in Roberts did retain an expectation of privacy in the locker unit. In Roberts the locker unit had been secured with the defendant's own packlock as was the footlocker in Chadwick. In Chadwick, where the footlocker was under the exclusive control of the police, the Supreme Court held that a warrantless search of the footlocker's interior by the police was unreasonable. The factual distinction between these two cases is that in Chadwick there had been no prior search of the footlocker's contents, whereas in Roberts there had been no prior seizure of the marijuana stored inside the locker unit. See Chadwick, 433 U.S. at 3-16, and Roberts, No. 79-1396, slip op. at 2-12.

117. No. 79-1396, slip op. at 4.
119. The search process continued until the police actually removed the marijuana from the locker unit. See Lustig v. United States, 338 U.S. 74, 78 (1949) ("search is not completed until effective appropriation as part of an uninterrupted transaction is made of illicitly obtained objects for subsequent proof of an offense" Id.).
cess, viewed in its entirety, is best characterized as a "joint endeavor" involving both private persons and governmental authorities.\textsuperscript{120} Such governmental involvement is arguably sufficient under \textit{Byars} and \textit{Lustig} to require that the fourth amendment safeguards be recognized.\textsuperscript{121}

Because the defendant arguably retained privacy interests in the contents of the locker and because of governmental involvement, the warrantless seizure of the marijuana was unreasonable unless exigent circumstances justified the police seizure.\textsuperscript{122} The fourth amendment does not require police officers to obtain a warrant to search and seize when they reasonably believe circumstances exist which pose a potential threat to life\textsuperscript{123} or contraband.\textsuperscript{124} The burden is on the state to show that their actions come within the exigent circumstances exception.\textsuperscript{125} From an analysis of the facts it seems that there were no exigent circumstances in \textit{Roberts} by which to justify the warrantless seizure of the marijuana. With the guard mounted over the storage facility, the defendant would have been unable to pick up, destroy, or take away the marijuana.\textsuperscript{126} Therefore, the initial seizure of the locker unit by the Stor-All employees was sufficient to guard against the destruction of the marijuana.\textsuperscript{127} No showing was made to indicate that it was difficult or impossible to obtain a search warrant.\textsuperscript{128} Nor can the warrantless seizure be justified under the consent exception to the warrant requirement.\textsuperscript{129} The defendant's personal privacy rights were at stake in \textit{Roberts}, not those of the Stor-All employees.\textsuperscript{130} While a third party may give consent, there must be proof that the consenting party "possessed common authority over

\begin{footnotes}
\textsuperscript{120} Cf. Cash v. Williams, 455 F.2d 1227, 1230 (6th Cir. 1972) (when police were summoned by private individuals to assist in and complete the search, the court independently tested the governmental involvement against fourth amendment standards); Corngold v. United States, 367 F.2d 1, 6 (9th Cir. 1966) (the joint involvement of federal officials and airline employees in the evidence gathering process was sufficient to mandate application of the exclusionary rule).

\textsuperscript{121} See notes 35-46 and accompanying text supra.

\textsuperscript{122} See generally C. Whitebread, supra note 25, § 4.03 at 108.


\textsuperscript{124} United States v. Guidry, 534 F.2d 1220, 1223 (6th Cir. 1976).

\textsuperscript{125} Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971).

\textsuperscript{126} See No. 79-1396, slip op. at 11.

\textsuperscript{127} See United States v. Chadwick, 433 U.S. 1, 13 (1977).

\textsuperscript{128} See No. 79-1396, slip op. at 3-4. Since the marijuana at Gladstone was seized on the following morning after the seizure at Independence, no exigent circumstances appeared to exist to justify the immediate and warrantless seizure at Independence.

\textsuperscript{129} See generally 1 W. LaFave, supra note 33, § 8.5 at 739-48; C. Whitebread, supra note 25, § 10.05 at 211.

