HOME SCHOOL LEGAL DEFENSE ASSOCIATION

Advocates for Family & Freedom

MEMORANDUM

August 28, 2007

To: Social Workers, Police Officers and Interested Citizens

From: Home School Legal Defense Association

Re: Why Warrantless Entries Into Homes Are Generally Unconstitutional

Warrantless Entries in General

Warrantless searches of private homes are generally illegal under the Fourth Amendment. In *United States v. Shaibu*, 920 F.2d 1423, 1425 (9th Cir. 1990), the Court said:

> A warrantless search of a house is per se unreasonable, *Payton v. New York*, 445 U.S. 573, 586 (1980), and absent exigency or consent, warrantless entry into the home is impermissible under the Fourth Amendment. *Steagald v. United States*, 451 U.S. 204 (1981).

The quotation above identifies the only two relevant exceptions to the need for a warrant to enter a home: (1) exigent circumstances, i.e., an emergency; or (2) consent. The federal courts have expressly held that the normal rules of the Fourth Amendment are applicable to entries into a private home in the context of a child abuse investigation.

Warrantless Entries in Child Abuse Investigations

In *White by White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986) the court considered a federal civil rights claim relative to an entry into a home for the purpose of conducting a child abuse investigation. In the context of a child abuse case, this court said:

> At the time of the entry into the home, it was settled constitutional law that, absent exigent circumstances, police could not enter a dwelling without a warrant

> even under statutory authority where cause existed. *See Payton v. New York*, 445 U.S. 573, 588-90 (1980). Washington law provides that law enforcement officers may not take a child into custody without a court order unless they have "probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order . . ." RCW 26.44.050. This provision defines the requirement of probable cause plus exigent circumstances. If the deputies complied with the statute, they have satisfied the constitutional requirement and are immune from suit.

797 F.2d at 815.

The Ninth Circuit Court of Appeals in the case of *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), stated the following on the warrant requirement to enter a home:

> The principle that government officials cannot coerce entry into people's houses without a search warrant or applicability of an established exception to the requirement of a search warrant is so well established that any reasonable officer would know it.

The Supreme Court has indicated, but not decided, that a social worker conducting an adversarial investigation is subject to the normal rules of the Fourth Amendment relative to searches and seizure. *Wyman v. James*, 400 U.S. 309 (1971). In *Wyman*, the Court held that a social worker's entry into a home for the purpose of a routine home visit as a condition of continued welfare eligibility was not a search within the meaning of the Fourth Amendment. However, the Court described the social worker's activity in that case in a way that is quite instructive. "The caseworker is not a sleuth, but rather, we trust is a friend to one in need." 400 U.S. at 323. The Court contrasted the welfare visit with a truly adversarial search saying, "the visit is not one by police or uniformed authority." 400 U.S. at 322. And, "[t]he home visit is not a criminal investigation, does not equate with a criminal investigation. . ." Moreover, the Court noted that the New York welfare home visit was purely voluntary. "If consent to the visitation is withheld, no visitation takes place." 400 U.S. at 317-318.

The clear lesson from *Wyman* is that adversarial invasions of a home by social workers are "searches" within the meaning of the Fourth Amendment.

Federal Cases Involving Warrantless CPS Investigations

Efforts to carve out an exception to the Fourth Amendment for child abuse investigations have failed in the federal circuits. The Tenth Circuit Court of Appeals was faced with a federal civil rights claim against a police officer who had allegedly violated a family's Fourth Amendment protection when he searched a child's body for evidence of criminal sexual abuse. *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993). The court examined the information possessed by the officer at the time of the investigation and held:

> The only information defendant possessed was that [the child] had a severe rash. Because defendant does not challenge the court's failure to find as a matter of law plaintiffs voluntarily consented to the searches under all of the circumstances of this case and does not allege any exigency, we agree with the district court . . . that no reasonable officer would consider the searches lawful. *Id.* at 792.

In the case of *Good v. Dauphin County Social Services*, 891 F.2d 1087 (3d Cir. 1989), the Third Circuit Court of Appeals refused to grant child abuse investigators a "social worker's exception" to the Fourth Amendment. A social worker and police officer entered an apartment late at night to investigate an anonymous tip received the day before that the plaintiff's child was the victim of abuse. When the officials demanded entry, the plaintiff objected but was told no warrant was necessary. The officials, "with no indication that the [seven-year old] child was injured, . . . stripped and inspected [her] body, ostensibly for marks or injuries. No injuries were found." *Id.* at 1090. The court rejected the qualified immunity defense absent evidence of "reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat." *Id.* at 1094.

