

JUDGE BRETT M. KAVANAUGH
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SUPPLEMENTAL APPENDIX 16(E)
SUPREME COURT AND APPELLATE COURT
FILINGS

1341694

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE GENERAL MOTORS CORPORATION,

Petitioner.

No. 00-3835 WMJ

(Petition for Writ of Mandamus)

TAMMY SMITH, by and through
Her Guardian, Mike Smith,

Plaintiff-Appellee,

vs.

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

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U. S. COURT OF APPEALS
EIGHTH CIRCUIT
No. 00-_____

(Appeal Under 28 U.S.C. § 1291
— Notice of Appeal Filed on
November 22, 2000)

TAMMY SMITH, by and through
Her Guardian, Mike Smith,

Plaintiff-Respondent,

vs.

GENERAL MOTORS CORPORATION,

Defendant-Petitioner.

No. 00-8023 WMJ

(Petition for Permission to Appeal
Under 28 U.S.C. § 1292(b))

**GENERAL MOTORS CORPORATION'S REPLY ON PETITION FOR PERMISSION
TO APPEAL UNDER 28 U.S.C. 1292(b), MEMORANDUM IN SUPPORT OF
APPELLATE JURISDICTION, AND PETITION FOR WRIT OF MANDAMUS**

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Plaintiff Tammi Smith's motion to dismiss the petition for permission to appeal for lack of jurisdiction is entirely unfounded. This Court's precedents clearly establish that this Court has jurisdiction to accept the certified question under 28 U.S.C. § 1292(b). See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 399-400 (8th Cir. 1987); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 278 (8th Cir. 1984). The only question is whether this Court should exercise its discretion to do so. This Court's precedents – both in the § 1292(b) context and in the context of mandamus petitions – make clear that attorney-client privilege and work product protection claims such as those raised by General Motors Corporation (“GM”) in this case are worthy of this Court's immediate review. (See General Motors Corporation's Petition for Permission to Appeal Under 28 U.S.C. § 1292(b), Memorandum in Support of Appellate Jurisdiction, and Petition for Writ of Mandamus (“GM's Pet.”) at 7-9.) Indeed, in the absence of some form of immediate review, GM will face irreparable harm and will effectively be denied appellate review altogether because once the documents at issue are produced, the privilege cannot later be restored. The district court therefore correctly certified the privilege issue for interlocutory appeal under § 1292(b).

As explained in GM's petition, this Court has appellate jurisdiction under the collateral order doctrine even if it declines to permit an appeal under § 1292(b). GM respectfully submits, however, that § 1292(b) appellate review is

the more appropriate means of appellate review because it will allow the Court to proceed to the merits of GM's appeal without the need to address further the jurisdictional question.

Finally, in the alternative, the Court should issue a writ of mandamus. Plaintiff nowhere disputes that the harm from an erroneous privilege ruling would be irreparable and that GM's privilege claims cannot be protected by an appeal after final judgment. Instead, plaintiff attempts to characterize GM's mandamus petition as involving an ordinary discovery dispute. This Court's recent precedents, however, make clear that mandamus is an appropriate vehicle for review of privilege claims. See, e.g., In re General Motors, 153 F.3d 714, 715 (8th Cir. 1998); In re Bieter Co., 16 F.3d 929, 931-32 (8th Cir. 1994). A writ of mandamus should issue in this case because the district court committed clear error in ordering GM to produce documents that fall squarely within the attorney-client privilege and work product protection.

I. THIS COURT HAS JURISDICTION TO REVIEW GM'S IMPORTANT PRIVILEGE CLAIMS UNDER 28 U.S.C. § 1292(b).

Contrary to Plaintiff's contention, the district court correctly concluded that the requirements of § 1292(b) have been met. First, the privilege issue certified by the district court involves a "controlling question of law." Plaintiff's argument that the certified question instead involves merely a "matter of discretion for the

trial court” is based upon Plaintiff’s mischaracterization of the certified question as being a mere discovery dispute. It is not. Instead, the district court certified the important legal question whether the Category 18 documents are protected by the attorney-client privilege and work product doctrine. This Court, like many of its sister circuits, has held that such privilege issues are controlling questions of law under § 1292(b). See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 399-400 (8th Cir. 1987); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 278 (8th Cir. 1984); GM’s Pet. at 7-8 (citing cases from other circuits).

Second, the fact that another federal district court in Missouri (as well as many courts across the country) has found these very same documents to be privileged confirms Magistrate Judge England’s conclusion below that there is, at the very least, substantial ground for disagreement with his privilege ruling in this case. See J.B. Hunt Transport, Inc. v. General Motors Corp., No. 4:98CV252 (E.D. Mo. Oct. 1, 1998) (attached to GM’s Pet. at Add. 14-15). Plaintiff’s suggestion that Judge Perry’s opinion in J.B. Hunt Transport regarding these very same documents “cannot be used as support for the argument that there is substantial ground for disagreement” because of the brevity of her written opinion (Pl.’s Mot. at 3-4), demonstrates unfounded disrespect for Judge Perry, who stated explicitly in her opinion that “[t]he Court heard argument of counsel, has made an in camera review of the General Motors ‘Litigation Study’ and has fully

considered the parties' briefs and evidence, including plaintiffs' letter response received this date." J.B. Hunt Transport (Add. 14). In any event, as explained in GM's petition, the face of the documents themselves makes clear that each of the documents was written by or to a GM attorney for the purpose of providing or obtaining legal advice and, therefore, is protected by the attorney-client privilege.

Third, as this Court has held, immediate appellate review of an important privilege issue may materially advance the ultimate termination of the litigation. See Simon, 816 F.2d at 399-400; Pritchard-Keang Nam Corp., 751 F.2d at 278. Plaintiff's suggestion that "the case must still be tried" regardless of whether the Category 18 documents are produced has no bearing on the § 1292(b) inquiry because "[r]eview under § 1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal." Garner v. Wolfenbarger, 430 F.2d 1093, 1096-97 (5th Cir. 1970). See also 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930, p. 440 (2d ed. 1996) (Review of privilege orders under § 1292(b) "may be rested on the ground that reversal and subsequent denial of production may . . . expedite discovery and trial.").

GM respectfully submits that this Court should exercise its discretion to permit GM to appeal under § 1292(b) because of the undeniable importance of GM's rights to the protections of the attorney-client privilege and work product

doctrine. In the absence of some form of immediate review by this Court, GM will never be able to obtain effective appellate review of its privilege claims.

II. THIS COURT HAS APPELLATE JURISDICTION UNDER THE COLLATERAL ORDER DOCTRINE.

Plaintiffs' brief does not address GM's argument that this Court has jurisdiction under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). It bears noting, however, that while denials of privilege claims are appealable under the collateral order doctrine, see In re Ford Motor Co., 110 F.3d 954, 957-64 (3d Cir. 1997), Section 1292(b) provides a simpler vehicle for appellate review because it will eliminate any need for further briefing on the jurisdictional question.

III. MANDAMUS IS AN APPROPRIATE REMEDY TO CORRECT THE DISTRICT COURT'S CLEAR ERROR ON THE PRIVILEGE ISSUE.

Plaintiff argues that mandamus is inappropriate because GM raises a mere "discovery dispute." (Pl.'s Mot. at 6.) Far from a run-of-the-mill discovery dispute, GM's petition invokes two protections that are fundamental to our judicial system – the attorney-client privilege and the work product doctrine. Because these important protections cannot be restored by an appeal from final judgment, this Court has repeatedly held that mandamus is an appropriate vehicle for review of attorney-client privilege and work product claims. See, e.g., In re General

Motors, 153 F.3d 714, 715 (8th Cir. 1998); In re Bieter Co., 16 F.3d 929, 931-32 (8th Cir. 1994).

The Magistrate Judge committed clear error in ordering GM to produce the Category 18 documents. Plaintiff's opposition in this Court, like the Magistrate Judge's orders below, focuses almost entirely upon whether the Litigation Study case review documents were "prepared in the regular course of business rather than for the purposes of litigation." (Pl.'s Mot. at 8 (quoting Dist. Ct. Order Aug. 7, 2000).) That overlooks the crucial fact that the Category 18 documents were not part of the Litigation Study case review. A review of the Category 18 documents will make clear that each of the documents was written by or to a GM attorney for the purpose of providing or obtaining legal advice and that the Magistrate Judge therefore committed clear error in denying GM's assertions of the attorney-client privilege and work product protection.

CONCLUSION

For the reasons set forth above and in GM's petition, GM respectfully requests leave to appeal the question certified by the district court under 28 U.S.C. § 1292(b). In the alternative, GM requests that this Court exercise its appellate jurisdiction under the collateral order doctrine. Finally, in the alternative, GM

requests a writ of mandamus ordering the district court to grant GM's requested protective order for the Category 18 documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via overnight mail on December 18, 2000 to: William W. Francis, Jr., Placzek, Francis & Overby, 1722 South Glenstone, Suite J, Springfield, Missouri 65804; and the Honorable James C. England, United States Magistrate Judge, 2200 U.S. Courthouse, 222 N. John Q. Hammons Parkway, Springfield, Missouri 65806.



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

00-3835
FILED

NOV 27 2000

MICHAEL GANS
CLERK OF COURT

IN RE GENERAL MOTORS CORPORATION,)

Petitioner.)

No. 00-_____

(Petition for Writ of Mandamus)

TAMMY SMITH, by and through
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INTRODUCTION

The district court ordered defendant General Motors Corporation ("GM") to produce numerous documents (the "Category 18" documents) that fall squarely within the heart of the attorney-client privilege. Each of the documents in question was written by a GM attorney or to a GM attorney, and each was made for the purpose of providing or obtaining legal services. Moreover, many of the documents were created in anticipation of litigation, and therefore are also protected by the related work product doctrine. The district court plainly erred in rejecting GM's privilege claims, and interlocutory review is necessary to correct the error and prevent irreparable harm to GM.

Although the district court did not sustain GM's privilege claim, the court did recognize (consistent with this Court's numerous precedents) that GM could not receive meaningful appellate review of the district court's privilege order absent immediate interlocutory review by this Court. Therefore, the district court issued an order under 28 U.S.C. § 1292(b) certifying the privilege issue for immediate interlocutory appeal. Pursuant to the requirements of § 1292(b) and Federal Rule of Appellate Procedure 5, GM now formally petitions for appeal and requests that this Court accept the appeal and set a briefing and argument schedule on the merits of the privilege issue. See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 399-400 (8th Cir. 1987) (accepting appeal of privilege issue under §

1292(b)); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 278 (8th Cir. 1984) (same).

As a protective measure, GM also filed a notice of appeal in the district court. In the event that the Court does not accept this appeal under § 1292(b), this Court has appellate jurisdiction over the privilege issue under the collateral order doctrine. See In re Ford Motor Co., 110 F.3d 954, 957-64 (3d Cir. 1997). Therefore, even if the Court does not accept the appeal under § 1292(b), the Court still should set a schedule for briefing and argument (including further briefing of this particular jurisdictional issue, if the Court so requests).

Finally, because this Court has previously found that mandamus proceedings are appropriate when a district court orders production of assertedly privileged documents, GM also petitions for a writ of mandamus. See In re General Motors, 153 F.3d 714, 715 (8th Cir. 1998); In re Bieter Co., 16 F.3d 929, 931-32 (8th Cir. 1994).

While any of these three avenues would suffice to establish this Court's jurisdiction, the clearest procedural path for the Court is (i) to accept the appeal under 28 U.S.C. § 1292(b) and (ii) to set a briefing and argument schedule on the merits of the privilege issue. At a minimum, however, the Court should consolidate GM's § 1292(b) petition, its appeal under the collateral order doctrine, and its mandamus petition and should set the case for full briefing and argument,

as GM has requested in its motion to consolidate filed simultaneously with this brief.

ISSUES PRESENTED

(1) Whether this Court should exercise its discretion to permit an appeal of the following question certified for interlocutory appeal by the district court under 28 U.S.C. § 1292(b):

Whether or not the documents that comprise Category 18 of the June 27, 2000 Litigation Study Privilege Log and also described in the August 18, 2000 Privilege Log entitled, 'Category 18 Non-Litigation Study Case Review Documents' are protected by General Motors' assertion of attorney/client privilege or attorney work product doctrine.

Add. 12; App. 45 (Nov. 15, 2000 Order at 1).

(2) Whether this Court has appellate jurisdiction under the collateral order doctrine over the district court's denial of GM's privilege assertions.

(3) Whether the district court committed clear error in denying GM's privilege claims such that mandamus should issue directing the district court to grant GM's motion for protective order over the Category 18 documents.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a products liability action filed in the United States District Court for the Western District of Missouri against GM. Plaintiff Smith alleges that she suffered an automobile accident while operating a GM automobile and that “the seat back” in her GM automobile “was defective in that it collapsed on impact and caused the plaintiff to be ejected from the car.” App. 17 (Compl. ¶ 2(c)).

In discovery, plaintiff sought a variety of documents from GM. GM asserted attorney-client privilege and/or work product protection as to a collection of documents referred to as the “Litigation Study” collection. This collection of documents stemmed from a study undertaken by GM engineers at the request of GM legal staff to assist the legal staff in defending pending and anticipated product liability lawsuits relating to GM seat design.

A separate group of documents – known as the “Category 18” documents – are involved in this appeal. The Category 18 documents were not generated as part of the actual Litigation Study case review and, indeed, were not even created at the same time as the Litigation Study case review. The Category 18 documents consist of notes and memoranda prepared by members of the GM Legal Staff, as well as various communications among members of the GM Legal Staff and

between members of the Legal Staff and other employees of GM. These legal notes and memoranda refer and relate to the seat design defect cases.¹

GM collected the Category 18 documents in a broad document sweep in a previous case alleging a seat design defect. In that case, the documents were simply listed on the privilege log as part of the Litigation Study collection. In subsequent cases, including this case, GM has continued to use the same privilege log for the sake of consistency.

GM's privilege log for the Litigation Study collection thus actually included two groups of documents: (1) those documents that were, in fact, part of the Litigation Study case review and (2) the separate Category 18 documents.

On August 7, 2000, Magistrate Judge James C. England concluded that "the Litigation Study should be categorized as industry research and development" and therefore held that the Litigation Study collection as a whole was not privileged. Add. 3; App. 31 (August 7, 2000 Order at 3). The August 7 Order did not mention the separate Category 18 documents. Id.

