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Search and Seizure Casebook

LEADERSHIP INSTITUTE BRANCH

LEGAL TRAINING SECTION

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Fourth Amendment
to the
United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Constitution
of the
Commonwealth of Kentucky

Sec. 10 Security from search and seizure – Conditions of issuance of warrant

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Advisory Warning:

The Kentucky Search & Seizure Case Briefs is designed as a study and reference tool for officers in training classes. Although care has been taken to make the case briefs included as accurate as possible, official copies of cases should be consulted when possible before taking any actions that may have legal consequences.

The issues and holdings that appear in each brief are only the opinions of the compilers of the Case Briefs. They are only meant to be used for guidance in statutory and case interpretation, are not offered as legal opinions, and should not be relied upon or cited as legal authority for any actions. Always consult legal counsel when in doubt about the meaning of a statute or court decision.

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SEARCH AND SEIZURE

I. CONSTITUTIONAL BASIS

A. U.S. Constitution--Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Kentucky Constitution--Section 10

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

C. Interpretation

Although the wording differs slightly, the Kentucky Supreme Court interprets Section 10 above of the Kentucky Constitution as having the same meaning as the Fourth Amendment to the U.S. Constitution.

Note: Neither Constitution prohibits **all** searches and seizures--only **unreasonable** ones. A search conducted under a legal search warrant is both reasonable and legal. Under certain exigent or emergency circumstances, searches and seizures conducted without a warrant are also reasonable and legal.

II. WHAT IS A SEARCH?

An officer who examines another person's premises, person, or property for the purpose of discovering contraband (such as stolen property) or other evidence for use in a criminal prosecution has conducted a "search". A search involves prying into hidden places[1] in order to discover something concealed.

III. WHAT IS A "SEIZURE"?

An officer who takes into custody a person (e.g., arrests that person) or property (e.g., removes a concealed deadly weapon from a suspect) seizes that person or property. The seizure may be temporary or permanent – the nature of the seizure will determine what circumstances must exist to authorize the seizure.

[1] Nichols v. Com., Ky., 408 S.W.2d 189 (1966).

IV. SEARCH SITUATIONS NOT PROTECTED BY FOURTH AMENDMENT

A. ABANDONED PROPERTY

A person may lose an expectation of privacy either:

1. by discarding the property in a place where others would have access to it[2] or
2. by disclaiming ownership of the object[3]

Such situations would include when a person discards their trash, in the area where trash is commonly picked up, or when they abandon an item of property (such as a purse) where others would have ready access to the item. It also includes when ownership of an item is denied by a person under suspicion, although it is found in close proximity to their location. (However, they may still be found legally responsible for the item, under the doctrine of constructive possession.)

B. PLAIN VIEW

An item seized in "plain view" is not protected by the Fourth Amendment since the officer has not conducted a "search" to discover the item. The plain view doctrine is summarized as follows:

- If an officer is where he has a legal right to be, and
- Sees, in plain view, contraband or evidence of a crime (and immediately recognizes it as such),
- The officer may seize it if the officer has a right to access the item (legally be where the item is located).[4]

1. Officer is Where He Has Legal Right to be

An officer's right to be in a location is established by:

- Being in a public place from where he sees evidence located in a public or private place
- Being Invited onto private property
- Obtaining actual consent from someone who has lawful control over private property
- Having implied consent
- Exigent (or Emergency) circumstances exist
- Executing legal process (arrest or search warrant).

2. Officer Sees in Plain View

When the officer sees the item, he must have probable cause at that time (Immediately) to believe the item is evidence of a crime.[5] He may not move the item for further examination or to look for serial numbers or other identifying marks.[6]

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[2] California v. Greenwood, 486 U.S. 35 (1988); Cook v. Com., Ky., 649 S.W.2d 198 (1983).
[3] Ragland v. Com., Ky., 265 S.W. 15 (1924) and James v. Com., Ky., 647 S.W.2d 794 (1983).
[4] Horton v. California, 469 U.S. 128 (1990).
[5] Texas v. Brown, 103 S.Ct. 1535 (1983).
[6] Arizona. v. Hicks, 107 S.Ct. 1149 (1987).

Plain touch, plain smell. The plain view doctrine implies use of the sense of sight, but the other senses may also be used. The U.S. Supreme court recognized the validity of plain "touch" (or feel) in Minnesota v. Dickerson[7] as well as "plain smell" in drug cases.[8]

3. Evidence of a Crime (Contraband)

Evidence (of a crime) may be divided into four categories:

- ★ **Instruments of a crime** – items used to commit crimes (e.g., weapons, burglar tools and other items used to commit theft).
- ★ **Fruits of a crime** – i.e., the gain or proceeds from a crime (e.g., money, stolen property, etc.).
- ★ **Contraband** – i.e., items prohibited by law (e.g., defaced firearm, illegal drugs, etc.).
- ★ **Other Evidence of a crime** – i.e., anything else that tends to prove that
  - a. A crime has been committed (i.e., the elements of a crime), and/or
  - b. A particular person committed it – usually circumstantial evidence found at a crime scene (e.g., fingerprints, lint, hairs, blood, etc.) that tend to show motive, intent, opportunity or means to commit the crime.

It is critical, however, that the officer immediately recognize that the item is, in fact, evidence or contraband.

4. Right to Access the Contraband or Evidence

If the evidence is located in a place where the officer also has a right to be, the officer may immediately seize the evidence. If the item is readily destructible and the officer reasonably believes that if he does not immediately take it into possession the evidence will be destroyed, an officer may trespass and take physical control. Otherwise, the officer must use his knowledge of the illegality as probable cause for a search warrant. The warrant then authorizes the entry and seizure.

C. Flyovers

In general, items are considered to be in plain view if seen from an aircraft (fixed or rotary-win) flying within legal airspace.[9]

D. Open Fields

An officer may search "open fields" without a warrant, without probable cause, despite notices or other efforts showing an expectation of privacy and despite the fact that the search may constitute a technical trespass.[10] An "open field" is any land not included in the curtilage and does not describe the actual condition of the land. The land may in fact be considered an open field, but may also have buildings on it, be wooded or be otherwise used. A person's "curtilage" is his home, a reasonable area for yard space (whether fenced or not) and the nearby buildings used in connection with the home. Outside the curtilage is the "open fields" and that land may be searched by an officer. When in an open field area the officer may not, however, on that account alone, search a building, person or non-abandoned car.[11]

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[7] 113 S.Ct. 2130 (1993).

[8] Johnson v. U.S., 333 U.S. 10 (1948); Cooper v. Com., Ky. App., 577 S.W.2d 34 (1979).

[9] California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989).

[10] Hester v. U.S., 265 U.S. 57, 44 S.Ct 445 (1924); Oliver v. U.S., 466 U.S. 170 (1984); Oliver v. U.S., 466 U.S. 170 (1984).

[11] U.S. v. Dunn, 480 U.S. 294 (1987) – see case for factors in determining if an area is curtilage.

E. Public Area

No one has a reasonable general expectation of privacy in a public area such as road, sidewalk, public park, etc., but they do have a reasonable expectation of privacy in their own person, luggage, or vehicle that is located in a public area.

As used here, "Public," means "open to the public," and includes various commercial establishments such as bars and retail stores. Therefore an officer can be in such an establishment in areas where prospective customers are allowed. at times when they are allowed to be there, and making no closer examination of things therein than an ordinary customer would and he will not have violated anyone's reasonable expectation of privacy.[12] A regulatory officer, such as an alcohol beverage control or charitable gaming officer, may enter into an area where the item they regulate is stored but that is not open to the general public, under circumstances where the general jurisdiction officer may not. Of course, some areas, such as bathrooms, may be so arranged as to support an expectation of some degree of privacy even though the general public is allowed to enter.

E. Citizen's Search

Both the Fourth Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution protect citizen from government action. Fruits of a citizen's search should not be excluded as being subject to any exclusionary rule, unless the citizen was acting as an agent of an officer. Generally the courts will allow an officer to search to the same extent already done by a citizen who has searched and then told the officer of the results, but a warrant would still be required if the search was to go beyond that area, unless there was some emergency presented.

F. Consent Searches

1. Requirements

A consent search is legal only if:

1. Consent is given voluntarily; <u>and</u>
2. Consent is given by a person with the authority to consent.

a. Consent must be Given Voluntarily

Consent is voluntary when the person is aware of what he is doing and gives the consent under free will. The consent must be given without force, threat, trickery or coercion. If the officer claims to have a search warrant but does not have one, any consent given is not voluntary. If the officer first makes statements to show his authority to search, any consent which the person then gives is not valid. The court will look at all the surrounding circumstances in deciding whether the consent was voluntary.[13] If a large number of officers were present, courts may find the consent was coerced. If

[12] <u>U.S. v. Santana</u>, 427 U.S. 38 (1976).
[13] <u>Hohnke v. Com.</u>, 451 S.W. 2d 162 (Ky., 1970).

possible, no more than two officers should be present. Generally, the simple fact that the officers are in uniform and/or armed does not make the consent coerced.[14]

b. Person Consenting Must Have Authority to Consent

Any person with control over the area to be searched may consent if he has a sound mind and is old enough to understand the ramifications of consent. A person must have possession or control over the property to give consent.[15] If a home is to be searched, the owner may normally consent. However, if the home is rented out to a tenant, the tenant, not the owner, should provide the consent.[16] If personal property such as a car or suitcase is to be searched, the owner may consent. If the person giving consent is not the suspect, the person giving consent must have authority over the place at least equal to the authority of the suspect. If two people such as husband and wife share the use and control of the property equally, either one may consent to the search. Further, the U.S. Supreme Court has held that any joint occupant of a residence may consent to search the residence if the other occupant is absent.

2. Exceptions

Even where two people share a home together, they may have an agreement that each person has complete control over certain areas, such as rooms, or items of personal property such as a toolbox. If they have this arrangement, one person may not consent to search the areas under the other person's control.

a. Hotel-Motel Situation

If the customer is still occupying his hotel or motel room, the manager or clerk may not give consent to search his room without his permission.[17] Once the customer checks out, however, the manager may freely consent to a search of the room. A posted checkout time is not necessarily dispositive as not all establishments require a formal checkout at the desk. There must be adequate evidence that the lodger has left the room permanently and thus abandoned any reasonable expectation of privacy in its contents. On the other hand, although the usual checkout time has passed, the tenant may be remaining with a reasonable belief that it is still his room.[18] However, if a maid enters the room and sees contraband, and reports it to the manager or the police, that information may of course be used to support a search warrant or even an exigent circumstances.

b. Parent-Children Situation

The courts have held that a parent may consent to the search of a child's room or effects in the premises controlled by the parent and over which the parent may exercise control.[19] However, if the child pays rent or room and board, a lessor-lessee relationship *may* exist and this relationship would determine the validity of the consent. An adult child, or even an older juvenile, may be held to be legally able to give consent of the parents' home, if they share authority over the area in question.

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[14] Stuckey, Gilbert B., Evidence For The Law Enforcement Officer, McGraw-Hill Book Co., p. 215 (1968).
[15] Combs v. Com., 341 S.W. 2d 774 (Ky., 1960).
[16] Chapman v. U.S., 365 U.S. 610 (1961).
[17] Stoner v. California, 376 U.S. 483 (1964).
[18] U.S. v. Owens, 882 F.2d 146 (10th Cir., 1984)).
[19] Carr v. Com., Ky., 463 S.W.2d 109 (1971).

c. Babysitters

If the suspect, or his spouse, is the owner of the home, a babysitter may be held to be unable to give a legal consent to search. The babysitter's authority over the home would likely be considered less than the authority of the owner. However, a babysitter's consent may be valid as similar to that of a guest of the owner who happens to open the door and admit law enforcement.[20]

d. Spouses

If one spouse consents, but the other spouse who is also present refuses, the refusal will control and a search will not be permitted.[21] If only one spouse is present and consents, it is not necessary to seek out the other spouse to gain their permission as well. (However, if the other person is absent because of police action, such as an arrest, and that seizure was for the purpose of removing them from the house, the consent of the remaining spouse is invalid.)

3. Warnings

Under both U.S. Supreme Court and Kentucky case law, a consent by a person may still be valid even though the officers do not inform the person of his right to refuse. However, the failure to warn is still a factor considered by the court in deciding whether the consent was voluntary.[22]

4. Limiting Consent

A person may limit consent to cover only certain parts of a house or building or withdraw his consent at any time. Once the subject withdraws consent, no further search can be justified as a consent search.

NOTE: Because of risks involved with a consent search, an officer should always get a search warrant instead, if possible. If a consent search is conducted, the officer should try to get a signed, written, recorded or otherwise documented consent.

G. Body Evidence

Evidence from a person's body, especially when evanescent (easily destroyed), may, under appropriate circumstances, be collected without a warrant. Evidence that is not possible to alter or destroy (such as a person's DNA) will generally require either consent or a warrant to obtain. In addition, evidence that requires surgery or an invasive medical procedure to recover will also, as a rule, require a warrant, unless there is a separate medical reason to remove the item immediately. (In such circumstances, of course, the patient will be presumed to have given consent, either explicit or implied, for the surgery.) Blood samples for DUI cases, if not given with consent, will require a warrant.[23]

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[20] See Butler v. Com.. Ky. 536 S.W. 2d 139 (1976). But also see Cain v. Com., Ky., 554 S.W. 2d 369 (1977), which case is harmonized with the Butler case, and in which a live-in lover was accepted standing to object.

[21] Georgia v. Randolph, 547 U.S. 103 (2006).

[22] Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and Hohnke v. Com., Ky., 451 S.W. 2d 162 (1970).

[23] Missouri v. McNeely, --- U.S. --- (2013).

V. BASIC CONCEPTS

Search and Seizure law focuses on the concept of the reasonable expectation of privacy an individual has in a particular area. Without that expectation, there are no Fourth Amendment implications. In addition, without that expectation, an individual lacks standing – the right to bring a claim – even if someone else's rights are allegedly violated, unless, for example, the person is a minor or legally incompetent to bring the claim on their own.

Probable Cause is the standard that is required for the issuance of a search warrant, for an arrest warrant or warrantless arrest, or for a vehicle exception (Carroll) search. It is more than reasonable suspicion, but less than a clear and convincing or beyond a reasonable doubt.

The Exclusionary Rule

If a search satisfies the basic requirements (as discussed above) and produces evidence relevant to criminal charges, that evidence is admissible (legally acceptable) in the trial on those charges. Conversely, if officers obtain evidence by an illegal search and seizure, the Court will exclude that evidence from the trial on the criminal charges, unless the Court finds an otherwise legal reason to admit it anyway. This rule of law, that evidence obtained by an illegal search and seizure is inadmissible in a criminal trial, is known as the "Exclusionary Rule."

Some of the more common grounds on which courts exclude evidence as the result of illegal search and seizure are as follows:

- ★ the search was not based on probable cause; or
- ★ the search went beyond the scope of the warrant; or
- ★ the search without a warrant was unreasonable because the officer had adequate opportunity to obtain a warrant.

The Derivative Evidence Rule (Fruit of the Poisonous Tree)

The Exclusionary Rule prohibits both direct and indirect use of unlawfully obtained evidence. Unlawfully obtained information cannot be the underlying basis for an investigation which develops other evidence. The new evidence is said to be tainted or the "fruit of the poisonous tree." The "fruit of the poisonous tree" doctrine may be applicable if illegally obtained evidence is the basis for discovery of:

- A willing witness who might not have been found.
- A confession or admission which might not have been made if the defendant had not been confronted with the illegally obtained evidence.
- Any other evidence which might not have been found even if an officer uncovers critical evidence which positively connects a suspect to a crime, if the evidence is obtained in violation of the defendant's Fourth Amendment rights, the evidence cannot be used unless an exception to the rule applies (such as the inevitable discovery exception,[24] the independent source exception[25], or the use of the evidence only in rebuttal[26]).

[24] Nix v. Williams, 104 S.Ct. 2501 (1984).

Constructive Possession

It is not necessary for an individual to be in actual possession of an item to be charged with its possession. So long as the item is where the individual may exercise control over it, for example, it is in their car, they may be found in *constructive* possession of the item. This may be the case even when the individual denies any authority over the item, if the item is close enough to the subject for the subject to exercise control over it. (For example, a handgun or drugs found under the seat the driver or passenger occupies in the vehicle, or in a closet or under the bed in the bedroom which the subject occupies.)

VI. SEARCHES UNDER A WARRANT

A. Court Preference for a Search Warrant

As a general rule, courts require a law enforcement officer to obtain a search warrant "whenever practicable,"[27] that is, so long as the officer has a reasonable opportunity to do so. In determining whether a search without a warrant is "reasonable," courts will consider as one factor whether the officer had enough time to get a warrant. Many decisions make it clear that courts highly prefer searches conducted with a warrant. They are often reluctant to reverse the judge issuing the warrant unless the evidence clearly shows the warrant to be invalid. Consequently, the officer should always obtain a search warrant unless special or emergency circumstances make it unreasonable.

B. What Is a Search Warrant?

A search warrant is a written order from an authorized judicial official (judge/trial commissioner) which directs a law enforcement officer to search specific places or persons, seize specific property and hold the property in accordance with law.

C. What Are the Requirements for a Legal Search Warrant?

To be legal, any search warrant in Kentucky must:

1. Be issued by a neutral, detached judge (meaning a judicial officer who is impartial, not personally involved); and
2. Contain the words "Commonwealth of Kentucky" at the top;[28] and
3. Be based on an affidavit showing probable cause; and
4. Be based on an affidavit sworn to before the issuing judge or other authorized person; and
5. Particularly describe the place or person to be searched; and
6. Particularly describe the items to be seized; and
7. Be signed personally by the judge or other authorized person who issues the warrant.

D. Requirement of a Neutral, Detached Judge

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[25] Segura v. U.S. 104 S.Ct. 3380 (1984).
[26] Murphy v. Com., 652 S.W.2d 69 (Ky. 1983).
[27] Coolidge v. New Hampshire, 403 U.S 443 (1971); U.S. v. Blanton, 520 F.2d 907 (6th Cir. 1975).
[28] Smith v. Com. , Ky., 504 S.W.2d 708 (1974).

Kentucky Rule of Criminal Procedure (RCr) 13.10 states that a search warrant may be issued "by a judge or other officer authorized by statute." Rule 1.06(a) defines "judge" to mean any judge, justice, or district court trial commissioner in the Kentucky court system. KRS 15.725(4) provides that in the event of the absence from a county of all district judges and all circuit judges and all trial commissioners, the circuit clerk in each county may issue criminal warrants prepared by the Commonwealth's attorney or county attorney. The Court of Appeals of Kentucky in the case of Com. v. Bertram[29] upheld the constitutionality of this statute. The term "criminal warrants" includes both arrest warrants and search warrants.

