CASE NOTES

CONSTITUTIONAL LAW—THE STRIP SEARCH OF A VISITOR TO A PENAL INSTITUTION IS UNREASONABLE UNDER THE FOURTH AMENDMENT UNLESS THERE EXISTS REASONABLY ARTICULATED GROUNDS TO SUSPECT THAT INDIVIDUAL OF ATTEMPTING TO SMUGGLE DRUGS OR OTHER CONTRABAND.—*Hunter v. Auger*, (8th Cir. 1982).

While visiting relatives held at Iowa penal facilities, Beulah Hunter, Jane Honorable and Sylvia Wiese were told that they must submit to a strip search or lose visiting privileges.[1] All three were advised that a strip search was required because of anonymous tips received by prison officials that drugs would be smuggled into the prison during the visit.[2] Jane Honorable and Sylvia Wiese submitted to the searches and no drugs or other contraband were found.[3] Beulah Hunter refused to be searched and subsequently was denied visiting privileges.[4]

Alleging that their fourth amendment right to be free from strip searches during visits to relatives in penal facilities had been violated, Hunter, Honorable and Wiese brought suit in the United States District Court for the Southern District of Iowa.[5] The court concluded that the strip search policy of the Iowa correctional institutions did not violate the appellants fourth amendment right to be free from unreasonable searches.[6]

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1. Hunter v. Auger, 672 F.2d 668, 670-71 (8th Cir. 1982). Beaulah Hunter, along with several members of her family, was visiting her son at the Iowa Men's Reformatory at Anamosa, Iowa. *Id.* at 671.

Jane Honorable was visiting her husband at Iowa Men's Penitentiary at Fort Madison, Iowa. *Id.* at 670.

Sylvia Wiese, accompanied by her three year old son, was visiting her husband at the Agusta Unit of the Iowa State Penitentiary, a minimum security prison farm. *Id.* at 671.

2. *Id.* at 670-71.

3. *Id.* at 670-71. A strip search at these facilities consisted of an "unclothed visual body search, including a visual inspection of the anal area while the subject is bent forward with the buttocks spread." *Id.* at 670 n.1.

4. *Id.* at 671. Ms. Hunter was informed by the warden that "all visits to any adult correctional facility were suspended and could be reinstated only after a satisfactory personal interview." *Id.*

5. *Id.* at 670. Appellants were seeking damages and declaratory and injunctive relief, and filed pursuant to 42 U.S.C. § 1983 (1979 & Supp. V 1981).

6. *Id.* Hunter v. Auger, No. 79-192-2, slip op. at 5 (S.D. Iowa Feb. 26, 1981). The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

The Court of Appeals for the Eighth Circuit *held*, reversed and remanded for further proceedings.[7] The strip search of a visitor to a penal institution is unreasonable under the fourth amendment absent reasonable articulated grounds for suspecting the particular visitor of attempting to smuggle drugs or other contraband. *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982).

The Eighth Circuit's adoption of this "reasonable suspicion" standard for strip searches marked its entry into an area of fourth amendment analysis which has produced a split within the circuit courts as to the proper standard to be applied.[8] *Hunter v. Auger* also presented the Eighth Circuit with a case of first impression, in that this particular area of fourth amendment analysis was applied to a new factual setting: the strip search of *visitors* to penal institutions.[9]

The lack of case law addressing the scope of searches of visitors to penal institutions resulted in the Eighth Circuit's reliance on case law concerned with the analogous area of strip searches conducted at borders.[10] An individual who is seeking entry into a different country may be subjected to a search of his person or his belongings on the basis of the need to control the influx of contraband into the country.[11] This type of search has been deemed acceptable because there exits a reasonable expectation by the individual that some type of search may be conducted.[12]

By its reliance on border search cases, the *Hunter* court implicitly recognized that the purpose for conducting a border search was much the same as that requiring the search of persons seeking to visit inmates within a penal facility.[13] The need to prevent the influx of contraband is present in both situations, as is the expectation by the individual that some type of search may result. The court also placed special emphasis on the security

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shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

7. Hunter v. Auger, 672 F.2d at 670.

8. *See* United States v. Dorsey, 641 F.2d 1213 (7th Cir. 1981)(no labeled standard); United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977)(reasonable suspicion); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967)(real suspicion).

