CRIMINAL PROCEDURE I

The Eighth Circuit handed down numerous opinions dealing with criminal procedure during the survey period. This article focuses on four of the more significant opinions. The first section analyzes three cases that all deal with consensual polygraph examinations that were followed by interrogations at which the defendants were not readvised of their Miranda rights. The Eighth Circuit held that by failing to readvise the defendants of their Miranda rights, statements made at the post-polygraph interrogations were rendered inadmissible. However, this holding was recently reversed by the Supreme Court. The second section focuses on the decision in United States v. Jacobsen, in which the Eighth Circuit held that where a private search is followed by a governmental search, the government's actions constitute a "new" or "second" search, subject to the warrant requirement to the extent that the authorities exceed the scope of the initial private search.

THE DUTY TO READVISE DEFENDANTS OF THEIR MIRANDA RIGHTS AFTER CONSENSUAL POLYGRAPH EXAMINATIONS

INTRODUCTION

In Miranda v. Arizona, the United States Supreme Court observed that custodial interrogation contains "inherently compelling pressures" which undermine the individual's will and which may force the individual to speak when the individual would not do so otherwise. In these situations, the individual's privilege against self-incrimination is jeopardized. Therefore, the Court

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1. 683 F.2d 296 (8th Cir. 1982).
3. Interrogation is custodial under Miranda whenever the individual is "in custody at the station or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 477. Two recent Supreme Court cases have defined the term custodial in more detail. See, e.g., Oregon v. Mathiason, 429 U.S. 492, 494 (1977) (holding that a suspect who voluntarily comes to the police station in response to a police request is not in custody, therefore not entitled to Miranda warnings); Beckwith v. United States, 425 U.S. 341, 343-47 (1976) (defendant not in custody where IRS agent came to defendant's home and interviewed defendant for three hours; thus no Miranda warnings required); see also, Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Cr. Rev. 93, 147-54 (discussing Mathiason and Beckwith).
4. 384 U.S. at 476.
5. Id. at 478. The fifth amendment states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.
held that in order to safeguard the individual's fifth amendment rights, the accused, prior to any custodial interrogation, must be warned of the constitutional right to remain silent, the right to counsel, and the right to have counsel present during interrogation. However, the *Miranda* decision noted that the suspect may waive these rights provided the waiver is knowingly and intelligently made. The "heavy burden" of demonstrating that the waiver was intelligent rests on the prosecution. Thus, in order for the government to admit a statement made during a custodial interrogation, the suspect must have been warned of the constitutional rights as set out in *Miranda* and have knowingly and intelligently waived those rights.

A problem often arises when separate custodial interrogations take place, i.e., whether *Miranda* warnings must precede each separate interrogation. This is the problem that the Eighth Circuit confronted in *Fields v. Wyrick*, *United States v. Elk* and *United States v. Jackson*. In each case, the court, in examining the totality of the circumstances, concluded that where custodial interrogations followed polygraph examinations, the failure to readvise the defendants of their constitutional rights prior to the post-polygraph interrogation rendered statements made therein inadmissible. However, these decisions were short lived—the Supreme Court addressed the meaning of interrogation under *Miranda*. *Id*. at 297. In *Innis*, the suspect was arrested for armed robbery and given *Miranda* warnings. He then requested a lawyer. On the way to the police station two policemen engaged in conversation and expressed fears that the weapon used in the robbery, hidden near a school for handicapped children, might be found by one of the children. One of the patrolmen testified that he had said, "God forbid one of them might find a weapon with shells and they might hurt themselves." *Id*. at 294-95. This conversation prompted the defendant to return to the area and reveal the location of the missing shotgun, which was later admitted into evidence. *Id*. at 296. In reversing the Rhode Island Supreme Court's decision that the defendant had been interrogated without a valid waiver of his *Miranda* rights, the Court reasoned that the Rhode Island court "erred . . . in equating 'subtle compulsion' with interrogation." *Id*. at 303.

6. In the recent case of Rhode Island v. Innis, 446 U.S. 291 (1980), the Court addressed the meaning of interrogation under *Miranda*. *Id*. at 297. In *Innis*, the suspect was arrested for armed robbery and given *Miranda* warnings. He then requested a lawyer. On the way to the police station two policemen engaged in conversation and expressed fears that the weapon used in the robbery, hidden near a school for handicapped children, might be found by one of the children. One of the patrolmen testified that he had said, "God forbid one of them might find a weapon with shells and they might hurt themselves." *Id*. at 294-95. This conversation prompted the defendant to return to the area and reveal the location of the missing shotgun, which was later admitted into evidence. *Id*. at 296. In reversing the Rhode Island Supreme Court's decision that the defendant had been interrogated without a valid waiver of his *Miranda* rights, the Court reasoned that the Rhode Island court "erred . . . in equating 'subtle compulsion' with interrogation." *Id*. at 303.

7. 384 U.S. at 444. The *Miranda* Court required that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id*.

8. *Id*.

9. *Id*. at 475.


11. 682 F.2d 154 (8th Cir.) rev'd per curiam, 103 S. Ct. 394 (1982).

12. 682 F.2d 168 (8th Cir. 1982).

13. 690 F.2d 147 (8th Cir. 1982).