A prosecutor or a law enforcement officer may never legally issue a search warrant on their own.[30]

E. What Is Probable Cause?

To show probable cause for the judge to issue a search warrant, the officer must present **reliable facts, information or circumstances** that are sufficient for a reasonable person to believe:

a. That a crime has been committed; **and**
b. That evidence of this crime (instruments, fruits, specific contraband, or other evidence) is on the premises (or person) to be searched.

In other words, the officer must put factual information in the affidavit, not conclusions. The officer must state the underlying facts and circumstances which support the belief that evidence of a crime is at the place to be searched, and make a clear link, in the narrative, between the location (on the front of the warrant) and the contraband for which the officer is searching.

F. How May the Officer Get Probable Cause?

The officer may obtain probable cause from one or a combination of the following:

a. Personal observations;
b. Admissions or confessions of a suspect;
c. Information given to the officer by victims and witnesses;
d. Information provided by informants (either named informants, or unnamed "reliable" informants);
e. Corroborated information from anonymous informants;
f. Information from other peace officers or departments;
g. Strong circumstantial evidence when combined with one of the above.

Two additional points are critical. **First**, the officer's mere **belief** that he has probable cause is not sufficient; the officer must have **evidence / facts** that convinces the judge as to probable cause. **Second**, the officer may show probable cause by putting together the knowledge of several officers. The officer is not limited to their own knowledge but should accurately reflect (with the exception of naming confidential informants, for example) from whom they obtain other information.

G. Using Informants to Show Probable Cause

The credibility of an informant can be established by showing (in the search warrant affidavit), one or more of the following:

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[29] 596 S.W.2d 379 (1980).
[30] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

- the informant is a law enforcement officer or dispatch personnel;
- the name of the informant;
- the statement of the informant was against his penal interest (i.e., contained information that could have helped convict him);
- the informant has provided information some number of times in the past which information was confirmed by the officer (and may have resulted in some number of arrests and convictions);
- his information has been duplicated by some other independent source; or
- the officer has been able to corroborate some of the details of the information.

The officer's affidavit should also indicate how and when the informant gained the information given in order to show the informant's basis of knowledge, but with care taken not to be so specific as to give away the identity of an informant who should remain unidentified. A named (or nameable) informant or witness always has more credibility than one that is truly anonymous, however. (An informant need not necessarily be named in a warrant, so long as the warrant indicates that the individual is known by the officer and may be identified.)

I. How Does the Officer Obtain the Warrant?

The officer must go to the proper judicial officer and submit an affidavit (a sworn statement). A search warrant affidavit sets out the facts which show a crime has been committed and that evidence of the crime is probably at a certain location. The officer should include specific conduct, statements, and observations that show probable cause. Simply stating the officer's own opinion or suspicion, even if based on long experience, is not enough. In addition, the affidavit must state the time when the facts or conduct occurred[31] so the judge can assess whether seizable goods are probably now on the premises.

J. Additional Requirements for the Affidavit and Warrant

1. The officer must clearly and specifically describe in his affidavit the place or person he wishes to search. The officer must include enough detail to enable other officers serving the warrant to identify and locate the property. As to buildings, the officer should list the street address, then specifically describe the rooms and buildings and any portion of the "curtilage" (the dwelling and the nearby area used to support activities in the dwelling--typically, the fenced-in area surrounding a house) to be searched. Errors in a warrant, such as an incorrect street address, will not necessarily make the warrant invalid if the total facts in the warrant make it clear what premises are to be searched. The test applied will be - does the warrant identify the premises accurately enough so that the officer executing it can reasonably determine the place to be searched?[32] Specific judges may require additional information, such as a photo or a latitude and longitude of the suspect location, as well.

   a. Apartment buildings or other multiple family dwellings can present a special problem. Unless the officer has probable cause to search the entire building, the officer should state in the affidavit the unit/apartment number of the unit to be searched or describe its location in detail.

[31] Bruce v. Com., 418 S.W. 2d 645 (Ky., 1967).
[32] Williams v. Com., 261 S.W. 2d 416 (Ky., 1953).

b. Vehicles. At times the officer's information about a vehicle involved in crime will be sketchy. Still, courts prefer that the affidavit describe the vehicle by giving its make, model, year, color, VIN, and license tag number, when possible.[33] When an officer is planning to search particular premises, the officer should request permission to search all vehicles on the premises, although such inclusive language is becoming less accepted.

2. The affidavit and the warrant must particularly describe the items to be seized. "General" warrants to seize broad categories of items are invalid.

3. The officer must swear to, and sign, the affidavit in the presence of a judge or other person authorized by written order of a judge. See RCr 13.10 and RCr 2.02.

4. The judge issuing the warrant must read the affidavit himself, or the warrant will be invalid.

K. Rules for Executing (Serving) the Warrant

Kentucky law generally requires the officer to execute the warrant (carry out the search) within a reasonable time after the judge issues it. The law does not set a certain number of days, but the warrant itself may give a time limit, as might local practice. Rules for the federal courts require warrants to be served within ten days after being issued unless the warrants specify otherwise. The officer may use whatever reasonable force is necessary to execute the warrant, including breaking into the building to be searched, although officers must keep in mind that they may be legally responsible to find a way to secure the premises after the search, and may be liable for unnecessary damage, as well. Forcing entry should be limited to what is absolutely necessary. In addition, in executing a search warrant, the scope of the officer's search must be appropriate considering the type of items being sought.[34]

Special Situation: Warrant to Search Place Where Alcoholic Beverages are being Sold or Possessed.

KRS 242.370: Where judge issues a warrant to search a place where alcoholic beverages are being sold or possessed, the officer must execute the warrant on the day he receives it.

L. What Items may be Seized in a Search With a Warrant

The officer executing a search warrant may legally seize the following if they are reasonably within the scope of the officer's search:

1. All items ordered to be seized in the warrant;
2. All instrumentalities of crime (that is, weapons and other objects, even cars, which have actually been used to commit crimes); and
3. Contraband (items illegal to possess, such as illegal drugs, an unregistered sawed-off shotgun, or stolen property); and
4. Fruits of crime (such as stolen bank money).[35]

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[33] Baird v. Com., Ky., 273 S.W. 2d 44 (1954).
[34] See McMahan's Adm'x v. Draffen, Ky., 47 S.W. 2d 716 (Ky. App., 1932).
[35] See Jones v. Com., 416 S.W. 2d 342 (Ky. 1967).

Other issues concerning search warrants include, for example, the possibility of obtaining a "no-knock" warrant, in which the judge authorizes entry to the premises without knocking, and anticipatory (or trigger) warrants, in which the warrant indicates that it will not be served until something specific occurs, such as the controlled delivery of a package. Area and administrative warrants are used, as a rule, only by code enforcement or regulatory officers.

NOTE There is no "crime scene exception" to the search warrant requirement. When the emergency terminates, the right to continue to search without a warrant also terminates.[36] At that point, the officers must seek consent, get a warrant, or find another exigent circumstance upon which to justify the search.

VI. SEARCHES WITHOUT A WARRANT

Overview

Kentucky and federal law recognize that certain searches are reasonable and legal even without a warrant. All such searches must be for some limited emergency or special circumstance. Most of them require some emergency circumstance where the officer has probable cause but not enough time to obtain a warrant.

Exigent circumstance searches (circumstances in which it would be unreasonable to require an officer to get a warrant):

(1) Frisk during a Terry stop
(2) Anonymous tips
(3) Search incident to lawful arrest or citation
(4) Closely-regulated businesses
(5) Sweep search
(6) Crime Scene Search
(7) Community Caretaker
(8) Entry of premises in hot pursuit to arrest
(9) Entry of premises to protect life or health
(10) Entry of premises to prevent destruction of evidence.

Note that each of these searches is separate from the others, designed to meet a specific emergency or unusual situation. The officer should always consider all of the search possibilities. Even though the officer may lack justification in a given incident to conduct certain of these searches without a warrant, the facts could justify one of the other types of search warrant exceptions.

A. Exigent Circumstance Searches

1. Frisk during a Terry Stop (a Temporary Investigative Detention)

[36] Mincey v. Arizona., 98 S.Ct. 2405 (1978); Thompson v. Lousiana, 105 S.Ct. 409 (1984); Flippo v. W.Virginia, 120 S.Ct. 7 (1999).

a. What is a "Terry Stop"?

A Terry stop is a temporary seizure of a person, by a law enforcement officer, to investigate the officer's suspicion that the person is involved in criminal activity. The Terry[37] case is only one of a number of cases that have established the law governing what has become known as a Terry stop. "Involved in criminal activity" means the person is about to commit any crime, is committing any crime, or has committed a crime.

b. How much Evidence is Required to Justify a Terry Stop?

Since a Terry stop is a seizure of a person, it is required by the Fourth Amendment to the U.S. Constitution to be reasonable. To be reasonable, thus legally justifiable, a Terry stop must be based on "reasonable suspicion" that the person is involved in criminal activity. **Reasonable suspicion** is more than a mere hunch, but less than probable cause. To be reasonable, the suspicion must be "articulable"--that is, it must be solid enough that the officer can put it into words and explain it clearly to another person. The officer should have specific items of evidence that make it reasonable for him to be suspicious.

Some factors which might give an officer "reasonable suspicion" to stop are:

(a) the place (such as a high-crime area);
(b) the time (such as late at night);
(c) suspicious conduct (such as refusing to identify himself and explain situation, carrying unusual items, or sneaky conduct or gestures);
(d) recent report of crime in vicinity;
(e) resemblance of suspect to description of wanted criminal;
(f) tips from reliable informants;
(g) officer's experience;
(h) the person runs; and
(i) the person has a criminal record.

Even though one of the above factors by itself may not be enough, and some (such as a high crime area) carry less weight, combinations of them may justify a stop.

c. What is a "frisk"?

A frisk is a search of a person for the purpose of locating weapons. It is usually limited to a pat down of the person's outer clothing. It is allowed for the sole purpose of the protection of the officer and other persons at the scene. During a frisk, if the officer feels something hard that could reasonably be, or contain, a weapon, he may reach inside the clothing and seize the object. Plus, if the officer feels an object that his sense of touch immediately tells him is contraband (something that is illegal for the person to possess, such as drugs), then he may seize it. The officer may not squeeze, slide or otherwise manipulate a non-weapon object in order to try to identify it as contraband.[38]

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[37] Terry v. Ohio, 88 S.Ct. 1868 (1968).
[38] See Minnesota v. Dickerson, supra.

d. When may an Officer Frisk a Suspect during a Terry Stop?

An officer may not frisk automatically, but must have articulable reason to believe the suspect is armed and dangerous.

Factors which might support such a belief include:

(a) officer's observations (e.g., he sees a bulge in a pocket);
(b) report that the suspect is armed;
(c) nature of the crime involved (e.g., an armed robbery); and
(d) suspect's conduct.

e. Must the Suspect Identify himself?

Generally, an officer may ask an individual for identification, but there is no legal requirement that the person comply with the request.[39] The subject may not, however, lie about their identity. If the suspect is the operator of a motor vehicle that has been legally stopped by an officer, he must show the officer his operator's license, motor vehicle registration and proof-of-insurance card.

e. Must the Suspect Answer the Officer's Questions?

An individual is never required to answer an officer's questions.

f. How Long may the Suspect be Detained?

The suspect may be detained no longer than is reasonably necessary for the officer to check out the officer's suspicions. Usually a Terry stop is completed within a few minutes, but it could last considerably longer and still be considered reasonable in some situations. It is critical, however, that the purpose of the stop be able to be adequately articulated by the officer.

g. May the Officer Use Force to Accomplish a Terry Stop?

The officer may use or threaten to use a reasonable amount of force to get the suspect stopped whether the suspect is on foot or in a vehicle. The officer may use or threaten to use a reasonable amount of force to control the situation. Courts have approved the use of drawn guns and/or handcuffs on the suspect if that was a reasonable precautionary measure considering the nature of the crime and the potential for harm presented by the situation. The officer may use or threaten to use a reasonable amount of force to keep the suspect from leaving the scene before the officer has finished.

However, the use or threatened use of force during a Terry stop may become so coercive and restrictive that the situation, if challenged in court, may be considered an arrest. And, if the officer had only reasonable suspicion, the arrest would be invalid; thus any evidence obtained as a result of the stop would be inadmissible to prove the person's guilt and the officer may face liability for a false arrest.

[39] Brown v. Texas, 443 U.S. 47 (1979)

i. Vehicle situation

In a vehicle situation, if the officer has a "reasonable belief" that the suspect is dangerous and might gain control of weapons within the vehicle, the officer may search the passenger compartment of the vehicle, looking only in places where weapons may be hidden.[40]

2. Search Incident to (in Connection with) Lawful Arrest

Whenever an officer arrests a person, with or without a warrant, he may search him immediately after the arrest.

a. When and Where?

This search usually occurs at the scene of, and immediately after, the arrest.

b. Search for What?

The officer may search for weapons and for evidence of a crime.

c. What Area?

The officer may search the entire person of the subject and the nearby area from which the subject might be able to obtain a weapon or destructible evidence. Reference to a weapon or evidence is meant to help define the distance of the place searched from the arrestee and not to limit the detail of the search.[41] Officers are not required to make an analysis as to how probable it is that weapons or evidence are in this nearby area.

d Searches of Persons of the Opposite Gender

The officer may search an arrested person of the opposite gender. However, the officer may, if circumstances permit, may decide to do a general frisk for weapons and wait to have a more extensive search for other evidence made later by an officer or other person of the same gender as the arrestee.

e. Booking Or Stationhouse Searches

Although this search might be viewed as a separate type, courts generally classify it as one form of the search incident to arrest. The courts consider this search reasonable because of the need to find any weapons, instruments of escape, and evidence on arrested persons before they are placed in with other prisoners. The search is an exception to the rule that searches incident to the arrest must be made immediately after, and close to, the point of arrest.[42]

If the arrested person is to be jailed, officers or the jailer will normally conduct a complete inventory of his personal possessions, seize them and have them examined as part of a routine, established inventory procedure. The search should be conducted at the same time the accused is jailed.

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[40] Michigan v. Long, 103 S.Ct. 3469 (1983).

[41] Collins v. Com. ., 574 S.W.2d 296 (Ky. 1978).

[42] The U.S. Supreme Court has upheld the stationhouse search without a warrant in U.S. v. Edwards, 94 S.Ct. 1239, (1974). Also see Illinois v. LaFayette, , 103 S. Ct. 2605 (1983).

Courts may allow reasonable delays, such as to get substitute clothing for the accused, but a long delay may support a claim that the police could have obtained a search warrant.

4. Sweep Searches

When officers are lawfully in a location, such as making an arrest pursuant to a warrant, it is permissible for officers to do a brief search of an area, looking not for evidence, but for suspects or victims. That search requires, however, that the officer have at least some reason to believe that someone might be in that area

5. Crime Scene Searches

There is no such thing as a crime scene or murder scene exception to the search warrant requirement. If an officer is at the scene of a crime, they may use other warrantless search doctrines to search the area, such as consent, a sweep (only for persons), plain view and an exigent circumstances, but may not otherwise search the area until a search warrant is obtained.

6. Entry of Premises in Hot Pursuit to Arrest

What Is This Search?

This type of search occurs when officers are chasing a suspect after a crime has been committed and he enters a building shortly before the officers arrive. Officers may enter the building without a warrant to search for the suspect, but might still be expected to, for example, knock and announce before entering private premises.

How Far May The Officer Search?

The officer may search all the rooms and potential hiding places until the suspect is apprehended. If the officer arrests a suspect in one room and reasonably believes there may be other suspects in other rooms, he may still search the other rooms and closets. Also, if the suspect is believed to have weapons, the officer may search furniture and other places in the building where the weapons could be hidden.[43] An officer may also search the rooms of an apartment house or motel.[44]

8. Entry of Premises To Prevent Destruction Of Evidence

a. Requirements

Courts may uphold entering premises without a warrant because an immediate search was necessary to prevent evidence from being destroyed. The officer must have probable cause to believe that a crime has been committed or is being committed. The evidence must be a kind which could quickly be destroyed. Finally, the situation must create a strong danger that the evidence will be destroyed if the officer delays to get a warrant.[45]

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[43] Warden v. Hayden, 387 U.S. 294 (1967).

[44] In Styles v. Com., a police officer had received a radio report of a robbery with the robber's description.[44] When he observed a suspect fitting that description and ordered him to stop, the man fled and removed a gun from his jacket pocket. The officer followed him into a motel and saw the elevator indicator stop at the fourth floor. He searched the rooms on the fourth floor for the suspect without a warrant and arrested the suspect. The search was upheld.

[45] Cupp v. Murphy, 93 S.Ct. 2000 (1973).

Officers will perhaps use this type of search most often to prevent the destruction of drugs. Further, the threat of a fire in the immediate area can justify seizure of evidence.[46] However, a search will be illegal where destruction of evidence is merely possible, and when other actions, such as posting a guard at the premises can prevent tampering with evidence while a search warrant is obtained.

[46] U.S. v. Gargotto, 510 F.2d 409 (6th Cir., 1974).

9. Community Caretaker / Entry of Premises To Protect Life Or Health

When the police officer has good reason to believe that a person's life or health is in danger, he may enter buildings or other areas without a warrant and search for the person. If the officer hears shots or cries for help coming from a building or room, he may enter and search without a warrant. If the officer finds someone injured, wounded, or unconscious, he may search the person for identification and medical data. If he has a reasonable belief that explosives, guns or other deadly devices are inside a building or car and that lives are immediately in danger, he may enter and search without a warrant. In certain circumstances, officers are authorized to act, not as law enforcement, but as caretakers of the community, in situations where, for example, a crime may not have been committed but there is a public safety need.

B. VEHICLES

1) Vehicle Stops

The standard for a vehicle stop is much the same as the standard for the stop of a person [47] and may be based upon reasonable suspicion or probable cause.

2) Pretext (Whren) Stops

An officer may make a stop for any valid traffic (or other) offense, no matter how minor, even if the actual intent is to investigate another, unrelated offense.