9. For example, in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court held that the strip search of *pretrial detainees* without any level of suspicion is not in violation of the fourth amendment. *Id.* at 558-59. However, the reasoning of the Court there was of no help to the Eighth Circuit because *Bell v. Wolfish* dealt with persons already incarcerated.

10. *See, e.g.*, United States v. Asbury, 586 F.2d 973 (2d Cir. 1978); United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

11. Carroll v. United States, 267 U.S. 132, 154 (1925).

12. *Id. See, e.g.*, United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970)(citing Carroll v. United States, 267 U.S. at 132, and Boyd v. United States, 116 U.S. 616, 623-24 (1886)).

13. 672 F.2d at 674-75.

dangers that exist at penal institutions.[14] Such dangers place upon prison officials the duty, and heavy burden, of intercepting contraband "by all reasonable means."[15] This duty, so closely related to the purpose of a border search, allowed the court to define the scope of the search of visitors to penal institutions in the context of a border search.

The *Hunter* court's reliance on border search cases was important for two reasons. First, these cases provided the court with technical guidelines from which to formulate its "reasonable suspicion" standard.[16] More importantly, a comprison to the border search situation enabled the court to set a substantive standard for searches requiring less than probable cause, thereby avoiding the need for a warrant.[17]

By quickly disposing of the need for probable cause in this type of situation, the court did not go through the detailed analysis found in the border cases where the courts sought to justify ignoring this fourth amendment requirement. In the context of border searches, this concept of a fourth amendment exception dates from the case of *Carroll v. United States*[18] where the Supreme Court stated in dicta that it was not unreasonable or intolerable for travelers crossing an international border to be stopped and searched.[19] This statement has become the basis for subsequent holdings that a person who became the object of the search had a reduced expectation of privacy,[20] and that the situation presented an exception to the fourth amendment requirements of a warrant and probable cause.[21]

In the border search situation, it is the *entry* into the country which

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14. *Id.* at 674.
15. *Id.*
16. *Id.* at 673-76.
17. *Id.* at 675-76.
18. 267 U.S. 132 (1925).
19. *Id.* at 154. The Court stated that travellers may be stopped when "crossing an international boundry because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.*
20. *See* United States v. Guadalupe-Garza, 421 F.2d at 878. The court there stated:
> [n]either history nor contemporary concepts of dignity suggests to anyone that he will be free from official scrutiny on crossing an international boundry. He must anticipate that he will be detained temporarily at the border. He will be interrogated. His vehicle, if any, and his personal effects will be examined. Such routine detention has never been equated with an arrest, however that term is defined in other contexts, and such routine inspections are not deemed unreasonable searches.

Id.

21. *Compare* United States v. Ramsey, 431 U.S. 606, 620 (1977)(customs officers' opening of mail without a warrant was proper and did not violate the fourth amendment, but fell within the border search exception to its requirements, where the search may be reasonable absent probable cause or a warrant) *with* Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (warrantless search of an automobile twenty-five miles inside the United States from the Mexican border, without probable cause to believe defendant had committed any offense was held not to be the functional equivalent of a border search).

makes the search reasonable.[22] There has never been any requirement that the reasonableness of a border search depend on the existence of probable cause.[23] There is an expectation that one will initially be subjected to a search, and no probable cause, not even a "mere suspicion" need be demonstrated.[24] The Eighth Circuit basically reached the same conclusion with respect to the search of visitors to penal institutions. The basis for the *Hunter* court's analysis, however, lies more with the policies in operation at Iowa's penal institutions, and how they work to create a situation where probable cause to search is not required, and less with a direct comparison to the detailed analysis of the border cases.[25]

Each visitor to a penal facility in Iowa must complete and submit a "Request for Visiting Permit,"[26] which includes a notice to the visitor of the possibility of a search, and a consent to the search which the visitor must either sign or be denied entry.[27] There are no written indications or warnings to the visitor that the search may involve the possibility of a strip search.[28] When the visitor submits his "Request for Visiting Permit," the inmate's visiting card is examined to see if this visitor is approved, and whether or not the visitor must be strip searched.[29]

By emphasizing a search policy which informed the visitor of an impending search of his belongings, pockets, purses and person, (though *not* a strip search), the *Hunter* court was able to formulate its "reasonable suspicion" standard requiring less than probable cause in the same manner as was done in border searches.[30] Thus, the search of visitors to penal facilities was added to the list of specially established exceptions to the fourth amendment requirements of a warrant and probable cause, previously delineated by the United States Supreme Court.[31] The Eighth Court determined

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22. United States v. Ramsey, 431 U.S. at 620.