14. See notes 101-05 and accompanying text in *infra*. 
Court recently reversed the decision in *Fields*.\(^{15}\)

**FACTS AND HOLDINGS**

On September 25, 1974, Edward Fields, a soldier stationed at Fort Leonard, Missouri, was arrested and charged with rape.\(^{16}\) At the time of arrest, Fields was advised of his *Miranda* rights.\(^{17}\) After discussing the matter with his attorney, Fields agreed to undergo a polygraph test in connection with the rape charge.\(^{18}\) Prior to the examination, Fields was fully advised of his constitutional rights, which he waived.\(^{19}\) Fields also signed a written consent form agreeing to take the polygraph examination.\(^{20}\) After completion of the examination, the examiner, an agent with the Army's Criminal Investigation Division, informed Fields that he was being deceitful.\(^{21}\) Without readvising Fields of his right to remain silent or right to counsel, the examiner asked for an explanation.\(^{22}\) Fields thereupon stated that he had sexual intercourse with the victim, but maintained that she had consented.\(^{23}\) At trial, this statement was introduced into evidence over Fields' objection that the statement was involuntary.\(^{24}\) Fields was convicted and sentenced to

\(^{15}\) Wyrick v. Fields, 103 S. Ct. 394, 397 (1982).

\(^{16}\) Fields v. Wyrick, 682 F.2d 154, 156 (8th Cir. 1982).

\(^{17}\) *Id.* at 162 (Ross, J., dissenting). The majority noted that Fields was subsequently released on his own recognizance and retained private counsel. *Id.* at 156.

\(^{18}\) *Id.*. Fields' counsel was not present at the polygraph examination. *Id.*

\(^{19}\) *Id.* Immediately before the polygraph examination, the examiner read the following to Fields:

> Before I ask you any questions, you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning. This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate. Do you want a lawyer at this time? Defendant answered, 'No.'


\(^{20}\) 682 F.2d at 156.

\(^{21}\) *Id.*

\(^{22}\) *Id.* at 156, 160.

\(^{23}\) *Id.* at 156. Following this statement by Fields, the examiner brought in two other officers. At this point, one of the officers readvised Fields of his constitutional rights before continuing. *Id.*

\(^{24}\) *Id.* There is no doubt that Fields' statement played a significant part in his conviction because it established that Fields had intercourse with the victim. The victim, at trial, was unable to identify her assailant because she was blindfolded. *Id.* at 158 n.5.
twenty-five years imprisonment.25

Robert Eagle Elk was arrested on April 28, 1981 in connection with the beating death of Richard Schreiner.26 After his arrest, Eagle Elk, upon the advice of his attorney, volunteered to take a polygraph examination.27 Prior to administering the test, the examiner fully advised Eagle Elk of his constitutional rights.28 Eagle Elk signed a written waiver of these rights as well as a consent form concerning the polygraph.29 Following the completion of the test and without a Miranda admonition, the examiner, an FBI agent, informed Eagle Elk that he was not being truthful and proceeded to question him about the crime.30 During this subsequent questioning, Eagle Elk made an incriminating statement to the effect that he had hit the victim twice on the head with a rifle.31 His motion to suppress this statement was denied, and Eagle Elk was convicted of involuntary manslaughter.32

Wilfred Jackson was under investigation for the deaths of two women who were struck by an automobile near Jackson's home.33 While serving time for a drunk driving conviction, Jackson was interviewed by a law enforcement agent concerning the deaths of the two women.34 Before this interview, Jackson was given his Miranda warnings and signed a waiver form.35 Jackson maintained he could remember nothing about the deaths of the two women and agreed to take a polygraph examination.36 Prior to taking the test, Jackson was again fully advised of his Miranda rights, and signed a waiver and consent form concerning the test.37 After the completion of the examination, and without new Miranda warnings, the examiner, an FBI agent, informed Jackson that his an-

25. Id. at 156. Fields' conviction was upheld on appeal. State v. Fields, 538 S.W.2d 348, 351 (Mo. Ct. App. 1976). After three unsuccessful attempts to get his conviction set aside in state courts, Fields filed for habeas corpus relief in federal district court. The lower court denied relief, which Fields appealed to the Eighth Circuit. 682 F.2d at 156.
27. Id. Elk's counsel was not present during the polygraph examination. Id.
28. Id.
29. Id.
30. Id. The government conceded that Elk was not given an additional Miranda warning after the completion of the examination. Id.
31. Id. At trial, Elk testified that it was another person who hit the deceased. Id.
32. Id. at 168.
33. United States v. Jackson, 690 F.2d 147, 148 (8th Cir. 1982).
34. Id.
35. Id. at 148-49.
36. Id. at 149.
37. Id. The consent form advised Jackson that he could refuse to take the test, stop the test at anytime, and could refuse to answer any questions. Id. at 149 n.6.
answers were deceptive and that he should tell the truth.\textsuperscript{38} Jackson then made highly incriminating statements.\textsuperscript{39} Jackson's motion to suppress was denied and he was convicted of involuntary manslaughter.\textsuperscript{40}

The court's opinion in \textit{Fields}, which \textit{Jackson} and \textit{Elk} exclusively relied upon,\textsuperscript{41} concluded that Fields did not knowingly and intelligently waive his constitutional right to have counsel present at the post-polygraph interrogation.\textsuperscript{42} The decision was based on the fact that Fields had not been readvised of his \textit{Miranda} rights following completion of the polygraph examination and prior to the post-examination interrogation.\textsuperscript{43} Despite the fact that Fields had been fully advised of his \textit{Miranda} rights prior to taking the polygraph examination and had agreed to waive them, the court held that this waiver did not encompass the post-examination interrogation. The court determined that Fields consented to answer only the polygraph inquiries, and that both he and his attorney expected to be informed of the results prior to allowing subsequent interrogation.\textsuperscript{44}