3) Search of a Vehicle on Probable Cause ("Vehicle Exception" or Carroll Search)

This type of search is different from either the search incident to arrest or the inventory search of an impounded vehicle. It is based on **probable cause** to believe that a vehicle contains evidence of a crime. It may be made before or after an arrest, or even without an arrest. The U.S. Supreme Court has justified the probable cause warrantless search of vehicles, and these types of searches are referred to as Carroll[48] searches. This doctrine is based upon the mobility of vehicles in general[49], the configuration of most vehicles (much glass which reduces the expectation of privacy therein) and the pervasive and continuing governmental control of vehicles.[50] Not to be overlooked is that even when the vehicle is immobilized by accident,[51] or by the arrest of all its occupants,[52] there is still the possibility that unknown confederates may remove the vehicle with the items it contains or else remove or destroy the seizable items.

a. Probable Cause

Kentucky decisions look at all the surrounding circumstances to determine whether an officer had probable cause to search a vehicle. They usually recognize the following as relevant factors which aid in establishing probable cause:

★report of a recent crime in the area;

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[47] Delaware v. Prouse, 440 U.S. 648 (1979).

[48] Carroll v. U.S., 267 U.S. 132 (1925).

[49] Cady v. Dombroski, 93 S.Ct. 2523 (1973) and cases cited therein; Robbins v. California , 101 S.Ct. 2841 (1981) (Justice Rehnquist's dissent).

[50] California v. Carney, 105 S. Ct. 2066 (1985).

[51] Cady v. Dombroski, supra.

[52] Pack v. Com., 610 S.W.2d 594 (1981); Michigan v. Thomas, 102 S.Ct 3079 (1982).

- ★description by witnesses of vehicle and occupants involved in such crime;
- ★officer's knowledge of occupants' criminal record or dangerousness;
- ★in local option cases, driver's record for such offenses or reputation as bootlegger plus car heavily weighted in back;
- ★time of night or other suspicious circumstances

Certain of these factors **by themselves** do not justify a search. But if the officer finds several of them **in combination**, there will normally be probable cause for a search.

b. When and Where may the Officer Conduct this Search?

The officer may search a vehicle on probable cause at the scene where he stops it[53] or otherwise locates it in a public place. The U.S. Fourth Amendment allows a warrantless probable cause search of a vehicle initially found in a public place although it is moved elsewhere by the authorities before the search.

c. What Area?

The officer may conduct a search of the entire vehicle including the glove compartment, trunk, hub caps, hood area, and within containers (bag, boxes, suitcases, etc.) providing only that he limit his search to those areas and containers which could physically contain any seizable item he has probable cause to believe is in the vehicle.[54]

d. Probable Cause Search of a Container in a Vehicle

If an officer has probable cause to believe a container in a vehicle contains evidence of a crime but the probable cause does not extend to the vehicle itself, the officer is allowed to stop the vehicle, seize the specific container, and search within it, all without a warrant.

4) Search Incident to Arrest (from a vehicle)

If the officer arrests an occupant (driver or passenger) of a vehicle, either while the occupant is in the vehicle or shortly after the occupant is removed from the vehicle, the officer may, of course, search the person arrested. However, the officer may not routinely search any part of the vehicle incident to the arrest, unless the arrested subject either has access to the vehicle or the officer is searching for evidence related to the offense for which the person is actually being arrested.[55] Note, however, that the officer may, possibly search the vehicle under a Terry-Long frisk, if there is reasonable suspicion the vehicle might contain a weapon or under the Carroll doctrine, when the officer has probable cause to believe that the vehicle contains contraband.

5) Roadblocks

Roadblocks are permitted for traffic purposes, such as for DUI. Roadblocks are not permitted solely for seat belt checks (see KRS 189.126) nor for other, non-traffic related reasons.[56]

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[53] Estep v. Com., 663 S.W.2d 213 (1983).
[54] See U.S. v. Ross, 456 U.S. 798 (1982).
[55] Arizona v. Gant, 126 S.Ct. 1710 (2009)
[56] See Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Illinois v. Lidster, 540 U.S. 419 (2004).

6) Miscellaneous Issues

Officers may require the driver[57] and passengers[58] to get out of a vehicle during any valid traffic stop.

7) Vehicle Impoundment, Inventory, Search for Evidence

This section involves impounded vehicles and addresses three issues:

- an officer's authority to impound a vehicle;
- an officer's authority to inventory the contents of an impounded vehicle; and
- An officer's authority to search an impounded vehicle for evidence of a crime.

1. Authority to impound a vehicle

To impound a vehicle is to seize it and hold it in custody. Impoundment of a vehicle by police is reasonable so long as they follow standard police policy and they do not search for evidence of a crime (which may be done only if there is probable cause to believe the vehicle is, or contains, evidence of a crime).[59]

a. Suggested policy as to when to impound

Courts hold that police shouldn't impound a vehicle (without probable cause to search for evidence) unless it is necessary under the circumstances. As was pointed out by the Kentucky Supreme Court in Wagner v. Com., it becomes necessary to impound if the vehicle, if not removed, constitutes a danger and if the owner/operator cannot reasonably arrange for removal in a timely manner.[60] A vehicle constitutes a danger if it is parked on the traveled portion of the roadway, is otherwise parked illegally, etc.

b. Suggested procedures to follow

The owner/operator should be offered the chance to get the vehicle removed. If he cannot arrange to get this done, the officer has the duty to eliminate the danger by pushing the vehicle out of the way or by impounding it and arranging to have it towed. If the vehicle does not constitute a danger, and it is not going to be impounded for some other reason (e.g., to be searched for evidence based on probable cause), it is the responsibility of the owner/operator to deal with the vehicle. If he will not or cannot arrange for removal, the officer should lock the vehicle and leave it where it is. If the owner/operator requests impoundment, and the officer complies, the owner/operator is liable for towing and storage expenses.

2. Authority to inventory an impounded vehicle

To inventory a vehicle is to check its interior, list the items found there, and take steps to safeguard any items of value. It is not to search for evidence, although certainly evidence might be located in the context of an otherwise lawful inventory.

When an officer has impounded a vehicle, there are several reasons why it should be inventoried:

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[57] Pennsylvania v. Mimms, 434 U.S. 106 (1977)
[58] Maryland v. Wilson, 519 U.S. 408 (1997)
[59] See Colorado v. Bertine, 107 S.Ct. 738 (1987).
[60] 581 S.W.2d 352 (1979).

- ★to protect the property in the vehicle,
- ★to protect law enforcement and the two company in case there is a disagreement as to what property should be in the vehicle,
- ★to protect law enforcement and the tow company from dangerous items (e.g., explosives) that may be in the vehicle, etc.

If an inventory goes beyond items in plain view, it is a search and is required by the Fourth Amendment to be reasonable. But an inventory search is **not** a search for evidence; it is an administrative search and **probable cause is not required**. The U.S. Supreme Court, in South Dakota v. Opperman, held that an inventory search is reasonable if it is done in accordance with standard police policy.[61] Neither a warrant nor consent of the owner/operator is required.

a. Suggested policy as to when to inventory

All impounded vehicles should be inventoried.

b. Suggested procedures to follow

Policy should cover matters such as the location(s) at which the vehicle may be inventoried (at the scene? at the impound lot?) and where in the vehicle officers may look (only in plain view? in the trunk? in closed containers? in locked containers?). Law enforcement officers should consider allowing the owner/operator to be present (or have a representative present) during the inventory, time and circumstances permitting.

3. Authority to search an impounded vehicle for evidence

An impounded vehicle may be searched for evidence of a crime:

a. With a search warrant

Search with a warrant is always best. Probable cause is required.

b. Without a warrant, but with consent

Probable cause is not required. But the officer should be very careful that the consent is valid.

c. Without a warrant or consent--probable cause search of a vehicle

The U.S. Supreme Court, in U.S. v. Ross, held that police may search an impounded vehicle, without a search warrant or consent, if they find the vehicle in a public place and have probable cause to believe the vehicle is, or contains, evidence of a crime.[62] The search of a vehicle on probable cause is usually conducted at the place where the vehicle is found, but the police may consider impounding the vehicle before searching if it would be dangerous to search the vehicle at the scene or the vehicle could not be adequately searched at the scene. Also, if police, while inventorying an impounded vehicle, develop probable cause to believe the vehicle contains evidence of a crime, they may then conduct a search for the evidence.

[61] 96 S.Ct. 3092 (1976)

[62] 102 S.Ct. 2157 (1982),

4. Plain view doctrine

Officers dealing with impounded vehicles should have the plain view doctrine in mind. What officers see in plain view may provide them with the probable cause needed to search the vehicle for evidence, either under a Carroll search or using a search warrant.

ARREST

Warrantless Arrests

Henry v. U.S., 361 U.S. 98 (1959)

FACTS: There was a theft of whiskey at a terminal in Chicago. Two FBI agents investigating saw Henry and Pierotti walk across the street from a tavern and enter a vehicle; they had information that Pierotti was implicated in the theft. The agents followed the car and saw Henry leave the car momentarily and return with several cartons, which were placed in the car. They drove off, but agents were unable to follow.

A little later, they saw the same car, back at the tavern. Again they followed the pair and the two men followed the same routine. The agents could not readily identify the contents of the cartons. They stopped the car and searched it, seizing the cartons. They took the two men to the office and held them, during that time they discovered the cartons held stolen radios. Both men were arrested.

Both were convicted and appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Is probable cause required for a lawful arrest?

HOLDING: Yes

DISCUSSION: The Court examined the history of warrantless felony arrests based on probable cause. The Court held that evidence sufficient to establish guilt is not necessary, but that simple good faith is not enough. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. In this situation, however, the Court found insufficient evidence to "permit them (the agents) to believe that (Henry) was violating or had violated the law. "

The Supreme Court reversed Henry's conviction.

Washington v. Chrisman, 455 U.S. 1 (1982)

FACTS: On January 21, 1978, Officer Daughtery (Washington State University PD) saw Overdahl "leave a student dormitory carrying a half-gallon bottle of gin." Believing him to be underage, Daughtery stopped Overdahl and asked for identification. "Overdahl said that his identification was in his dormitory room and asked if the officer would wait while he went to retrieve it." The officer told him that he would have to accompany him, "to which Overdahl replied 'OK.'"

The two proceeded to the 11th floor of the dorm, where Overdahl's room was located. "Chrisman, Overdahl's roommate, was in the room when the officer and Overdahl entered." Daughtery "remained in the open doorway, leaning against the doorjamb while watching Chrisman and Overdahl." The officer noted that "Chrisman … became nervous at the sight of an officer."

Less than a minute after they arrived, "the officer noticed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing." He recognized the seeds as marijuana seeds and that the "pipe was

of a type used to smoke marijuana." He entered the room and looked more closely at the items and confirmed his initial belief.

Daughtery "informed Overdahl and Chrisman of their" Miranda rights, and each "acknowledged that he understood his rights and indicated that he was willing to waive them." Daughtery asked about other contraband in the room and Chrisman handed him the box he'd had in his hands when Daughtery arrived; it "contained three small plastic bags filled with marihuana and $112 in cash." When a second officer arrived in response to a call from Overdahl, they told the students that a room search would be necessary. They told the two students that "they had an absolute right to insist that the officers first obtain a search warrant, but that they could voluntarily consent to the search." The "two student conferred in whispers for several minutes before announcing their consent" – and also signed written waivers. "The search yielded more marihuana and a quantity of lysergic acid diethylamide (LSD)."

Chrisman was charged with possession of both drugs and he moved for suppression of the evidence. When that was denied, he was eventually convicted on both charges. The state Court of Appeals affirmed but the Washington Supreme Court reversed. It found that "although Overdahl had been placed under lawful arrest and 'there was nothing to prevent Officer Daughtery from accompanying Overdahl to his room,' the officer had no right to enter the room and either examine or seize contraband without a warrant." The Court's reasoning was that "there was no indication that Overdahl might obtain a weapon or destroy evidence and, with the officer blocking the only exit from the room his presence inside the room was not necessary to prevent escape." As such, because the Court held that the officer's entry into the room wasn't lawful, he could not take advantage of plain view to seize anything within the room. (In addition, if the consent was the "fruit if the officer's initial entry" – anything found as a result of that consent must be suppressed also.)

The case was appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: May an officer accompany an individual inside their home when they are under arrest, and take action on items they see in plain view?

HOLDING: Yes

DISCUSSION: The Court began by stating that the "'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be."[63]

The Court stated that Daughtery "had a right to remain literally at Overdahl's elbow at all times; nothing in the Fourth Amendment is to the contrary." The Washington Court's "premise … [was] that Officer Daughtery was not entitled to accompany Overdahl from the public corridor of the dormitory into his room, absent a showing that such 'intervention' was required by 'exigent circumstances.'" The Supreme Court, however, "disagree[d] with this novel reading of the Fourth Amendment." It went on to say that the "absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer's authority to maintain custody over the arrested person" and "that authority [is not] altered by the nature of the offense for which the arrest was made." The Court noted that "[e]very arrest must be presumed to present a risk of danger to the arresting officer" and "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."

[63] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The Court concluded that it was "not 'unreasonable' under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest." As such, Daugherty's presence in the room was lawful, and thus his plain view of the contraband was also lawful. The Court stated that "[t]his is a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy." In that situation, the "Fourth Amendment does not prohibit seizure of evidence of criminal conduct found in these circumstances."

The Court reversed the judgment of the Washington Supreme Court.

Welsh v. Wisconsin, 466 U.S. 740 (1984)

FACTS: On April 24, 1978, a witness "observed a car being driven erratically." Eventually, it swerved off the road and stopped in an open field. The witness was concerned about the driver and that he would "get back on the highway" so he placed his own vehicle so as to block in the suspect vehicle and asked a passerby to call for the police. Before the police arrived, the driver of the suspect vehicle got out and asked the witness for a ride home, but the witness "suggested that they wait for assistance in removing or repairing the car." Instead, the driver walked away from the scene. When the police arrived, they talked to the witness, and he explained what had occurred. The officer checked on the ownership of the vehicle and learned that Welsh was the registered owner and lived only a short distance away.

They proceeded to the Welsh home, arriving at about 2100. Welsh's stepdaughter answered the door and admitted the officers. They found Welsh upstairs, naked in bed, and arrested him for driving under the influence. He was taken to the station and refused to submit to breath testing, which subjected him to a greater penalty.

The Wisconsin's trial court concluded that Welsh's arrest was lawful and his refusal to submit to breath testing unreasonable. However, the appellate court found that "the warrantless arrest of [Welsh] in his home violated the Fourth Amendment because the State, although demonstrating probable cause to arrest, had not established the existence of exigent circumstances." Therefore, his refusal to submit to the breath test was reasonable. The Wisconsin Supreme Court "reversed the Court of Appeals, relying on the existence of three factors that it believed constituted exigent circumstances: the need for 'hot pursuit' of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent destruction of evidence."

Welsh appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: May officers make a warrantless probable cause arrest, inside a home, absent strong exigent circumstances?

HOLDING: No

DISCUSSION: The Court began its opinion by stating that "[i]t is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" One of the principal protections "against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the house for purposes of search or arrest." The Court has held that "searches and seizures inside a home

without a warrant are presumptively unreasonable" unless a exigent circumstance exists, and those are "few in number and carefully delineated."

The Court noted that its "hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause is relatively minor" and "[b]efore agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."

At the time this offense occurred, Wisconsin classified driving under the influence as a noncriminal, traffic offense, for which no jail time was possible. "A warrantless home arrest cannot be upheld simply because evidence of [Welsh's] blood-alcohol level might have dissipated while the police obtained a warrant."

The U.S. Supreme Court held that Welsh's arrest was invalid and vacated the judgment of the Wisconsin Supreme Court.

Devenpeck v. Alford, 543 U.S. 146 (2004)

FACTS: On the evening of his arrest, Alford was driving to work when he saw a disabled car on the highway shoulder. It was dark, so he stopped to assist the motorist jack up their car and gave them a flashlight to use. On his way back to his car, a Washington State Trooper, Haner, also stopped. (Haner had noted the disabled car while traveling in the opposite direction and had turned around to assist as well.) Alford told Haner about the motorist's difficulty. Alford drove off as Haner went to assist.

The motorists told Haner they thought Alford was another officer, "in part because his car had 'wig-wag' headlights." Concerned, Haner contacted Sgt. Devenpeck and went in search of Alford. He found Alford and pulled him over. He noted that Alford's license plate was covered by a tinted cover and almost unreadable. Inside the car, Haner saw an amateur radio broadcasting transmissions of the Kitsap County Sheriff's Office, a microphone (which indicated the radio could transmit), a portable scanner and handcuffs. Haner asked him about the wig-wags and Alford told him they were part of a new alarm system. Haner asked him to demonstrate the lights and Alford "pressed several buttons, but was unable to activate the lights." (Another officer later found the correct button and activated the lights; the button was near Alford's right knee.)

Sgt. Devenpeck arrived and also asked about the lights. Devenpeck noticed a tape recorder on the seat that was apparently recording the stop. Devenpeck told Haner to get Alford out of the car and "informed Alford that he was under arrest for making an illegal tape recording." Alford told the troopers that he'd "previously had a similar problem with the [sheriff's office] and that he had a copy of the Washington Court of Appeals opinion in his glove compartment which held that the state Privacy Act does not apply to police officer performing official duties." The officers did not look at the document; Devenpeck later stated that "his belief that he had probable cause to arrest Alford was based solely on his view that Alford had violated the Privacy Act."

On the way to jail, Devenpeck called the local prosecutor but did not mention the case that Alford had cited. The prosecutor agreed that there was "clearly probable cause" for the arrest but later testified that his "determination was based primarily on conduct other than the tape recording." Haner also later admitted that the case Alford cited had been "mentioned in a law enforcement digest that Haner generally read." The prosecutor actually recommended additional charges but "Devenpeck rejected this

suggestion, explaining that the State Patrol does not, as a matter of policy, 'stack charges' against an arrestee."

Alford spent the night in jail and his car was towed and impounded. The criminal charge was later dismissed. Alford filed a lawsuit based upon both 42 U.S.C. §1983 and a state claim for "unlawful arrest and imprisonment" against the Washington State Patrol and the individual troopers. The Patrol was dismissed and, at jury trial, the jury found for the defendant officers. Alford requested a new trial and was denied; he then appealed.

The Ninth Circuit reviewed the case. The Court noted that the defendant officers "now claim on appeal that they had probable cause to arrest Alford for offenses other than tape recording and therefore, Alford's rights were not violated" even though it was clear that they did not have probable cause for the charge they actually placed against Alford. The Ninth Circuit stated, however, that the rule in the circuit was that "[p]robable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the suspect was arrested."[64] In this case, "[t]he conduct underlying the crimes suggested by the defendants is unrelated to Alford's tape recording." (The officers suggested an impersonation charge, based upon the headlights, or an obstruction charge based upon Alford not turning on the lights, upon request, although he knew how to do so.)