GM timely moved for reconsideration, contending in part that (i) the August 7 Order was inconsistent with Judge Catherine Perry's decision in J.B. Hunt

¹GM has filed these documents under seal as the second volume of its appendix to this brief. Because this brief is being publicly filed, GM's ability to discuss the substance of the documents is limited.

Transport, Inc. v. General Motors Corp., No. 4:98CV252 (E.D. Mo. Oct. 1, 1998) (Add. 14-15; App. 12-13), which concluded that the Litigation Study collection documents were privileged, and (ii) the court, in any event, had failed to address specifically and analyze the Category 18 documents. In an effort to better describe the Category 18 documents and to make clear that these documents were not a part of the Litigation Study case review, GM attached to its motion for reconsideration a supplemental privilege log that included more detailed information regarding each of the documents in Category 18. See App. 26-28 (Privilege Log for Category 18 Non-Litigation Study Case Review Documents).

The court denied GM's motion for reconsideration. The court concluded that Judge Perry's decision in J.B. Hunt "has little, if any, precedential value for this case." Add. 9; App. 42 (Nov. 1, 2000 Order). The court also stated that the August 7 Order in this case "implicit[ly]" found that the Category 18 documents were not privileged. The court stated that "defendant's attempt to exclude the Category 18 documents from the original ruling based on chronology or to change the characterization of the documents in order to distinguish them from the Litigation Study case review as a whole is unpersuasive." Add. 10; App. 43 (Nov. 1, 2000 Order).

The court did acknowledge, however, the importance of the privilege issue, the strong arguments in favor of finding the Category 18 documents privileged,

and the impossibility of restoring the privilege once the documents are produced.

The court therefore certified the following question for immediate appellate review under 28 U.S.C. § 1292(b):

Whether or not the documents that comprise Category 18 of the June 27, 2000 Litigation Study Privilege Log and also described in the August 18, 2000 Privilege Log entitled, 'Category 18 Non-Litigation Study Case Review Documents' are protected by General Motors' assertion of attorney/client privilege or attorney work product doctrine.

Add. 12; App. 45 (Nov. 15, 2000 Order at 1). The court expressly found that this question "is a controlling question of law as to which there is a substantial ground for difference of opinion and immediate appeal from the Order . . . may materially advance the ultimate termination of the litigation." *Id.*

ARGUMENT

I. THIS COURT SHOULD ACCEPT THE APPEAL UNDER 28 U.S.C. § 1292(b) AND SET A BRIEFING AND ARGUMENT SCHEDULE ON THE PRIVILEGE ISSUE.

This Court has previously accepted appeals of privilege claims under § 1292(b). See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 399-400 (8th Cir. 1987); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 278 (8th Cir. 1984). See also Little Rock Sch. Dist. v. Borden, Inc., 632 F.2d 700, 703 (8th Cir. 1980) (accepting appeal under § 1292(b) from an order compelling testimony). In addition, other courts of appeals have frequently accepted appeals of privilege

claims under § 1292(b). See, e.g., Boyson v. Columbia/HCA Health Care Corp., No. 00-0506, 2000 U.S. App. LEXIS 21206, *2 (6th Cir. Aug. 15, 2000); Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 339 (9th Cir. 1996); Cox v. Administrator, U.S. Steel & Carnegie, 17 F.3d 1386, 1395 (11th Cir. 1994), modified by 30 F.3d 1347; Garner v. Wolfenbarger, 430 F.2d 1093, 1096-97 (5th Cir. 1970).

In this case, the district court correctly concluded that the question of whether the attorney-client privilege and work product doctrine apply to the Category 18 documents met the standards for appeal under § 1292(b). First, as the district court found, the privilege question is a “controlling question of law” for which immediate appeal “may materially advance the ultimate termination of the litigation.” It is well established that “a question of law need not completely dispose of the litigation in order to be ‘controlling.’” 19 Moore’s Federal Practice, § 203.31[3], p.203-90 (Matthew Bender 3d ed.). Rather, as the Fifth Circuit explained in holding that appellate review of privilege claims is appropriate when certified by a district court under § 1292(b), “[r]eview under § 1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal.” Garner, 430 F.2d at 1096-97. See also 16 Wright, Miller & Cooper, Federal Practice and Procedure § 3930, p.440 (2d ed. 1996) (Review of privilege orders under § 1292(b) “may be rested

on the ground that reversal and subsequent denial of production may . . . expedite discovery and trial.”). That is unquestionably the case here, as resolution of GM’s privilege assertion would determine whether an entire category of documents must be produced. Moreover, immediate appeal would prevent the intractable problems of attempting to cure an erroneous privilege ruling on appeal from final judgment, and would also have the more immediate benefit of avoiding the still unresolved question in this Circuit of the appealability of privilege rulings under the collateral order doctrine.

Second, the district court was correct to find that there is “substantial ground” for disagreement on this issue. Add. 12; App. 45 (Nov. 15, 2000 Order at 1). Indeed, another federal district court in Missouri held that these same documents were privileged. See J.B. Hunt Transport, Inc. v. General Motors Corp., No. 4:98CV252 (E.D. Mo. Oct. 1, 1998) (Add. 14-15; App. 12-13). What is more, as explained more fully below in the mandamus section and as even a cursory review of the documents at issue confirms, the documents fall squarely within the heart of the attorney-client privilege under Missouri law and the work product protection under federal law.

For these reasons, the district court appropriately certified the question for appeal under § 1292(b). This Court should accept the appeal under § 1292(b) and Fed. R. App. P. 5 and set a briefing and argument schedule.

II. IN ANY EVENT, THIS COURT HAS APPELLATE JURISDICTION UNDER 28 U.S.C. § 1291 AND THE COLLATERAL ORDER DOCTRINE.

Under the collateral order doctrine, an order may be immediately appealed if it: (1) conclusively determines the disputed question; (2) resolves an important issue that is completely separate from the merits of the underlying action; and (3) is effectively unreviewable on appeal from a final judgment in the underlying action. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); see also Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-45 (1993); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). When these three requirements are met, appellate jurisdiction is proper and nondiscretionary.

In this case, each of the three requirements for the collateral order doctrine is satisfied, and this Court therefore has appellate jurisdiction even if it declines to accept the appeal under § 1292(b). As the Third Circuit has held in an extensive and well-reasoned opinion, district court decisions rejecting claims of attorney-client privilege or work product protection satisfy all three prongs of the collateral order doctrine. See In re Ford Motor Co., 110 F.3d 954, 957-64 (3d Cir. 1997).

GM submits that this Court should follow the lead of the Third Circuit's Ford decision and hold that jurisdiction is proper under the collateral order

doctrine.² (Of course, as already stated, the Court need not reach that important jurisdictional issue if it simply accepts the appeal under 28 U.S.C. § 1292(b).)

A. The District Court's Order to Disclose Privileged Documents Conclusively Determines the Disputed Question.

The district court's orders denying GM's Motion for Protective Order and GM's Motion for Reconsideration conclusively determined the privileged status of the Category 18 documents. The district court cannot effectively reconsider or retract the substance of its orders once the privileged documents have been produced to Plaintiffs. As the Third Circuit observed, once the district court requires the production of documents claimed to be privileged, its order "leaves no room for further consideration by the district court of the claim that the documents are protected." Id. at 958.

²It appears that this Court has not addressed the question of whether it should follow In re Ford Motor Co. for the simple reason that it has held that mandamus relief is appropriate for erroneous denials of privilege claims. See, e.g., Baker v. General Motors Corp., 209 F.3d 1051, 1052 n.1 (8th Cir. 2000) ("Because we grant the petition, we do not decide whether this order was subject to appellate review . . .").

B. The District Court's Order Resolves an Important Issue Completely Separate from the Merits of the Underlying Litigation.

The district court's order also meets the second prong of the Cohen test because it resolves an important issue that is completely separate from the merits of the underlying action. The privilege issues in this case are separate from the merits of the underlying action because GM seeks review solely on the question whether the attorney-client privilege or work product doctrine applies to a particular category of documents. That question does not require the Court to address the substantive allegations at issue regarding whether GM is liable under Missouri products liability law. To the contrary, resolution of the facts on which a claim of privilege depends, such as "who prepared the relevant documents, when they were prepared, and what was their purpose," do not implicate the merits of the parties' substantive claims in any way. Ford Motor Co., 110 F.3d at 958. Indeed, courts decide whether a document is privileged without reference to the nature of the underlying lawsuit. Therefore, although disclosure of the information contained in the documents may often have some bearing on the ultimate outcome of the lawsuit, the determination of whether the document itself is privileged does not in any way require the Court to delve into the merits of the case or resolve the kinds of issues that are necessary to resolve the main dispute between the parties. Id.

GM's assertion of privilege also raises an indisputably important issue (as confirmed by the district court's decision to certify the issue for appeal under 28 U.S.C. § 1292(b)). Protection of the confidentiality of privileged and work product documents is essential to the effective operation of our legal system. As the Supreme Court explained, "full and frank communication between attorneys and their clients" serves "to promote broader public interests in the observance of law and administration of justice," which protect individual rights and interests. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Indeed, the attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." Hunt v. Blackburn, 128 U.S. 464, 470 (1888). As the Third Circuit explained in holding that denials of privilege claims are appealable under the collateral order doctrine, the attorney-client privilege and work product protection are "at the heart of the adversary system," and "one of the pillars that supports the edifice that is our adversary system." Ford Motor Co., 110 F.3d at 961-62. Protection of the privilege, which is "deeply embodied in our legal culture," thus plainly presents an important issue within the meaning of the collateral order doctrine. Id.

C. An Order to Disclose Privileged Documents Is Effectively Unreviewable on Appeal from a Final Judgment.

Finally, GM cannot obtain meaningful appellate review of its attorney-client privilege and work product claims after final judgment. As this Court has often observed in privilege cases, once privileged documents are produced, their confidentiality is lost and can never be recovered. See, e.g., In re General Motors Corp., 153 F.3d 714, 715 (8th Cir. 1998) (immediate review “appropriate because the district court’s order would otherwise destroy the confidentiality of the communications at issue.”); In re Bieter Co., 16 F.3d 929, 931-32 (8th Cir. 1994) (“an appeal after disclosure of the privileged communication is an inadequate remedy”).

As the Third Circuit reasoned, once the documents are produced, the cat will be “out of the bag.” See, Ford Motor Co., 110 F.3d at 963.

[O]nce putatively protected material is disclosed, the very “right sought to be protected” has been destroyed. That is so because . . . underlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, without the fear of disclosure, so as to aid in the administration of justice. Concomitantly, the work product doctrine is designed to promote the adversarial process by maintaining the confidentiality of documents prepared by or for attorneys in anticipation of litigation. Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. At best, on appeal after final judgment, an appellate court could send the case back for re-trial without use of the protected materials. At that point, however, the cat is already out of the bag.

Ford Motor Co., 110 F.3d at 963.

Evidentiary rulings at trial would be too late to correct an erroneous denial of privilege, as the attorney-client privilege requires not only protecting privileged communications from being admissible as evidence, but also ensuring that they remain confidential. As the Third Circuit observed, “[a]ttorneys cannot unlearn what has been disclosed to them in discovery; they are likely to use such material for evidentiary leads, strategy decisions, or the like. More colorfully, there is no way to unscramble the egg scrambled by the disclosure; the baby has been thrown out with the bath water.” Ford Motor Co., 110 F.3d at 963; see also, Siedle v. Putnam Inv., Inc., 147 F.3d 7, 9 (3d Cir. 1998).

Not surprisingly, in the context of mandamus relief, this Court and nearly every other court in the country have concluded that an appeal after final judgment is not an adequate remedy for erroneous denials of privilege assertions. See, e.g., Baker v. General Motors, 209 F.3d 1051, 1053 (8th Cir. 2000) (“This extraordinary remedy is appropriate because the judge’s order would otherwise destroy the confidentiality of the communication at issue.”); Chase Manhattan Bank v. Turner & Newall, PLC, 964 F.2d 159, 163 (2d Cir. 1992); Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1490-92 (9th Cir. 1989); Jenkins v. Weinshienk, 670 F.2d 915, 917 (10th Cir. 1982); Rowley v. McMillan, 502 F.2d 1326, 1335 (4th Cir. 1974); Harper & Row Publishers, Inc. v. Decker, 423 F.2d

487, 492 (7th Cir. 1970), aff'd by equally divided Court, 400 U.S. 348 (1971). The inevitable consequences of an order to disclose privileged documents is identical for purposes of the collateral order doctrine.

In sum, each criterion of the collateral order doctrine is satisfied here, and this Court therefore has appellate jurisdiction even if it declines to certify the question under § 1292(b).

III. IN ANY EVENT, MANDAMUS IS AN APPROPRIATE REMEDY TO CORRECT THE DISTRICT COURT'S CLEAR ERROR ON THE PRIVILEGE ISSUE.

This Court has made clear that “[w]here the district court has rejected a claim of attorney-client privilege, we will issue a writ of mandamus when the party seeking the writ has no other adequate means to attain the desired relief and the district court’s ruling is clearly erroneous.” In re General Motors, 153 F.3d 714, 715 (8th Cir. 1998). In other words, this Court will consider privilege questions in mandamus proceedings and issue a writ if the district court’s ruling was clearly erroneous. In this case, the district court clearly erred by ordering GM to produce an entire category of documents that are squarely at the heart of the attorney-client privilege and work product doctrine, and the privilege once lost can never be restored.

A. The Court Will Entertain Attorney-Client Privilege Claims in Mandamus Proceedings Because the Privilege Cannot Be Restored by Subsequent Appellate Remedies.

Once privileged documents are produced, their confidentiality is lost and can never be recovered. See, e.g., In re General Motors Corp., 153 F.3d 714, 715 (8th Cir. 1998); In re Bieter Co., 16 F.3d 929, 931-32 (8th Cir. 1994) (“an appeal after disclosure of the privileged communication is an inadequate remedy”). For this reason, this Court has repeatedly held that mandamus proceedings are appropriate when the district court denies a claim of attorney-client privilege. See, e.g., Baker v. General Motors, 209 F.3d 1051, 1053 (8th Cir. 2000); In re General Motors Corp., 153 F.3d at 715 (8th Cir. 1998); In re Bieter Co., 16 F.3d at 931-32. “The extraordinary remedy of mandamus is appropriate because the district court’s order would otherwise destroy the confidentiality of the communications at issue.” In re General Motors Corp., 153 F.3d at 715.