A court in the Second Circuit has also specifically applied the normal rules of the Fourth Amendment to child abuse investigations conducted by social workers. Relying on a case previously affirmed by the Second Circuit, a federal district court in New York announced that traditional Fourth Amendment standards apply to social workers and police officers making child abuse investigations. In the case of *Tenenbaum v. Williams*, 862 F. Supp. 962 (E.D.N.Y. 1994), the court held that the probable cause and warrant requirements, applicable to Fourth Amendment cases under criminal law, applied to searches and seizures of children believed to have been subjects of child abuse. The district court relied upon a case affirmed by the Second Circuit, wherein it was stated, "The emergency removal of John Doe requires 'probable cause' to believe that he was in immediate physical danger from his surroundings and that removal was necessary to insure his safety." *Doe v. Connecticut, Dept. of Children and Youth Services*, 712 F. Supp. 277, 284 (D.Conn. 1989), *aff'd*, 911 F.2d 868 (2nd Cir. 1990).

State Cases Involving Warrantless CPS Investigations

State courts are expected to apply both federal and state law to cases before them and have consequently also applied the traditional law of the Fourth Amendment to child abuse investigations by social workers. In several cases, these state courts have interpreted state statutes in such a way as to prevent the possibility of a conflict with the United States Constitution.

The Alabama Court of Appeals decided a case in which a social worker received an anonymous report of child abuse but was denied entry by the mother. The social worker then went to state court under Alabama law seeking a court order to coerce the entry. The order was granted by the trial court, but that decision was reversed by the Alabama Court of Appeals. *H.R. v. Alabama Dept. of Human Resources*, 612 So. 2d 477 (1992), *cert. denied* (Ala. 1993).

The Alabama Court of Appeals held that the Alabama statute which authorized entry orders "upon cause shown" should be construed to mean "reasonable or probable cause."

Otherwise, the court said, the legislature would have required unconstitutional searches. The full discussion of the Alabama court on this issue is as follows:

> What is a standard for the kind of and limits of information and material to be presented to the court which would rise to be "cause shown"? We will not attempt to establish the parameters of such a standard here. We suggest, however, that the power of the courts to permit invasions of the privacy protected by our federal and state constitution, is not to be exercised except upon a showing of reasonable or probable cause to believe that a crime is being or is about to be committed or a valid regulation is being or is about to be violated . . . .
>
> This court is well acquainted with the difficult task of DHR in investigating charges and complaints of child abuse and neglect. However, the case worker cannot be empowered to enter private homes, poor or rich, without reasonable cause to believe that the charged acts are occurring. Such an entry is in pursuit of an investigation which may or probably will result in criminal charges or removal of custody of children. We consider that the legislature did not intend to authorize an unconstitutional act in enacting § 26-14-7.

Similarly, the Supreme Judicial Court of Massachusetts reviewed a judge's decision which ordered a family to submit to a non-emergency investigation following an anonymous report. *Parents of Two Minors v. Bristol*, 397 Mass. 846, 494 N.E.2d 1306 (1986). The court concluded that "the judge did not have authority to order the plaintiffs to submit to a non-emergency home visit by an employee of the DSS investigating an anonymous report of child abuse." 397 Mass. at 853, 494 N.E.2d at 1311.

Recent Warrantless Entry Cases

The U.S. Ninth Circuit Court of Appeals in the case of *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (alluded to previously), affirmed the Fourth Amendment protection for families subject to child abuse and neglect investigations. The Social workers and police officers brought a motion for summary judgment to have the complaint dismissed on the grounds of immunity. The defendants' claimed that even though they may have violated the family's Fourth Amendment protections by forcing their way into a home pursuant to a child abuse and neglect investigation, the law applying the Fourth Amendment was not clearly established. The Court ruled that the law was clearly established in California, that the only exception to the Fourth Amendment requirement to obtain a warrant or court order to enter a home, is consent and exigent circumstances. Neither of those situations was apparent; therefore, the defendants were subject to the assessment of damages for violations of the plaintiffs' constitutional rights.

Roe v. Texas Department of Protective and Regulatory Services, 299 F.3d 395 (5th Cir. 2002), held that social workers were bound by the Fourth Amendment in their investigation of child abuse. Specifically, the court said that "we must apply the traditional Fourth Amendment analysis where a child protective services search is so intimately intertwined with law enforcement." *Id.* at 407.

Roska ex rel Roska v. Peterson, 2003 WL 1963209 (10th Cir. 2003), also applied Fourth Amendment standards to social worker investigations. In that case, the court held that social workers were required to obtain a warrant before entering a home to remove a child.

In *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), the court held that social workers who entered a private school and interviewed a child about child abuse had violated the Fourth Amendment because they did not first obtain a warrant. The court said that "it is clear that the foregoing actions [entering the school and interviewing the child] constitute both a search and a seizure under the Fourth Amendment… the defendants' warrantless search of the school and seizure of the child are presumptively unreasonable." *Id.* at 509, 513.

Thus, in recent years, the federal courts of appeals have made it clear that social workers are bound by the Fourth Amendment's warrant requirement even in child abuse investigations.

Conclusion

The Fourth Amendment is *federal* law, and applies equally to all states. The law is clear that there is no social worker exception to the requirements of the Fourth Amendment. Police officers and social workers that ignore the law are subject to the payment of money damages under 42 U.S.C. 1983, 1986. Home School Legal Defense Association is committed to defending the constitutional rights of its member families all across this nation and its territories.