The officers requested qualified immunity, as well. The two part analysis requires that the "law governing the official's conduct [was] clearly established." The court found that it had been, since 1992, the date of the earlier opinion. The burden of proof for demonstrating this is upon the plaintiff, and the court held that the plaintiff was successful. The burden then shifts to the defendants to show that "'a reasonable police officer could have believed, in light of the settled law, that he was not violating a constitutional right' by arresting Alford for illegal tape recording." Under this "objective reasonableness" test, the troopers' subjective beliefs are not a factor in the analysis. Because there is no dispute that the taping was legal, the Court found no reason to support the troopers' arguments that they made a "reasonable mistake of law" because this case did not involve a "fine legal distinction under exigent circumstances." The troopers were not in a particular hurry, they had time to read the applicable statute and the opportunity to read case law (as offered by Alford) and to bring it to the attention of the prosecuting attorney.

The Ninth Circuit concluded that "[n]o objectively reasonable officer could have concluded that taping an officer during a traffic stop on a public thoroughfare was barred by the Privacy Act." The Court stated that the trial court should have granted Alford a new trial and reversed and remanded the decision. The troopers appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Does an arrest violate the Fourth Amendment when an officer has probable cause to make an arrest for one offense, but then makes an arrest, instead, for an offense not closely related to the first?

HOLDING: No

DISCUSSION: The Court began its discussion with a review of the Fourth Amendment. The Court noted that previous "cases make clear that an arresting officers's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." In addition, "his subjective reason for making the arrest need not be the criminal offense as to which of the known facts provide probable

[64] Gasho v. U.S., 39 F.3d 1420 (9th Cir. 1994).

cause." The Court continued, stating that "[t]he rule that the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent," and "makes the lawfulness of an arrest turn upon the motivation of the arresting officer – eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not 'closely related' to that subjective reason."

In other words, "[t]his means that the constitutionality of an arrest under a given set of known facts will 'vary from place to place and from time to time,'"[65] depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection."

The Court noted that "[i]f Haner, rather than Devenpeck, had made the arrest, on the stated basis of *his* suspicions; if Devenpeck had not abided the county's policy against 'stacking' charges; or if either officer had made the arrest without stating the grounds; the outcome under the 'closely related offense' rule might well have been different."

The Court reversed the decision of the lower court and remanded the case for further proceedings.

Virginia v. Moore, 128 S.Ct. 1598 (2008)

FACTS: On February 20, 2003, officers from Portsmouth (VA) stopped Moore. They had heard, via the radio, "that a person known as 'Chubs' was driving with a suspended license." The officers knew that Moore used that nickname and verified that Moore's license was, in fact, suspended. They arrested Moore for the offense and during the search incident to the arrest, they discovered that he was in possession of 16 grams of crack cocaine and a large amount of cash. They charged him with the drug offense.

However, under Virginia law, the arrest was not valid, as Virginia law required the issuance of a summons rather than a custodial arrest under the specific circumstances with which they were faced. Moore argued for suppression, which was denied. He was convicted at trial but that conviction was overturned by Virginia's appellate court. The arrest was eventually found to be invalid by the Virginia Supreme Court, which ruled that the arrest and search violated the Fourth Amendment. The evidence found subsequent to the arrest was suppressed.

Virginia requested certiorari and the U.S. Supreme Court accepted the case.

ISSUE: Is an arrest made upon probable cause unlawful under federal law if the state in which the arrest is made would not permit the arrest on other grounds?

HOLDING: No

DISCUSSION: After reviewing the history of the Fourth Amendment in respect to arrest, the Court noted that:

[65] Quoting Whren v. U.S., 517 U.S. 806 (1996).

> In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.

Although, the Court stated that states are "free 'to impose higher standards on searches and seizures than required by the Federal Constitution,'" that whether a particular action is valid "within the meaning of the Fourth Amendment" has never been dependent "on the law of the particular State in which the search occurs." The Court acknowledged that "Virginia chooses to protect individual privacy and dignity more than the Fourth Amendment requires, but it also chooses not to attach to violations of its arrest rules the potent remedies that federal courts have applied to Fourth Amendment violations." As an example, evidence from such arrests is not usually excluded from trial. The Court looked to its earlier ruling in Atwater v. Lago Vista[66], and found that because of the "need for a bright-line constitutional standard," it would uphold the general rule of probable-cause arrests even to minor misdemeanor cases. Further, it stated that "[i]ncorporating state-law arrest limitations into the [U.S.] Constitution would produce a constitutional regime no less vague and unpredictable than the one [the Court] rejected in Atwater."

The Court accepted that "linking Fourth Amendment protections to state law would cause them to 'vary from place to place and from time to time.[67] Doing so would also cause confusion "if federal officers were not subject to the same statutory constraints as state officers." The Court concluded "that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution and that while States are free to regulate such arrests however they choose, state restrictions do not alter the Fourth Amendment's protections."

Moore also argued that even if the arrest was lawful, the subsequent search was not. The Court noted, however, that it had "recognized … that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence."[68] The Court agreed that it "equated a lawful arrest with an arrest based upon probable cause" even though state law may define that differently. Since the officers in this case actually placed Moore in physical arrest and custody, they faced the same risks that any other officers making an arrest might encounter. As such, the Fourth Amendment does not demand the exclusion of the evidence in this case.

The Virginia Supreme Court decision was reversed, and the case remanded for further proceedings.

Arrest Warrants

Payton v. New York, 445 U.S. 573 (1979)

FACTS: On January 14, 1970, after a lengthy investigation, New York officers had probable cause to arrest Payton in a murder. Without a warrant, the officers went to Payton's apartment. Although the lights were on and music was playing, there was no answer to their knock. They broke down the door but no one was there. However, in plain view, there was a shell casing that they seized and later used in Payton's trial.

Payton appealed the entry and seizure of the shell casing, which was important evidence in the trial, but the state courts upheld his conviction. Payton appealed and the U.S. Supreme Court accepted certiorari.

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[66] 532 U.S. 318 (2001).
[67] Quoting from Whren v. U.S., 517 U.S. 896 (1996).
[68] See U.S. v. Robinson, 414 U.S. 218 (1973).

ISSUE: Absent exigent circumstances, may officers enter a residence for the purpose of making a warrantless arrest?

HOLDING: No

DISCUSSION: The warrantless arrest of a person is a seizure the Fourth Amendment requires to be reasonable. "The physical entry of the home is the chief evil against which the Fourth Amendment is directed... we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort… In terms that equally apply to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The U.S. Supreme Court reversed the conviction.

Steagald v. U.S., 451 U.S. 204 (1981)

FACTS: Armed with an arrest warrant for Ricky Lyons, DEA agents developed information that Lyons could be found at Steagald's house. Armed only with an arrest warrant, agents entered Steagald's house to search for Lyons, who was not there. They did not have a search warrant. During the search for Lyons, officers spotted drug (cocaine) evidence.

Upon being informed of the initial observation of cocaine in the house, the lead agent sent an officer for a search warrant. While waiting for the warrant, they conducted a second search which revealed more incriminating evidence. When the officer returned with the warrant, a third search revealed 43 pounds of cocaine. Steagald was arrested on federal drug charges.

Prior to trial, Steagald moved to suppress all of the evidence based on the officers' failure to obtain a search warrant for the house. That was denied, Steagald appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is an arrest warrant alone adequate to protect the interests of third persons when their homes are searched for other people?

HOLDING: No

DISCUSSION: The agents relied on the arrest warrant as legal authority to enter the home of a third person based on their belief that Lyons may be a guest there. Regardless of how reasonable this belief may have been, it was never subjected to the scrutiny of a detached judicial officer. The Court found that to hold otherwise would allow officers armed only with an arrest warrant to search the homes of the suspect's friends and relatives, thereby violating their reasonable expectation of privacy in their own homes.

The U.S. Supreme Court reversed the conviction.

See also: *U.S. v. Buckner, 717 F.2nd 297 (6th Cir. Ky. 1983)*
Jones v. Lewis, 874 F.2nd 1125 (6th Cir. Ky. 1989)

Arrest - Exclusionary Rule

Herring v. U.S., 129 S.Ct. 695 (2009)

FACTS: On July 7, 2004, Investigator Anderson (Coffee County, Alabama, Sheriff's Department) learned that Herring was at the office to retrieve something from an impounded vehicle. Knowing that Herring was "no stranger to law enforcement," Anderson checked for warrants. There were none in Coffee County, so Pope, the clerk, checked with her counterpart in Dale County, the neighboring county. That clerk reported an active FTA warrant. Pope relayed the information to Anderson, at the same time asking for a faxed copy of the warrant. Anderson and another deputy stopped Herring as he was leaving the lot and arrested him. Incident to the arrest, they searched and found methamphetamine and a pistol - Herring was a convicted felon.

However, it turned out that the warrant had been recalled some months previously and had simply not been removed from the computer system. But, by the time that was discovered, the incriminating evidence had already been located. Herring was indicted in federal court and moved for suppression. The trial court, and ultimately the Eleventh Circuit, concluded that the Coffee County deputies were "entirely innocent of any wrongdoing or carelessness," so suppression was not appropriate.

Herring requested certiorari from the U.S. Supreme Court, which accepted the case.

ISSUE: Does the Fourth Amendment require evidence found during a search incident to arrest be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent?

HOLDING: No

DISCUSSION: The Court began its opinion by noting that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." In this case, the "Coffee County officers did nothing improper," and in fact, "the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant." Even though the error was likely negligent on the part of another government agency, the Court did not find it reckless or deliberate. The Coffee County deputies acted in "good faith" reliance on the representations of another government official.[69]

The Court stated that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." The rule is intended to "deter deliberate, reckless, or grossly negligent conduct, or in some instances recurring or systemic negligence." The Court found no indication that the error that occurred was anything more than a simple mistake on the part of an unidentified Dale County clerk. Even if agreed to be negligence, that negligence was not so egregious as to trigger the exclusionary rule.

Herring's conviction was upheld.

[69] See U.S. v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

SEIZURE - DEFINITIONS

Definition of Seizure

Davis v. Mississippi, 394 U.S. 721 (1969)

FACTS: On December 2, 1965, a young woman reported that she had been raped at her home in Meridian, Mississippi. Her only description of her assailant was that he was a "Negro youth." The only physical evidence left at the scene were finger and palm prints on the window through which he entered. Beginning the following day, local police brought in 24 young Negro men into the station to be questioned, fingerprinted and then released. 40 or 50 other men were also questioned, either at their home, place of work, school, or at police headquarters. Davis, age 14, was brought in and released after questioning on December 3, and was questioned several times subsequently. He was "exhibited to the victim in her hospital room." The victim, however, did not identify Davis. On December 12, Davis was taken some 90 miles away, to Jackson, and jailed overnight. He was not arrested nor was he provided counsel. Davis eventually took a lie detector test and signed a statement. He was then sent back to the Meridian jail, where he was fingerprinted a second time. His prints, along with those of 23 other young men, were sent to the FBI for comparison, and eventually, the FBI reported that his prints matched those taken from the window.

Davis was indicted, tried and convicted of rape. He argued that the use of his prints should have been suppressed because of the circumstances under which they were taken. His Mississippi appeals were denied. He appealed to the U.S. Supreme Court, which accepted certiorari.

ISSUE: Is a detention for the purpose of taking fingerprints a seizure?

HOLDING: Yes

DISCUSSION: The Court began by stating that it could "recognize no exceptions to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof." The Court continued to state that "[t]o make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes." The Court "turn[ed] to the question whether the detention of [Davis] during which the fingerprints used at trial were taken constituted an unreasonable seizure of his person in violation of the Fourth Amendment." Since his detentions (the initial brief detention in Meridian and the later, longer detention in Jackson) were "based on neither a warrant nor probably cause" – they were "constitutionally invalid."

Mississippi argued that the initial detention "occurred during the investigatory rather than accusatory stage" and thus did not require probable cause, or in the alternative, that a seizure for the purpose of fingerprints alone did not require probable cause. The Court, however, stated that argument "would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." The Court acknowledged that the taking of fingerprints might be "a much less serious intrusion upon personal security that other types of police searches and detentions." However, fingerprints are not subject to change, so the Court found no reason to find that "the general requirement that the authorization of a judicial officer be obtained in advance of detention" be waived when the seizure was for the purpose of obtaining fingerprints.

The U.S. Supreme Court overturned Davis's conviction.

Dunaway v. New York, 442 U.S. 200 (1979)

FACTS: Dunaway was a suspect in an attempted robbery and homicide but the detective lacked sufficient probable cause to get a warrant. However, the lead detective had other detectives "pick up" Dunaway and "bring him in" for questioning. The detectives did so, and "although [Dunaway] was not told that he was under arrest, he would have been physically restrained if he had attempted to leave."

Dunaway was taken to headquarters, given his Miranda warnings and interrogated. Eventually he made statements implicating himself in the crime. He was convicted; the New York state appellate courts upheld the conviction.[70] The case was appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the transportation of someone to the police station a seizure?

HOLDING: Yes

DISCUSSION: The Court held that "there [could] be little doubt that [Dunaway] was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station." The prosecution conceded that "the police lacked probable cause to arrest [Dunaway] before his incriminating statement during interrogation." However, the government argued that the "seizure of [Dunaway] did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a 'reasonable suspicion' that [Dunaway] possessed 'intimate knowledge about a serious and unsolved crime.'"

In this situation, the "detention of [Dunaway] was in important respects indistinguishable from a traditional arrest." Just because he "was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes … obviously do not make [Dunaway's] seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny.

The Court stated that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." The Court concluded by noting that "[t]o allow law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth" was incorrect.

The Court reversed the conviction.

Brower v. County of Inyo, 489 U.S. 593 (1989)

FACTS: Brower died when he crashed the stolen car he was driving into a roadblock set up by police. The roadblock consisted of an 18-wheel tractor-trailer commandeered by the police that had been placed across both lanes of a two-lane road. The trailer was located immediately behind a curve and was not lit up in any way. A police car, with its headlights on, was placed between Brower's oncoming car and the truck, facing Brower's car, effectively blinding Brower.

[70] This case was remanded back, initially, for further discussion due to the intervening case of Brown v. Illinois, 422 U.S. 590 (1975).

The family sued, claiming a violation of the Fourth Amendment's right to be free from unreasonable seizures. The lower courts found in favor of the county, and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is blocking a roadway, making a collision unavoidable, a seizure under the Fourth Amendment?

HOLDING: Yes.

DISCUSSION: The Court agreed that Brower was seized. A person is seized whenever there is a governmentally caused termination of that person's freedom of movement through means intentionally applied. Whenever an officer restrains the freedom of a person to walk away, he has seized that person. A Fourth Amendment seizure requires an intentional acquisition of physical control of a person or thing. The government must intend to seize the person (or thing), must put in motion action to seize the person (or thing), and the person (or thing) must be seized by that action.

The U.S. Supreme Court reversed the lower court's decision and remanded the case.

Florida v. Bostick, 501 U.S. 429 (1991)

FACTS: Two Broward County Sheriff's Office deputies boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale, Florida. Both displayed badges and one carried a zipper pouch used to carry handguns. (At no time did the officers display a gun.) The officers asked Bostick for his identification and ticket, which he produced. Both were returned. Persisting, the officers asked Bostick if they could search his luggage; he agreed. Cocaine was discovered in the second piece of luggage. (Bostick stated that he did not give consent to search the second bag, but the trial court found that he did give consent.)

The Supreme Court of Florida reasoned that Bostick was seized because a reasonable passenger would not have felt free to leave the bus and avoid questioning.

The Supreme Court accepted certiorari.

ISSUE: Is a request to search luggage (absent other factors) a seizure?

HOLDING: No

DISCUSSION: The Supreme Court decided that the Florida court's reliance on a single issue, that the encounter took place on a bus, as too restrictive, and that it was more appropriate to look at the "totality of the circumstances" surrounding the encounter. The correct issue is whether the police conduct in question would have communicated to a reasonable person that the person was free to refuse the officer's request or otherwise end the meeting. Since that issue was not reached by the lower courts, the Supreme Court send the case back for a further consideration based on their decision.

California v. Hodari D., 499 U.S. 621 (1991)

FACTS: In April, 1988, Officer Pertoso, along with other members of the Oakland P.D., in plainclothes but with a jacket that identified him as police, approached a group of young people, including

Hodari, a juvenile. When they fled, Pertoso pursued the group, but took a slightly different route, one that brought him face-to-face with Hodari. However, Hodari was watching for pursuit behind him, and did not see the officer until they were almost upon each other. When he spotted the officer, he tossed away a small rock, later proved to be crack cocaine. Pertoso tackled him and the police recovered the rock. Hodari was also in possession of $130.

Hodari requested suppression of the cocaine, claiming that he had been seized by the pursuit, and that the seizure was unreasonable. The trial court denied the motion and he was convicted. He appealed, and the California appellate court found that because the officer did not have reasonable suspicion to pursue Hodari, the evidence was the fruit of an illegal seizure. The Supreme Court accepted certiorari.

ISSUE: Is a foot pursuit a seizure?

HOLDING: No

DISCUSSION: The Court explored the issue of what action was required to create a seizure. To constitute a seizure, the Court agreed that "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." In this case, there had been no contact between the two prior to Hodari discarding the cocaine. The Court stated that "[a]n arrest requires *either* physical force … *or*, where that is absent, <u>submission</u> to the assertion of authority." The Court stated that while an arrest can be made without physical contact, by an officer calling out to a suspect that they were under arrest, but only if the suspect then submits to that authority by stopping, lying down or similar behavior that indicates surrender. The Court also looked at the social consequences of encouraging suspects to flee, stating that "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."

The Supreme Court reversed the lower court and remanded the case.

<u>U.S. v. Place</u>, 462 U.S. 696 (1983)

FACTS: Place was waiting in line at Miami International Airport when his behavior attracted the attention of narcotics agents. The officers approached Place and asked for identification, which he provided. They asked for, and received consent, to search two checked suitcases. However, because the plane was ready to depart, they did not search the suitcases at that time. After he left, the officers discovered some discrepancies in addresses on his luggage tags. (Investigation revealed neither address existed.) They contacted New York DEA and they approached Place as he deplaned at La Guardia Airport. They, too, asked for and received identification. He refused to consent to a search of his luggage, however.

Place was informed that they were going to hold the luggage and seek a federal warrant to search the luggage. The DEA Agent took the luggage to Kennedy Airport, where the suitcases were subjected to a "sniff test" by a drug canine. The dog reacted positively to one of the cases. At that point, 90 minutes had elapsed. The agents later received a search warrant and opened the suitcases, finding cocaine in one of them.

Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Is a detention of luggage for the purposes of search a seizure of the owner of the luggage?