The facts in \textit{Fields}, \textit{Elk} and \textit{Jackson} are almost identical. The only difference between the three cases is that in \textit{Jackson} the defendant had not retained counsel or consulted with an attorney prior to taking the polygraph examination.\textsuperscript{45} Nevertheless, the court in \textit{Jackson}, as well as in \textit{Fields} and \textit{Elk}, concluded that the defendant did not make a knowing and intelligent waiver of his rights because he was not readvised of his \textit{Miranda} rights before the subsequent interrogation.\textsuperscript{46}

Judge Ross, dissenting in \textit{Fields}, disagreed with the court's opinion.\textsuperscript{47} In looking at the totality of the circumstances, Judge Ross concluded that Fields did make a knowing and intelligent

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\bibitem{38} \textit{Id.} at 149.
\bibitem{39} \textit{Id.} Jackson's incriminating statements were to the effect that he had heard a bump when he was driving his car and when he got out, two women were on the ground. At trial, Jackson maintained he could not remember anything concerning the deaths. \textit{Id.} at 148-49.
\bibitem{40} \textit{Id.}
\bibitem{41} \textit{See Jackson, 690 F.2d at 149-50, Elk, 682 F.2d at 170.}
\bibitem{42} 682 F.2d at 157-58.
\bibitem{43} \textit{Id.} at 160-61. The subsequent decisions in \textit{Jackson} and \textit{Elk} made it clear that in the absence of additional \textit{Miranda} warnings following the completion of the polygraph examinations, but prior to further interrogation, the defendant's incriminating statements were to be viewed as not a knowing and intelligent waiver of their constitutional rights. \textit{Jackson, 690 F.2d at 150, Elk, 682 F.2d at 170.}
\bibitem{44} 682 F.2d at 160-61.
\bibitem{45} The \textit{Jackson} opinion does not mention this distinction. See 690 F.2d at 148-49.
\bibitem{46} \textit{See} notes 41-44 and accompanying text \textit{supra}.
\bibitem{47} \textit{Id.} at 162 (Ross, J., dissenting).
\end{thebibliography}
waiver of his constitutional rights at the post-polygraph interrogation. Also, Judge Ross argued in his specially concurring opinion in Elk that the Fields decision had created a per se rule and that the court's inquiry was no longer directed at the totality of the circumstances.

In the end, Judge Ross' position prevailed when the Supreme Court summarily reversed Fields. In a per curiam opinion, the Court was in complete agreement with Judge Ross. In looking at the totality of the circumstances, the Court concluded that Fields had knowingly and intelligently waived his constitutional rights at the post-polygraph interrogation.

BACKGROUND

Generally, once a suspect has been given an initial warning, there is no requirement that the suspect be readvised of constitutional rights prior to every subsequent interrogation. However, an initial Miranda warning will not be given eternal efficacy either. There is no per se rule as to when the accused must be readvised of constitutional rights. Instead, the ultimate question in each case is: "Did the defendant, with full knowledge of his legal rights, knowingly and intelligently relinquish them?" In answering this question, the United States Supreme Court, in North Carolina v. Butler, stated that this is a matter which depends in

48. Id.
49. 682 F.2d at 170-71 (Ross, J., specially concurring). The only reason Judge Ross concurred in the opinion is that he was convinced that Fields mandated such a result. However, Judge Ross was still adamant that Fields was wrongly decided. Id. at 170.
51. Compare 103 S. Ct. at 394-97 with 682 F.2d at 162-64 (Ross, J., dissenting).
52. 103 S. Ct. at 395-97. Justice Stevens filed a separate concurring opinion and Justice Marshall filed a dissenting opinion. Id. at 397.
55. Miller v. United States, 396 F.2d 492, 496 (8th Cir. 1968) cert. denied, 393 U.S. 1031 (1969). See also State v. Tatum, 621 S.W.2d 82, 85 (Mo. Ct. App. 1981) (posing the question as: "Did defendant at the time of responding to the officer's inquiry in fact knowingly, voluntarily and intelligently waive the rights delineated in Miranda?") (quoting State v. Brown, 601 S.W.2d 311, 313 (Mo. Ct. App. 1980)).
each case upon "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."57 In other words, courts must look at the totality of the circumstances.58

In examining the totality of the circumstances to determine if the defendant made a knowing and intelligent waiver, courts attach importance to whether the defendant was readvised of constitutional rights prior to the subsequent interrogation.59 In deciding whether the suspect should have been readvised of constitutional rights, courts pay primary attention to the time span between the initial warning and the subsequent interrogation.60 Courts also consider whether the suspect has given a valid waiver at an earlier session,61 whether the suspect was at least asked if he or she remembered the warnings from a previous session62 and whether