\textsuperscript{130} See No. 79-1396, slip op. at 3; see also Stoner v. California, 376 U.S. 483, 489 (1964).
\end{footnotes}
or other sufficient relationship to the premises or effects sought to be inspected." 131 In Roberts the defendant had the exclusive use and possession of the locker unit. Therefore, the Stor-All employees could not consent to a warrantless seizure of the marijuana. Because the defendant's legitimate privacy interests were infringed by the police seizure of the marijuana, and no recognized exceptions to the warrant requirement were applicable, the warrantless seizure was arguably unreasonable and, therefore, arguably unconstitutional.

CONCLUSION

The analysis of a specific search and seizure question necessitates more than simply the resolution of the case before the reviewing court. Appellate courts have been said to have the obligation of examining not just the facts in a given litigation. Rather they have a duty of determining whether a course of police conduct, if not subjected to the appropriate fourth amendment restraints, could eventually erode the guarantee of the amendment that each citizen has a right to be free of unwarranted governmental intrusions into his privacy. In making a determination as to whether a particular degree of governmental involvement is sufficient to make the action of the private individual those of the government, the appellate court should determine whether the purpose of the exclusionary rule would be furthered by a finding of governmental action.

The Eighth Circuit's decision in Roberts will only encourage the type of government involvement in a search and seizure which was condoned under the "silver platter doctrine". Under the Roberts decision a private individual only needs to deprive the defendant of possessory rights in his property and then invite the police into an area (in which the defendant has a retained expectation of privacy) and allow them to actually conduct the search and seizure. The evidence then would be admissible regardless of the manner in which it was actually obtained. Certainly this decision is not in line with the Supreme Court's directive in Byars that the

131. United States v. Matlock, 415 U.S. 164, 171 (1974). The Supreme Court has defined "common authority" as "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Id. at 171 n.7. See Stoner v. California, 376 U.S. 483, 487-89 (1964) (hotel owner's consent to search not effective against the guest); see also Chapman v. United States, 365 U.S. 610, 616-17 (1961) (landlord's consent to search not effective as against the tenant).

132. See note 107 and accompanying text supra.
"fourth amendment should be given a generous interpretation so that its protections were not violated by circuitous and indirect methods." Under the Eighth's Circuit's decision in *Roberts* the court has given no consideration to the protected expectation of privacy. Instead the area of lawful police conduct has been greatly expanded under the *Roberts* decision at the expense of the individual citizen's right to be free of unwarranted governmental intrusions into his life.

**VOLUNTARY DETENTION vs. SEIZURE OF A PERSON**

**INTRODUCTION**

In *United States v. Deggendorf,* the Eighth Circuit simply based its decision on the magistrate's finding of fact that a defendant voluntarily accompanied police. In so doing, the court seems to have freed the lower court from reviewing a magistrate's actions, thereby depriving the defendant of a suppression hearing on the illegality of his arrest. Although the Eighth Circuit dealt with many issues when resolving *Deggendorf,* this article will deal only with the voluntariness issue because this issue seems to depart from precedent and limits a defendant's rights.

**FACTS**

In *Deggendorf,* the defendant was enroute from Orlando, Florida to St. Louis, Missouri. In Orlando, at the airport security checkpoint, his typewriter case was examined by a security officer who found a large brown envelope which felt bendable or granular. When informed that he could not take the envelope on board the plane, the defendant placed it in the typewriter case which was then forwarded as baggage on the airplane. Believing that the envelope held drugs, the Orlando police called the Orlando Drug Enforcement Administration (DEA) Office and gave a full account of the checkpoint incident. The Orlando DEA office then notified the DEA office in St. Louis. Upon his arrival in St. Louis the defendant was observed by local DEA agents, who were accompanied by two informants. The defendant met a man identified by the informants as a cocaine user and dealer. Two DEA agents and a St. Louis detective approached the defendant and his companion. One agent identified himself, showed his badge, and re-

133. 626 F.2d 47 (8th Cir. 1980).
134. *Id.* at 52-53, 52-53 n.4.
135. *Id.* at 49.
136. *Id.* at 49-50.
quested them to accompany him to the airport police room.\textsuperscript{137}
Enroute to the police room, the DEA agent questioned the defendant as to his identity. After remaining in the police room for a few minutes, the agents took the defendant and his companion to the United States Attorney's office to apply for a warrant to search the typewriter case. While at the office, and prior to applying for the warrant, the agents supplemented their information by further investigation carried out by a St. Louis detective and the two informants.\textsuperscript{138}