HOLDING: No

DISCUSSION: The limitations on the detention of a person apply to the detention of a person's luggage (or other containers). The agent made a seizure when he told Place he was taking the luggage to a Judge to get a warrant. On facts less than probable cause, it is reasonable to *briefly* detain luggage for limited investigative purposes. One must take into account the *length* of detention in determining whether the seizure is so minimally intrusive to be justified on reasonable suspicion. In assessing the length of detention, one must take into account whether police diligently pursue their investigation. In this case, agents knew when the flight would arrive and had ample time to arrange for the dog to be brought to their location. This would have minimized the intrusion on Place's Fourth Amendment interest.

The Court found that holding the luggage was a seizure and upheld the lower court's decision.

Hayes v. Florida, 470 U.S. 811 (1985)

FACTS: In 1980, in Punta Gorda, Florida, a "series of burglary-rapes occurred." In one instance, "[p]olice found latent fingerprints on the doorknob of the bedroom of one of the victims." They also found a "herringbone pattern tennis shoe print" near the front porch of the victim's home. Although they had little evidence pointing to Hayes, they "interviewed him along with 30 to 40 other men who generally fit the description of the assailant." The police came to believe Hayes was a primary suspect and they "decided to visit [Hayes'] home to obtain his fingerprints, or if he was uncooperative, to arrest him." Detectives went to Hayes' home and asked him to come with them to the station for questioning. He was reluctant, at which point they told him he would be arrested. He then "blurted out" that he would prefer to go with them without being arrested. (They "also seized a pair of herringbone pattern tennis shoes in plain view.")

He was taken to the station house and fingerprinted. When it was determined that his prints matched those left at the scene, he was arrested. Hayes argued that the evidence should be suppressed, as it was the "fruit of an illegal detention." The trial court denied the motion and admitted the evidence. Hayes was eventually convicted for burglary and sexual battery.

Hayes appealed. The Florida appellate court "declined to find consent, reasoning that in the view of the threatened arrest it was, 'at best, highly questionable' that Hayes voluntarily accompanied the officers to the station." The Court also agreed that they officers lacked probable cause to make an arrest. However, they found that "the officers could transport [Hayes] to the station house and take his fingerprints on the basis of their reasonable suspicion that he was involved in the crime."

The Florida Supreme Court denied review but the U.S. Supreme Court accepted certiorari.

ISSUE: Is the transportation of an unwilling subject to the police station a seizure?

HOLDING: Yes

DISCUSSION: The Court found that "[t]here is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth

Amendments." The Court continued by stating that in its view, "that line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." The Court held to the view "that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause."

The Court noted that the "Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." However, in this case, the U.S. Supreme Court found that the officers had, in the absence of a warrant or probable cause, unlawfully seized Davis and reversed the judgment of the Florida courts.

Michigan v. Chesternut, 486 U.S. 567 (1988)

FACTS: On December 19, 1984, four officers were riding patrol in a marked car in Detroit. As they approached an intersection, one of the officers "observed a car pull over to the curb." A man got out of the car and approached Chesternut, "who was standing alone on the corner." Chesternut, seeing the patrol car, "turned and began to run." The officers, in the car, followed him, "to see where he was going." They caught up with him and "drove beside him," They observed Chesternut "discard a number of packets he pulled from his right-hand pocket." Officer Peltier "got out of the cruiser to examine the packets" and "discovered that they contained pills." Chesternut stopped only a few steps away. Peltier, who was also a paramedic, surmised on the basis of his experience that the "pills contained codeine." Chesternut was arrested for possession and was taken to the station house. There he was searched and additional pills were found, as well as heroin and a hypodermic needle. He was further charged on these offenses as well.

Prior to trial, Chesternut argued that "he had been unlawfully seized during the police pursuit preceding his disposal of the packets." The trial court magistrate agreed and recommended the dismissal of the case, ruling that "that a police 'chase' like the one involved in this case implicated Fourth Amendment protections and could not be justified by the mere fact that the suspect ran at the sight of the police." The case was dismissed and the appellate court "'reluctantly' affirmed." The appellate court concluded that Chesternut's "flight from the police was insufficient, by itself, to give rise to the particularized suspicion necessary to justify this kind of seizure."

The Michigan Supreme Court denied review, and the government applied for a hearing before the U.S. Supreme Court, which accepted certiorari.

ISSUE: Is being followed by the police (in a vehicle) a seizure?

HOLDING: No

DISCUSSION: In U.S. v. Mendenhall,[71] the Court created the test "to be applied in determining whether 'a person has been seized within the meaning of the Fourth Amendment.'" This test states that a person is only seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." While the test is flexible, it "calls for

[71] 446 U.S. 544 (1980).

consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." The objective prong of the test – "looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."

In this factual pattern, however, the Court concluded "that [Chesternut] was not seized by the police before he discarded the packets containing the controlled substance." There was no indication in the record that the officers did more than follow him, it does not reflect that they "activated a siren or flashers; or that they commanded [Chesternut] to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block [Chesternut's] course or otherwise control the direction or speed of his movement." Although the Court noted that "the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating," it did not constitute a seizure, as it was not "so intimidating that [Chesternut] could reasonably have believed that he was not free to disregard the police presence and go about his business."

The U.S. Supreme Court ruled that Chesternut was not seized (lawfully or unlawfully) and thus, the charges were improperly dismissed. The case was remanded back for further proceedings.

DEFINITION OF SEARCH

Bond v. U.S., 529 U.S. 334 (2000)

FACTS: Bond was traveling on a bus from California to Arkansas. The bus stopped at a Border Patrol checkpoint in Texas, where a Border Patrol agent boarded the bus to check the immigration status of the passengers. After completing the check, the agent walked forward from the back of the bus, squeezing all of the soft luggage that the passengers had placed in the overhead compartments. He squeezed a bag belonging to Bond that was in the compartment over Bond's head and felt a solid brick-like object. Bond admitted the bag was his and gave consent to the agent to open it. The agent discovered a brick of methamphetamine and arrested Bond. Bond's motion to suppress the drugs as fruit of an illegal search was denied, and he was convicted of possession with intent to distribute methamphetamine. The Fifth Circuit Court of Appeals upheld the conviction, finding that the manipulation of the bag was not a search within the meaning of the Fourth Amendment. The Supreme Court accepted certiorari.

ISSUE: Is the squeezing of soft-sided luggage a "search?"

HOLDING: Yes

DISCUSSION: The U. S. Supreme Court reversed the Court of Appeals, holding that the agent's manipulation of the carryon bag violated the Fourth Amendment prohibition against unreasonable searches. The Court rejected the government's argument that by placing his bag in the passenger compartment, and thus exposing it to the public, Bond did not have a reasonable expectation of privacy that his bag would not be physically manipulated. After all, it would not be unusual for such a bag to be touched and moved by other passengers while traveling. The Court distinguished this case from California v. Ciraolo,[72] and Florida v. Riley[73] which the government had cited as justification. In Ciraolo and Riley, the Court had held that matters open to public observation are not protected. The

[72]476 U. S. 207 (1986).
[73]488 U.S. 445 (1989).

Court distinguished those cases by noting that they had involved only visual observation, not tactile observation of an opaque bag by manipulating it. The Court noted that while carryon bags are not part of the person, a traveler uses them to transport personal items that they wish to keep with them.

Further, the Court stated that while a traveler certainly has to expect that a carryon bag might be handled or moved by other passengers or employees of the carrier, the traveler does not have an expectation that they will “feel the bag in an exploratory manner”. Therefore, the physical manipulation of the bag violated the Fourth Amendment, and the Court reversed the conviction.

SEIZURE - SITUATIONS THAT LACK FOURTH AMENDMENT PROTECTION

Abandoned Property

California v Greenwood, 486 U.S. 35 (1988)

FACTS: Acting on information indicating that Greenwood might be engaged in narcotics trafficking, police obtained from the trash collector garbage bags left on the curb in front of Greenwood's house. Based on evidence found in the trash, police obtained a search warrant to search Greenwood's house and found quantities of cocaine and hashish. Greenwood and others were arrested and released on bail. The police again received information that Greenwood was continuing to engage in narcotics trafficking. The police again obtained Greenwood's trash from the trash collector. A second search warrant was obtained. The police found more narcotics and evidence of narcotics trafficking. Greenwood was again arrested.

Greenwood claimed that the search of the trash violated his Fourth Amendment rights. The California courts agreed and the U.S. Supreme Court accepted certiorari

ISSUE: Does the Fourth Amendment prohibit a warrantless seizure and search of garbage left for collection outside the curtilage of a home?

HOLDING: No.

DISCUSSION: Greenwood had no expectation of privacy in the garbage bags left at the curb (the usual place for collection) outside his house. Abandoning the garbage to the public is sufficient to defeat the Fourth Amendment claim. Society does not accept as objectively reasonable that abandoned property left at the curb for disposal is private. It is common knowledge that "plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." Moreover, Greenwood placed his refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might have himself have sorted through the trash or permitted others, such as the police, to do so.

The Court reversed the California decision.

See also: U.S. v. Oswald, 783 F.2d 663 (6th Cir. 1986)

PLAIN VIEW

Coolidge v. New Hampshire, 403 U.S. 443 (1971)

FACTS: On January 13, 1964, Pamela Mason, 14, "left her home in Manchester, NH," during the evening hours, in a "heavy snowstorm." Apparently she had received a call from a man requesting a babysitter. Some eight days later, "her body was found by the side of a major north-south highway several miles away," the victim of a homicide. The investigation led to Edward Coolidge when a neighbor reported that he'd "been away from home on the evening of the girl's disappearance." They asked him a number of questions, including whether he owned any guns. Coolidge admitted to having

two shotguns and a rifle. He agreed to take a lie-detector test on his next day off. His actions were characterized as cooperative.

On Sunday morning, the police contacted him concerning the lie detector test and "asked him to come down to the police station for the trip to Concord" where the test was to take place. That evening, two plainclothes officers "arrived at the Coolidge house," where Coolidge's wife and mother were awaiting his return. They told Coolidge's mother to leave and told his wife that Coolidge was in "serious trouble" and would likely not return that night. The officers were apparently not the ones who had been there before. Upon request, his wife produced four guns for their inspection and gave them clothing that she "thought her husband might have been wearing on the evening" Mason disappeared.

Coolidge was kept in jail overnight, but released the next morning. The police continued their investigation and they "accumulated a quantity of evidence to support the theory that it was he who had killed Pamela Mason." On February 19, the prosecution team concluded that it had sufficient "evidence to justify the arrest of Coolidge on the murder charge and a search of his house and two cars." The Manchester police chief made a formal application for the warrants. The "complaint supporting the warrant for a search of Coolidge Pontiac automobile … stated that the affiant 'has probable cause to suspect and believe, and does suspect and believe, and herewith offers satisfactory evidence, that there are certain objects and things used in the Commission of said offense, now kept, and concealed in or upon a certain vehicle ….'" The warrant was issued, executed and the vehicles seized. (In fact, the vehicles were searched a total of three times over a year and a half period.)

Coolidge was charged and tried for the murder. A variety of evidence was admitted, including the rifle (alleged to be the murder weapon) and vacuum sweepings from the vehicle and the clothing. Coolidge was convicted and appealed, and the New Hampshire Supreme Court affirmed the conviction. The U.S. Supreme Court accepted certiorari.

ISSUE: May an item clearly linked to a crime be seized, if it is in plain view?

HOLDING: No (but see opinion)

DISCUSSION: Coolidge's first claim was that the warrant was invalid because it was "not issued by a 'neutral and detached magistrate.'" The "determination of probable cause was made by the chief 'government enforcement agent' of the State – the Attorney General – who was actively in charge of the investigation and later was to be chief prosecutor at the trial." The State argued that "any magistrate, confronted with the showing of probable cause made by the … police chief, would have issued the warrant in question." The Court noted that "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations." The Court found that the warrant could not stand.

To save the conviction, the State next proposed "three distinct theories to bring the facts of the case within one or another of the exceptions to the warrant requirement." First, the Court suggested that the search of the vehicle was incident to a valid arrest. However, even assuming that Coolidge's arrest, inside his home was valid, the search of a vehicle outside, in the driveway, was certainly outside his control. (And in fact, the "vehicle was not touched until Coolidge had been removed from the scene.") Controlling case law at the time "make it clear beyond any question that a lawful pre-Chimel arrest of a suspect outside his house could never by itself justify a warrantless search inside the house." There was nothing that would suggest that "a different result" would be the case under the reverse.

Even assuming that a search of the vehicle in the driveway was permitted, Preston v. U.S.[74] made it "plain that they could not legally seize the car, remove it, and search it at their leisure without a warrant."

Next, the State proposed that a Carroll search was appropriate. The Court, however, noted that there was "no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of the house." The objects believed to be in the vehicle "were neither stolen nor contraband nor dangerous." There was no way Coolidge could have "gained access to the automobile after the police arrived on his property." The Court agreed that there was probable cause but found no exigency to justify a search.[75]

Third, the state put forth that the vehicle itself was an "instrumentality of the crime" and could be seized because it was in plain view. The Court, however, noted that if "the initial intrusion that brings the police within plain view … is supported," either by a warrant or "by one of the recognized exceptions to the warrant requirement," the seizure will be appropriate. In addition, the nature of the item must be "immediately apparent." The Court noted that "plain view alone is never enough to justify the warrantless seizure of evidence." Even with "[i]ncontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause," it has still "repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure." In addition, plain view must be inadvertent, and "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is entirely different." In this case, the Court found that the "'plain view' exception cannot justify the police seizure of the Pontiac car in this case," as "[t]hey had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property."

The Court found the seizure of the car to be unconstitutional, and "[s]ince evidence obtained in the course of the search was admitted at Coolidge's trial," the Court reversed the judgment and remanded the case for further proceedings.

Texas v. Brown, 460 U.S. 730 (1983)

FACTS: On the evening in question, a "Fort Worth, Tex., police officer stopped [Brown's] automobile at night at a routine driver's license checkpoint, asked him for his license, shined his flashlight into the car, and saw an opaque, green party balloon, knotted near the tip, fall from [Brown's] hand to the seat beside him." The driver (Brown) rummaged in the glovebox for his operator's license. Knowing from experience that narcotics were often packaged in that way, the "officer shifted his position to obtain a better view and noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment." He also used his flashlight to illuminate the area.

His search being fruitless, Brown admitted to the officer that he was not in possession of his driver's license. The officer asked Brown to get out of the car, and he did so. The officer picked up the green balloon. The officer found it "to contain a powdery substance within its tied-off portion." Brown was arrested and his vehicle searched.[76] Upon testing, the powder was confirmed to be heroin.

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[74] 376 U.S. 364 (1964).

[75] Note that no exigency is required to justify a Carroll search now.

[76] The opinion calls this an inventory search.

Brown was charged and requested suppression. The trial court denied the motion and Brown was convicted. The Texas appellate court reversed that decision; ruling that the evidence should have been suppressed as a violation of Brown's Fourth Amendment rights. The government appealed, and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is evidence illuminated by a flashlight, inside the passenger compartment of a car considered to be in "plain view?"

HOLDING: Yes

DISCUSSION: The Court noted that the Texas courts had relied heavily on its decision in Coolidge v. New Hampshire.[77] The Court explained that once an object has been observed in "plain view," "the owner's remaining interests in the object are merely those of possession and ownership." The Court's decisions have "come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."

The court also ruled that it was "beyond dispute that [the officer's] action in shining his flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment." In a much earlier case, U.S. v. Lee,[78] the Court had ruled that the use of a searchlight to illuminate an area did not constitute a search. In addition, the fact that the officer "changed his position" and "bent down" to view the contents of the glove compartment – in fact, any member of the general public could have done the same. "There is no legitimate expectation of privacy … shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by inquisitive passerby or diligent police officers." As such, there was no doubt that the first prong of the "plain view" analysis was met – in that the officer was where he was lawfully allowed to be when he observed the contraband.

Next, the Court discussed whether the "incriminating nature of the items [were] 'immediately apparent' to the police officer." The Texas appellate court interpreted this to mean that the officer "must be possessed of near certainty as to the seizable nature of the items." The Court acknowledged that its use of the phrase "immediately apparent" "was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine,"

Instead, the Court looked to its opinion in Colorado v. Bannister,[79] and held, specifically, that the appropriate standard for the second prong of the plain view analysis is probable cause. In addition, the Court found that the Texas officer did possess sufficient probable cause as to justify his seizure of the green balloon.

Finally, the Court agreed that the officer had no "reason to believe that any particular object would be in Brown's glove compartment or elsewhere in his automobile." In that the "inadvertence" requirement of the plain view doctrine was also met.

The Court overturned the judgment of the Texas appellate court and the case remanded for further proceedings.

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[77] 403 U.S. 443 (1971).
[78] 274 U.S. 559 (1927).
[79] 449 U.S. 1 (1980).

Horton v. California, 496 U.S. 128 (1990)

FACTS: Horton committed an armed robbery and took jewelry and cash from his victim. In committing the robbery, Horton and his partner were armed with a machine gun and a stun gun. Investigation by officers developed probable cause to search Horton's house for the proceeds of the robbery and the weapons. The search warrant, signed by the magistrate, authorized the search for the proceeds only. During the search, officers found an Uzi, a handgun, and two stun guns. Horton claimed that the seizure of the weapons violated the Fourth Amendment since the weapons were not on the warrant. The state contended that the weapons were in plain view.

ISSUE: Are illegal weapons (or other items recognized as contraband) left in plain view subject to seizure, when the warrant under which the search is being performed does not mention them?

HOLDING: Yes

DISCUSSION: Plain view is a legal concept that requires a prior legal justification for the officer to be present when he sees the evidence to be seized. It is an essential predicate to any warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence would be plainly viewed. Not only must the officer be lawfully located in the place from which the object can be lawfully seen, but also he or she must have a lawful right of access to the object itself.

The Supreme Court upheld the seizure.

Sedillo v. U.S., 419 U.S. 947 (1974)

FACTS: Sedillo was walking on a freeway on-ramp when an officer stopped him. He gave the officer his name but had no identification. The officer noticed an envelope in his shirt pocket and saw through the window that there was a name other than Sedillo on the item inside. The officer thought the envelope contained a Treasury check and pulled it from Sedillo's pocket. The check had been endorsed.

Sedillo was arrested and eventually convicted of forgery. He appealed; the U.S. Supreme Court accepted certiorari.

ISSUES: May an officer seize an item on plain view without specific knowledge as to the status of the item - such as whether it is contraband?