57. Id. at 374-75 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
58. In Butler, the suspect refused to sign the FBI's standard written waiver form, saying "I will talk to you but I am not signing any form." 441 U.S. at 371. The suspect then made inculpatory statements which the trial court ruled admissible. The North Carolina Supreme Court reversed, and ordered a new trial on the grounds that the suspect had not explicitly waived his rights. The United States Supreme Court reversed, holding that Miranda does not require an express oral or written waiver. Id. at 371-73. Instead, the Court decided that an examination of the totality of the circumstances is the inquiry to determine if the suspect knowingly and intelligently waived constitutional rights. The Court stated that the standard for determining waiver had always depended upon weighing the circumstances surrounding the interrogation. Id. at 374-75. See also, Note, Totality of Circumstances: A Guideline for Waiver of Miranda Rights?, 51 U. Colo. L. Rev. 247 (1980) (discussing Butler).
59. See notes 60-63 and accompanying text infra.
60. See, e.g., United States v. Paulton, 540 F.2d 886, 891 (8th Cir. 1976) (no additional warnings required where only a short period of time elapsed); Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968) (no additional warnings required where only three days elapsed); Johnson v. State, 324 So. 2d 298, 302 (Ala. Crim. App. 1975) (no additional warnings required where defendant warned three or four days earlier); State v. Tatum, 621 S.W.2d 82, 85 (Mo. Ct. App. 1981) (no additional warnings required where defendant was advised two days earlier); State v. Gallagher, 36 Ohio App. 2d 29, —, 301 N.E.2d 888, 890-91 (1973) (no additional warnings required where defendant advised 11 days earlier); Ex parte Bagley, 509 S.W.2d 332, 338 (Tex. Crim. App. 1974) (no additional warnings required where only eight hours elapsed); State v. Blanchey, 75 Wash. 2d 926, —, 454 P.2d 841, 845 (1969) (no additional warnings required where only four days elapsed), cert. denied, 396 U.S. 1045 (1970).
61. See United States v. Taylor, 461 F. Supp. 210, 213-14 (S.D.N.Y. 1978) (defendant who had already been advised of rights and waived them did not have to be rewarned prior to subsequent interrogation); People v. Dent, 13 Ill. App. 2d 157, —, 266 N.E.2d 501, 504 (1970) (where defendant was fully advised of rights and had waived them prior to a lineup, there was no requirement to rewarn defendant at subsequent interrogation following the lineup). See also United States v. Anthony, 474 F.2d 770, 773 (5th Cir. 1973) (dictum) (defendant had previously waived his Miranda rights; thus no requirement to rewarn defendant of constitutional rights at subsequent interrogation).
62. See United States v. Standing Soldier, 538 F.2d 196, 199-201 (8th Cir. 1976)
the same interrogator conducted the subsequent interrogation. 63

Also of importance in determining if a suspect knowingly and intelligently waived constitutional rights at a subsequent interrogation is whether the suspect had previously asked for or retained counsel.64 In Edwards v. Arizona,65 the Supreme Court held that once a suspect invokes the right to counsel, the suspect cannot be subjected to any subsequent interrogation unless counsel is present.66 However, if the suspect initiates dialogue with the authorities, this prohibition is inapplicable.67 If the suspect initiates the dialogue and the authorities say or do something that constitutes interrogation, the analysis returns to whether there was a knowing and intelligent waiver under the totality of the circumstances.68

The Polygraph-Miranda Cases

There are a handful of decisions that have addressed the issue of whether a defendant should be readvised of constitutional rights following the completion of a consensual polygraph examination. In two cases, United States v. Little Bear69 and Keiper v. Cupp,70 the courts specifically rejected the argument that the defendant should be readvised of constitutional rights.71 In another case, Henry v. Dees,72 the court accepted the argument that the defendant should be readvised of constitutional rights, but the Henry court primarily relied upon the fact that the defendant was mentally retarded.73

In Little Bear, the defendant, under investigation for the death
of her husband, agreed to take a polygraph test. Prior to the test, she was advised of her rights and signed waiver and consent forms. During the test, the examiner asked if she had killed her husband. Little Bear responded that she had and that she wanted to discuss it. The testing procedure was terminated, and further questioning resulted in a signed confession. The Eighth Circuit determined that Little Bear had voluntarily confessed and knowingly and intelligently waived her constitutional rights even though she was not readvised of her rights prior to the post-polygraph interrogation. However, the court did note a concern for the coercive effect of polygraph examinations.

In Keiper, the defendant was under arrest for the drowning death of his fiancée. Keiper had been given Miranda warnings on several occasions prior to and immediately before undergoing a polygraph examination. Keiper had also signed a consent and waiver of rights form. Upon completion of the test, the defendant was informed he was being deceptive. At this time, Keiper became emotionally upset and made highly incriminating statements. The Ninth Circuit, in reviewing the totality of the circumstances, upheld the defendant's statements as voluntary, specifically rejecting any notion that the waiver only applied to the polygraph test and that the defendant should have been given another set of Miranda warnings after the polygraph test was completed.

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74. 583 F.2d at 412.
75. Id.
76. Id. at 412-13.
77. Id. at 413.
78. Id. Little Bear was not rewarned of her Miranda rights following the test.
79. Id. at 413-14.
80. Id. at 414. The court stated:

Although we are satisfied with the district court's decision in the circumstances of this case, we must add a caveat concerning police questioning in a polygraph situation. Owing to the often coercive impact of a lie detector test, full instructions of the suspect's rights should be furnished whenever such examinations are administered to persons under criminal investigation.