They went to an address where, according to the informants, the defendant's companion resided, and upon running a license check on the vehicle in the driveway it was discovered that it was registered to the defendant's companion. The defendant's name was run through a Drug Information computer, revealing that he had a prior arrest for conspiring to traffic in cocaine. All these foregoing facts were incorporated in an affidavit in support of a search warrant. Bags of cocaine were discovered in the envelope during the subsequent search of the typewriter case.\textsuperscript{139}

\textbf{Analysis}

In the district court the defendant was convicted for possession of cocaine with intent to distribute\textsuperscript{140} after denial of his motion to suppress the evidence.\textsuperscript{141} On appeal, he contended that the district court erred in not suppressing the cocaine. He contended that the affidavit did not state sufficient facts to establish probable cause to search because certain of the facts in the affidavit were tainted by the unreliability of the informants, and others by the illegality of his arrest.\textsuperscript{142}

The Eighth Circuit applied the \textit{Aguilar} test\textsuperscript{143} and found the informants to be reliable.\textsuperscript{144} Therefore, the Eighth Circuit concluded that the district court had properly considered the informants' statements in determining whether probable cause supported the warrant. The Eighth Circuit next considered the defendant's contention that certain facts were tainted by the illegality of his arrest. The court concluded that the agent did not have

\textsuperscript{137} \textit{Id.} at 50. The magistrate's report adopted by the district court and the Eighth Circuit stated that the agent "directed" the defendant and his companion to accompany him to the police room. \textit{Id.} at 52-53 n.4.
\textsuperscript{138} \textit{Id.} at 50.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 50.
\textsuperscript{141} \textit{Id.} at 49.
\textsuperscript{142} \textit{Id.} at 51.
\textsuperscript{143} \textit{Aguilar v. Texas}, 378 U.S. 108, 114 (1964).
\textsuperscript{144} 626 F.2d at 51-52.
probable cause to arrest the defendant at the time he was detained in the airport. However, the court held that the defendant had voluntarily accompanied the agents to the police room. Therefore, it was found that the evidence obtained subsequent to his voluntary detention was not tainted by an illegal arrest and the evidence had been correctly admitted. The dissenting judge, while concurring on the issue of probable cause and the reliability of the informants, disagreed with the majority on the voluntariness issue.

Not all confrontations between police and citizens are characterized as “seizures of persons” in the fourth amendment sense. If it is found that the citizen voluntarily accompanied a police officer there has been no “seizure” and the court will not inquire as to the constitutionality of the police conduct. In United States v. Mendenhall, the Supreme Court had an opportunity to address the voluntariness issue. In Mendenhall, the defendant was convicted of possession of heroin with intent to distribute following denial by the district court of her motion to suppress the introduction of the heroin. The defendant contended that the evidence was procured through an unconstitutional search and arrest by DEA agents. The defendant had been approached by DEA agents as she disembarked from a plane. After some initial questioning about her identity, the defendant was asked to, and did, accompany the agents to the airport DEA office for further questioning. The Supreme Court’s finding of voluntariness rested upon the district court’s specific finding of fact. The court analyzed these facts in light of the totality of the circumstances and held that the evidence was plainly adequate to support a finding that the defendant had voluntarily consented to her detention. Therefore, although the agents were acting on less than probable cause, fourth amendment safeguards were not afforded because the encounter was not a “seizure” within the meaning of the fourth amendment.