23. *Id.* at 619.

24. Henderson v. United States, 390 F.2d at 808.

25. 672 F.2d at 671-74. The court formulated its "reasonable suspicion" standard only after dispensing with the problem of probable cause. *Id.*

26. *Id.* at 672.

27. *Id.* at 672 n.8. This form states: "PERSONS ON THE PREMISES OF THE STATE PENITENTIARY DO HEREBY GIVE CONSENT TO A PERSONAL SEARCH AND INSPECTION OF ALL PACKAGES, PURSES, AND OTHER ITEMS IN THEIR POSESSION. REFUSAL OF CONSENT TO INSPECTION IS BASIS FOR DENIAL OF ADMISSION." *Id.*

28. *Id.*

29. *Id.* at 672.

30. *Id.* at 674.

31. *See* Mincy v. Arizona, 437 U.S. 385 (1978). The Court stated: "[t]he Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well documented exceptions.'" *Id.* at 390 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

For some of the "well documented" exceptions, see *Terry v. Ohio*, 392 U.S. 1, 22-24 (1968) (a police officer may conduct a pat-down "stop-and-frisk" search without probable cause); *Bell*

that a warrant and probable cause were not required on the basis that a visitor to a penal facility expected to be searched.

The task of the court, once the probable cause requirement was disposed of, was to insure that the search was reasonable.[32] After balancing the interests of the state in keeping contraband out of prisons against the intrusive nature of the searches of the appellants, the court found the practices of the Iowa corrections officials to be unreasonable.[33] The court based its holding here on the method in which the strip search notation appeared on the inmate's visiting card.

A notation on the inmate's visiting card indicating that the visitor is to be strip searched most commonly results from an anonymous tip, either from inside or outside facility, that the visitor may attempt to smuggle contraband.[34] The court noted that even though the corrections officials will attempt to corroborate this information,[35] an unsuccessful attempt at corroboration will not prevent the notation that the visitor is to be strip searched.[36]

If the visitor agrees to submit to the strip search, a detailed description of the basis for the search, for purposes of review, must be recorded in a log book.[37] The court noted that this review procedure may easily be frustrated, however, as cursory statements are permitted if there is insufficient time.[38] In addition to this procedure, an official may seek to obtain authorization for a strip search in the absence of a notation on an inmate's visiting card if the official has reason to believe the visitor will attempt to smuggle contra-

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v. Wolfish, 441 U.S. at 558-59 (pretrial detainees may be strip searched after contact visits without probable cause); and *Carroll v. United States*, 267 U.S. at 154 (an automobile may be searched in some circumstances, absent probable cause). *But see United States v. Ross*, 102 S. Ct. 2157 (1982), where the Court held that when police officers have legitimately stopped an automobile and have probable cause to believe that contraband is concealed somewhere within it, they may conduct a probing search of compartments and containers whose contents are not in plain view, within the vehicle. *Id.* at 2168-69. Police officers may conduct the search as thoroughly as a magistrate could have authorized in a warrant. *Id.* at 2172.

32. 672 F.2d at 673-74. The court relied on *Delaware v. Prouse*, 440 U.S. 648 (1979), where the Supreme Court stated that the essential purpose of the fourth amendment was "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials." *Id.* at 653-54. 672 F.2d at 673.

33. *Id.* at 675.

34. *Id.* at 673. The warden and those persons he authorizes are allowed to make such notations. *Id.* at n.12.

35. *Id.* at 673. Corroboration can be done by reviewing the inmate's file, monitoring correspondence and telephone conversations, and contacting the Narcotics Division of the Iowa Department of Criminal Investigation for a check of the inmate's background and that of other named individuals. *Id.*

36. *Id.* The notation is reviewed every ninety days but may remain on the inmate's card for an indefinite length of time. *Id.*

37. *Id.* at 672-73.