81. 509 F.2d at 239.
82. Id. at 239-40.
83. Id. at 241.
84. Id. at 240.
85. Id.
86. Id. at 241. The reasoning in Keiper and Little Bear has been followed in state courts as well. See People v. Barreto, 256 Cal. App. 2d 392, —, 64 Cal. Rptr. 211, 220 (1967) (where lie detector taken willingly, the fact defendant was told by the examiner the test revealed that defendant was not telling the truth does not demonstrate coercion; thus confession made thereafter was voluntary); State v. Henry, 352
Finally, in *Henry*, the Fifth Circuit held that the defendant's waiver of his constitutional rights to remain silent and have counsel present during a polygraph examination did not extend to questions asked by the polygraph examiner after the examination.\(^8\) Henry, a mentally retarded defendant, with his counsel present, had signed a written consent form waiving his constitutional rights with respect to the polygraph test.\(^8\) After the examiner had completed the first round of questions, the examiner informed Henry that he was being deceptive.\(^9\) Henry then made incriminating statements.\(^9\) The court, in looking at the totality of the circumstances, found that Henry was subjected to interrogation following the completion of the polygraph examination without the benefit of being readvised of his constitutional rights.\(^9\) The court found it significant that Henry had limited mental ability.\(^9\) Under these circumstances, the court concluded Henry did not knowingly and intelligently waive his constitutional rights at the post-polygraph interrogation.\(^9\)

**ANALYSIS**

There is no doubt that the Supreme Court's summary reversal of *Fields* also decided the fate of *Elk* and *Jackson*. The Court applied a totality of the circumstances test, something which it felt the Eighth Circuit did not do.\(^9\) In looking at the totality of the circumstances, the Court noted that Fields had waived his rights prior to the polygraph examination and was told that he had the right to cut off the questioning at any time.\(^9\) The Court also felt it would have been unreasonable for Fields to assume that he would not be questioned as to any unfavorable results that the polygraph registered.\(^9\) The Court also rejected the notion that polygraph ex-

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\(^8\) Henry v. Dees, 658 F.2d 406, 408 (5th Cir. 1981). See notes 87-93 and accompanying text infra.

\(^8\) See *Henry*, 658 F.2d at 410.

\(^8\) Id. at 408.

\(^9\) Id. at 409.

\(^9\) Id. at 408-09.

\(^9\) Id. at 409-11.

\(^9\) Id. at 411.

\(^9\) Id.

\(^9\) Id. at 410.

\(^9\) Id. at 408.

\(^9\) Id. at 409.

\(^9\) Id. at 408-09.

\(^9\) Id. at 409-11.

\(^9\) Id. at 411.

\(^9\) Id.

\(^9\) Id. at 396.

\(^9\) Id. Justice Marshall, in dissenting, disagreed that the defendant necessarily had agreed to undergo post-polygraph questioning. Justice Marshall pointed out that a polygraph examination is a discrete test and an individual who agrees to
aminations are inherently coercive. Further, the Court explained away the Eighth Circuit's decision in *Fields* as a misinterpretation of *Edwards v. Arizona*. The Court concluded by characterizing the requirement to readvise defendants of their constitutional rights prior to post-polygraph interrogations as illogical and an unreasonable restriction on police questioning.

The Supreme Court's analysis of *Fields*, however, seems somewhat misguided. The Eighth Circuit did not misinterpret *Edwards*, nor did it fail to apply a totality of the circumstances test. The Eighth Circuit's opinion in *Fields* clearly noted that the defendant and his counsel had initiated further dialogue with the authorities and the inquiry, then, returned to whether Fields knowingly and intelligently waived his rights under the totality of the circumstances.

In each case, the Eighth Circuit relied on two factors in examining the surrounding circumstances. The first factor was that the defendants had only agreed to waive their rights with respect to the polygraph test itself. The second factor was that polygraph examinations have a coercive affect on individuals, often leading to confessions. From these facts, the court concluded that the defendants could not have knowingly and intelligently waived their constitutional rights without being readvised of those rights following the completion of the polygraph examination, but prior to the post-polygraph interrogation.

Requiring readvisement of constitutional rights is hardly an illogical or unreasonable restriction on police questioning, as the Supreme Court characterized it to be. Courts have never set a per

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97. Id. at 396-97.
98. Id. at 397.
99. Id.
100. 682 F.2d at 158.
101. Id. at 160. As the court in *Fields* stated: "There is . . . no evidence that Fields . . . anticipated that the CID officer would attempt to elicit incriminating statements from Fields after the examination was run." Id. (emphasis added).
102. Id. at 159. The court cited D. Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector* (1981). In this text, several relevant observations are made. The author notes that, for example, the Los Angeles Police Department maintains a polygraph laboratory. The examiners from this lab estimate that they obtain confessions from around 25% of the suspects examined. More precisely, of all the suspects examined, about 60% are diagnosed as deceptive and about 40% of that 60% produce confessions. Id. at 208. In summing up, the author states that "polygraphic interrogation in the hands of a skillful examiner is . . . an effective inducer of confessions. Its confessionary influence may be most effective with the naive and gullible or, among criminals, the less experienced, less hardened types." Id. at 214.
103. See note 43 and accompanying text supra.
se rule as to when a defendant should be readvised. Instead, courts focus on all of the surrounding circumstances. Even though the Eighth Circuit did not focus on the usual factors, such as the time span between warning and questioning, the court did find factors from the surrounding circumstances sufficient to require the defendants to be given an additional warning of their constitutional rights. As mentioned, these factors were that the defendants only waived their rights with respect to the polygraph test itself and the coercive nature of polygraph examinations. It can hardly be said that the Eighth Circuit was illogical in making these factual determinations.

Even though the Eighth Circuit's opinion in Fields was reversed, and other courts seem to differ in this area, the Eighth Circuit in Fields, Elk and Jackson applied the correct analysis by examining the totality of the circumstances. The court's reasoning for holding that there was not a knowing and intelligent waiver at the post-polygraph examination seems justified by the factual findings it found significant.