HOLDING: No

DISCUSSION: Under the only possible justification, the "plain view" doctrine, the officer still did not have justification to seize the check and examine it. Nothing in the record indicates that the officer had any reason to suspect the check was evidence of a crime of any kind.

The Court reversed Sedillo's conviction.

See also: *Hazelwood v. Com., 8 S.W.3d 886 (Ky., 1999) – firefighter finds contraband in plain view while fighting house fire.*

Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct 2130 (1993)

FACTS: At 8:15 p.m., officers saw Dickerson leave an apartment building known to the officers as a "crack house." (One of the officers had executed several warrants on the property, and the police had received many complaints of drug sales on the property.) Dickerson walked toward the marked police car. The officer's suspicion was aroused when Dickerson looked at the car, made eye contact with the officer, then abruptly turned and entered an alley on the side of the apartment building.

The officer stopped Dickerson and patted him down for weapons. The officer found no weapons but did notice a lump in a coat pocket. The officer examined the lump with his fingers and determined that the object felt like a lump of crack. The officer reached in the pocket and retrieved a lump of crack cocaine. Dickerson claimed this search violated the Fourth Amendment because it exceeded the scope of the frisk. Dickerson was convicted, he appealed, and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: May officers seize nonthreatening contraband found on a person during the course of a frisk?

HOLDING: Yes.

DISCUSSION: If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour and mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. However, the continued exploration of the item after concluding the item is not a weapon exceeds the scope of lawful authority.

The Court upheld Dickerson's conviction.

Johnson v. U.S., 333 U.S. 10 (1948)

FACTS: At about 7:30 on the evening in question, Lt. Belland, Seattle PD narcotics detail, received information from a CI that "unknown persons were smoking opium at the Europe Hotel." The informer was taken to the hotel, and he went in, returning immediately to report the smell of burning opium in the hallway. Belland returned a little later with other officers. When they entered the hotel, they immediately recognized the smell of burning opium "which to them was distinctive and unmistakable." They went to the room from which the odor was emanating but did not know who was occupying the room. They knocked, and when asked who was at the door, Lt. Belland identified himself by name. After a short delay, during which the officers heard "shuffling or noise" from inside, Johnson (the defendant) answered the door. When Belland told her he needed to talk to her, she "stepped back acquiescently and admitted us." He told her that they had smelled opium but she denied it. Belland told Johnson she was under arrest and that they were going to search the room. The search "turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use."

Johnson requested suppression from the trial court, which was denied, and she was convicted. The Ninth Circuit Court of Appeals affirmed the conviction; Johnson appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: May odor alone justify a search?

HOLDING: Yes

DISCUSSION: Johnson argued that the odor alone was not enough to base an arrest and subsequent entry. The Court, however, found otherwise, stating that "this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of the most persuasive character."

The Court went on to state that:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences that reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves in to a home is also a grave concern, not only to the individual but also to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman of Government enforcement agent.

However, the Court did agree that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." But, in this situation, the Court did not find that to be the case. The officers gave no reason for failing to get a warrant except for inconvenience and slight delay. The Court stated that "[t]hese are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement." In Johnson's case, they continued:

> No suspect was fleeing or likely to take flight. The search was of permanent premises, not a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay in getting a warrant.

The U.S. Supreme Court reversed the judgment of the Ninth Circuit, and reinstated the conviction

NOTE: While the Court agreed that "plain smell" might be sufficient probable cause, that does not mean that the officer may immediately search and seize the contraband. It may still be necessary to get a search warrant for that purpose, depending upon where the evidence is actually located.

Flyovers

California v. Ciraolo, 476 U.S. 207 (1986)

FACTS: Santa Clara police received an anonymous telephone tip that marijuana was growing in Ciraolo's backyard. The yard was surrounding by a six-foot outer fence and a 10-foot inner fence, completely enclosing the yard. The investigating officer secured a small, fixed-wing plane and flew

over the yard at an altitude of 1,000 feet, within legal navigable airspace. Officers in the plane readily identified the eight to ten foot tall marijuana plants growing in the small backyard and took photos of the plants. Based on this information, police obtained a search warrant. The next day, 73 marijuana plants were seized from the property.

Ciraolo was convicted and appealed. The state appellate court held that Ciraolo had demonstrated an expectation of privacy by erecting the fences and that the officers had entered the "curtilage" of the house by flying over and observing the yard. The state court held that since this observation was done with the express intent of surveilling this particular property, that it was a "direct and unauthorized intrusion" on Ciraolo's privacy.

Eventually, the case was appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is there an expectation of privacy in an enclosed backyard, from a fixed-wing aircraft flying overhead?

HOLDING: No

DISCUSSION: The Court discussed the two prongs of the Katz rationale, the subjective and the objective expectations of privacy in a particular situation. The Court determined that while Ciraolo had manifested a subjective expectation of privacy in erecting the fences, it was unreasonable to award an objective expectation of privacy in an outside area. The Court determined that the "Fourth Amendment simply does not require the police traveling in the public airways in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."

The U.S. Supreme Court held that the Fourth Amendment was not violated and remanded the case for further proceedings.

Dow Chemical Co. v. U.S., 476 U.S. 227 (1986)

FACTS: Dow Chemical operated a large chemical plant with numerous buildings, with outdoor equipment and piping running between the buildings. Dow maintained elaborate fencing and security measures around the perimeter, and it was not possible to see the buildings from ground-level outside the grounds of the plant.

The EPA made a request to do an administrative inspection of the plant and was refused. The EPA employed a photographer to take photographs of the plant from the air. Upon learning of this, Dow sued the EPA for an illegal search. The District Court found in favor of Dow Chemical, but the Court of Appeals held that the EPA did not exceed the scope of their authority. Dow Chemical appealed.

Eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Was the taking of aerial photographs of a business facility a violation of the Fourth Amendment?

HOLDING: No

DISCUSSION: The taking of aerial photographs, from proper navigable airspace, is not a prohibited search. Open areas of a commercial property are not entitled to the protection given to the

curtilage, in effect, businesses have no curtilage where the occupants would have a reasonable and legitimate expectation of privacy. For the purposes of aerial surveillance, the outside of the commercial structure is comparable to an "open field" in which an individual is not awarded an expectation of privacy. The Court also stated that the "mere fact that human vision is enhanced somewhat," by the means of a camera or magnifying apparatus, does not change the result.

The U.S. Supreme Court held that the search did not violate the Fourth Amendment and upheld the judgment.

Florida v. Riley, 488 U.S. 445 (1989)

FACTS: Acting upon an anonymous tip that Riley was growing marijuana at his residence, the Pasco County Sheriff's Office started an investigation. Riley lived in a rural area, in a mobile home. A greenhouse was located behind the mobile home. Due to fences and other screening, it was impossible to see into the greenhouse. However, two panels of the roof were missing. The entire property was posted against entry.

The investigating officer arranged for a helicopter ride over the property. From approximately 400 feet, he was able to look down into the greenhouse and observed what he believed to be, and what later proved to be, marijuana plants. A search warrant was obtained, and marijuana plants were found. Riley was charged and convicted with possession of marijuana. Riley appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is an officer's observation of enclosed property from the air, by helicopter, permissible?

HOLDING: Yes

DISCUSSION: Relying upon the related case of Ciraolo, the Supreme Court found no difference in an observation from a fixed-wing aircraft flying at a legal altitude, and observation from a helicopter, also flying at a legal altitude, although that altitude was considerably lower than that allowed for fixed-wing planes.

The U.S. Supreme Court upheld the conviction.

Open Fields

Hester v. U.S., 265 U.S. 57 (1924)

FACTS: Revenue officers observed Hester leave his home and bring a bottle to Henderson, sitting in a car outside. Upon being challenged by the officers, both Hester and Henderson ran. Hester dropped a gallon jug, which broke, but which retained enough of its contents to be identifiable as moonshine whiskey. Another officer entered the house, spoke to Hester's father, who owned the house, was told there was no moonshine there. However, the officer located another broken glass container that also contained moonshine.

Hester was convicted and appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Are contraband items found in the "open fields" - outside the curtilage - subject to seizure without a warrant?

HOLDING: Yes

DISCUSSION: The moonshine was first seen outside the house, in Hester's possession, and the contents of the containers were identified after the containers had been abandoned, by being thrown away. Even if trespass can be argued, that does not make the search and subsequent seizure of the moonshine unconstitutional. The Court stated that the "special protection" given to people in their "persons, houses, papers and effects," is not extended to the open fields. The U.S. Supreme Court upheld the conviction.

Oliver v. U.S., 466 U.S. 170 (1984)

FACTS: Kentucky State Police narcotics agents, acting on a report that marijuana was being raised on Oliver's farm, went to the farm to investigate. They drove past Oliver's house to a locked gate with a "No Trespassing " sign, but with an open footpath around the gate on one side. The agents walked around the gate and alongside the road; they found a field of marijuana over a mile from Oliver's house. The trial court suppressed the evidence, but the appellate court reversed that decision. Eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Does the "Open Fields" doctrine apply to areas outside the curtilage?

HOLDING: Yes

DISCUSSION: The Court found that there is no reasonable expectation of privacy in open fields. Steps taken to protect privacy, such as erecting fences and "No Trespassing" signs around the property, do not establish the expectation of privacy in an open field that society recognizes as reasonable. Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. General property rights or property protected by laws of trespass have little or no relevance to the applicability of the Fourth Amendment.

The U.S. Supreme Court affirmed the judgment.

U.S. v. Dunn, 480 U.S. 294 (1987)

FACTS: DEA agents, upon discovering that Carpenter had purchased large quantities of chemicals and equipment used to manufacture controlled substances, placed tracking devices on some of the equipment and chemical containers. The devices led them to Dunn's ranch. Aerial photographs showed the truck backed up to a barn behind the house. A perimeter fence surrounded the ranch and inside that area, several barbed wire fences were erected. In particular, one was around the house area, which was 150 feet from the barn, and a wooden fence enclosed the front area of the barn. The barn itself had an open doorway surrounded by locked, waist-high gates. The officers entered the fenced-in area and went to the front of the barn. They smelled chemicals and heard a motor running. The agents did not cross the locked gate but using a flashlight, peered inside, and saw what they believed to be a drug lab. Twice the next day, they entered the ranch, confirming the presence of the lab, but did not enter the barn itself. They obtained a search warrant, seized chemicals, equipment and drugs from the property and arrested Dunn.

Dunn challenged the entry of the property as a violation of the Fourth Amendment. The trial court denied the motion to suppress, but the appellate court found in favor of Dunn. The case was appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the entry of officers onto private property that is outside the curtilage of the residence, permissible?

HOLDING: Yes

DISCUSSION: The Court found that the barn was not within the protected "curtilage" of the property. The extent of the curtilage can be defined using four factors: 1) the proximity of the area to the home, 2) whether the area is within an enclosure (fence) that also surrounds the home, 3) the nature and use of the area and 4) the steps taken by owner to protect the area from view by passersby.

In this situation, the barn was a considerable distance from the home, was not surrounded by the same fence as the home (but was inside the perimeter fence), the barn was obviously not used for residential purposes, and the barn did not have doors but the interior was open to plain sight. The Court went on to comment that the fences were of the nature to contain livestock, not to block the view, and that the use of a flashlight to enhance sight was permissible.

The U.S. Supreme Court reversed the decision of the appellate court.

See also: Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998)

Public Areas

U.S. v. Santana, 427 U.S. 38 (1976)

FACTS: On August 16, 1974, Officer Gilletti, an undercover officer with the Philadelphia police, arranged a heroin "buy" with McCafferty, from whom he'd bought before. The transaction was to occur at "Mom Santana's." Gilletti received the necessary marked cash from his department and transported McCafferty to Santana's residence. McCafferty took the money and went into the house, returning moments later with several glassine envelopes of heroin. Gilletti, who was driving, then stopped the car, identified himself and arrested McCafferty. He told her they were returning to the Santana house and asked where the money might be found. She replied, "Mom has the money." Gilletti relayed that information to other officers and took McCafferty to the police station.

Officer Pruitt, with others, drove to the Santana residence. Upon arrival, they saw Santana standing in the threshold with a brown paper bag. They pulled to within 15 feet and got out of the van, shouting "police" and showing their credentials. Santana retreated back into the house. They followed her and as they caught her, glazed paper packets of a white powder (later confirmed to be heroin) dropped to the floor. Another individual in the house, Alejandro, tried to grab the envelopes but was restrained. Santana was forced to empty her pockets and some of the marked money was found. She was indicted for distribution.

The trial court suppressed the heroin and the money, finding that the officers had overstepped their boundary. The appellate court affirmed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the threshold of a residence a public place?

HOLDING: Yes

DISCUSSION: When Santana was standing in her threshold entryway of her house, she was in full view of the public. She was just as exposed to the public view as she would have been if she had been outside the house. The Court also held that her arrest, set in motion in a public place, could not be prevented by her retreat into the house, and that it was reasonable for the officers to follow her into the house under the "hot pursuit" doctrine of exigent circumstances.

The U.S. Supreme Court reversed the lower court's decision and remanded the case.

Dog Sniff

Illinois v. Caballes, 543 U.S. 405 (2005)

FACTS: On November 12, 1998, Trooper Gillette (Illinois State Police) stopped Caballes on I-80, for driving 71 in a 65 mph zone. When Gillette called in the stop on the radio, Trooper Graham (Drug Interdiction Team) overheard it and told dispatch that he was going to meet Gillette to allow his dog to sniff the vehicle. (Gillette specifically did not request this, however.) Gillette approached Caballes, told him the reason for the stop and asked for his documents, which Caballes produced. Gillette saw "an atlas on the front seat, an open ashtray, the smell of air freshener, and two suits hanging in the back seat without any other visible luggage."

Gillette told Caballes to pull his car off to the shoulder and to come back to Gillette's car, because it was raining. Caballes did so, and Gillette told him he was going to write him a warning citation. Gillette called in to check on Caballes' license status and for any possible warrants. While waiting, Gillette asked him where he was going and why he was "dressed up" - Caballes was apparently wearing a suit. Caballes stated he was moving from Las Vegas to Chicago and normally dressed up because he was a salesman, but he was not currently employed. Gillette later testified that Caballes "continued to act nervous even after being told he was receiving only a warning ticket" and that he found that unusual.

Gillette learned from dispatch that Caballes has "surrendered a valid Illinois to Nevada" but the status of his Nevada license would take two more minutes. Gillette asked for a criminal history. He asked Caballes for permission to search his vehicle; Caballes refused. Gillette asked Caballes if he'd ever been arrested, which Caballes denied. Dispatch reported that Caballes had two prior arrests (but apparently had not been convicted) for distribution of marijuana. While writing the warning ticket, Gillette was interrupted by another officer on the radio asking him about something unrelated. Gillette was still writing the warning when Graham arrived with his dog and began walking around Caballes' car. In less than a minute, the dog had alerted at the trunk, and Graham informed Gillette of the alert. Gillette searched the trunk and found marijuana. Caballes was charged with cannabis trafficking. Caballes requested suppression and was denied by the trial court, where he was convicted.

Caballes appealed. The appellate state court affirmed, finding that the police "did not need reasonable articulable suspicion to justify the canine sniff and that, although the criminal history check improperly extended defendant's detention, the delay was *de minimis*." The Illinois Supreme Court, however, had addressed several other issues. The Court looked back to another Illinois case which held that "evidence obtained by a canine sniff was properly suppressed because calling in a canine unit unjustifiably

broadened the scope of an otherwise routine traffic stop into a drug investigation."[80] In that case, the court held that such actions required "'specific and articulable facts' to support the stopping officer's request for the canine unit."

The Supreme Court discounted the observations made by Gillette that he considered unusual, the lack of luggage despite a claimed cross-country move, the business attire, the air freshener, his apparent nervousness, and offered alternative explanations for each of these actions. The Court noted that "they constitute nothing more than a vague hunch" that Caballes was involved in illegal activities. The Illinois Supreme Court overturned the lower court's holding and reversed the conviction. The U.S. Supreme Court accepted certiorari.

ISSUE: Does a sniff by a police dog, that reveals nothing but the presence of contraband, during a lawful traffic stop and from a place where the dog has a right to be, violate the Fourth Amendment?

HOLDING: No

DISCUSSION: The Court noted that "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment."[81] Any interest a person might have in "possessing contraband cannot be deemed 'legitimate.'" The Court drew heavily upon its opinion in U.S. v. Place,[82] in which it "treated a canine sniff by a well-trained narcotics dog as 'sui generis'[83] because it 'discloses only the presence or absence of narcotics, a contraband item.'" In this situation, "the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation." The Court went to great lengths to distinguish this case from Kyllo v. U.S., noting that the "legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [one's] hopes or expectations concerning the nondetection of contraband in the trunk of his car."

The Court vacated the judgment of the Illinois Supreme Court and remanded the case back for further proceedings consistent with this opinion.

See also: Raglin v. Com., 812 S.W.2d 494 (Ky. 1991).

Florida v. Harris, 133 S.Ct. 1050 (2013)

FACTS: On June 24, 2006, Deputy Wheetley (Liberty County, FL, SO) was on patrol with his drug dog, Aldo. Deputy Wheetley made a traffic stop of Harris, as his truck bore an expired license plate. As the deputy approached, he saw that Harris was "visibly nervous,." He was "unable to sit still, shaking and [was] breathing rapidly." There was an open can of beer in the cup holder. Deputy Wheetley asked for consent to search, which was refused. He retrieved Aldo, who did a "free air sniff" around the vehicle. He alerted on the driver's side door handle.

Based on that alert, Deputy Wheetley concluded that he had probable cause to search the vehicle. He did not find any of the drugs Aldo was trained to locate (methamphetamine, marijuana, cocaine, heroin

[80] People v. Cox, 782 N.E.2d 275 (2002).
[81] U.S. v. Jacobsen, 466 U.S. 109 (1984).
[82] 462 U.S. 696 (1983).
[83] "Of its own kind or class – the only one of its kind." Black's Law Dictionary.

and ecstasy), but did locate 200 pseudoephedrine pills, 8,000 matches, hydrochloric acid, antifreeze, and a coffee filter full of iodine crystals – all ingredients for making methamphetamine. He arrested Harris and gave him Miranda warnings; Harris admitted he cooked methamphetamine at his home. He was charged with possessing pseudoephedrine for the purpose of manufacturing methamphetamine. Pending trial, Harris "had another run-in with Wheetley and Aldo" when he was stopped for a broken brake light. Aldo again alerted on the car but this time, nothing was located.