As explained above, neither later evidentiary rulings at trial nor appellate review of a final judgment on the merits can correct any erroneous denial of privilege, because the attorney-client privilege not only prohibits the introduction of privileged communications as evidence at trial, but also protects the confidentiality of the communications. See Ford Motor Co., 110 F.3d at 963 (“[A]ttorneys cannot unlearn what has been disclosed to them in discovery; they are likely to use such material for evidentiary leads, strategy decisions, or the

like.”); Siedle, 147 F.3d at 9 (“Compelling a party that disputes an unsealing order to forego an appeal until the conclusion of the underlying litigation would ‘let the cat out of the bag, without any effective way of recapturing it if the district court’s directive was ultimately found to be erroneous.”). Therefore, courts across the country have held that immediate interlocutory review is necessary to protect the privilege and prevent irreparable harm. See, e.g., Baker v. General Motors, 209 F.3d 1051, 1053 (8th Cir. 2000); Chase Manhattan, 964 F.2d at 163; Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1490-92 (9th Cir. 1989); Jenkins v. Weinshienk, 670 F.2d 915, 917 (10th Cir. 1982); Rowley v. McMillan, 502 F.2d 1326, 1335 (4th Cir. 1974); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), aff’d by equally divided Court, 400 U.S. 348 (1971).

B. A Writ of Mandamus Should Be Issued Because the Non-Litigation Study Case Review Documents Are Protected by the Attorney-Client Privilege.

The attorney-client privilege protects “confidential communications . . . between an attorney and . . . client’ concerning representation of the client.” State ex rel. Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. banc 1995). The Missouri Supreme Court “has spoken clearly of the sanctity of the attorney-client privilege.” State ex rel. Peabody Coal Co. v. Clark, 863 S.W.2d 604, 607 (Mo. banc 1993). The Court has adopted a very broad view of the privilege:

As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law -- that is, by lawyers -- anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened. The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value . . . than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.

State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978).

As the privilege log explains, Category 18 consists entirely of confidential communications by members of the GM Legal Staff to other members of the GM Legal Staff and GM employees, as well as one document written by a GM employee to a GM attorney. These documents were "made for the purpose of facilitating the rendition of legal services" to GM -- specifically in assisting in the defense of GM in seat-related litigation. See R.M. Dolgin, 1997 WL 732495 at *1. As such, these documents are protected attorney-client communications.

Addressing a similar question in State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978), the Missouri Supreme Court held that letters concerning fire loss claims written by an attorney to his client (an insurance company) are protected by the attorney-client privilege. The Court there held that an attorney's analysis of an investigation and recommendations based upon that analysis are privileged even when they do not refer to any information provided by the client or contain any advice given by the attorney concerning a communication made by the client. Id. at 382. In doing so, the Court overruled its own prior adherence to the "Wigmore approach," under which "not all of a lawyer's advice is confidential, and statements by the lawyer which are not in the nature of advice are totally unprotected, except to the extent that they disclose what the client has said." Id. at 384. The Court instead adopted the view that "confidentiality of communications between attorney and client [is] the more fundamental policy, to which disclosure is the exception." Id. at 383. The Court defined the privilege broadly:

Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected.

Smith, 574 S.W.2d at 384-85.

Under this test, the Category 18 documents are clearly privileged. To take one example, the first document in Category 18 – the “Toth Memo” – is the very type of document addressed by the Missouri Supreme Court in Smith. The Toth Memo is a memorandum from GM attorney Gary Toth to GM attorney Susan Mason and GM employee Donald Maertens analyzing strategies for seat back litigation. See App. 201 - 207 (LIT001999-LIT002005). Moreover, the Toth Memo explicitly includes Toth’s legal advice. As such, it is at the very heart of the attorney-client privilege.

The other documents likewise are clearly privileged. For example, Category 18 includes a memorandum from GM attorney Drema Kopcak to three GM attorneys discussing legal issues that may arise in future litigation. App. 216 (LIT003335). Likewise, Category 18 includes a memorandum from GM attorney Susan Mason to GM attorney Robert Weinbaum that discusses various legal issues involved in seat back cases. App. 221-226 (LIT003345-50).

In fact, each of the documents in Category 18, except for one, is a document created by a GM attorney to another GM attorney or GM employee concerning representation of GM in pending or future seat back litigation. See App. 26-28 (Privilege Log for Category 18 Non-Litigation Study Case Review Documents). The only document in Category 18 that was not written by a GM attorney was a memorandum from GM engineer Robert Hoffman to GM attorneys that explicitly

requests assistance from the GM legal staff -- which, of course, is the prototypical attorney-client privileged communication. App. 218-220 (LIT003342-44).

Not surprisingly, many courts have held these very same documents to be privileged. Most notably, the United States District Court for the Eastern District of Missouri found that "General Motors' claims of privilege (whether attorney client privilege or attorney work product) as listed on defendant's privilege log, are properly invoked, and that the documents are privileged from discovery." J.B. Hunt Transport, Inc. v. General Motors Corp., No. 4:98CV252 at 1 (E.D. Mo. Oct. 1, 1998) (Add. 14-15; App. 12-13). The district court in the case at hand was dismissive of Judge Perry's order because it contained "no specific findings." Add. 9; App. 2 (Nov.1, 2000 Order at 3). But Judge Perry entered her order after hearing oral arguments, reviewing the briefs filed by the parties and conducting an in camera review of the documents.³

The Magistrate Judge's conclusion that the documents were "industry research and development, not subject to the attorney client or work product

³Similarly, other courts have found either the Category 18 documents in particular, or the Litigation Study collection in whole or in part, to be privileged. See, e.g., Rosado v. General Motors Corp., No. 96-3279, Slip Op. 9 (Mich. Cir. Ct. Dec. 14, 1998) (Add. 16-28); Newton v. General Motors Corp., No. 92-0638, Slip Op. 7 (W.D. La. Oct. 21, 1994) (Add. 29-36); Estate of Tracy Luther Lyons v. General Motors Corp., No. 92,151 (Okla. Ct. App. May 19, 2000) (Add. 37-47); Himes v. General Motors Corp., No. 96-1280, Slip Op. 2 (Ariz. Sup. Ct. Oct. 15, 1999) (Add. 48-49).

privilege,” Add. 3-4; App. 31-32 (Aug. 7, 2000 Order at 3-4), constituted clear error.⁴ The district court’s conclusion that the GM documents should be stripped of the privilege because they are part of the Litigation Study collection is simply wrong. The Category 18 documents were not part of the Litigation Study case review. Indeed, they were not even created at the same time as the study. The mere fact that both the Litigation Study and case review and the Category 18 documents address seat back litigation is by no means grounds for stripping the latter of the attorney-client privilege.

More fundamentally, moreover, the district court misconstrued Missouri attorney-client privilege law. Even if the Category 18 documents had been “part of a joint effort at GM to compile information regarding seat back design and cases involving seat back accidents,” Add. 10-11; App. 43-44 (Nov. 1, 2000 Order at 4-5), which they were not, that alone would not strip these particular documents of the privilege. As the Missouri Supreme Court made clear in Smith, the documents are privileged even if they contain “analysis of what is known to date of the situation,” a “discussion of additional avenues to be pursued,” and an effort to “keep[] the client advised of things done or opinions formed to date.” Smith,

⁴The Magistrate Judge did not find a waiver of the privilege. This brief therefore does not address waiver.

574 S.W.2d at 384-85. Rather, "all of these communications, not just the advice," are protected. Id. (emphasis added).

C. Some of the Non-Litigation Study Case Review Documents Are Protected Attorney Opinion Work Product.

Some of the Category 18 documents are also protected as attorney opinion work product. See App. 26 - 28 (Privilege Log for Category 18 Non-Litigation Study Case Review Documents) (detailing which documents are protected by the work product doctrine as well as the attorney-client privilege). Federal law recognizes two types of work product: (1) fact work product, which is only discoverable if the party seeking discovery can show a substantial need for the materials and cannot obtain the information by other means, and (2) opinion work product, which contains the mental impressions, conclusions, opinions or legal theories of counsel and is absolutely protected from disclosure. See In re General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000). These Category 18 documents fall squarely within the definition of opinion work product and, as such, are absolutely protected from disclosure. See id.

These Category 18 documents consist of notes and memoranda prepared by members of the GM Legal Staff in anticipation of litigation and reflect the opinions, conclusions and legal strategy of members of the GM Legal Staff. These are quintessential examples of protected opinion work product. As the U.S.

Supreme Court recognized in Hickman v. Taylor, an attorney's work product is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and [in] countless other tangible and intangible ways." Hickman v. Taylor, 329 U.S. 495, 511 (1947); Baker, 209 F.3d at 1054-55; Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8th Cir. 1986).

These documents at issue undoubtedly fall within the confines of the attorney-client privilege and opinion work product doctrine and, therefore, are absolutely protected from disclosure. The magistrate judge's contrary ruling constitutes clear error that cannot be corrected on appeal after final judgment on the merits. For that reason, a writ of mandamus is appropriate.

CONCLUSION

For the foregoing reasons, GM respectfully requests leave to appeal the question certified by the district court under 28 U.S.C. § 1292(b). In the alternative, GM requests that this Court exercise its appellate jurisdiction under the collateral order doctrine. Finally, in the alternative, GM requests a writ of mandamus ordering the district court to grant GM's requested protective order for the Category 18 documents.

Respectfully submitted,

By: 

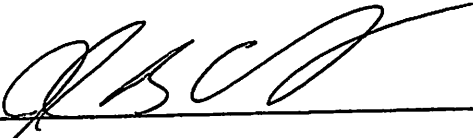
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via overnight mail on November 27, 2000, to: William W. Francis, Jr., Placzek, Francis & Overby, 1722 South Glenstone, Suite J, Springfield, Missouri 65804; and the Honorable James C. England, United States Magistrate Judge, United States District Court, Western District of Missouri, 201 U.S. Courthouse, 811 Grand Boulevard, Kansas City, Missouri 64106.



ADDENDUM

	<u>Pages</u>
Order Denying General Motors' Motion for Protective Order	ADD1-ADD6
Order Denying General Motors' Motion for Reconsideration	ADD7-ADD11
Certification of Question for Appeal under 28 U.S.C. § 1292(b)	ADD12-ADD13
<u>J.B. Hunt Transport, Inc. v. General Motors Corp.,</u> No. 4:98CV252 (E.D. Mo. Oct. 1, 1998)	ADD14-ADD15
<u>Rosado v. General Motors Corp.,</u> No. 96-3279 (Mich. Cir. Ct. Dec. 14, 1998)	ADD16-ADD28
<u>Newton v. General Motors Corp.,</u> No. 92-0638 (W.D. La. Oct. 21, 1994)	ADD29-ADD36
<u>Estate of Tracy Luther Lyons v. General Motors Corp.,</u> No. 92,151 (Okla. Ct. App. May 19, 2000)	ADD37-ADD47
<u>Himes v. General Motors Corp.,</u> No. 96-1280 (Ariz. Sup. Ct. Oct. 15, 1999)	ADD48-ADD49

made as a litigation strategy that frustrates and encumbers discovery. It is her contention that the purpose of the protective order, which was to protect GM's trade secrets or other confidential research and development, no longer exists because the documents have been produced in other similar litigation against GM. Therefore, she contends that the protective order is no longer valid, that defendant has not established good cause for its entry, and that defendant has abused the intent and spirit of the original agreement for its entry.

In response to plaintiff's motion, defendant has submitted a proposed protective order, in which a "sharing provision" has been added. That provision would permit plaintiff to share documents with attorneys handling similar cases under certain conditions. [GM's Response to Plaintiff's Motion, Exhibit B]. GM has also agreed to review any documents that plaintiff claims were inappropriately marked as "Confidential."

Having reviewed the arguments of the parties, the Court finds that the Motion to Dissolve the Protective Order should be denied. The need to protect against disclosure of confidential information remains in this case. Considering the offer made by defendant to review documents that may have been inappropriately marked as "Confidential," and because defendant has offered a proposed protective order that addresses some of plaintiff's concerns, the Motion to Dissolve the Protective Order will be denied. If the parties request, the Court would consider modification to comport with defendant's Exhibit B, the sharing protective order.

II. Motion for Protective Order Regarding the Litigation Study

Defendant has moved for a protective order for the "Litigation Study," which it claims contains information to be protected by the attorney-client and work product privileges. Defendant contends that the documents created as part of the study were intended to assist GM's legal staff in the defense of product claims against GM, and are therefore entitled to protection

under either claim of privilege.

The purpose of the attorney client privilege is to encourage full and frank communication between attorneys and their clients. Upjohn v. United States, 449 U.S. 383, 385 (1981). It is applicable to communications made for the purpose of securing legal advice in the context of attorney corporate client relations where those communications are not disseminated beyond those persons who need to know their contents. In Re Bieter Co., 16 F.3d 929, 936 (8th Cir. 1994). The privilege protects legal, rather than business, advice. Saideo Int'l v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982).

"The work product privilege is designed to promote the operation of the adversary system by ensuring that a party cannot obtain materials that his opponent has prepared in anticipation of litigation." Pittman v. Frazer, 129 F.3d 983, 988 (8th Cir. 1997), citing Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991). To determine whether a document has been prepared in anticipation of litigation or for trial, the standard is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Wright & Miller, Federal Practice and Procedure, § 2024, at 198-99 (1970). "[T]here is no work product immunity for documents prepared in the regular course of business rather than for the purposes of litigation." Id.; Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987).

The Court has carefully reviewed the materials submitted for its in camera review, as well as the affidavits and exhibits in support of defendant's claim that the Litigation Study was designed to develop an engineering rationale to use in defense of claims against GM. This Court agrees with the rulings from other courts, which have concluded that the Litigation Study should be categorized as industry research and development, not subject to the attorney client or work

product privilege. Essential to this ruling are the following conclusions: the study was authored by GM engineers; it was undertaken in the ordinary course of GM's business to evaluate seat safety; it was conducted primarily by research and development members to improve the safety of GM vehicles' seat backs; it contained no thought processes or opinions or legal theories of any attorney; the legal department acted in conjunction with the engineering department by compiling data regarding cases involving seat back accidents and forwarding the same to the seat safety research and development team in the engineering department; and although the departments worked together, it is clear that the compilation of information from the legal staff was not prepared in anticipation of future litigation, but rather, was compiled for statistical and engineering purposes for what can better be described as an "engineering study" on seat backs.