CONCLUSION

The Eighth Circuit applied a totality of the circumstances test to conclude that the defendants' statements made during a post-polygraph interrogation were not a knowing and intelligent waiver of their constitutional rights as set out in Miranda. The Eighth Circuit stated that the defendants should have been readvised of their constitutional rights prior to the post-polygraph interrogation. Even though the decisions were effectively reversed by the Supreme Court, the Eighth Circuit applied the correct approach and its decisions were justified by the findings of fact the court found significant.

GOVERNMENTAL SEARCHES FOLLOWING PRIVATE SEARCHES

INTRODUCTION

The United States Constitution protects individuals from unreasonable searches and seizures. All searches and seizures

104. See notes 53-58 and accompanying text supra.
105. Fields, 682 F.2d at 157-61. For the usual factors considered by the courts see notes 60-63 and accompanying text supra.
106. 682 F.2d at 159-60.
107. Id.
108. See notes 69-99 and accompanying text supra.
109. U.S. Const. amend. IV. This amendment provides:
conducted without a warrant are per se unreasonable unless one of the exceptions to the warrant requirement exists. When evidence is obtained through an unreasonable search and seizure, the "exclusionary rule" will apply; that is, the prosecution may not introduce the illegally obtained evidence at the defendant's trial. However, the fourth amendment's proscription against unreasonable searches and seizures has been judicially limited to apply only to governmental conduct. Thus, when a private individual conducts an illegal search, seizes evidence and turns over the fruits of that search to government officials, there is no fourth amendment violation upon which to exclude the evidence.

When the authorities are called to the scene of a private search, however, they are limited to the scope of the private

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.

Id.


111. The Supreme Court over the past several decades has created six exceptions to the warrant requirement. They are: (1) searches incident to arrest; (2) automobile searches; (3) hot pursuit searches; (4) consent searches; (5) stop and frisk searches; and (6) plain view searches. See C. WHITBREAD, CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 4.03(c), at 108 (1980).

112. In Weeks v. United States, 232 U.S. 383 (1914), the Court held that articles seized through an unlawful search and seizure of defendant's home by federal officers could not be used against the defendant. Id. at 388. This rule of exclusion was held applicable to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961).

113. Burdeau v. McDowell, 256 U.S. 465, 475 (1921). In Burdeau, the petitioner sought the return of certain books, papers, and other materials seized from his office by private detectives because this evidence was going to be used against him in a grand jury hearing charging McDowell with the fraudulent use of the mails. To this issue the Supreme Court stated:

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its 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; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Id.

114. Id. at 476. To this the Burdeau Court added:

The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory nature.

Id.
If the authorities search beyond the scope of the private search, the courts treat this as a "new" or "second" search, and the fourth amendment and the exclusionary rule become applicable. It is not always clear whether the authorities exceeded the scope of the private search. The Eighth Circuit faced this problem in United States v. Jacobsen. The court held that a Drug Enforcement Administration agent exceeded the scope of a private search, which had exposed a bag containing white powder, by extracting a sample of the powder and conducting a field analysis on the substance.

FACTS AND HOLDING

A supervisor for a private carrier, Federal Express, discovered a damaged package. In accordance with company policy, a manager conducted a search of the package. The search uncovered a tube of duct tape; inside the tube were four plastic bags, one inside the other, with the innermost bag containing white powder. Suspecting the powder was cocaine, Federal Express notified the Drug Enforcement Administration (DEA). When a DEA agent arrived, the manager handed over the damaged package containing the white powder. The agent proceeded to remove the tube from the package and the plastic bags out of the tube. The agent next extracted a sample of the white powder from the plastic bags to conduct a field analysis, which revealed that the powder was cocaine. Before having the package rewrapped, the agent removed another sample of the powder for future testing.

The package was addressed to a Mr. D. Jacobs. Upon further investigation, DEA agents discovered that Bradley Jacobsen was living at the address on the package, and was mentioned in two other investigations for cocaine distribution. On the basis of this information and the field test results, a search warrant was issued for Jacobsen's home. On May 1, 1981, a DEA agent delivered the package to the Jacobsen home. Mr. Jacobsen's wife accepted delivery. Within the hour, several DEA agents appeared with the search warrant and knocked on the door. This time Mr. Jacobsen answered. When the agents identified themselves, Mr.

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115. See notes 116-34 and accompanying text infra. However, an exception exists where the private individual has authority to consent to the search. See United States v. Matlock, 415 U.S. 164, 167-68 (1974) and note 125 infra.
116. See notes 128-50 and accompanying text infra.
117. 683 F.2d 296 (8th Cir. 1982).
118. Id. at 297.
119. Id.
120. Id. at 297-98.
Jacobsen slammed the door, knocking one agent to the ground. The agents forced open the door and conducted a search of the home, finding cocaine traces, cocaine paraphernalia and burned remnants of the package. The Jacobsens were arrested.