Harris moved for suppression, arguing that the alert was not enough for probable cause. At the suppression hearing, Deputy Wheetley testified both about his own training and that of Aldo.[84] Logs were introduced in evidence showing Aldo's ability to locate hidden drugs, and he performed "satisfactorily." However, Aldo's actual certification had expired the year before. Upon being questioned, Wheetley agreed that he "did not keep complete records of Aldo's performance in traffic stops or other field work; instead, he maintained records only of alerts resulting in arrests." He argued that Aldo's two alerts on a vehicle that did not contain the actual substances he was trained to locate was likely as a result of Harris transferring methamphetamine odor from his hands to the door handle.

The trial court denied the motion to suppress Harris took a conditional plea and appealed. Ultimately, the Florida Supreme Court reversed his plea, ruling that the deputy lacked probable cause to search the vehicle. In fact, the Florida Supreme Court created "a strict evidentiary checklist to assess a drug-detection dog's reliability. Requiring the State to introduce comprehensive documentation of the dog's prior hits and misses in the field, and holding that absent field records will preclude a finding of probable cause no matter how much other proof the State offers." The State requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Must a drug dog's "field performance records" be used to prove a dog's reliability?

HOLDING: No

DISCUSSION: The Court noted, that a "police officer has probable cause to conduct a search when 'the facts available to [him] would warrant a [person] of reasonable caution in the belief'" that contraband was present.[85] In evaluating whether that standard is met, the Court noted it had "consistently looked to the totality of the circumstances," rejecting "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." The Court looked back to Illinois v. Gates, emphasizing that probable cause is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules."[86]

Looking to the decision of the Florida Supreme Court, the Court questioned how, for example, a "rookie dog" could ever be successful, as the prosecution would not be able to introduce "extensive documentation of the dog's prior 'hits' and 'misses' in the field." Absent "field performance records," they would never be able to use the dog, no matter how reliable. The court concluded that the "finding

[84] Both had trained extensively, separately and Aldo had been certified by a private company that specialized in training law enforcement dogs. They were partnered in 2005 and received refresher training. They did four hours of training a week to maintain skills, as well.
[85] Texas v. Brown, 460 U.S. 730 (1983); Carroll v. U.S., 267 U.S. 132 (1925).
[86] 462 U.S. 213 (1983).

of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements."

The Court also noted that "field data … may not capture a dog's false negatives," and in addition, "if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all." Instead, the officer may have simply been unable to find the drugs or the drugs may have been present in such small quantities that the officer missed them. In addition, the "dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person." Field records are not as reliable as the "dog's performance in standard training and certification settings," in fact, as they are done in controlled testing environments. Even in the absence of a formal certification, a dog that has "recently and successfully completed a training program that evaluated … proficiency in locating drugs," can be considered reliable. Of course, the Court continued, the defendant has a right to challenge the dog's reliability, but in such cases, a "probable-cause hearing focusing on a dog's alert should proceed much like any other," allowing each side to "make their best case."

The Court agreed that a "sniff is up to snuff when it meets [the] test" as to "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." In this case, "Aldo's did."

The U.S. Supreme Court reversed the decision of the Florida Supreme Court and remanded the case.

Florida v. Jardines, 133 S.Ct. 1409 (2013)

FACTS: In 2006, Det. Pedraja (Miami-Dade PD) received a tip that marijuana was being grown at Jardines' house. About a month later, the PD and the DEA did a joint surveillance, in which Det. Pedraja surveilled the home for about 15 minutes. He saw no vehicles or activity at the house; the blinds were drawn. He and Det. Bartelt approached the house, along with Bartelt's "drug-sniffing dog." The dog was on a lead. When they came to the front porch, the dog, "apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor." The dog was "tracking back and forth" which was later described as "bracketing." Eventually, the dog sat at the base of the front door, identifying that as the odor's strongest point. Using that information, Det. Pedraja received a warrant for the residence. When it was executed later that day, they found Jardines and marijuana plants, for which he was charged.

At trial, Jardines moved for suppression, arguing that the dog sniff at his porch was an unreasonable search. The trial court granted the suppression. The initial appellate court reversed that decision but the Florida Supreme Court quashed the Court of Appeals decision, approving the trial court's decision to suppress. The Government appealed and the U.S. Supreme Court granted certiorari.

ISSUE: May a drug dog be used to seek evidence within the curtilage?

HOLDING: No

DISCUSSION: The Court noted that "officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house." They "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." The Court noted that the concept that the curtilage is protected has

"ancient and durable roots" with Blackstone[87] and that the curtilage is "intimately linked to the home, both physically and psychologically," where "privacy expectations are most heightened.[88]

The Court noted that an "officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares [the public way] and enters the Fourth Amendment's protected areas." When, for example, the Court has permitted visual observation of the curtilage from the air, the observation was done in a "physically nonintrusive manner." The Court noted that in Boyd v. U.S.[89] it reiterated that the general rule is that "our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close[90] without his leave." The Court agreed that it was undisputed that "the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home." The only question was whether they had permission to do so, and of course, they did not.

The Court had recognized that the "knocker on the front door is treated as an invitation to the home by solicitors, hawkers and peddlers of all kinds."[91] The "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." The Court agreed that "complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." As such, a "police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen may do.'"[92] But, the Court continued, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else." A knocker does not invite one to "engage in canine forensic investigation." The Court emphasized: "to find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to – well, call the police."

The question for the Court to determine was "whether the officer's conduct was an objectively reasonable search," which further depended upon whether they had an "implied license to enter the porch, which in turn depend[ed] upon the purpose for which they entered." Their behavior (in bringing the dog) "objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do."

The Court agreed that in other cases, it had upheld the use of drug-sniffing dogs. In this case, however, the "officers learned what they learned only by physically intruding on Jardines' property to gather evidence," much like in the situation in U.S. v. Jones.[93] The "Fourth Amendment's property-rights baseline" "keeps easy cases easy." The Court ruled that the use of "trained police dogs to investigate a home and its immediate surrounding is a 'search' within the meaning of the Fourth Amendment." The Court affirmed the decision of the Supreme Court of Florida in suppressing the evidence.

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[87] 4 W. Blackstone, Commentaries on the Laws of England 223 (1769).
[88] California v. Ciraolo, 476 U.S. 207 (1986).
[89] 116 U.S. 616 (1886).
[90] Property, especially that which is "enclosed" in some way.
[91] Breard v. Alexandria, 341 U.S. 622 (1951)
[92] Kentucky v. King, 563 U.S. – (2011).
[93] U.S. v. Jones, 565 U.S. – (2012).

Consent

Chapman v. U.S., 365 U.S. 610 (1961)

FACTS: On the date in question, "[a]cting without a warrant but with the consent of the petitioner's landlord, Georgia law enforcement officers entered – through an unlocked window – and searched [Chapman's] rented house, in his absence" and found a bootlegging operation. He was indicted and argued for suppression of the seized items, claiming that the seizure was unlawful. The trial court denied the motion and the state appellate court's upheld that denial. The federal appellate courts also affirmed that ruling.

Chapman appealed; the U.S. Supreme Court accepted certiorari.

ISSUE: May a landlord give permission for law enforcement to enter a tenant's apartment?

HOLDING: No

DISCUSSION: The Government argued that the officers entered under the invitation of the landlord, who has an "absolute right to enter the … premises 'to view waste,' and that he should be able to exercise that right through law enforcement officers to whom he has delegated his authority." (However, no cases or statutes were put forth as evidence of this.) The Court, however, quickly found that to permit such an entry, "would reduce the [Fourth] Amendment to a nullity and leave [tenant's] homes secure only in the discretion of [landlords].[94] The Court also noted that there were processes available to the landlord to abate the nuisance (the still) and he had not exercised any of those options.

The Court found the search to be unlawful and that the evidence should have been suppressed at trial. The U.S. Supreme Court reversed the conviction.

McDonald v. U.S., 335 U.S. 451 (1948)

FACTS: McDonald was arrested in D.C. for being involved in a "numbers operation." He had been under police surveillance "for several months prior to the arrest." During that time, he rented a room from Mrs. Terry. The officers "observed him enter the rooming house during the hours in which operations at the headquarters of the numbers game are customarily carried on." On the day he was arrested, "three police officers surrounded the house." They did not have a search or an arrest warrant. From outside, "one of the officers thought that he heard an adding machine." Because such equipment is commonly used in the numbers operation, they "sought admission to the house." One officer "opened a window leading into the landlady's room and climbed through," and "[h]e identified himself to her and admitted the other officers to the house."

The officers searched the first floor and proceeded to the second. They found one bedroom door locked and "one of the officers stood on a chair and looked through the transom." He saw McDonald and another man (Washington) inside, along with "numbers slips, money piled on the table, and adding machines." McDonald opened the door when ordered to do so. The two men were arrested, and all of the evidence was seized.

[94] Johnson v. U.S., 333 U.S. 10 (1948).

Eventually, McDonald and Washington were convicted, and the federal appellate court affirmed. The U.S. Supreme Court accepted certiorari.

ISSUE: Is delay and inconvenience a valid reason to bypass a search warrant?

HOLDING: No

DISCUSSION: The Court quoted the text of the Fourth Amendment and stated that its "guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." The Amendment "marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation." The prosecution justified what had occurred by stating that they had been admitted to the house by the landlady, and that "[l]ooking over the transom was not a search, for the eye cannot commit the trespass condemned by the Fourth Amendment."

In this case, the "officers [were] not responding to an emergency," and as such "there must be compelling reasons to justify the absence of a search warrant." Once the officers looked over the transom, "they certainly had adequate grounds for seeking a search warrant." McDonald and the second man were "busily engaged in their lottery venture" and there was no indication they had observed the officers peering at them over the transom. Inconvenience and delay "are no justification for bypassing the constitutional requirement."

The Court noted that:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergencies, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weight the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing, and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

The U.S. Supreme Court reversed the convictions of both men.

Stoner v. California, 376 U.S. 483 (1964)

FACTS: On October 25, 1960, two men robbed a food market in Monrovia, CA. Shortly after the robbery, police found a checkbook belonging to Stoner. Two of the check stubs indicated payments made to the Mayfair Hotel, in Pomona. Learning that Stoner had a prior criminal record, officers obtained a booking photo showed it to witnesses in the robbery. They identified Stoner as the man who had carried the gun. The officers went to the Mayfair Hotel to find Stoner. The desk clerk provided his room number, but stated that Stoner was out, since his room key was in his mail box. Upon being told why the officers were interested in Stoner, the desk clerk gave permission for them to search

the room. Inside, they found clothing that matched the description given by the robbery witnesses, as well as a large handgun.

Two days later, Stoner was arrested in Las Vegas, NV. The evidence found in his room was used at trial and he was convicted. Stoner appealed, and the California Supreme Court found it to be a lawful search incident to arrest, and affirmed the conviction.

Stoner appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: May a hotel clerk give consent for the police to enter a hotel room?

HOLDING: No

DISCUSSION: The Court noted that the "search of [Stoner's] room by the police officers was conducted without a warrant of any kind, and it therefore 'can survive constitutional inhibition only upon a showing that they surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant.'"

The California appellate court decided that the search was justified as incident to a lawful arrest, "[b]ut a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." While the Court agreed that there might be leeway, it was "clear that the search of [Stoner's] hotel room in Pomona, California, on October 27 was not incident to his arrest in Las Vegas, Nevada, on October 29."

Instead, the government argued that the search was pursuant to the consent given by the hotel clerk. However, the Court noted, previous case law[95] had provided that a hotel clerk could not give consent, and noted that it was "[Stoner's] constitutional right which was at stake," and that only "[Stoner] could waive, by word or deed, either directly or through an agent."

The U.S. Supreme Court reversed the judgment of conviction of the California Supreme Court.

U.S. v. Watson, 423 U.S. 411 (1976)

FACTS: On August 17, 1972, an informant (Khoury) called a postal inspector, telling him that Watson "was in possession of a stolen credit card and had asked Khoury to cooperate in using the card to their mutual advantage." The postal inspector had worked with Khoury in previous cases, some also including Watson. They met a few days later, to exchange additional cards, and upon Khoury's signal, indicating that Watson in fact had additional cards, the officers moved in and arrested Watson.

However, a search revealed that Watson had no additional cards in his possession. The inspector asked Watson if he could look inside his car, which was just outside, and Watson agreed. The postal inspector cautioned Watson that "[i]f I find anything, it is going to go against you," but Watson still agreed. Watson provided keys and the inspector searched, finding under a floor mat an envelope containing two cards with the names of other people.

[95] Lustig v. U.S., 338 U.S. 74 (1949); U.S. v. Jeffers, 342 U.S. 48 (1951).

Eventually, he was convicted. The Ninth Circuit reversed the conviction, holding that the postal inspector had time to have gotten an arrest warrant and should have done so, and that Watson's "consent to search had been coerced and hence was not a valid ground for the warrantless search of the automobile." The government appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: May an arrested party give a valid consent?

HOLDING: Yes

DISCUSSION: The Court quickly upheld the arrest by the postal inspector. With regards to the consent, the Court found that "[t]here was no overt act or threat of force against Watson proved or claimed." In addition, "[t]here were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment." Although he was under arrest, his consent was given on the public street, not in the "confines of the police station." "Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." That Watson claimed not to know that he could withhold consent, "though it may be a factor in the overall judgment, is not to be given controlling significance."

The U.S. Supreme Court reversed the Ninth Circuit Court's decision and the conviction was reinstated.

Florida v. Royer, 460 U.S. 491(1983)

FACTS: Royer purchased a one-way airline ticket from Miami to New York City under an assumed name. His luggage was checked under that same assumed name. While in the waiting area, he was approached by two police detectives, who believed his actions and appearance fit a "drug profile." When requested, Royer produced identification, which carried his correct name, and the airline ticket, with the assumed name. When asked about the name discrepancy, he explained a friend had purchased the tickets.

The detectives informed him that they suspected he was carrying narcotics and asked him to accompany them to a small room nearby. They did not return his identification or tickets to him. Without asking permission, an officer reclaimed the luggage and brought it to the room. When asked if they could search the luggage, Royer, without verbally consenting, produced a key and unlocked one of the suitcases. That case contained marijuana. Royer stated he did not know the combination of the second case, so officers pried it open and found more marijuana. Royer was then arrested and convicted. He appealed to the U.S. Supreme Court, which accepted certiorari.

ISSUE: Is a consent for search of luggage valid when the officers have already seized the luggage and removed it to another location?

HOLDING: No

DISCUSSION: When the officers identified themselves, and asked him to accompany them to another location, without giving him back the ID and tickets, Royer was effectively seized and was not free to leave. As a practical matter he was under arrest, and his consent to the search of his belongings was not voluntary.

The U.S. Supreme Court accepted certiorari.

See also: *U.S. v. Smith, 884 F.2d 581 (6th Cir. 1989)*

Ohio v. Robinette, 519 U.S. 33 (1996)

FACTS: Officer stopped Robinette for speeding. While stopped, the officer asked Robinette for consent to search the car. Robinette consented to the search and the officer found some marijuana and one tablet of MDMA. Robinette sought to suppress the evidence, claiming that the officer did not, and was required to, advise Robinette of that he was free to go before asking for consent. His motion was rejected; he was convicted. However, the Ohio appellate courts found that Robinette had a right to be told he was free to go prior to the request for consent and reversed the conviction. Eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is an officer required to advise a person detained for investigatory purposes that they have the right to leave when asking for consent to search?

HOLDING: No.

DISCUSSION: The Fourth Amendment test for a valid consent to search is that the consent be voluntary. Voluntariness is a question to be determined by all of the circumstances. While it would be unrealistic to impose on consent searches the *requirement* of a warning, it would likewise be unrealistic to require officers to inform detainees they are free to go before consent may be deemed voluntary.

The Court reversed the Ohio court's judgment and remanded the case.

NOTE: While the Court does not require a warning, giving a warning will go towards showing that the consent was voluntary.

See also: *U.S. v. Mesa, 62 F.3d 159*
U.S. v. Guimond, 116 F.3d 166
U.S. v. Smith, 263 F.3d 571
U.S. v. Burton, 334 F.3d 514 (6th Cir. Tenn. 2003)

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)

FACTS: Bustamonte was a passenger in a vehicle driven by Gonzales, along with four other men. Officer Rand observed the vehicle with one headlight and the license plate light out, and stopped it. The driver could not produce a license, and when the others were asked, only Alcala, who was also in the front seat, was able to do so. Alcala stated that the car belonged to his brother. All of the occupants got out of the vehicle at the officer's request. Officer Rand asked Alcala for permission to search the vehicle, and Alcala agreed. Gonzales testified that Alcala actually helped to search the vehicle, opening the trunk and glove compartment. Under the left rear seat, the officers found three wadded-up checks, which had previously been stolen from a car wash. Bustamonte was convicted of unlawfully possessing a check. The federal appellate court held that the prosecution had not sufficiently proven that the consent was voluntary. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Must the police affirmatively show that an individual knew of their right to refuse consent to a search?

HOLDING: No

DISCUSSION: The Court stated that the prosecution must show, taking into consideration the totality of the circumstances, that consent was voluntary and not the result of duress or coercion. While a showing that an individual knew of their right to refuse consent is a factor, it is not necessary to establish that a given consent was voluntary.

The U.S. Supreme Court reversed the appellate decision and reinstated the conviction.

U.S. v. Matlock, 415 U.S. 164 (1974)

FACTS: Matlock "was arrested in the front yard of a house in which he lived along with a Mrs. Graff (daughter of the lessees) and others." Mrs. Graff admitted the officers into the house and gave consent to search that house, including the bedroom she shared with Matlock. In a bedroom closet, they found almost $5,000 in cash.

Matlock was charged with bank robbery and moved for suppression. The District Court ruled that "where consent by a third person is relied upon as justification for a search, the Government must show, inter alia, not only that it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search." The District Court further stated that the prosecution had not satisfactorily proved "that Mrs. Graff had such authority." The Seventh Circuit Court of Appeals affirmed the suppression of the evidence and the U.S. Supreme Court accepted certiorari.

ISSUE: Must a third party be shown to have authority to permit a search, when a search is premised on that individual's consent?

HOLDING: Yes

DISCUSSION: The Court noted, initially, that both the parties, and the courts below, had assumed that "the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial." The trial court had excluded, as inadmissible hearsay, "the out-of-court statements of Mrs. Graff with respect to her and [Matlock's] joint occupancy and use of the [bedroom in question]," as well as other information that they shared that room. The Court considered this decision to be in error and held that the statements were admissible under several exceptions to the hearsay rule.

The Court found that the statements were admissible, and that the "preponderance of the evidence [was] that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence [the cash found in the closet]."

The U. S. Supreme Court reversed the lower court's decision and remanded the case back to the trial court for further proceedings consistent with this opinion.