38. *Id.* at 673.

band during his visit.[39]

The ease with which a visitor could be strip searched, when the basis for the search was no more than a single, uncorroborated anonymous tip exhibiting no indicia of reliability, prompted the court to declare that the procedures used by Iowa corrections officials were in violation of the fourth amendment.[40] Penal officials must have a reasonable suspicion to believe that a particular visitor will attempt to smuggle contraband.[41]

The problem with the court's reasoning, as it set forth its "reasonable suspicion" standard, was that the reasoning was conclusory and failed to give an adequate basis for this standard. The court relied on language formulated in border search cases and applied that language to the search of the appellants. The analysis that other federal circuits have formulated in distilling a standard which is less than probable cause, however, while still affording a level of protection to the individual being searched, is important due to the extent of disagreement among the circuits as to the proper standard to be applied in strip searches.[42]

The *Hunter* court relied mainly on border search cases of the Fifth and Second Circuits which have previously adopted the "reasonable suspicion" standard.[43] Yet, before these courts adopted this standard, they expressly rejected the standard of the Ninth Circuit,[44] the first federal circuit to address the applicable standard to be applied for strip searches.[45]

The Ninth Circuit's stricter "real suspicion" standard found its basis in the "clear indication test" articulated by the United States Supreme Court in *Schmerber v. California*.[46] The Ninth Circuit thus attempted to set a standard which directed the focus of the search toward the place that the

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39. *Id.* The parties in *Hunter* had stipulated that " '[e]ach individual authorized to order a strip search may order such a search on the basis of a visual observation of an incoming visitor, if, in the judgment of the observer . . . the search is justified.' " *Id.*

40. *Id.* at 675.

41. *Id.* at 674.

42. *See supra* note 8 and accompanying text.

43. 672 F.2d at 674-75 (citing United States v. Asbury, 586 F.2d at 975-76 (reasonable suspicion applied to search by United States customs officials at international airport); United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978)(reasonable suspicion applied to search of airplane crew on basis of informant's tip); United States v. Himmelwright, 551 F.2d at 995 (reasonable suspicion applied to search of luggage by customs officials)).

44. *See* United States v. Asbury, 586 F.2d at 976; United States v. Afanador, 567 F.2d at 1328; United States v. Himmelwright, 551 F.2d at 995.

45. Henderson v. United States, 390 F.2d at 809 (strip search of appellant by customs official included a body cavity search, revealing packets of heroin inserted in her vagina).

46. *Id.* at 808. The Supreme Court in *Schmerber* stated that "[i]n the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risks that such evidence may disappear unless there is an immediate search." 384 U.S. 757, 769-70 (1966). The Court determined that the taking of blood samples for the purpose of anzlyzing them to obtain the content of alcohol was reasonable under the fourth amendment, subject to the "clear indication" standard. *Id.* at 770-71.

evidence was almost certain to be found.[47] Although the Ninth Circuit recognized the fact that the special type of situation presented by a border search may exempt an initial search from the fourth amendment probable cause requirements,[48] the court found itself faced with a potentially unreasonable situation in that the initial unintrusive search could easily lead to a strip search, and, in some cases, to a body cavity search.[49] Therefore, a more stringent standard was said to be needed.[50]

Fully articulated, the Ninth Circuit's "real suspicion" standard provides that the level of suspicion justifying the initiation of a strip search is a subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person is attempting to smuggle contraband into the country.[51] Thus, the Ninth Circuit had evolved a three-tiered, progressive standard where the level of intrusiveness in a search corresponded with the level of suspicion justifying the search.[52] Under this analysis, no suspicion was required for the initial search of the person or his belongings, "real suspicion" was required for a strip search, and the very intrusive body cavity search required the highest level of suspicion of a "clear indication" that contraband would in fact be found in the particular body cavity to be searched.[53]

It was this structured approach taken by the Ninth Circuit that the Fifth Circuit declined to follow. In *United States v. Himmelwright*,[54] the Fifth Circuit declined to follow the Ninth Circuit's "reasonable suspicion" standard because it did not fit the fact pattern presented, and thus was unable to provide a clear line to be drawn between strip searches and body

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47. 390 F.2d at 808. The court stated:

> [I]f there is to be a more than casual examination of the body, if in the course of the search of a woman there is to be the requirement that she manually open her vagina for visual inspection to see if she has something concealed there, we think that we should require more than a mere suspicion. Surely, to require such a performance is a serious invasion of personal privacy and dignity and so unlawful if "unwarranted." Surely, in such a case, to be warranted, the official's action should be backed by at least the "clear indication" . . . required in *Schmerber*.