The fact that some of the information provided by legal staff came from individual cases and included allegations of defective seats and settlements or verdicts cannot be used to shield the entire study from disclosure, where the documents were prepared for purposes of engineering research and development, and not in anticipation of litigation. See Searle, 816 F.3d at 401-03. "Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality." Id., quoting SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D.Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). The role of the legal staff did not extend beyond gathering cases alleging seat back failures for the committee to study the risks associated with the seat designs with the focus of recommending technical improvements to the design. Based on these conclusions, the Court finds that GM's claims of privilege, whether attorney client or work product, as listed on defendant's most recent privilege log, are not properly invoked and the documents are therefore not privileged from discovery by plaintiff.

For the reasons stated herein, it will therefore be the order of the Court that the motion for Protective Order Regarding the Litigation Study be denied. It will be the further order of the Court that the Litigation Study be released, pursuant to the proposed protective order.

III. Plaintiff's Discovery Requests and Motion for Sanctions

Plaintiff also complains that defendant has been unresponsive to its discovery requests by providing inconsistent, rephrased, or qualified responses. It is defendant's position, among other things, that plaintiff's requests have been overbroad and overreaching, and have been requests for privileged information in some instances.

Given the discussion at the July 17 hearing and the rulings in this order, it may be that many of the discovery issues have been resolved. Additionally, the parties are directed to attempt to resolve any remaining discovery disputes between themselves in accordance with Rule 37 (a). Accordingly, the Court will dismiss any remaining discovery requests without prejudice at this time.

Plaintiff also made an informal request for sanctions in this case, on the grounds that defendant has not complied with discovery requests, has buried her case in a morass of information, and has allegedly hidden documents. This Court is firmly convinced, however, that defendant has asserted its claims of privilege in good faith and has not committed discovery abuses or conducted itself in a contemptuous manner. The Court looks askance at plaintiff's accusations and request for sanctions, which the evidence indicates are wholly unfounded. To the extent that plaintiff requested sanctions, that motion is denied.

IV. Conclusion

For the reasons stated herein, it is hereby

ORDERED that plaintiff's Motion to Dissolve Protective Order be, and it is hereby,

denied. It is further

ORDERED that the Proposed Protective Order be, and it is hereby, entered in this case.

It is further

ORDERED that defendant's Motion for Protective Order Regarding the Litigation Study

be, and it is hereby, denied. It is further

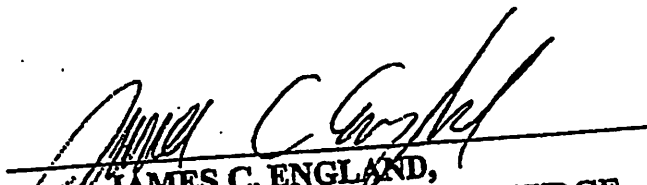
ORDERED that the Litigation Study be released, pursuant to the Proposed Protective

Order. It is further

ORDERED that plaintiff's requests to resolve discovery disputes be, and they are hereby,

dismissed without prejudice. It is further

ORDERED that plaintiff's request for sanctions be, and it is hereby, denied.



JAMES C. ENGLAND,
UNITED STATES MAGISTRATE JUDGE

Date: ^{Aug.} July 7, 2000

ARGUMENT

This supplemental brief addresses the decision in *Huddell v. Levin*, 537 F.2d 726 (3rd Cir. 1976), which contains *several* distinct holdings relevant to this case - all but one of which (the burden of proof issue) reflect settled principles of products liability law in crashworthiness cases.

1. GM is compelled to bring the Court's attention to what appears to be a critical misunderstanding of the record below. The error is critical because it has a direct bearing on GM's argument (based on *Huddell* and its progeny) regarding the trial court's exclusion of speed as a factor for consideration by the jury on the issue of design defect. At oral argument, this Court suggested that there was some agreement by the experts in the record that the roof structure of the Camaro should have been able to withstand a collision where the combined speeds of the vehicles was 110 mph. A review of the record reveals *no* testimony by any GM expert that the Camaro's roof structure should have been able to withstand a collision at that closing speed (*see specifically testimony of K. Orłowski*, T26 72-22 to 74-12; T27 28-12 to 28-17). The speed and severity of the collision were, therefore, highly relevant factors which the jury should have been required to consider on the question of defect.

The court's misunderstanding may have been caused by the reference in plaintiff's brief to testimony given by his expert, Phillips, that crashes at a combined speed of 110 mph are foreseeable (*see* p.9-10 of plaintiff's original appellate brief). The relevant question is not foreseeability, but whether the roof design was reasonably crashworthy. It is well-established that the relevant issues the jury will consider in assessing the reasonableness of the design include: "What degree of design safety and how many injury-minimization features are

enough? In what collisions *and at what speeds?*" Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 633, 640 (1981). In *Huddell*, the court (Judges Aldisert, Gibbons, and Rosenn all agreeing) thus explained that "[t]he relative severity of the impact goes to the heart of the issue of defectiveness in terms of the ordinary purposes for which the product, the head restraint, was designed." 537 F.2d at 740 (emphasis added). Similar to the plaintiff here, the plaintiff in *Huddell* argued that "if a seat belt [or roof design] is faulty, it remains faulty whether an accident occurs at 5 m.p.h. or 100 m.p.h." *Id.* The Court responded:

This may be true, but it begs the question: the question is whether or not the seat belt or the head restraint is "faulty." If the seat belt did not adequately protect its wearer in a 5 m.p.h. crash, then a proper inference might be drawn that the belt was defective; but if a man were killed wearing his seat belt in a 100 m.p.h. crash, could it be argued with the same assurance that the belt was defective? At least in the context of safety design, we see no meaningful way to evaluate the defectiveness vel non of a product except in the context of a particular risk.

Id. at 743. On the basis of this settled principle of law, the court overturned a jury verdict where the jury had been instructed not to consider the relative severity of the crash. Here, Judge Fuentes' instructions to the jury *not* to consider speed on the question of defect contravened that heretofore settled principle. That error, on its own, requires that the judgment in this case be vacated and the case remanded for a new trial.¹

2. *Huddell* also held that the plaintiff bears the burden of proving the injuries that would have occurred in the proposed alternative design, which is the only "controversial"

¹ In this Court, plaintiff has primarily argued that the error was harmless because the jury considered speed in determining proximate cause. That is nonsensical. The proximate cause and defect issues are distinct; *both* must be established for liability. The fact that speed was considered by the jury for proximate cause purposes does not mean that the jury considered it for defect -- particularly since the jury was specifically instructed *not* to do so.

Huddell issue. The issue is not implicated in this case, however, because the *only* expert testimony in the record indicating the injuries plaintiff would have suffered under his proposed alternative designs came from GM's experts (see GM Br. at 19; GM Reply Br. at 17-18). Plaintiff *tried* to introduce this kind of evidence through Phillips, but Judge Fuentes correctly prevented plaintiff from doing so because Phillips (an engineer) was unqualified to render such an opinion, prompting plaintiff's counsel to say that "this is crucial" and "I've got problems" (T14 113-18 to 114-12).²

An opinion addressing the burden of proof question thus would be *dicta*. In any event, *Huddell* should remain the law of New Jersey on the burden of proof issue.³ In the ordinary case, the plaintiff bears the burden of proof. Section 433B of the Restatement (Second) lists the two well-recognized exceptions to this rule. First, the burden is shifted

² If this Court were to overturn *Huddell* on the burden of proof issue, and thereby to shift the burden to the defendant, the Court would be required to vacate the judgment and remand for a new trial. An appellate court cannot rule against a party by retroactively altering the burden of proof, and then holding that the party did not meet that burden. The party in such a case, if it had known at the trial level that it had the burden, likely would have presented more evidence to sustain it.

³ The only support for any suggestion that New Jersey somehow has already departed from *Huddell* is a single trial court decision, see *Thornton v. General Motors Corp.*, 280 N.J. Super. 295 (Law Div. 1994), a case that contradicts other trial court decisions, and a footnote in an Appellate Division opinion accepting *Huddell* but indicating that a contrary rule "may be" more in line with a Supreme Court decision addressing apportionment in the medical malpractice context, see *Crispin v. Volkswagenwerk*, 248 N.J. Super. 540, 569 n.1 (App. Div. 1991). As we explain in the text, however, the traditional apportionment cases do not translate to this context.

The Reporters' Note to the draft Restatement suggests that New Jersey "may wind up" departing from *Huddell*. See § 16 Reporters' Note, at 304. To the extent that prediction can somehow be read to suggest that New Jersey already has done so, such a suggestion "mischaracterize[s]" the law. See *Vickles & Oldham, Enhanced Injury Should Not Equal Enhanced Liability*, 36 S. Tex. L. Rev. 417, 447 (1995).

"[w]here the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment *among them*." This exception does not apply to a crashworthiness case:

[T]he claimant does not apportion the total injuries sustained in the collision between the negligent driver causing the accident and the manufacturer whose design aggravated the injury. . . . [T]he claim against the manufacturer is based . . . upon the theory that the injuries incurred were greater than those that would have been sustained had there been no defect. The claimant proves this aspect of damages by showing what probably would have occurred had a safer alternative design been used. This required showing against the manufacturer has absolutely nothing to do with apportionment between tortfeasors When viewed in this elemental form, the plaintiff's enhanced burden of proof is nothing more than a requirement to prove that which he is claiming: that "fewer" or "lesser" injuries would have occurred with a different design.⁴

Hoenig, 55 St. John's L. Rev. at 703-04.

Second, the burden is shifted where "the conduct of two or more actors is tortious, and it has proved that harm has been caused to the plaintiff by only one of them, but there is

⁴ For these reasons, "the burden of proof controversy is a false issue." Hoenig, 55 St. John's L. Rev. at 706. See also Folan, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 Washburn L.J. 600, 615 (1977) ("The Restatement requires a defendant to go forward with proof of apportionment because he is the one who seeks to rely on it to relieve himself of liability for all or a portion of the damages. However, in a second collision-crashworthy case, the defendant has no liability absent proof of enhanced injury.") Other commentators have reached the same conclusion. See Vickles & Oldham, 36 S. Tex. L. Rev. at 449 (analyzing arguments made against *Huddell* and concluding that they "do not justify relieving plaintiffs from the burden of proving that which they allege is an enhanced injury case -- that lesser injuries would have been sustained had a different design been used"); Levenstam & Lapp, *Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DePaul L. Rev. 55, 84 (1988) ("The apportionment that is contemplated is not a division among the injuries that the plaintiff sustained, but rather the difference between the injuries actually incurred and the injuries that would have resulted in the collision in the absence of the alleged defect.").

uncertainty as to which one has caused it." This is the classic "two shooter-one fatal shot" scenario and is not an issue in crashworthiness cases.

Because neither traditional exception to the ordinary burden of proof applies in this case, the plaintiff in a crashworthiness case has the burden of proving that the injuries that would have occurred under the proposed alternative design are less than the injuries that did occur.

To satisfy this burden, evidence must be presented, through expert testimony, of the injuries that would have occurred had the alternative design been utilized:

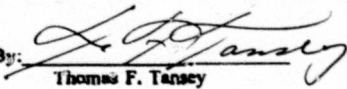
[T]he M.D. should testify regarding the extent of plaintiff's enhanced injuries actually incurred and the extent of plaintiff's hypothetical injuries based on the bio-mechanical engineer's opinion as to what would have happened had the defendant employed the alternative design. Naturally, the physician should contrast the severity of plaintiff's actual injuries with those that would have been incurred had the vehicle not been defectively designed.

Schneider, *The Plaintiff's Perspective: Proving Enhanced Injury*, 450 PLI/Lit 129, 153 (1992); see also *Caiazzo v. Volkswagenwerk*, 647 F.2d 241, 250 (2d Cir. 1981) ("evidence will generally, perhaps even necessarily, be in the form of expert testimony"). The testimony provided by the experts cannot be vague or speculative, however, such as a statement that the plaintiff would have "survived" in the alternative design. Rather, there must be testimony (not just circumstantial evidence) as to "whether the hypothetical victim of the survivable crash would have sustained no injuries, temporary injuries, permanent but insignificant injuries, extensive and permanent injuries, or, possibly, paraplegia or quadriplegia." *Huddell*, 537 F.2d at 738. It is undisputed that plaintiff presented no such evidence here.

Respectfully submitted,


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Statement of the Matter Involved

In its lengthy and far-reaching opinion, the Appellate Division substantially altered the nature of proof required in crashworthiness cases. The court's decision conflicts with holdings from this Court, other New Jersey courts, and the United States Court of Appeals for the Third Circuit. And contrary to the stated goal of the Products Liability Act, it portends a potentially sizeable expansion of liability not only in crashworthiness cases but in design defect cases more generally. The Appellate Division's important liability rulings warrant this Court's intervention.

1. *Legal Background*

In a design defect case, the plaintiff must prove a defect and that the defect caused his injuries. *Zaza v. Marquess & Nell, Inc.*, 144 N.J. 34, 49 (1996). To determine defect, the jury applies a risk-utility balancing test to assess whether a product was "not reasonably fit, suitable and safe" for its intended or reasonably foreseeable purposes. N.J.S.A. 2A:58C-2. "Analysis of the policy issue is focused by examining a list of factors which balance risk against utility, the ultimate question being whether, under all the circumstances, the manufacturer was reasonable in marketing the product designed as it was." Dreier, Goldman & Katz, *New Jersey Products Liability and Toxic Torts Law* 118 (1998) (hereinafter Dreier, Goldman & Katz); (see also Zaza,

144 N.J. at 50).¹ One *sine qua non* to a finding of defect is a feasible alternative design that the manufacturer could have employed. If there is no such alternative design, then the product cannot be found defective (with rare exceptions). See N.J.S.A. 2A:58C-3(1); *Restatement (Third) of Torts: Products Liability* § 2(b), at 12 (Proposed Final Draft, Apr. 1, 1997).

To prove causation in a design defect case, the plaintiff must show that the product was used in a foreseeable manner. See *Jurado v. Western Gear Works*, 131 N.J. 375, 389 (1993).² The plaintiff also must demonstrate that the defect actually caused the injuries -- that the injuries would not have occurred but for the defect. See *Zaza*, *supra*, 144 N.J. at 49.

An automobile "crashworthiness" case involves a straightforward application of those principles, requiring a showing of defect and causation. The jury considers whether there was a reasonable alternative design that the manufacturer

¹ The jury considers: (1) the usefulness and desirability of the product -- its utility to the user and to the public as a whole; (2) the safety aspects of the product -- the likelihood that it will cause injury and the probable seriousness of the injury; (3) the availability of a substitute product that would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. See, e.g., *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 173-74 (1978).