At trial, this evidence was introduced over the defendant's objection that the evidence obtained at their home was the fruit of an illegal search of the package. The Jacobsens were both convicted of possession with intent to distribute cocaine and conspiracy to distribute cocaine.\textsuperscript{1}

The Eighth Circuit held that the first DEA agent went beyond the scope of the private search by extracting a sample of the powder and conducting a field analysis.\textsuperscript{1} Since the government did not allege any of the exceptions to the warrant requirement, the court concluded that the DEA was required to obtain a search warrant before extracting the sample and conducting the field analysis.\textsuperscript{1} Without the results of the field analysis, the court held that there was no probable cause to issue the search warrant, therefore, the fruits of the search of the home also should have been excluded.\textsuperscript{1}

**BACKGROUND**

In a case involving a search by private individuals who notify the authorities and the authorities seize the evidence found by the private individuals and either engage in further searches or examine or analyze the fruits of the private search, the applicability of the fourth amendment requires three separate inquiries: (1) did the private individuals have the authority to consent to the search on behalf of the accused; (2) were the private individuals acting as agents of the government in conducting the search; and (3) if the initial search was truly private, did the authorities exceed the scope of the private search so as to engage in a new or second search in which the fourth amendment and exclusionary rule would apply? If the private individuals had the authority to consent to the search, then there would be no fourth amendment concern.\textsuperscript{1} However, if the private individuals were acting as agents

\textsuperscript{121} Id. at 298.
\textsuperscript{122} Id. Mr. Jacobsen was also convicted of assaulting a federal officer. Id.
\textsuperscript{123} Id. at 299.
\textsuperscript{124} Id. at 299-300.
\textsuperscript{125} Id. at 300. Under the doctrine of the "fruit of the poisonous tree," the court was correct in suppressing the evidence seized at the home. In general, the rule states that evidence derived from information acquired by government officials through unlawful means is not admissible in a criminal prosecution. See Wong Sun v. United States, 371 U.S. 471, 484-88 (1962).
\textsuperscript{126} See, e.g., United States v. Matlock, 415 U.S. 164, 167-68 (1974). In Matlock, a
of the government, or if there was some degree of governmental involvement, knowledge or acquiescence in the private search, the fourth amendment and the exclusionary rule would apply. This article focuses exclusively on the third inquiry: did the authorities exceed the scope of a truly private search, thus engaging in a new or second search in which the fourth amendment and exclusionary rule would apply.

As to this inquiry, the court in United States v. Bomengo stated that "we have long recognized that a police view subsequent to a search conducted by private citizens does not constitute a 'search' within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search." Thus, as long as the government does not exceed the scope of the private search, so as not to constitute a new or additional search, there will be no fourth amendment inquiry.

In Walter v. United States, the Supreme Court addressed this issue for the first time. In Walter, a private carrier delivered a number of sealed packages to the wrong company. Employees of the company opened the sealed packages and discovered boxes of films. On the boxes were a number of suggestive drawings and explicit descriptions of the film's contents. One employee opened some of the boxes and, without success, attempted to view...
portions of the films by holding them up to the light. The employees called the FBI, which later took possession of the films. Sometime later, FBI agents, without any effort to obtain a search warrant, viewed the films with a projector. Thereafter, the petitioners were indicted on obscenity charges.

The Supreme Court ruled that the unauthorized viewing of the films constituted an unreasonable invasion of the defendant's constitutionally protected privacy interest. Justice Stevens, writing for the plurality, pointed out that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties" because a private individual is not governed by the fourth amendment's prohibition against unreasonable searches and seizures. However, "an officer's authority to possess a package is distinct from his authority to examine its contents." Justice Stevens' opinion goes on to say that if the results of the private search are in plain view when the fruits of the search are turned over to the authorities, the government may examine the materials, but "the Government may not exceed the scope of the private search unless it has the right to make an independent search." Justice Stevens' opinion viewed the screening of the film as an expansion of the private search because the private parties had not screened the film and because, prior to the screening, "one could only draw inferences about what was on the films." The opinion also noted that just because the drawings and the writings on the boxes containing the films could establish probable cause to believe that the films were obscene, this fact alone did not excuse the failure to obtain a search warrant. "[I]f

135. Id.
136. Id.
137. Id.
138. Id.
139. Id. at 654 (Stevens, J., plurality opinion).
140. Id. at 656.
141. Id. at 654. See Ex parte Jackson, 96 U.S. 727, 733 (1877) (establishing that sealed packages in the mail cannot be opened by government officials without complying with the fourth amendment).
142. 447 U.S. at 657.
143. Id. at 651. Justice Stevens specifically did not decide whether the government would have been required to obtain a warrant had the employees actually screened the films first. Id. at 657 n.9. However, Justice White, in a concurring opinion joined by Justice Brennan, noted that even if the employees had screened the films before turning them over to the FBI, the authorities still would have been required to obtain a warrant prior to projecting the films. Id. at 662 (White, J., concurring).
144. Id. at 657.
145. Id. at 657-58 n.10.
probable cause dispensed with the necessity of a warrant, one would never be needed.\textsuperscript{146}

Finally, the opinion rejected the government's argument that the private search which exposed the boxes of films frustrated all reasonable expectations of privacy by the owner, and that the projecting of the films did not violate any privacy interest protected by the fourth amendment.\textsuperscript{147} The opinion pointed out that the private search only frustrated the owner's privacy expectation in part. "It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection."\textsuperscript{148} Thus, the screening of the films by the FBI agents exceeded the scope of the private search, thereby invoking fourth amendment analysis.\textsuperscript{149} Since the FBI had not obtained a search warrant and there were no exigent circumstances to justify the warrantless search, the screenings violated the fourth amendment's proscription against unreasonable searches and seizures, and the evidence was excluded.\textsuperscript{150}

Only a few courts have answered the question of whether law enforcement officials exceed the scope of a private search when they extract a sample to conduct a field analysis on a substance discovered by a private search. Almost all courts that have addressed this issue have answered this question in the negative.