Id.

48. *Id.*

49. *See supra* note 47 and accompanying text.

50. 390 F.2d at 808. The court stated that "[i]f, however, the search of the person is to go further, if the party, male or female, is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required." *Id.*

51. United States v. Guadalupe-Garza, 421 F.2d at 879. The court also held that the objective facts must bear some reasonable relationship to the suspicion that something is concealed on the body of the person to be searched. *Id.* Otherwise, the scope of the search was not related to the justification for its initiation, as it must be to meet the reasonableness standard of the fourth amendment. *Id.*

52. United States v. Rodrigues, 592 F.2d 553, 556 (9th Cir. 1979).

53. *Id.*

54. 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977).

cavity searches.[55]

The Fifth Circuit, in refusing to adopt the "real suspicion" standard of the Ninth Circuit, said the situation called for a more flexible "reasonable suspicion" standard to afford the full measure of protection which the fourth amendment commanded.[56] Although *Himmelwright* did not fully articulate the scope of its "reasonable suspicion" standard, it did state that the standard incorporated some of the same concepts used by the Ninth Circuit in its "real suspicion" standard.[57] These concepts are also relied on by *Hunter*,[58] and include the requirement that the contraband exist in the particular place to be searched,[59] and that more than a generalized suspicion of criminal activity would be needed.[60]

In *United States v. Afanador*,[61] the so-called "flexibility" of the Fifth Circuit's "reasonable suspicion" standard was expanded.[62] The court said that instead of giving hard and fast rules, it would set only the parameters of the standard.[63] *Afanador*, like *Hunter*, was a case where the basis for conducting a strip search originated from an anonymous tip.[64] The standard in *Afanador* was said to apply where the authorities had received detailed information,[65] and where there was no reason to believe the information was unreliable.[66]

Hunter was relied on *United States v. Asbury*,[67] where the Second Circuit rejected the "real suspicion" standard and accepted the Fifth Circuit's "reasonable suspicion" standard.[68] In *Asbury*, the court stated that the "real suspicion" standard suggested the alternative of an "unreal suspicion" which was difficult for the court to conceptualize.[69] The court was more comfortable with the "reasonable suspicion" standard because even though the Ninth Circuit defined its standard in terms of reasonableness, the use of the term "real" added an unnnecessarily confusing factor to the fourth

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55. 551 F.2d at 994-95. After the defendant submitted to a strip search, a visual inspection of her vagina revealed a protruding tap. *Id.* at 993. Upon request, and without a customs official touching her, the defendant removed the object which turned out to be cocaine. *Id.*

56. *Id.* at 994.

57. *Id.* at 994-95.

58. 672 F.2d at 674-75.

59. *Id.* at 675.

60. *Id.*

61. 567 F.2d 1325 (5th Cir. 1978).

62. *Id.* at 1328.

63. *Id.*

64. *Id.*

65. *Id.* at 1329. The information specified that a named individual traveling in a certain capacity would be carrying a type a contraband on a particular date and flight. *Id.*

66. *Id.*

67. 672 F.2d at 674 (citing United States v. Asbury, 586 F.2d 973 (2d Cir. 1978)).

68. 586 F.2d at 976.

69. *Id.*

amendment standard, which was simply that of reasonableness.[70] The court also provided a very useful list of twelve factors which may be considered in determining the issue of reasonableness.[71]

By examining the substantive development of the level of suspicion required for a strip search, along with the detailed analyses of the courts faced with such situations, it becomes apparent that the "real" and "reasonable" suspicion standards are based on essentially the same concepts. The courts also appear to be engaged in a semantics argument. The three-tiered, progressive analysis of the Ninth Circuit may seem more structured in its application,[72] but the "reasonable suspicion" standard does little in substance to effectuate a more flexible test. It does succeed in removing the classifications of the intrusiveness of the searches, but beyond this, the language and requirements are basically the same. This was the reasoning of the Seventh Circuit in *United States v. Dorsey*,[73] also a border case, where the court declined to label the level of suspicion.[74] In declining to follow either the Ninth or Fifth Circuits, the Seventh Circuit said it believed that any attempt to label the level of suspicion required for a strip search would not be helpful in resolving disputes involving the diverse circumstances presented in search situations.[75] Rather, the court adhered to a balancing test in which the level of suspicion of the agent or official conducting the search is weighed against the level of indignity perpetrated upon the individual being searched.[76]