² Foreseeability of use can be considered an aspect of defect and causation. See *Dreier, Goldman & Katz*, *supra*, at 132.

could have employed. As in any design defect case, the jury also makes the determination whether the utility of the design was outweighed by the risk of enhanced injuries that it posed. The jury further decides whether the car was used in a foreseeable manner and whether plaintiff's injuries in the car crash likely would have been less severe had the reasonable alternative design been employed. See generally *Huddell v. Levin*, 537 F.2d 726, 737-39 (3d Cir. 1976); *Crispin v. Volkswagenwerk AG*, 248 N.J. Super. 540, 558 (App. Div.), certif. denied, 126 N.J. 385 (1991).

2. Trial Proceedings

This case arises out of an automobile accident that occurred on June 9, 1986. Plaintiff, Michael Green, was driving a 1986 Chevrolet Camaro IROC Z28 with a T-top roof design. The car was manufactured by defendant General Motors. Green's Camaro crashed into an oncoming school bus. The crash was quite violent: At the time of the accident, the two vehicles were traveling at a combined speed of between 45 and 81 miles per hour, with the Camaro traveling between 40 and 76 miles per hour. PETA 2-5. (Pictures of the car after the crash are at Db12.)

Green was rendered a quadriplegic and sued GM on a crashworthiness theory, arguing that his injury was a result of the roof collapsing and hitting his head during the crash. As required under the crashworthiness doctrine, Green pointed to two alleged alternative roof designs that GM could have employed -- either a standard roof design or a 3-bar roof design.

The trial court instructed the jury that speed "cannot be considered by you as to whether the Camaro was defective," T30 46-17 to 46-18, and that speed was not "relevant . . . on the question of whether the product was defective," T30 56-2 to 56-4. GM objected to those instructions -- arguing that, as the Third Circuit had stated in *Huddell*, the speed and severity of the crash go "to the heart" of the defect issue. 537 F.2d at 740.

To prove causation for his enhanced injuries, plaintiff sought to introduce evidence of the injuries he likely would have suffered under the alternative designs he proposed. He attempted to elicit such testimony from a design engineering expert, Dr. Phillips. GM objected because Dr. Phillips had no medical training or expertise. Plaintiff contested the objection, noting that the court's ruling on Dr. Phillips was "crucial because *if I can't do it with this guy, . . . then I have problems.*" T14 113-21 to 113-22 (emphasis added). The trial court agreed with GM and prohibited Dr. Phillips' testimony. GM subsequently moved for involuntary dismissal and for judgment against plaintiff (and later for judgment n.o.v.), arguing that plaintiff had failed to provide competent expert testimony of the injuries he likely would have suffered in a car with an alternative design. The trial court denied GM's motions.

In rendering its verdict, the jury answered special interrogatories. The jury concluded that the roof design was defective and it agreed with plaintiff that, as a matter of historical fact, Green's injury had occurred when the roof hit

his head. The jury also found that Green would have suffered no injuries had an alternative design been employed (the issue on which GM argued there was no competent expert testimony to support the jury's conclusion).

The jury awarded Green \$13 million for future medical expenses; \$149,315 for loss of past income; \$305,860.35 for loss of future income; and \$4 million for pain and suffering. The total damage award was \$17,767,175.35. The trial court added \$8,142,174.55 in prejudgment interest and costs of \$135 minus a credit of \$799,000 for a settlement reached between plaintiff and the school bus company. The total damage award was therefore \$25,110,484.90.

3. *Appellate Division Decision*

On appeal, GM challenged both the liability and the damages judgments. As to liability, the Appellate Division first considered whether the speed at which the crash occurred is relevant to the jury's "defect" determination. The Third Circuit in *Huddell, supra*, had stated that speed went "to the heart" of the "defect" issue and that there was "no meaningful way to evaluate the defectiveness vel non of a product except in the context of a particular risk." 537 F.2d at 740, 741. The Appellate Division disagreed and held that the speed of the cars at the time of the collision was irrelevant to the jury's consideration whether the roof design was defective. The court stated that "[w]e must respectfully disagree . . . with the speed

analysis in *Huddell*" and that "we depart from *Huddell*" on the speed issue. PETA18.

The Appellate Division next addressed GM's argument that plaintiff had failed to present any competent expert testimony identifying the injuries that he likely would have suffered under the alternative designs he proposed. GM pointed out that the Third Circuit in *Huddell* had emphasized that "it is absolutely necessary that the jury be presented with some evidence as to the extent of injuries, if any, which would have been suffered . . . had the plaintiff's hypothetical design been installed." 537 F.2d at 737-38 (internal quotation omitted). As noted above, plaintiff attempted to introduce such evidence by means of a design engineering expert, Dr. Phillips, but the trial court did not allow Phillips' testimony on that subject. The Appellate Division, without addressing GM's argument directly, affirmed the jury's conclusion that plaintiff would have suffered no injuries in a car with a reasonable alternative design. PETA22.

To bolster that conclusion, the Appellate Division also stated that the defendant bears the burden of proving the injuries that likely would have occurred in a car with an alternative design. In so concluding, the Appellate Division again expressly disagreed with the Third Circuit's interpretation of New Jersey law in *Huddell*. A decision "to follow *Huddell v. Levin* and place the burden on plaintiff" would be "error." PETA 26. The Appellate Division noted that the courts of New Jersey have divided on this issue in the years since *Huddell*. See

McLaughlin v. Nissan Motor Corp., U.S.A., 267 N.J. Super. 130, 135 (Law Div. 1993) (following *Huddell*); *Thornton v. General Motors Corp.*, 280 N.J. Super. 295, 299-303 (Law Div. 1994) (rejecting *Huddell*). The Appellate Division explained that this Court has yet to address the issue and stated that "[t]he uncertainty concerning where New Jersey places the burden of proof for allocating causation of injuries in a crashworthiness case has attracted national attention." PETA 23.

The Appellate Division also considered GM's argument that the trial court had erred by instructing the jury that it may consider the defendant's duty to inspect and test the T-roof car. GM had specifically objected to this instruction at the charge conference, stating that "it's absolutely inappropriate for this to be instructed because whether we inspect it or not, the issue is, is the product that went on the road defective?" T24 54-14 to 54-16 (emphasis added). And GM explicitly renewed its previous objections after the instructions were given. T30 72-11 (GM's counsel: "We renew our objections."). As to the failure-to-test instruction, the Appellate Division agreed with GM that it was "inexplicabl[e]" and stated that "[w]e are at a loss therefore to understand why the trial judge gave this portion of his charge." PETA 26-27. But the Appellate Division did not overturn the jury verdict; it stated that "GM did not specifically object to the charge." *Id.* at 29.³

³ The Appellate Division reversed or vacated large portions of the damages award. Plaintiff, Green, has filed a notice of a cross-petition for certification on certain damages issues.

Questions Presented

1. Whether in a crashworthiness case the speed and severity of an automobile crash, and the forces generated as a result, are relevant to the jury's determination whether an automobile design was defective.

2. Whether plaintiff in a crashworthiness case must provide competent testimony that plaintiff likely would have suffered less severe injuries in a car with a reasonable alternative design.

3. Whether a specific objection at the charge conference, followed by a blanket renewed objection after the charge, is sufficient to preserve an objection to a jury instruction.

The Errors Complained Of

First, the Appellate Division erred by concluding that the speed of a vehicle at the time of a collision is irrelevant to the question whether a particular aspect of the vehicle's design was defective.

Second, the Appellate Division erred by not requiring plaintiff to prove by competent testimony that he likely would have suffered lesser injuries in a car with an alternative roof design. In failing to impose that requirement, the Appellate Division further erred by shifting to the defendant the burden of proving the injuries that plaintiff likely would have suffered in a car with the alternative design.

Third, the Appellate Division erred by concluding that GM's multiple objections to the erroneous failure-to-test instruction were insufficient to preserve the issue for appeal.

Why Certification Should be Allowed and Comments on the Appellate Division's Opinion

The Appellate Division held that the speed of a vehicle at the time of an accident is not relevant to the determination whether the car's design was defective. That decision finds no apparent precedent in any American jurisdiction. Furthermore, it squarely conflicts with a leading decision of the Third Circuit interpreting New Jersey law. See, e.g., *Huddell*, 537 F.2d at 740 (severity of the crash "goes to the heart" of the defect determination); cf. PETal8 ("We must respectfully disagree, however, with the speed analysis in *Huddell*"); *ibid.* ("we depart from *Huddell*" on speed). And when federal courts and lower state courts disagree over state law, serious problems can result. Cf., e.g., *Hakimoglu v. Trump Taj Mahal Assoc.*, 70 F.3d 291, 293 n.2 (3d Cir. 1995); *id.* at 302-04 (Becker, J., dissenting).

In addition, the Appellate Division held -- again in contrast to the Third Circuit -- that a manufacturer can be liable even though no competent witness testified that plaintiff likely would have suffered less severe injuries had the manufacturer employed a reasonable alternative design. The Appellate Division further decided that the defendant rather than plaintiff bears the burden of proving the injuries that plaintiff likely would have suffered in a car with a reasonable alternative design. That controversial burden of proof question has divided

common-law courts throughout the country, and the Appellate Division's decision creates yet another split with the Third Circuit and with other New Jersey courts.

The decision of the Appellate Division, in short, charts a great deal of new territory for the crashworthiness doctrine -- in a manner that conflicts both with the federal courts' long-standing interpretation of New Jersey law and with other cases decided by the New Jersey courts. The issues are of great importance because they substantially affect crashworthiness cases, which generally involve large sums of money; this case, for example, resulted in a \$25 million trial verdict. And the decision could have a serious impact not only on crashworthiness cases but on design defect cases more generally.

- 1. The Appellate Division's decision that speed is irrelevant to the jury's determination of defect is without any precedent, it contravenes the Third Circuit's interpretation of New Jersey law, and it reflects a substantial change in the elements of a design defect claim.**

The Appellate Division reached the unprecedented conclusion that the speed at which the car was traveling at the time of a crash was irrelevant to the jury's determination of defect. *The clear error of that result is demonstrated by the fact that neither the Appellate Division nor plaintiff could unearth a single case that has agreed with that conclusion.*

The novelty of the Appellate Division's approach becomes even more evident from *Crispin v. Volkswagenwerk AG*, 248 N.J. Super. 540, 549, 558-59 (App. Div. 1991). There, the proposition that speed is relevant to the question of defect was so obvious

that the court simply assumed as much in deciding the nature of the expert evidence needed to prove impact speed.

The Third Circuit correctly stated over 20 years ago (in interpreting New Jersey law) that the "relative severity of the impact goes to the heart of the issue of defectiveness." *Huddell*, 537 F.2d at 740. Speed is critical because of the role it plays in creating the forces experienced by a vehicle in a crash. How the vehicle responds to such forces is central to an evaluation of its design.

Similar to plaintiff here, the plaintiff in *Huddell* argued that "if a seat belt [or roof design] is faulty, it remains faulty whether an accident occurs at 5 m.p.h. or 100 m.p.h." *Ibid.* The Court responded:

This may be true, but it begs the question: the question is whether or not the seat belt or the head restraint is faulty. If the seat belt did not adequately protect its wearer in a 5 m.p.h. crash, then a proper inference might be drawn that the belt was defective; but if a man were killed wearing his seat belt in a 100 m.p.h. crash, could it be argued with the same assurance that the belt was defective? At least in the context of safety design, we see no meaningful way to evaluate the defectiveness vel non of a product except in the context of a particular risk. [*Id.* at 741 (emphasis added)].

The court thus overturned a jury verdict where the jury had been instructed not to consider the relative severity of the crash. The panel of Judges Aldisert, Gibbons, and Rosen was unanimous on this issue.

This aspect of *Huddell* has not been controversial until now. As applied to a crashworthiness case, the "defect" determination requires the jury to determine "What degree of design safety and

how many injury-minimization features are enough? In what collisions and at what speeds?" Hoenig, *Resolution of "Crashworthiness" Claims*, 55 *St. John's L. Rev.* 633, 640 (1981) (hereinafter Hoenig) (emphasis added). In this case, for example, in addition to deciding the other particulars of a crashworthiness claim, the jury should have assessed whether it is reasonable for a Camaro roof not to completely withstand a violent and severe crash in which the closing speed was between 45 and 81 miles per hour (and the Camaro was traveling between 40 and 76 miles per hour).

The Appellate Division nonetheless stated that "[w]e must respectfully disagree, however, with the speed analysis in *Huddell*." PETa18. That conclusion raises the question: How did the Appellate Division -- and the trial judge -- come to decide that the speed of the car and the severity of the crash were irrelevant to the question of defect?

The trial court erred by conflating two distinct concepts: (1) the circumstances of *the crash*, which are relevant to the defect inquiry; and (2) plaintiff's conduct *before the crash*, which generally is not. The circumstances of the crash include factors (such as the severity of the crash) that caused the car's design features (such as a roof) to operate in the manner they did during the crash. The reasonableness of a design in which, for example, the roof does not withstand a crash will be directly tied to the speed at which the car was traveling at the time of impact, as the Third Circuit recognized in *Huddell*. By contrast,

plaintiff's conduct before the crash (whether plaintiff was drunk or asleep, for example) generally does not affect how the design features operate during the crash and is not relevant to the "defect" determination. The trial court failed to grasp this subtle but vital distinction, concluding that the speed of the vehicles at the time of the crash was part of plaintiff's conduct. This confusion begat its erroneous instruction that speed was not relevant to the defect inquiry. See PETA 12.

The Appellate Division upheld the trial court's ruling, but it appeared to recognize the error of the trial court's reasoning, relying instead on a different (albeit, far broader) rationale. The Appellate Division correctly stated that liability in a crashworthiness design defect case requires proof that there was a reasonable alternative design, that the accident occurred in a reasonably foreseeable manner, and that plaintiff's injuries would have been less severe had the alternative design been employed. But the Appellate Division's fundamental mistake was its conclusion that those elements are not only *necessary* -- but *sufficient* -- for liability in a design defect case.

Contrary to the conclusion of the Appellate Division, the jury not only must determine whether those three requirements for liability exist, but also must analyze the risk-utility factors to determine whether under all the circumstances, the manufacturer was *reasonable* in marketing the product designed as it was. See *Zaza, supra*, 144 N.J. at 49-50. In other words, even if the manufacturer could have designed an alternative that

would have caused less severe injuries, the jury also must determine, through the risk-utility analysis, whether the vehicle as designed was reasonably safe.