In two pre-Walter decisions, \textit{United States v. Ford}\textsuperscript{151} and \textit{State v. Stump},\textsuperscript{152} the courts held that law enforcement agents did not undertake a new or additional search, proscribed by the fourth amendment, when the agents extracted samples to conduct field analyses of a substance discovered by a private search. In \textit{Ford},

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.} at 658. If there is no expectation of privacy in the items searched or seized, then, the fourth amendment is not applicable. \textit{Katz v. United States}, 389 U.S. 347, 351-53 (1967); \textit{C. WHITEBREAD, supra} note 110, § 4.02, at 85.

\textsuperscript{148} 447 U.S. at 659.

\textsuperscript{149} \textit{Id.} at 657-58.

\textsuperscript{150} \textit{Id.} at 659. Two other cases have also dealt with private searches of packages containing obscene material. \textit{Compare United States v. Sherwin}, 539 F.2d 1, 8 (9th Cir. 1976) (holding that there was no seizure when a private individual voluntarily turned over to authorities obscene books discovered in private search) \textit{with United States v. Kelly}, 529 F.2d 1365, 1372 (8th Cir. 1976) (holding that government must obtain a search warrant before seizing obscene books and magazines even though private individual discovered them). Under \textit{Walter}, it is clear that the authorities can seize material in plain view discovered by a private search, but cannot exceed the scope of the private search. See notes 131-50 and accompanying text \textit{supra}. Thus, \textit{Sherwin} would seem more in line with \textit{Walter}. \textit{Sherwin} did not decide whether the authorities exceeded the scope of the private search by examining the contents of the books.

\textsuperscript{151} 525 F.2d 1308 (10th Cir. 1975).

\textsuperscript{152} 547 P.2d 305 (Alaska 1976).
an airline employee opened a shoe box after becoming suspicious of the woman sending the package. Upon opening the package, the agent discovered eight prophylactics containing a powdered substance. Local police officers were called and upon their arrival were shown the contents of the package. One of the officers conducted an on-the-spot field test that revealed that the powder was heroin. On appeal, the Tenth Circuit held that this did not constitute a new or different search.

In *Stump*, the court, facing almost identical facts, also concluded that the police officers did nothing that exceeded the initial search by the private individual.

Two post-*Walter* decisions have also reached this same conclusion. In fact, in *United States v. Barry*, the Sixth Circuit held that *Walter* was not even applicable because *Walter* involved material covered by the first amendment. Finally, in *People v. Adler*, the New York court, in a footnote, dispensed with the argument that the contraband discovered by a private search and subjected to a field analysis by law enforcement officials exceeded the scope of the initial private search.

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153. 525 F.2d at 1309.
154. Id.
155. Id. at 1309-10.
156. Id. at 1310.
157. Id. at 1312.
158. 547 P.2d at 306. In fact, the only real difference between the two cases is that in *Stump*, the substance was cocaine. Id.
159. Id. at 307-08.
160. 673 F.2d 912 (6th Cir. 1982).
161. Id. at 920. The court reasoned that the government's testing of five pills discovered in a bottle by a private search was not on the same scale as the investigation in *Walter*. Id. In a dissent, Chief Judge Edwards argued that *Walter* was indeed applicable and that a search warrant should have been procured prior to conducting the testing on the pills taken from the bottle discovered by the private search. Id. (Edwards, C.J., dissenting).
163. Id. at —, 409 N.E.2d at 891 n.4, 431 N.Y.S.2d at 416 n.4. The footnote reads:

That the drugs were subjected to laboratory analysis does not alter the nature of the seizure. The drugs, the nature of which was reasonably self-evident, were already lawfully in the possession of the police. Unless we are prepared to hold that there is a reasonably and justifiable expectation of privacy in the contents of a pill capsule, it cannot be said that an intrusion into privacy interests was effected by scientifically examining the drugs. Indeed, to read *Walter* to require a warrant at this point would result in a mandate that the police obtain a warrant whenever legally seized drugs are to be subjected to analysis. We do not read *Walter*, involving as it did First Amendment considerations and a general exploratory viewing of films contained within separate sealed boxes, as compelling that result.

Id.
ANALYSIS

The Eighth Circuit relied on Walter in holding that the DEA agent exceeded the scope of the private search by extracting a sample of the white powder and conducting a field analysis on the substance. First, the court noted that there was no dispute that the initial discovery of the powder by the Federal Express employee was a truly private search. The court next pointed out the parallels between Walter and Jacobsen. First, the initial exposure of the powder only frustrated the Jacobsens' privacy expectation in part. Second, the DEA agent could only infer that the powder was in fact a controlled substance. Third, the government had to go beyond the private search to discover the true composition of the powder. On the basis of these parallels, the court concluded that the government action in taking the sample and conducting a field analysis represented a significant extension of the private search. In the absence of exigent circumstances, which the government did not allege, the agents were required to obtain a search warrant authorizing the taking and analysis of the samples of the powder.

The Eighth Circuit also rejected the approaches taken in United States v. Barry and People v. Adler. The court reasoned, first, that Walter rested on fourth amendment grounds, not on first amendment grounds as Barry claimed. Second, the Eighth Circuit felt that the Adler decision erroneously allowed a finding of probable cause to eliminate the warrant requirement. Even though the Eighth Circuit stands alone, the court applied a correct analysis of Walter to the facts of Jacobsen and reached the correct decision.

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164. 683 F.2d at 299-300.
165. Id. at 298-99.
166. Id. at 299.
167. Id.
168. Id.
169. Id.
170. Id. at 299-300.
171. Id. at 300 n.4. See also, notes 160-63 and accompanying text supra.
172. 683 F.2d at 300 n.4.
173. Id.