Beyond labeling, the standards applied by the various circuits remain basically the same. Even when the standard is not labeled,[77] the analysis of the Fifth Circuit[78] and the Second Circuit's factors to weigh when considering whether the search was reasonable[79] are still referred to as being of paramount concern.[80]

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70. *Id.*

71. *Id.* at 976-77. The list includes:

> (1) excessive nervousness, (2) unusual conduct, (3) an informant's tip, (4) computerized information showing pertinent criminal propensities, (5) loose-fitting or bulky clothes, (6) an itinerary suggestive of wrong-doing, (7) discovery of incriminating matter during a routine search, (9) needle marks or other indications of drug addiction, (10) information derived from the search or conduct of a traveling companion, (11) inadequate luggage, and (12) evasive or contradictory answers.

Id. (citations omitted).

72. United States v. Rodrigues, 592 F.2d at 556.

73. 641 F.2d 1213 (7th Cir. 1981).

74. *Id.* at 1217. The court said that it would leave an evaluation of this distinction to another day. *Id.*

75. *Id.* at 1218.

76. *Id.*

77. *Id.*

78. *See* United States v. Himmelwright, 551 F.2d at 994-95.

79. *See supra* note 71 and accompanying text.

80. United States v. Dorsey, 641 F.2d at 1219.

Even though *Hunter* followed essentially the same reasoning, it nonetheless labeled its standard of suspicion as "reasonable suspicion" when reviewing the strip search policy of Iowa penal facilities.[81] The court said that to the extent a strip search notation resulted from an uncorroborated anonymous tip containing a bare allegation that contraband would be smuggled into the prison, the strip search policy as used in Iowa unreasonably infringed on the rights guaranteed by the fourth amendment.[82] The court did not feel that its labeled standard would be restrictive in its application but stated that the very fact that it was labeled "reasonable" provided sufficient flexibility to adequately guide officials in the greatly varied situations that will arise.[83]

The emphasis on flexibility comes from the fact that *Hunter* was an anonymous tip case as well as a strip search case. The court pointed out that there was great variety in the amount of reliability of informants' tips.[84] For this reason, the court stated that it would not attempt to formulate one standard designed to cover all possible fact patterns.[85] Instead, it would apply the "reasonable suspicion" standard which would allow the corrections officers to consider the facts that exist at the time of the search, and also evaluate the reliability of the informant's tip.[86] While the tip in this case need not have satisfied the two-pronged test for informants' tips, as set out by the United States Supreme Court in *Aguilar v. Texas*[87] *and Spinelli v. United States*,[88] because the *Hunter* court had disposed of the probable cause requirement,[89] the court said that the tip must possess sufficient indicia of reliability to justify the official placing the strip search notation on the inmate's visiting card, or to justify a strip search based on suspicious activities observed by the officers.[90]

When the *Hunter* court applied its "reasonable suspicion" standard, it stated that reasonable suspicion could exist only if the informant's tip was linked to other objective facts known to corrections authorities, beyond the bald assertion of drug smuggling activity.[91] In essence, this was an application no different that the standard, labeled or otherwise, which has been

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81. 672 F.2d at 675.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 676.
87. 378 U.S. 108 (1966). The test required for a obtaining a search warrant based on an informant's tip involves an affidavit setting forth the underlying circumstances necessary for a magistrate to determine the validity of the information, and that there was an attempt to establish that the informant was credible or his information reliable. *Id.* at 114.
88. 393 U.S. 410 (1969)(citing Aguilar v. Texas, 378 U.S. at 114).
89. 672 F.2d at 674.
90. *Id.* at 676.
91. *Id.*

formulated by the other circuits.[92]

Hunter does not attempt to completely eliminate case-by-case analysis. In the area of analyzing the reasonableness of fourth amendment searches, the delicate balance between the interests of the state and the rights of the individual will sway one way or the other on the facts of the particular case. Yet, in the final analysis, the labeled, articulated standard does serve a useful purpose. Strip searches, even when conducted by professionals, are humilating and degrading. In order to preserve the integrity of the concept that "one's anatomy is draped with constitutional protection,"[93] the existence of an explicit, labeled standard enforces the premise that a higher level of scrutiny will be used by courts when confronted with a strip search.[94]