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145. Id. at 52.
146. Id. at 53.
147. Id. at 54 (Arnold, J., dissenting in part).
149. Id.
150. 446 U.S. 554 (1980).
151. Id. at 549.
152. Id. at 546-47.
153. Id. at 547.
154. Id. at 547-48.
155. See 446 U.S. at 557-60.
156. 446 U.S. at 59-60.
On this basis the Court held that the Court of Appeals was in error in ruling that the evidence was unlawfully obtained. The Court in Mendenhall was widely divided on this issue. Only two justices concluded that the evidence was sufficient to support a finding that the defendant voluntarily accompanied agents to the airport DEA office. Three other justices assumed that the defendant had been “seized” but upheld the seizure because the agents possessed reasonable grounds to justify it. The four dissenting justices concluded that the defendant had been “seized” within the meaning of the fourth amendment and that the agents did not possess probable cause to justify the seizure.

If a detention is involuntary, it is characterized as a “seizure” within the meaning of the fourth amendment. The fourth amendment’s exclusionary rule is triggered when a police intrusion amounts to an unreasonable seizure of a person, including those seizures which involve merely a brief detention. A seizure is unreasonable unless it is supported by probable cause. This rule was absolute until the Supreme Court in Terry v. Ohio introduced the “stop and frisk” doctrine as an exception to the probable cause requirement. Terry involved a brief “on the spot” confrontation between a citizen and a policeman investigating suspicious circumstances. In Terry, the Supreme Court defined a special category of fourth amendment “seizures” so substantially less intrusive than arrests, that the general rule requiring probable cause was replaced by a reasonable suspicion standard. This exception to the probable cause requirement was arrived at by the Court balancing the limited violation of an individual’s privacy against society’s countervailing interests in police safety. After

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157. Id. at 552 (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).
158. Id. at 559-60.
159. See 446 U.S. at 559-60 (Stewart, J., writing the opinion of the Court; Rehnquist, J., joining).
160. See 446 U.S. at 560 (Powell, J., concurring in part and concurring in the judgment; Burger, C.J., and Blackmun, J., joining).
161. See 446 U.S. at 556-77 (White, J., dissenting; Brennan, Marshall, and Stevens, J.J., joining).
162. Custodial “Seizures” and the Poison Tree Doctrine, supra note 148, at 736.
164. Custodial “Seizures” and the Poison Tree Doctrine, supra note 148, at 737.
165. Fourth Amendment Protections, supra note 163, at 618-19. See Terry v. Ohio, 392 U.S. 1, 27 (1968); Custodial “Seizures” and the Poison Tree Doctrine, supra note 148, at 737.
166. Terry v. Ohio, 392 U.S. at 1, 7 (1968).
167. Id. at 26.
168. Id. at 26-27.
balancing these considerations, the Court approved a brief stop and frisk of the individual when the officer had a suspicion that the individual was carrying a weapon. The Supreme Court has narrowly maintained the scope of this exception by applying it only to a pat-down search for weapons.

In *Terry*, the Supreme Court did not deal with the issue of the legality of an involuntary custodial interrogation on less than probable cause where the detention did not amount to an “official arrest.” In *Dunaway v. New York*, the Supreme Court dealt with this issue and rejected the argument that the balancing test employed by the Court in *Terry* should be utilized in determining the “reasonableness” of a seizure involving involuntary custodial interrogation. The Court concluded that such a “seizure” so severely intrudes upon an individual’s privacy that it can only be justified by a showing of probable cause.

In *United States v. Deggendorf*, the government maintained that either the agent had probable cause to arrest the defendant at the airport or, in the alternative, that the encounter was a “Terry-type stop,” not an arrest. As to the first contention, the Eighth Circuit found that the facts which the agents possessed were not sufficient to establish probable cause to arrest the defendant at the airport exit. Rather, the agents were acting on a “reasonable suspicion of criminal activity which warranted further investigation.” Even though the majority did not find probable cause for the arrest, it upheld the admission of the evidence acquired.

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169. *Id.* at 30–31.
171. *Custodial “Seizures” and the Poison Tree Doctrine, supra* note 148, at 738.
173. *Id.* at 211-12.
174. *Id.* at 216.
175. 626 F.2d 47 (8th Cir. 1980).
176. *Id.* at 52. The majority did not consider the question of whether the detention in this case was a “Terry-type stop.” The facts of this case do not fit within the narrowly defined exception, because the defendant was not detained by the DEA agents for the purpose of a pat-down search for weapons. See notes 49-53 and accompanying text *supra*.
177. *Id.* In explaining its conclusion, the court stated that;

[At the time the agent approached the defendant], he knew essentially three facts: (1) a man fitting Deggendorf’s description had refused to open an envelope in Orlando; (2) at St. Louis, the passenger met Schmidt, a cocaine user and dealer; and (3) the passenger and Schmidt were worried about and then retrieved the brown typewriter case.