To be sure, the Appellate Division acknowledged that "there are seven listed factors" in what it termed "the classical statement of the risk-utility analysis," but the court then stated that "the issue upon which most claims will turn is the proof by plaintiff of a reasonable alternative design the omission of which renders the product not reasonably safe." PETA 10-11 (quotations omitted) (emphasis added). See also *Fiorino v. Sears Roebuck & Co.*, No. A-1685-96T1, 1998 WL 139123 at *7 n.3 (N.J. App. Div., Mar. 19, 1998) (Dreier, J.) ("various risk/utility factors can be summarized and rephrased" as bearing only on question whether plaintiff proved a reasonable alternative design). In seeking support for its effective elimination of the risk-utility reasonableness analysis, the Appellate Division latched onto Section 2(b) of the proposed final draft of the *Restatement (Third) of Torts*. But the Appellate Division's reliance on the draft *Restatement* is misplaced for a number of reasons.

First, regardless of what the draft *Restatement* says, numerous decisions of this Court recognize that the jury is to consider the risk-utility factors in conducting the reasonableness/defect inquiry. "This Court has adopted the risk-utility analysis as a means of determining whether a product is defectively designed." *Johansen v. Makita USA, Inc.*, 128 N.J.

86, 95 (1992). See also, e.g., *Becker v. Baron Bros.*, 138 N.J. 145, 151-54 (1994); *Feldman v. Lederle Labs.*, 97 N.J. 429, 444-45 (1984); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 182 (1983); *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 173-74 (1978).

Second, the Appellate Division's reliance on the draft Restatement is wrong even on its own terms. Section 2(b) states that a product is

defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

And comment f to Section 2 elaborates:

A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account.

In contrast to the draft Restatement, the Appellate Division in this case (and in two earlier opinions by Judge Dreier) generally would not allow the jury to consider a "broad range" of factors in determining whether a product was defective. See

Congiusti v. Ingersoll-Rand Co., 306 N.J. Super. 126, 138-39 (App. Div. 1997) (Dreier, J.A.D.) ("in most cases the inquiry" into reasonable alternative design "will most probably present the issue to a jury in a clear and well-defined manner"); *Grzanka v. Pfeifer*, 301 N.J. Super. 563, 579 (App. Div. 1997) (Dreier, J.) ("the omission of the alternative design renders the product not reasonably safe" so long as there is a "reasonably foreseeable risk"); see also PETall (citing *Congiusti* and *Grzanka* for appropriate "defect" test).⁴

Third, while the Appellate Division's version of New Jersey law arguably simplifies the jury's task by eliminating the "reasonableness" judgment inherent in the risk-utility factors, it does so by placing a thumb on plaintiff's side of the scale. A difficult element of a plaintiff's case (convincing a jury that the manufacturer was unreasonable to market the product as designed) has disappeared. And that result contravenes the stated policy of the Products Liability Act, which "has been interpreted as evincing a legislative policy to limit the expansion of products-liability law" and to "limit the liability of manufacturers." *Zaza, supra*, 144 N.J. at 47 (internal quotations omitted).

Fourth, the fallacy of the Appellate Division's decision effectively to eliminate the jury's consideration of the risk-

⁴ The Appellate Division also cited *Smith v. Keller Ladder Co.*, 275 N.J. Super. 280 (App. Div. 1994), but that case held that a reasonable alternative design is necessary for a defect finding, not that it is sufficient.

utility factors is exposed most clearly by the result it produced in this case. The Appellate Division's stripped-down test for design defect liability led it to conclude that the speed and severity of an automobile crash are suddenly irrelevant to the defect determination. But that result is totally unprecedented, and contravenes the Third Circuit's interpretation of New Jersey law -- all of which indicate that something is seriously amiss with the analysis that led to the result.

- 2. The Appellate Division's standard for proving the injuries that plaintiff would have suffered in a car with a reasonable, alternative design contravenes other New Jersey decisions and the Third Circuit's interpretation of New Jersey law.**

In direct conflict with *Huddell*, the Appellate Division affirmed the judgment entered on the jury verdict notwithstanding the absence of competent testimony that plaintiff would have suffered lesser injuries had an alternative design been employed. Plaintiff tried to introduce such evidence through a design safety engineer, but the trial court denied the testimony because the proffered witness was not a medical expert. The court's ruling prompted plaintiff's counsel to say (correctly) to the trial judge that this is "crucial because if I can't do it with this guy, . . . then I have problems." T14 113-21 to 113-22. Cf. Carbetta-Scandy, *Litigating Enhanced Injury Cases*, 54 *U. Cin. L. Rev.* 1257, 1277 (1986) ("The issue in proving a claim of enhanced injuries is often one of a particular expert's competency to testify in these specialized areas").

As plaintiff counsel's spontaneous admission at trial suggests, the jury must consider competent expert testimony to determine the injuries that plaintiff would have suffered in a car with an alternative design. The necessity of such testimony in crashworthiness cases is obvious and widely acknowledged. See *Curtis v. General Motors Corp.*, 649 F.2d 808, 813 (10th Cir. 1981) ("Expert testimony is required in order for the jury to avoid pure speculation"); *Caiazza v. Volkswagenwerk A.G.*, 647 F.2d 241, 250 (2d Cir. 1981).

The Appellate Division nonetheless rejected GM's argument, stating in conclusory fashion that "[b]ut for the crushing injury to plaintiff's spine, plaintiff was virtually uninjured." PETA22. As GM had repeatedly pointed out, however, the fact that plaintiff's only injury was to his spine does not mean that plaintiff would have suffered *no injuries* had an alternative design been employed. A medical expert is necessary to render that judgment, and plaintiff failed to provide such testimony. The Appellate Division never came to grips with this critical point.

By contrast, when presented with a virtually identical scenario, the Third Circuit in *Huddell* reached the correct conclusion. That court emphasized that "it is *absolutely necessary* that the jury be presented with some evidence as to the extent of injuries, if any, which would have been suffered had the plaintiff's hypothetical design been installed." 537 F.2d at 738 (internal quotation omitted) (emphasis added). The plaintiff

there, like Green, offered evidence that "there was no evidence of significant injury to vital organs from the accident as it happened." *Ibid.* (emphasis added). But the Third Circuit responded that "this ignored the possibility that injury to those organs might have been more severe if the great forces of the collision had been more widely distributed over the head and body by an alternat[ive] . . . design. It was not established whether the hypothetical victim of the survivable crash would have sustained no injuries, temporary injuries, permanent but insignificant injuries, extensive and permanent injuries, or, possibly, paraplegia or quadriplegia." *Ibid.*

Similarly, the Delaware Supreme Court's recent unanimous decision in *Mazda Motor Corp. v. Lindahl*, No. 2831996, 1998 WL 112609 (1998), is in accord with the standard of proof established in *Huddell* -- and contravenes the Appellate Division's approach. In that case, the plaintiff had been partially ejected from his vehicle and killed. His survivor claimed that the seat restraint system was defective and enhanced the decedent's injuries. The defendant conceded that there was a reasonable alternative design; the disputed issue concerned the injuries the decedent would have suffered in a car with that design. The Delaware Supreme Court found insufficient evidence to prove such injuries and reversed the judgment entered on the jury verdict for plaintiff:

[The expert] never stated that decedent would have survived the physiological forces on his body had an alternate, safer seat been employed. [The expert] offered no opinion as to the nature of the injuries

that would have been inflicted on the occupant of a vehicle with a properly designed seat. Thus, he failed to provide any basis from which the jury could conclude that an accident with an alternate seat design was survivable. [1998 WL 112609 at *6].

In attempting to prop up its conclusion that there was sufficient evidence of the injuries plaintiff would have suffered in a car with an alternative design, the Appellate Division shifted the burden of proof, placing it on defendant and thereby generating yet another *major* change in New Jersey law.⁵ That decision conflicts with other New Jersey cases and with the Third Circuit's decision in *Huddell*. See *McLaughlin v. Nissan Motor Corp., U.S.A.*, 267 N.J. Super. 130, 135 (Law Div. 1993) (following *Huddell*). But cf. *Thornton v. General Motors Corp.*, 280 N.J. Super. 295, 299-303 (Law Div. 1994) (rejecting *Huddell*). The Appellate Division pointedly noted that "the Supreme Court has not yet spoken definitively on this subject" although "[t]he uncertainty concerning where New Jersey places the burden of proof for allocating causation of injuries in a crashworthiness case has attracted national attention." PETA25, 23 (emphasis added). As the Appellate Division not so subtly suggested, this

⁵ By contrast, the Delaware Supreme Court stated in *Lindahl* that its conclusion was valid regardless whether the plaintiff or the defendant bore the burden of proof on the question of injuries in a car with an alternative design: "We likewise reject [plaintiff's] 'survivability' argument, not because we hold that a plaintiff always bears the burden of identifying the specific injuries caused by the defect (a decision we do not now reach), but because [plaintiff] has failed to offer sufficient evidence of the injuries that would have occurred had there been a properly-designed seat." 1998 WL 112609 at *6 (emphasis added).

case presents an appropriate opportunity for this Court to clarify and resolve this important issue, which has divided common-law courts throughout the country and within New Jersey. See *Restatement (Third) of Torts* § 16 cmt. d, at 294-313 (Proposed Final Draft, Apr. 1, 1997) (discussing at length the widespread controversy over the burden-of-proof issue).

Not only is the burden-of-proof issue important, but the Appellate Division resolved it incorrectly. In the ordinary case, the plaintiff bears the burden of proof. The burden is shifted "[w]here the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them." *Restatement (Second) of Torts* § 433B(2). That exception simply does not apply to a crashworthiness case, however. Indeed, "the burden of proof controversy is a false issue." *Hoenig, supra*, 55 *St. John's L. Rev.* at 706.

[T]he claim against the manufacturer is . . . based . . . upon the theory that the injuries incurred were greater than those that would have been sustained had there been no defect. The claimant proves this aspect of damages by showing what probably would have occurred had a safer alternative design been used. *This required showing against the manufacturer has absolutely nothing to do with apportionment between tortfeasors.* [*Id.* at 704 (emphasis added)].

See also *Vickles & Oldham, Enhanced Injury Should Not Equal Enhanced Liability*, 36 *S. Tex. L. Rev.* 417, 449 (1995) (declaring that arguments made against *Huddell* "do not justify relieving plaintiffs from the burden of proving that which they allege in

an enhanced injury case -- that lesser injuries would have been sustained had a different design been used").

The inescapable conclusion from the foregoing is that the issue is sufficiently important throughout the country and in New Jersey (and is sufficiently uncertain in New Jersey, as the Appellate Division emphasized) that this Court should address it in this case.

3. The Appellate Division devised an unprecedented, unfair, and legally erroneous standard for preserving objections to jury instructions.

The trial court instructed the jury to consider the defendant's alleged failure to adequately test the Camaro T-top design "in determining whether the Camaro was defective." T30 51-24 to 52-1. That instruction constituted nearly two of the eleven pages of jury instructions on crashworthiness. See T30 46-24 to 56-25. The Appellate Division found the instruction erroneous, labeling it "inexplicabl[e]." PETA26. The Appellate Division stated that it was "at a loss to understand why the trial judge gave this portion of the charge." *Id.* at 27.

The Appellate Division nonetheless refused to overturn the judgment entered on the jury verdict, stating that GM did not "specifically object" to this instruction. *Id.* at 29.⁵ That

⁵ The Appellate Division indicated that the instruction was not "plain error" because the jury interrogatories "contain no reference to testing, but look only to the issues of defect and proximate cause." PETA30; see also *Fiorino*, 1998 WL 139123 at *5 (no plain error in *Green* because "the jury answered specific interrogatories that were not affected by the mistaken charge"). But that ignores two critical points: The first question on the verdict form asked whether the product was defective, Pal, Da67, (continued...)

conclusion represents a gross departure from settled New Jersey practice.

At the charge conference, GM's attorneys specifically argued: "the issue in this case is was our product defective. Suppose we got lucky and never did any test, the product is not defective. If we had done a single test, if the product is not defective, the plaintiff loses so this adds nothing at all. . . . *it's absolutely inappropriate for this to be instructed because whether we inspect it or not, the issue is, is the product that went on the road defective?*" T24 54-6 to 54-16 (emphasis added).

Moreover, after the charge to the jury and before the jury retired, the court entertained additional objections. Plaintiff's counsel identified two objections "other than obviously all the exceptions that we've taken previously." T30 71-12 to 71-13 (emphasis added). GM's counsel then stated: "We renew our objections." T30 72-11 (emphasis added). Again, the court and the parties stated and understood that objections previously made were preserved for appeal. GM thus easily satisfied the standard of *Rule 1:7-2*, which states that "no party

* (...continued)
and the trial court instructed the jury that "[i]n determining whether the Camaro was defective, you may take into account that a manufacturer is also under a duty to make reasonable inspection and tests of its products" T30 51-24 to 52-1.

Before instructing the jury, the trial court informed the parties of the charge it intended to give. The court then turned to plaintiff's counsel and asked whether he had any objections "apart from the objections that you have already raised." T29 13-20 to 13-21 (emphasis added). GM's counsel was then given the same opportunity. The trial court thus indicated at that time that the objections already raised were noted and preserved.

may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict."

Indeed, in its motion for a judgment n.o.v. or a new trial, GM reiterated its argument that the failure-to-test instruction was improper. In response, plaintiff's counsel never explicitly suggested that GM's objection had not been preserved. Nor did the trial court ever say that the objection had not been preserved.

Given this extensive record, the Appellate Division's statement that GM somehow failed to "put the judge on notice," PETa 29, of GM's objections to this instruction is perplexing. We are aware of no case in New Jersey in which a court has held an objection waived when there had been an objection at the charge conference followed by a statement that "we renew our objections" after the charge was given and before the jury retired. Cf., e.g., *Bradford v. Kupper Assoc.*, 283 N.J. Super. 556, 572 (App. Div. 1995), *certif. denied*, 144 N.J. 586 (1996); *Sun Source, Inc. v. Kuczkir*, 260 N.J. Super. 256, 265 (App. Div. 1992), *certif. denied*, 133 N.J. 439 (1993). The Appellate Division's error on this point is terribly unfair and a sufficiently serious departure from the settled course of civil practice in New Jersey that it warrants this Court's attention and supervision.