In remanding the case, the Eighth Circuit did offer Iowa prison officials some alternative suggestions for controlling prison visits when only a "mere suspicion" exists that a visitor may attempt to smuggle contraband.[95] At relatively little cost, visits could be carried on while the parties were seated across from one another at wide tables with glass partitions, and telephones for private communicatons between prisoners and visitors could be provided.[96] Beyond these suggestions, the court left the specifics to prison officials, stating that it was not the court's function to become too involved in matters of prison administration or security.[97] The end result of this decision, however, was that the security interests of the state were protected while the fourth amendment rights of the visitors to be free from strip searches, absent a reasonable suspicion that they will attempt to smuggle contraband, were maintained.

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92. *See supra* note 8 and accompanying text. Of the remaining federal circuits, the Tenth and Third Circuits have adopted the "real suspicion" standard. *See* United States v. Fitzgibbon, 576 F.2d 279, 284 (10th Cir.), *cert. denied*, 439 U.S. 910 (1978); United States v. Diaz, 503 F.2d 1025, 1026 (3d Cir. 1974). The First Circuit has gone so far as to apply the underlying concepts of the "reasonable suspicion" test as a starting point, but described the analysis in *Afanador* as being "indefinite." United States v. Wardlaw, 576 F.2d 932, 934 (1st Cir. 1978).

93. United States v. Afanador, 567 F.2d at 1331.

94. 672 F.2d at 676.

95. *Id.*

96. *Id.*

97. *Id.*

ANTITRUST—A GROUP HEALTH PLAN SUBSCRIBER WHO RECEIVES THE SERVICES OF A PSYCHOLOGIST SUFFERS AN ANTITRUST INJURY PREDICATED UPON THE PLAN'S FAILURE TO REIMBURSE THE SUBSCRIBER FOR THE COSTS OF SUCH TREATMENT, AND THEREFORE HAS STANDING TO MAINTAIN A TREBLE DAMAGE ACTION UNDER SECTION 4 OF THE CLAYTON ACT. *Blue Shield of Virginia v. McCready,* (U.S. Sup. Ct. 1982).

Carol McCready was insured pursuant to a group health plan issued by Blue Shield of Virginia.[1] According to the plan, subscribers were partially reimbursed for costs incurred with respect to outpatient psychotherapy treatments provided by psychiatrists but not clinical psychologists, unless the psychologist's treatments were billed through and supervised by a medical doctor.[2] After being treated by a clinical psychologist, McCready submitted claims to Blue Shield which were routinely denied[3] because the treatments "had not been billed through a physician."[4] McCready brought a class action suit[5] in federal district court alleging that the defendants[6] had engaged in an unlawful conspiracy to exclude psychologists from receiving compensation under the Blue Shield plan, in violation of section 1 of the Sherman Act.[7] McCready also alleged that the failure to reimburse her was in furtherance of the conspiracy and that she had sustained injury to her property for which she was entitled to treble damages pursuant to section 4 of the Clayton Act.[8]

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1. Blue Shield of Virginia v. McCready, 102 S. Ct. 2540, 2543 (1982).

2. *Id.*

3. McCready v. Blue Shield of Virginia, 649 F.2d 228, 230 n.4 (4th Cir. 1981). McCready was inadvertently paid $128.00 for one claim submitted for psychological services. *Id.* Blue Shield attempted to obtain a refund when the error was discovered. *Id.*

4. Blue Shield v. McCready, 102 S. Ct. at 2543.

5. *Id.* The class consisted of "all Blue Shield subscribers who had incurred costs for psychological services since 1973 but who had not been reimbursed." *Id.*

6. McCready v. Blue Shield, 649 F.2d at 229. Also named as defendants were Blue Shield of Southwestern Virginia, Medical Services of the District of Columbia, and the Neuropsychiatric Society of Virginia. *Id.* The Virginia Academy of Clinical Psychologists had filed a similar claim against these same defendants. *See Virginia Academy of Clinical Psychologists v. Blue Shield of Viriginia, 624 F.2d 476 (4th Cir. 1980).*

7. 15 U.S.C. § 1 (1976). That section provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." *Id.*

8. Blue Shield v. McCready, 102 S. Ct. at 2544. Section 4 of the Clayton Act states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (Supp. IV 1980).