*Id.* The court went on to state that “[w]e do not consider these facts ‘sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.” *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).
178. *Id.* (quoting *United States v. Williams*, 604 F.2d 1102, 1125 (8th Cir. 1979)).
pursuant to the arrest. It reached this result by concluding that Mendenhall controlled its disposition of the seizure issue. By applying an analysis similar to that used by the Supreme Court in Mendenhall, the Court held that the defendant had voluntarily consented to accompany the DEA agents to the police room. The Court acknowledged the fact that the district court never reached the issue of voluntariness, but had merely adopted the magistrate's findings which included a description of the airport encounter. The dissenting judge, Judge Arnold, disagreed with the majority's interpretation of Mendenhall. He stated that reliance on the magistrate's report was not a sufficient review of the facts to establish voluntariness. In Mendenhall there had been an actual finding by the district court that the defendant had voluntarily accompanied the agents to the office. The dissenting judge reasoned that the Supreme Court's decision in Mendenhall turned upon this key finding by the trier of fact. Therefore, he stated that without an explicit factual finding in this case, voluntariness cannot be established. This being the case, he concluded that Dunaway controlled. The dissent noted that in both Dunaway and this case, the degree of restraint was strikingly similar. In both cases the defendants were taken into custody for interrogation, and although neither was told he was under arrest, each would have been physically restrained had he attempted to leave. Furthermore, he found that both "defendant[s] were forcibly deprived of [their] liberty by being compelled by the State to go to a place where [they] did not wish to be." The dissent, in applying Dunaway, found that the arrest was illegal and, therefore any evidence obtained pursuant to that arrest must be suppressed.

CONCLUSION

In Deggendorf the Eighth Circuit has narrowed the scope of

179. Id. at 53.
180. Id.
181. Id. at 52-53.
182. Id. at 52 n.4.
183. Id. at 54 (Arnold, J., dissenting in part).
184. Id.
185. 446 U.S. at 557.
186. 626 F.2d at 55 (Arnold, J., dissenting in part).
187. See id. at 54-55.
188. 626 F.2d at 54.
189. Id. at 55.
190. See 626 F.2d at 54; see also Dunaway v. New York, 442 U.S. 200, 203 (1979).
191. 626 F.2d at 55.
192. Id.
protection afforded the individual by the fourth amendment. The Supreme Court has been very steadfast in maintaining the requirement of probable cause for a "seizure." Only one exception has been recognized to that stringent requirement and it applied to a very minimal intrusion into an individual's privacy. There was no factual finding by the district court in Deggendorf that the defendant voluntarily consented to accompany the DEA agents. Viewing the facts in light of the totality of the circumstances it appears that the defendant was not freely rendering his consent. The decision so heavily relied upon by the Eighth Circuit is itself a weak decision. Only two justices concluded that the defendant in Mendenhall had voluntarily accompanied the DEA agents to the police room. The other justices concluded that the defendant had been "seized." The two justices who concluded that the defendant had voluntarily accompanied the agents relied on the specific factual finding of voluntariness by the district court. In Deggendorf the district court never reached this issue. A factual finding on this particular issue of voluntariness certainly appears to be of major importance in determining whether or not a person has been "seized" and in turn whether the probable cause requirement is applicable. By failing to require an explicit factual finding on this issue, the Eighth Circuit appears to be expanding the scope of lawful police conduct and at the same time greatly narrowing fourth amendment protections previously afforded to individuals. Under this decision police are able to detain an individual on less than probable cause for interrogation and their actions will be justified even without a specific finding by the trial court that the defendant voluntarily accompanied the agents.

Virginia K. Troia—'82