Conclusion

For the foregoing reasons, the petition for certification should be granted.

Dated: April 17, 1998

Respectfully submitted,



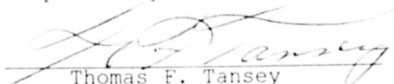
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CERTIFICATION

I certify that this Petition presents substantial questions and is filed in good faith and not for purposes of delay.

Dated: April 17, 1998

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PERMANENT

ORAL ARGUMENT NOT SCHEDULED

No. 92-3191

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

EDWARD CLARK, JR.,

Appellant

United States Court of Appeals
For the District of Columbia Circuit
FILED MAR 15 1993
RON GARVIN
CLERK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The parties involved in this case in the district court and in this Court are the United States of America and Edward Clark, Jr.

B. Rulings Under Review. References to the ruling below appear in the Brief of Appellant.

C. Related Cases. This case has not previously been before this Court or any other court. Counsel is unaware of any related cases pending in this Court or any other court.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-3191

UNITED STATES OF AMERICA,

Appellee

v.

EDWARD CLARK, JR.,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the officers had reasonable suspicion to stop Clark.
2. Whether the officers' actions during the stop -- approaching the car with a drawn gun, removing Clark from the car, and making Clark kneel on the ground -- were reasonable; and, if not, whether the evidence should be excluded.
3. Whether Officer Jordan's initial search of the car was reasonable; and, if not, whether the evidence should be excluded.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction in the United States District Court for the District of Columbia. This court has jurisdiction under 28 U.S.C. § 1291, and the district court had jurisdiction under 18 U.S.C. § 3231.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court

On November 18, 1991, defendant-appellant Edward Clark, Jr., was arrested and charged with possession with intent to distribute five or more grams of cocaine base in violation of 21 U.S.C. § 841(a). Clark filed a suppression motion. See Miranda v. Arizona, 384 U.S. 436 (1966); Weeks v. United States, 232 U.S. 383 (1914). He argued, in relevant part, that he was stopped, and the car he was driving searched, in violation of Terry v. Ohio, 392 U.S. 1 (1968).¹

Judge Thomas Hogan held an evidentiary hearing on March 10 and 11, 1992. At its conclusion, Judge Hogan orally denied Clark's motion to suppress. As to the stop, Judge Hogan

¹ Clark also contended that a statement he made to the police, which arguably led to the discovery of the drugs, was obtained in violation of Miranda. Clark does not renew that argument on appeal.

concluded that "the specific and articulable facts Officer Stone had before him and Officer Jordan [] gave rise to a reasonable suspicion that Mr. Clark was engaged in criminal activity, that he was in possession of the drugs, that in that case was supposed to be a stash of marijuana." Tr. 145.

As to the manner of effectuating the stop, Judge Hogan concluded that Detective Jordan acted reasonably in having his gun drawn during the stop. He also concluded that it was reasonable for the officers to take Clark out of the car and to make him kneel on the ground. He further found that the search of the car was permissible. Tr. 135, 145, 147-148, 150, 152.

Clark entered a conditional plea of guilty. After a hearing on July 15, 1992, Judge Hogan sentenced Clark to 92 months' imprisonment.

B. Statement of Facts

At around 7:30 p.m. on November 18, 1991, Officer Stone and Detective Jordan of the Metropolitan Police Department, both in plain clothes, drove to the 5400 block of Georgia Avenue in Northwest Washington to get some doughnuts. Officer Stone entered the doughnut store. While in the store, he had a conversation with Ernest Braxton. Braxton offered marijuana to Officer Stone, and Stone agreed to buy some. Braxton left to get the marijuana. He came back and gave the marijuana to Officer Stone. Stone asked Braxton if his friend (Detective Jordan) could also buy some marijuana. Officer Stone and Braxton then walked over to Detective Jordan (who was still in the parked car)

and showed him the marijuana. Apparently spotting police radios on the car seat, Braxton ran. The officers caught him a few minutes later and arrested him. Tr. 136.

In an effort to cooperate and obtain lenient treatment, Braxton told the officers that he knew someone who had a stash of marijuana. Braxton described the man to the officers. Braxton was then placed in a car with Officer Jewell, who had been called to the scene to transport Braxton, and who was told by Officer Stone that Braxton had described another suspect. While in the transport car, Braxton pointed to a man on Georgia Avenue (defendant Clark) and said he was the man with the stash of marijuana. Officer Jewell pulled her car next to the car of Detective Jordan and Officer Stone and told them that Braxton had identified the man across the street, who was then getting into a car, as the man with the stash of marijuana. Tr. 137-138, 144-147.

Officer Stone and Detective Jordan pulled next to Clark's car. Detective Jordan approached the car with his gun drawn and ordered Clark out of the car. The officers took Clark to the rear of the car and made him kneel on the ground. Detective Jordan did a cursory search for weapons in the passenger side of the car but did not find anything. At the same time, Clark was talking with Officer Stone, and told him that drugs were under the front seat of the car. Officer Stone then searched the car and found a plastic bag with cocaine base in a pocket on the driver's door. Tr. 139-141, 150-152.

SUMMARY OF ARGUMENT

1. The officers had reasonable suspicion to stop Clark. When a known informant (as opposed to an anonymous tipster) informs the police that another person is engaged in criminal activity, the police ordinarily have reasonable suspicion to stop that person. Here, Ernest Braxton, a known informant, identified Clark to the police and stated that Clark possessed marijuana. The officers had no reason to doubt that information. In addition, a number of other factors enhanced its reliability: Braxton was a marijuana seller and thus had a basis for knowing others in the drug trade; he had just been arrested and thus had an incentive to cooperate; the information he gave was immediately verifiable; and his identification of Clark matched the earlier description he had given to the police.

2. The officers' actions during the stop -- approaching Clark with a gun drawn, removing Clark from the car, and making Clark kneel -- were reasonable. The Supreme Court and this Court have made clear that those are reasonable steps for the police to take during a Terry stop of a person in a car who is suspected of criminal activity. Thus, this was not a de facto arrest.

Even if the stop were a de facto arrest, the officers had probable cause to arrest Clark. And even if the stop were a de facto arrest and the officers did not have probable cause, the evidence should not be excluded. Where (as here) the police had reasonable suspicion to make a stop, and the frisk of a person and search of his car did not exceed the permissible scope of

Terry and Michigan v. Long, 463 U.S. 1032, 1051 (1983), there is no logical basis for excluding any evidence found during the frisk of person or search of car.

3. Officer Jordan's initial search of the car for weapons was reasonable. An officer may search a car's passenger compartment when stopping a "potentially dangerous" person.

In any event, the police discovered the drugs by means wholly independent of that initial search. Thus, even if the initial search of the car were unreasonable, that is not a basis for excluding the evidence.

ARGUMENT

The starting point for analysis of this case is the text of the Fourth Amendment, which provides that people have a "right * * * to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court must determine whether the officers acted reasonably: first, in stopping Clark; second, in the manner in which they stopped and detained him; and, third, in the initial search of the car he was driving. This Court reviews de novo the district court's decision whether a Terry stop was reasonable. United States v. McKie, 951 F.2d 399, 401 (D.C. Cir. 1991).²

² Pursuant to Circuit Rule 12(c), this appeal is to be "considered on the original record without the necessity of an appendix." The clerk "shall reproduce for this Court's use two copies of the pertinent parts of the record." Pursuant to Rule 12(c)(2), we have submitted an appendix containing the full transcript of the suppression hearing to assist the Court in its review.

I. THE OFFICERS HAD REASONABLE SUSPICION TO STOP CLARK

The dispute in this case concerns neither a consensual encounter (which is not a seizure under the Fourth Amendment), nor a formal arrest (for which the police must have probable cause). Rather, it concerns a police "stop."³ Clark's first contention is that the police violated the Fourth Amendment because they did not have "reasonable suspicion" to stop him, as required by Terry v. Ohio, 392 U.S. 1 (1968). That contention is erroneous.

A. In Terry, the Supreme Court held that it is reasonable under the Fourth Amendment for police officers to "approach a person for the purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U.S. at 22. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Adams v. Williams, 407 U.S. 143, 145 (1972). Instead, a police officer may forcibly stop an individual when the officer can "point to specific and articulable facts which, taken together with the rational inferences from those facts," Terry, 392 U.S. at 21, give the officer "reasonable suspicion" to believe that a person "has been, is, or is about to be engaged in criminal activity." United States v. Place, 462 U.S. 696, 702 (1983); see Terry, 392

³ Such a stop is variously referred to as a "stop," "investigatory stop," "detention," or "Terry stop."

U.S. at 33-34 (Harlan, J., concurring).

When subsequently considering the validity of a stop, a reviewing court "must consider the totality of the circumstances -- the whole picture." United States v. Sokolow, 490 U.S. 1, 8 (1989) (internal quotation omitted). The incident must "be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training," United States v. Hall, 525 F.2d 857, 859 (D.C. Cir. 1976), "not in terms of library analysis by scholars." United States v. Cortez, 449 U.S. 411, 418 (1981). Courts may not engage in "unrealistic second-guessing" of police action. United States v. Sharpe, 470 U.S. 675, 686 (1985).

B. In this case, the officers' reasonable suspicion arose from Ernest Braxton's in-person identification of Clark as a possessor of drugs. It is settled that information an officer receives from a third party -- as opposed to that he observes first-hand -- may give him the requisite "reasonable suspicion" for a stop. The Supreme Court in Adams v. Williams flatly "reject[ed] [the] argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person." 407 U.S. at 147.

When analyzing the Terry implications of a stop resulting from information provided by another person, it's important to distinguish two categories: tips from an anonymous person and tips from a person who has identified himself to the authorities

(a "known informant"). This case involves a tip from a known informant.⁴

Most of the controversy about whether tips can provide reasonable suspicion has concerned tips from anonymous informants. See, e.g., Wayne R. Lafave, "Street Encounters" and the Constitution, Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 39, 77-78 (1968). Anonymous tips are inherently dangerous because "it is possible for anyone with a grudge to fabricate a tip whose neutral details, such as clothing or location, would provide the corroboration required * * * ." United States v. McClinnhan, 660 F.2d 500, 502 (D.C. Cir. 1981). That is not to say that tips from anonymous sources must be ignored. In Alabama v. White, 496 U.S. 325, 329-332 (1990), the Supreme Court concluded that an anonymous tip alone generally does not provide reasonable suspicion to warrant a stop, but that an anonymous tip which is corroborated in part does provide reasonable suspicion. See also United States v. Clipper, 973 F.2d 944, 949-950 (D.C. Cir. 1992); McClinnhan, 660 F.2d at 502-503.

⁴ The factors generally important in determining whether an informant's tip is sufficient to establish reasonable suspicion are the informant's veracity and his basis of knowledge. Alabama v. White, 496 U.S. 325, 328-329 (1990). A court examines those same factors in determining whether an informant's tip establishes probable cause, Illinois v. Gates, 462 U.S. 213, 230 (1983), but allowance must be made for the fact that the reasonable suspicion standard "is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." Alabama v. White, 496 U.S. at 330.

Officers have much greater leeway to stop persons in cases (such as this one) where they receive tips or information from known informants. The reason is readily apparent: The danger inherent in an anonymous tip -- that the information has been fabricated by a prankster or a person with a grudge -- is greatly reduced when the tip is from a known informant. As the courts have recognized, a known informant can be apprehended and subjected to legal sanctions if he provides a false tip. See Adams v. Williams, 407 U.S. at 147 ("the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connelly's investigation proved the tip incorrect"); Clipper, 973 F.2d at 951 ("we are aware that anyone fabricating information runs a risk * * * the making of fraudulent reports is punishable by law."); United States v. Salazar, 945 F.2d 47, 51 (2d Cir. 1991) (known informant "must, as a general matter, be thought more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false"). Because of the array of legal sanctions that act to deter known informants from providing false information, a tip from a known informant regarding another person's criminal activity is ordinarily considered sufficiently reliable to justify a Terry stop⁵ -- provided, of course, that

⁵ That assumes, as is usually the case with tips from known informants, that the known informant "names or otherwise specifies with great particularity the person about whom he is speaking." Wayne R. Lafave, Search and Seizure § 9.3(e), at 474-475 (1987). That assumption is accurate in this case; this is not a case where a person gave a vague description of the person who committed the crime; and thus is not a case where the legal

the police have no independent reason to doubt the veracity of the information. Indeed, Clark has not cited a single case where a tip from a known informant has been held insufficient to provide reasonable suspicion to justify a stop; the four cases on which he relies concern tips from anonymous sources. See Clark Br. 16-21.

The officers in this case thus had reasonable suspicion to stop Clark. A known informant -- Braxton -- had identified Clark as a person engaged in criminal activity, and the police had no reason to doubt Braxton's veracity. Judge Hogan correctly analyzed the issue: "This is more than Alabama v. White in the sense we have an identified informant, not an anonymous tip.

* * * There's no indication that defendant Braxton pointed out three or four other people first that they tried to pat down, didn't find anything on, that he went immediately up the street to this one individual and said, 'That's him.'" Tr. 146.

C. We do not rest our argument, however, solely on the fact that a known informant identified Clark to the police. Four other factors enhanced the reliability of Braxton's information.

First, the officers knew that Braxton was a participant in the drug trade: Braxton had sold marijuana to Officer Stone just a few minutes before he identified Clark. It is reasonable for

question is "whether a sufficiently detailed description can be obtained to justify the seizure of any particular person." Id. at 460; see Tr. 145 ("The officers established * * * that he did point out Mr. Clark * * * as well as physically identified him driving down the street as the one that had the stash, or that is, that had the marijuana.").

the police to assume that one (such as Braxton) engaged in the drug trade in an area knows others (such as Clark) who are also involved in the business. In other words, the officers could reasonably assume that Braxton had a basis for knowing that Clark was involved in the drug business. See United States v. Chin, 981 F.2d 1275, 1278 (D.C. Cir. 1992) (identification of another person as an owner of drugs by one caught with drugs "could be viewed as weightier than a tip from a more distant informant").

Second, Braxton was in custody at the time he told the police about Clark. Clark argues that Braxton's status should have caused the police to doubt Braxton's information. Clark Br. 14. But an admitted criminal participant has a strong incentive not to lie because "should he lie to the police," he "risks disfavor with the [police and] prosecution." United States v. Davis, 617 F.2d 677, 693 (D.C. Cir. 1979). There is, in addition, an incentive for an arrestee to provide truthful information regarding another person's criminal activity. It's common knowledge that defendants can receive better treatment if they cooperate with the police and prosecution in the investigation of other criminals. See, e.g., U.S.S.G. 5K1.1 (allowing sentence reduction for defendant who provides substantial assistance to authorities in "investigation or prosecution of another person"). Indeed, the officers here knew Braxton was thinking along those lines when he gave them information about Clark: "[T]he evidence to the Court's satisfaction established he then did indicate he would cooperate

and try to turn over someone else who had given him the drugs." Tr. 144; see Tr. 10 (testimony of Officer Stone) ("he stated to me that if he told me where the person was that was holding the stash, would I be able to drop the charges for him. I advised him that I would talk to the U.S. Attorney about it, but at this time, I could not promise him anything.").

Third, this case involved information (the identification of Clark) that could be immediately verified by the police. Someone volunteering information is less likely to lie if the lie will be immediately exposed. See Adams v. Williams, 407 U.S. at 146 ("The informant here came forward personally to give information that was immediately verifiable at the scene.").

Fourth, Braxton's initial description of Clark matched the person he subsequently identified on the street. Tr. 145 (Clark "matched the description"). The fact that Braxton had earlier provided a description made it less likely that he was simply picking a person at random off the street; and the fact that the person he subsequently identified matched the earlier description enhanced Braxton's overall believability.

In light of all of this, Clark's submission on appeal reduces to the argument that there was a chance that Braxton was lying to the police. But that is true in all cases where police rely on information provided by a third party, yet this Court has emphasized that the mere possibility of fabrication is insufficient to defeat reasonable suspicion. United States v. White, 648 F.2d 29, 40-45 (D.C. Cir. 1981). To stop a person,

police officers do not need proof beyond a reasonable doubt, or even probable cause; all they need is reasonable suspicion. In this case, they had it -- as Judge Hogan properly determined.

II. THE OFFICERS' ACTIONS IN EFFECTUATING THE STOP -- APPROACHING THE CAR WITH A DRAWN GUN, REMOVING CLARK FROM THE CAR, AND MAKING CLARK KNEEL ON THE GROUND -- WERE REASONABLE

The second issue is whether the manner in which the officers stopped and detained Clark was reasonable. Clark contends: (1) that the officers used unreasonable force in approaching the car with a gun drawn, removing him from the car, and making him kneel on the ground; (2) that the stop was therefore a de facto arrest for which the officers did not have probable cause; and (3) that suppression of the evidence is therefore required. Clark Br. 24-27. See United States v. Laing, 889 F.2d 281, 285 (D.C. Cir. 1989) ("Although an investigative stop is not an arrest, it may become one if the duration of the stop or the amount of force used is 'unreasonable' under the circumstances.").⁶

⁶ In the text, we address whether those three challenged police actions were unreasonable. We contend that they were not and that this stop therefore was not a de facto arrest. But even if those actions were unreasonable, we do not believe that Clark should win this appeal for two independent reasons.

First, even if this Court were to agree with Clark that the officers acted unreasonably, and that Clark was thus de facto arrested, see Clark Br. 27, the district court's decision should be affirmed because the combination of facts in this case (discussed in Section I) gave the police probable cause to arrest Clark. Cf. Sibron v. New York, 392 U.S. 40, 66 (1968); see Tr. 126. And Clark does not dispute that the officers' actions were permissible incidents of an arrest.

Second, even assuming a de facto arrest occurred and the police did not have probable cause, the evidence should not be

A. Clark suggests that an officer must have reasonable suspicion that a person is armed -- in addition to reasonable suspicion that a person is engaged in criminal activity -- in order to justify drawing his gun when effectuating a stop. Clark Br. 26. This Court has correctly rejected that argument. United States v. White, 648 F.2d at 34-36.

In United States v. White, the police received an anonymous tip about persons involved in drug trafficking. The informant gave no indication that the persons were armed. In making the stop, the officers approached the suspects with their guns drawn.⁷ White argued that this was unreasonable under the circumstances, and thus the stop was a de facto arrest, which required probable cause. This Court disagreed and concluded that the police officers had acted reasonably under the circumstances:

The officers were approaching a car which they had been told contained both traffickers and a cache of narcotics. Reviewing the situation through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training, we cannot say that the officers acted unreasonably in being prepared for possible violence.

excluded. "The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix v. Williams, 467 U.S. 431, 443 (1984). Where (as here) the police have reasonable suspicion to make a stop, and the subsequent frisk of person and search of car does not exceed the permissible scope of Terry and Michigan v. Long, 463 U.S. 1032, 1051 (1983), any evidence found during the frisk or car search clearly has been discovered by means "wholly independent" of the police action (such as drawing a weapon) that allegedly transformed the stop into a de facto arrest.

⁷ Clark is incorrect to suggest that guns were drawn only after "furtive and suspicious actions of the suspects." Clark Br. 26; see 648 F.2d at 31.

648 F.2d at 36 (internal quotation omitted). In reaching its conclusion, the Court in White specifically rejected the ivory tower suggestion that individuals possessing narcotics pose no risk of serious personal injury. Id. at 36 n.33. "[I]t has uniformly been recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia." United States v. Payne, 805 F.2d 1062, 1065 (D.C. Cir. 1986). And because "Terry grants broad discretion to the police when they act to protect themselves," United States v. Mitchell, 951 F.2d 1291, 1296 (D.C. Cir. 1991), the Court in White approved District Judge Pratt's ultimate assessment of the officers' action: "I think the officers would be a little foolhardy if they approached the car at 7:30 in the evening, a car with three people in it, without their guns, at the ready." 648 F.2d at 36.

White makes clear that an officer may have her weapon drawn when approaching a suspect the officer has reasonable suspicion to believe is engaged in criminal activity -- especially drug- or gun-related activity. See, e.g., Clipper, 973 F.2d at 952; Laing, 889 F.2d at 285. The decisions from the other courts of appeals are in accord with White. See, e.g., United States v. Prior, 941 F.2d 427, 430 (6th Cir. 1991); United States v. Lechuqa, 925 F.2d 1035, 1040 (7th Cir. 1991); United States v. Hastamorir, 881 F.2d 1551, 1557 (11th Cir. 1989); see also Lafave, Search and Seizure § 9.2(d), at 364 ("it cannot be said that whenever police draw weapons the resulting seizure must be

deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present"); cf. White, 648 F.2d at 34-35 ("Courts have generally upheld stops made at gunpoint when the threat of force has been viewed as reasonably necessary for the protection of the officer.").

But we need not rest our argument regarding the drawn gun solely on the fact that the officers had reasonable suspicion that Clark possessed drugs. Two other factors compel the conclusion that Detective Jordan acted reasonably in approaching Clark with his gun drawn.

First, the encounter occurred in a high-crime area. Tr. 146 ("this is a high drug area * * * violence is endemic with the drug problem"). This Court has recognized that the police have more latitude in protecting themselves against potential danger in such areas. See, e.g., United States v. White, 648 F.2d at 36 & n.34. Judge Hogan noted: "It's very realistic. That's a problem in the District of Columbia today. A police officer had been shot in the near past. The officers know cars have been stopped recently in the past in various parts of the city from which multiple weapons are found. Officers have been shot at recently." Tr. 148. Detective Jordan was well aware of these problems: "The particular area is known for weapons offenses involving handguns, weapons offenses not involving guns, but knives, a high-narcotic traffic area for the sales of marijuana and crack cocaine." Tr. 42.

Second, Clark was in a car. A car stop is fraught with

danger because a person in a car may easily conceal a weapon. Thus, officers may take more protective steps in approaching a person in a car than in approaching a person on the street. See Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) ("we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile"); Adams v. Williams, 407 U.S. at 148 & n.3; United States v. Robinson, 414 U.S. 218, 234 n.5 (1973) ("a significant percentage of murders of police officers occurs when the officers are making traffic stops"); United States v. White, 648 F.2d at 37 ("Since an officer's view of a suspect seated in a car is always partially obscured, the officer is at a disadvantage both when he approaches the occupant and when he tries to question him through a car window. He cannot scrutinize the suspect's movements as he can a pedestrian's; there is consequently a greater opportunity for the suspect in a car to pull out a hidden weapon.").

In sum, Detective Jordan acted reasonably in having his gun drawn while effectuating the stop. The contrary position urged by Clark is untenable. It would leave an officer with the unappetizing choice of either forgoing the stop of a suspected drug trafficker or keeping his gun in his holster while approaching a suspected drug trafficker who is sitting in his car. That would inevitably lead to an increase in the already distressing number of police officers shot during the line of duty, see Clipper, 973 F.2d at 950 ("[i]n 1987, 2,789 officers were attacked with firearms"); and would cause officers not to

stop persons whom they have reasonable suspicion to suspect of criminal activity. Neither the Constitution nor common sense requires those results.

B. Clark also suggests that the police acted unreasonably by removing him from the car. Clark Br. 24. Contrary to Clark's intimation, the Supreme Court established in Pennsylvania v. Mimms, 434 U.S. at 109-112 -- in the context of a police stop of a car with an expired license plate -- that the police may order persons out of an automobile when conducting a Terry stop. See also New York v. Class, 475 U.S. 106, 115 (1986) ("officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon."). The Court in Mimms noted that the added intrusion on the person's liberty by getting out of the car was "de minimis" -- "at most a mere inconvenience" -- that "cannot prevail when balanced against legitimate concerns for the officer's safety." 434 U.S. at 111.

This Court applied Mimms in United States v. White, and held that "the officers' orders to the occupants to get out of the car for questioning were compatible with an investigatory stop." 648 F.2d at 36-37. The Court noted that "[c]ourts have routinely allowed officers to insist on reasonable changes of location when carrying out a Terry stop." Id. at 37. And the Court quoted Judge Leventhal's cogent observation that "[w]e are not dealing here with psychological gamesmanship staged in the backroom of

the police station. As a society, we routinely expect police officers to risk their lives in apprehending dangerous people. We should not bicker if in bringing potentially dangerous situations under control they issue commands and take precautions which reasonable men are warranted in taking." Id. at 39 (quoting Bailey v. United States, 389 F.2d 305, 315 (D.C. Cir. 1967) (Leventhal, J., concurring)).

In this case, Officer Stone testified that "based on heavy narcotics trafficking in the area which is associated with weapons, we felt it was necessary for our safety to take the subject out of the vehicle." Tr. 16. That judgment was eminently reasonable, and in light of the case law, Clark's contention concerning his removal from the car is without merit.

C. Clark apparently contends that forcing him to kneel during the stop was unreasonable. Clark Br. 24. But the officers did not attempt to rough Clark up or otherwise intimidate him. They did not handcuff Clark or order him to lie flat on the ground. Tr. 139, 147, 149-150. The officers simply took a reasonable step to maintain the status quo and to ensure their safety during the stop -- to give them an extra second to react should Clark decide to run or to attack one of them. The courts have regularly approved such steps. Indeed, this Court has noted that, while "[t]he amount of force used to carry out the stop and search must be reasonable," it may "include using handcuffs or forcing the detainee to lie down to prevent flight." Laing, 889 F.2d at 285; see United States v. Purry, 545 F.2d 217,

220 (D.C. Cir. 1976) ("We think the handcuffing of Purry was reasonable, as a corollary of the lawful stop."); Lafave, Search and Seizure § 9.2(d), at 365-366 ("under certain circumstances a police order that the suspect lie on the ground will be permissible"). In this case, compelling Clark to kneel was well within the range of reasonable police action incident to a Terry stop.

III. DETECTIVE JORDAN'S INITIAL SEARCH OF THE CAR WAS REASONABLE

Clark suggests that Detective Jordan's initial search of the car was unreasonable and beyond the scope of a permissible Terry car search. Clark Br. 24, 27. Clark does not explicitly challenge the second search (conducted by Officer Stone), during which Officer Stone found the drugs. See Clark Br. 24, 27; id. at 2 n.1. The second search occurred after Clark told Officer Stone that drugs were in the car, thus clearly providing probable cause for the second search. Tr. 151 ("it was an appropriate search once he had the information there was contraband in the car. That gave him probable cause to search the vehicle at that point."). Clark's argument thus concerns only the initial search of the car, but the argument fails for two independent reasons.

A. Detective Jordan's initial search of the car was reasonable. In Michigan v. Long, 463 U.S. 1032, 1051 (1983), the Supreme Court held that officers may search the passenger compartment of a car for weapons during a stop "as long as they possess an articulable and objectively reasonable belief that the

suspect is potentially dangerous." If the suspect has been taken out of the car pursuant to the stop, the officers may still search the car because "a Terry suspect in Long's position [might] break away from police control and retrieve a weapon from his automobile." Ibid. In addition, "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside." Id. at 1052.

A search of the passenger compartment of a person's car is thus permissible when the person stopped is suspected of a drug offense: Such a person surely qualifies as "potentially dangerous." See United States v. Williams, 822 F.2d 1174, 1178-1180 (D.C. Cir. 1987). As Judge Hogan noted, "in this city, in about any area today, [] drugs and guns go hand in hand and [] in this city, violence is endemic with the drug problem; that an officer making a valid investigatory stop of a suspect in the car enjoys some greater latitude and may conduct a protective search of the areas of the passenger compartments of the vehicle where weapons might be concealed, and that's what the officer testified he did." Tr. 146.

Judge Hogan correctly concluded, in light of Long, that when the police "know that in traffic stops and in a high drug area at night, where someone's been identified as a drug dealer, it [is not] beyond the purview of our case law or the Constitution that they can * * * pat the car down." Tr. 148. Detective Jordan's initial search of the car in this case was reasonable.

B. Detective Jordan's cursory initial search of the car found nothing, and that search occurred simultaneously with Clark's conversation with Officer Stone in which Clark told Stone that drugs were under the driver's seat. Tr. 140, 150. The drugs were therefore discovered by means wholly independent of Detective Jordan's initial search of the car. As a result, we believe that the question whether Detective Jordan's initial search of the car exceeded the bounds of Terry and Long (which, as explained above, it clearly did not) is simply irrelevant to the exclusionary rule issue raised in this appeal. See Nix v. Williams, 467 U.S. at 440-448 (discussing independent source and inevitable discovery exceptions to exclusionary rule).

CONCLUSION

Chief Justice Rehnquist has stated that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Adams v. Williams, 407 U.S. at 145. The officers in this case did not simply shrug their shoulders. They acted reasonably under the circumstances. The judgment of the district court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing brief were this day mailed to counsel for appellant at the following address.

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