Illinois v. Rodriguez, 497 U.S. 177 (1990)

FACTS: Police were called to the home of Dorothy Jackson, in Chicago. There, Gail Fischer met them. She was severely bruised and told officers she had been beaten by Edward Rodriguez earlier that day. She further told officers that she had left him sleeping in their apartment and agreed to go with the officers to unlock the apartment door with her key. She referred to the apartment as "our"

apartment and stated that she had belongings there. It was unclear from the record whether she indicated that she currently lived there.

When they arrived at the apartment, Fischer unlocked the door and invited the officers to enter. In the living room, they spotted drug paraphernalia and containers of white powder, later proved to be cocaine. In the bedroom, they found more of the white powder in containers in open briefcases. Rodriguez was asleep there, as well. Rodriguez argued that the entry into the apartment was illegal because Fischer had vacated the apartment several weeks before. The trial court agreed, stating that she was not a "usual resident" but at best, an "infrequent visitor" to the apartment at the time. The court found that her name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment nor was she to be there when Rodriguez was absent and that she had moved some of her belongings from the apartment to another location.

The trial court suppressed the evidence and the state appellate court affirmed. The state appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is a search lawful when the officers have valid reason to believe the individual has authority over the property in question?

HOLDING: Yes

DISCUSSION: The trial ended its consideration upon determining that Fischer did not have actual authority to allow the officers to enter the apartment. The Supreme Court, however, found that the officers' reasonable belief in the validity of Fischer's consent to be a primary issue and remanded the case back to the lower courts for further determination. The Court directed that if the lower court found that the officers' belief was reasonable concerning Fischer's authority over the apartment, then the search would be valid.

The U.S. Supreme Court reversed the lower court's decision and remanded the case for further consideration based upon the opinion.

Florida v. Jimeno, 500 U.S. 248 (1991)

FACTS: A Dade County police officer overheard Jimeno using a public telephone arranging what the officer believed to be drug transaction. Jimeno then drove off in his car and the officer followed. When Jimeno turned right at a red light without stopping, the officer pulled Jimeno over. After advising Jimeno that he was going to give him a traffic citation, he then told Jimeno that he believed he had narcotics in his car. The officer asked for permission to search the car, and Jimeno agreed. The passengers got out of the car and the officer began a search. He found a folded, brown paper bag on the floor. The officer opened the bag and found cocaine inside. Jimeno was arrested and charged with possession with intent to distribute, and he was eventually convicted. On appeal, Jimeno contended that his permission to search the car did not extend to the closed paper bag inside the car. The Florida trial court and appellate courts agreed, suppressing the evidence.

The U.S. Supreme Court accepted certiorari.

ISSUE: Is it reasonable to consider a suspect's general consent to a search of his vehicle to include consent to search containers found in it?

HOLDING: Yes

DISCUSSION: The expressed object defines the scope of a search. The suspect did not place any express limitations on the scope of the search. He merely gave a general permission to search his car. It was objectively reasonable for an officer to conclude that a general consent to search the car would include consent to search all containers inside that may contain contraband. The Court indicated that it might have reached a different result if the container in question was locked, such as a briefcase, but saw no problem with a paper bag. The suspect may place any limits he wishes on the scope of the search, but if a general consent can be reasonably understood to extend to a particular container, there is no need for a specific authorization to search that container.

The U.S. Supreme Court reversed the decisions of the Florida courts, and remanded the case.

Bumper v. North Carolina, 391 U.S. 543 (1968)

FACTS: Bumper lived with his grandmother, Leath, in rural North Carolina. Two days after a rape was reported, the Sheriff, three deputies and a state officer went to the house. They announced they had a search warrant and Leath admitted them. During the search, they took a rifle into evidence that was later introduced at trial. During the trial, it became known that there was, in fact, no warrant. The officers stated they were relying upon Leath's "consent" to enter and search the house. Bumper was convicted and the state appellate courts affirmed.

Bumper appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Is a search justified on "consent" when the consent has been given based on a declaration that a warrant exists?

HOLDING: No

DISCUSSION: The burden is on the prosecution to show that any consent was given freely and voluntarily. A search based on a warrant can later be suppressed if it is shown that the warrant was invalid, so the "result can be no different" when the officers claim to have a warrant when they do not. "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent."

The U.S. Supreme Court reversed the conviction.

U.S. v. Mendenhall, 446 U.S. 544 (1980)

FACTS: Mendenhall was stopped by agents of the DEA in the Detroit airport and was asked to produce her identification and airline ticket. The names on the two did not match. She was asked to accompany the agents to the DEA office in the airport and did so. Mendenhall was asked to consent to a search and did so. (She was told she did not have to consent to a search several times.)

A female officer asked Mendenhall to remove several items of clothing. Without comment, Mendenhall removed two packages from her underclothing; they appeared to contain heroin. She was subsequently arrested. Mendenhall was convicted and appealed, and the appellate courts reversed her conviction, finding that she had not given a valid consent.

The prosecution appealed and the U.S. Supreme Court accepted certiorari

ISSUE: Is a consent to search valid when there is no indication of duress or coercion?

HOLDING: Yes

DISCUSSION: Mendenhall's consent was voluntary and valid, under the circumstances. An examination of the totality of the circumstances failed to find any evidence of coercion or duress during the process. The Court held that a person is "seized only when, by means of physical force or a show of authority, his freedom of movement is restrained."

The U.S. Supreme Court reversed the decision to overturn the conviction and remanded the case for further proceedings.

See also: U.S. v. Wiggins, 828 F.2d 1199 (6th Cir. 1987)

U.S. v. Drayton, 536 U.S. 194 (2002)

FACTS: On February 4, 1999, Drayton and Brown were on a Greyhound bus from Ft. Lauderdale, Florida to Detroit, Michigan. The bus stopped in Tallahassee for the bus to be refueled and cleaned. The passengers were required to disembark. As they reboarded, the driver checked tickets and then left the bus to go into the terminal. As he left the bus, three Tallahassee police officers, in plainclothes but with visible badges, boarded the bus.

Onboard, Officer Hoover knelt on the driver's seat and faced the rear of the bus, where he could watch the passengers, but he did not obstruct the exit. Officers Lang and Blackburn went to the rear of the bus, and Officer Blackburn stayed there, facing forward. Lang worked his way forward, questioning passengers about their travel plans and matching passengers with luggage in the overhead racks. He did not block the aisle. Lang testified that passengers that declined to cooperate were allowed to do so, but that most were cooperative. Some passengers even left the bus during the process, to make a purchase in the terminal or smoke a cigarette.

Drayton and Brown were seated next to each other, with Drayton on the aisle and Brown in the window seat. Lang displayed his badge and spoke to them in a low voice. Both claimed the same green bag in the overhead rack, and Brown agreed that the bag could be checked. Blackburn checked the bag and found no contraband. Both Drayton and Brown were dressed in heavy jackets and baggy pants despite the warm weather. Lang asked Brown if he had weapons or drugs and asked consent to search, which Brown allowed. Lang felt hard objects in the thigh pockets of the pants, and he arrested Brown, turning him over to Hoover. He then asked Drayton's consent for a pat-down, and again found the same hard objects. Drayton was also arrested. Eventually, the officers discovered packages taped into the men's underwear, with Brown having 3 bundles totaling 483 grams of cocaine and Drayton having 2 bundles totalling 295 grams of cocaine.

Eventually both were charged. The District Court denied their request for suppression, but the Court of Appeals remanded the appeal with orders to grant the motions. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is a search on a bus automatically coercive?

HOLDING: No

DISCUSSION: The Court equated the approach of the passengers on a bus to be similar to approaching individuals on the street and asking questions. Officers may ask consent even when they have no particularized suspicion about them. This case differed slightly from the Court's earlier case in Florida v. Bostick, in that Lang did not specifically tell the passengers they had a right to decline. The Court of Appeals stated what was effectively a per se rule, that ALL bus searches were inherently coercive, but the Supreme Court disagreed. The facts in this case indicate that the officers made every effort to make it a non-coercive encounter, and their failure to make a specific notification does not make it automatically coercive. In fact, even after arresting Brown, Lang asked for Drayton's consent before doing a pat-down.

The U.S. Supreme Court reversed the appellate court ruling and remanded the case.

Georgia v. Randolph, 126 S.Ct. 1515 (2006)

FACTS: Scott and Janet Randolph were a married couple living in Georgia. They separated in May 2001 over marital difficulties, with Janet going to Canada with her son to live with her parents. Some time later, Janet and the boy returned, but it is unclear whether it was for the purpose of seeking reconciliation or to recover additional property. If it was to seek reconciliation, it did not go well. On the morning of July 6, 2001, Janet called the police because Scott had taken their son away.

When the police arrived, Janet not only advised them of their marital difficulties and Scott's taking of their son, she also told them Scott was a cocaine user. After Scott returned, and the boy was subsequently recovered by officers (he had been left with a friend), the officers asked Scott about the drug use. Scott denied it. Janet told the officers that there were items of drug evidence in the house. When the officers asked Scott if they could search his home, he emphatically refused permission. The officers then asked Janet, who not only gave permission to search the home, but led them upstairs to Scott's room. An officer observed and seized a drinking straw with evident cocaine residue on it. He went to his cruiser to get an evidence bag for the straw, but when he returned to the house Janet revoked her permission. A search warrant was obtained and additional drug evidence was seized. Scott was indicted for possession of cocaine.

At trial, Scott's motion to suppress the evidence as the product of a warrantless search, and that his wife's consent was negated by his unequivocal refusal was overruled. The trial court found that Janet had common authority to consent to the search. The Court of Appeals of Georgia reversed on the ground that the "'consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search'" The Supreme Court of Georgia affirmed, distinguishing the case from U.S. v. Matlock[96] as in Matlock the consent of the person with common authority was valid against the absent party.

The U.S. Supreme Court accepted certiorari.

ISSUE: Is the warrantless search and seizure of evidence lawful when the search is based on the consent of a person with common authority over the area searched with another person, and the other person is present and expressly refuses consent?

[96] 415 U.S. 164 (1974).

HOLDING: No.

DISCUSSION: The Court noted that in its previous cases of consent of a person with common authority, the second occupant was not physically present and objecting to the search. Common authority is not synonymous with technical property interest, but that any of the cohabitants has a right to permit inspection of common areas. Cohabitants assume the risk that one of them may permit such an inspection. Common authority for the purposes of the Fourth Amendment may be broader than the rights accorded under property law. "The constant element in assessing Fourth Amendment reasonableness in consent cases, then, is the great significance given to widely shared social expectations, . . . influenced by the law of property, but not controlled by its rules."

The Court then addressed what it described as "assumptions tenants usually make about their common authority when they share quarters."[97] Among them would be that your roommate might invite in a guest you find obnoxious while you are out. Also, while you may share authority over common areas, they would not likely have authority to let officers search your personal things, like your dresser drawers. The Court invoked Minnesota v. Olson[98] for the proposition that overnight houseguests have a legitimate expectation of privacy in their quarters since it would be unlikely that their host would admit somebody to their space over their objection. From this, the Court presumed that an inhabitant of shared space would likewise be able to prevent the other from inviting an unwanted person over his objection. It concluded that there was "no common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." Therefore, since a co-tenant has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, the disputed invitation to a police officer to come in and search is worthless. The dispute effectively negatives the consent.

The majority disputed the minority's contention that this decision would shield domestic abusers by allowing the violator to trump the permission of the victim to enter the dwelling. In dicta defending its holding, the majority said the minority was confusing two separate issues. These were when you can enter to do a search, and when you can enter for other reasons without committing a trespass. The Court stressed that this decision applied to contested consent to search cases. "No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence . . . has just occurred or is about to . . . occur, however much a spouse or other cotenant objected." In essence, an exigent circumstance (imminent domestic violence) would justify entry over any objection.

The Court concluded its opinion by wrapping up a couple of what it described as loose ends. First, it attacked the seeming contradiction from Matlock about a co-tenant having authority to give permission in his own right. How can his own right to consent be negated by a co-tenant's refusal? This was explained away not being "an enduring and enforceable ownership right as understood by the law of private property" but as authority based on customary social usage that goes to the reasonableness requirement for the expectation of privacy. The second loose end was how did this affect situations where the potentially objecting cotenant was asleep (Illinois v. Rodriguez[99]), in the back yard, in a police vehicle, or

[97] Id.
[98] 495 U.S. 91 (1990).
[99] 497 U.S. 177 (1990).

any other circumstance where he would be close by or reachable? The Court said that so long as there was no evidence that the police have removed the potentially objecting party for the sake of pre-empting his opportunity to object, the consent of the other co-tenant would be valid.

The U.S. Supreme Court affirmed the lower court's decision.

See also: *U.S. v. Sumlin, 567 F.2d 684 (6th Cir. 1977)*
Colbert v. Com., 43 S.W.3d 777 (Ky. 2001)

Fernandez v. California, 134 S.Ct. 1126 (2014)

FACTS: In October 2009, in Los Angeles, Fernandez approached Lopez and told him that he was in the territory of the Drifters gang. He pulled out a knife and Lopez ended up cut on the wrist. He fled the scene and called 911 for help, but he was attacked by four men and robbed of his cell phone and wallet, and $400 cash. Two LAPD officers responded and drove down an alley frequented by the Drifters. A man "who appeared scared" walked past them and said "[t]he guy is in the apartment." The officers spotted a man run into the building indicated. A minute later, they "heard sounds of screaming and fighting coming from that building."

With backup's arrival, the officers knocked on the door. Roxanne Rojas answered the door; she was "holding a baby and appeared to be crying." She had blood and her shirt and an apparently injured hand. Her face was reddened and had a "large bump on her nose." She said she'd been in a fight. Officer Cirrito asked if anyone else was inside, and she said her son (age 4) was there. He asked her to step outside so he could do a protective sweep. Fernandez appeared, wearing only boxers. He was agitated and said "You don't have any right to come in here. I know my rights." Suspecting he'd assaulted Rojas, he was removed and arrested. Lopez then identified him as one of his attackers as well and Fernandez was then taken to jail. About an hour later, Det. Clark returned and told Rojas what had happened. He received oral and written consent to search. They found gang paraphernalia, a butterfly knife, clothing identified by Lopez and ammunition. Rojas' son showed them a sawed off shotgun.

Fernandez was charged with robbery, possession of a firearm by a felon and related federal firearms charges. He moved to suppress, but was denied. He pled nolo contendere (no contest) to the firearms charges. He was convicted at trial of the robbery and another related charge. The California appellate courts affirmed. He requested certiorari from the U.S. Supreme Court, which granted review.

ISSUE: Does the refusal to consent to a search extend past the point at which the objecting party is removed, if another co-inhabitant gives consent later?

HOLDING: No

DISCUSSION: The Court agreed that a warrant is generally required for a home search, but that there are reasonable exceptions to that rule. One of those exceptions is consent. The Court noted that "it would be unreasonable – indeed, absurd – to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search." Requiring a warrant under such circumstances "would needlessly inconvenience everyone involved – not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed." The Court then questioned what should be done "when there are two or more occupants? Must they all consent? Must they all be asked? Is consent by one occupant enough?"

Initially, the Court faced that issue in U.S. v. Matlock,[100] holding that "the consent of one who possesses common authority against the absent, nonconsenting person with whom the authority is shared." In Illinois v. Rodriguez, the earlier holding was reaffirmed and extended, when the consent was given by a person who officers reasonable believed was a resident, but in fact, was not.[101] Although consent by "one resident of jointly owned premises" is usually enough, the court had "recognized a narrow exception to this rule in Georgia v. Randolph.[102] In that case, the Court upheld that a "physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." However, the Randolph Court 'went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present."

In the case at bar, Fernandez argued that the only reason he was not present was because he was arrested, and that his objection should have remained in effect. However, the Court noted that the dictum in Randolph did not mean that removing an occupant under a valid arrest would necessarily invalidate the search. Following the rule proposed by Fernandez would require officers to decide how long an objection should reasonably last. The Court concluded that it would take Randolph on its face, and that denying someone in the position of Rojas "the right to allow the police to enter *her* home would also show disrespect for her independence," especially when she would have reason to have all dangerous items removed from the premises. The Court agreed that "the Fourth Amendment does not give [Fernandez]" the power to control Rojas in that manner.

The Court upheld the decision of the California court.

BODY EVIDENCE

Schmerber v. California, 384 U.S. 757 (1966)

FACTS: Schmerber was arrested for driving while intoxicated. He had been injured in a wreck and taken to the hospital. A police officer directed the hospital to take a blood sample. That sample indicated the presence of alcohol. Schmerber argued that he had not agreed to have the blood drawn and that the evidence violated his right against self-incrimination. The lower court upheld the conviction.

Schmerber appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the introduction of physical evidence taken against a defendant's will from their body admissible?

HOLDING: Yes

DISCUSSION: The Court found "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis" of his blood. As such, the evidence was admissible.

Schmerber's conviction was affirmed.

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[100] 415 U.S. 164 (1974).
[101] 497 U.S. 177 (1990).
[102] 547 U.S. 103 (2006).

See also: Holbrook v. Knopf, 847 S.W.2d 52 (Ky., 1993)

Cupp v. Murphy, 412 U.S. 291 (1973)

FACTS: When Murphy learned he was a suspect in his wife's murder, he called the Portland, Oregon, police and voluntarily came in for questioning. While there, officers noticed a "dark spot" on his finger. They asked if they could scrape under his fingernails; he refused. "Under protest and without a warrant, the police proceeded the take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown."

Ultimately, he was charged, and the evidence admitted against him at trial. He was convicted and appealed. The Oregon courts affirmed his conviction, but upon appeal to the Ninth Circuit Court of Appeals, Murphy's conviction was reversed.

Oregon requested certiorari, which was granted.

ISSUE: Is seizing and taking fingernail scrapings from a suspect (when you have probable cause that they committed the crime) permitted?

HOLDING: Yes

DISCUSSION: The Court differentiated this case from Davis v. Mississippi, in which it concluded that fingerprints taken during an invalid seizure were inadmissible at trial.[103] In this case, the Court noted, even though Murphy was not arrested at the time, there was probable cause to believe he had committed the crime.

Further, Murphy was aware he was a suspect, and once the officer asked to scrape his fingernails, he put his hands behind his back, and then into his pockets. Under those circumstances, the police were justified "in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails."

The decision of the Ninth Circuit was reversed.

Winston v. Lee, 470 U.S. 753 (1985)

FACTS: On July 18, 1982, Watkinson was closing his shop for the night. An armed man approached him, and they exchanged shots. Watkinson was injured; the other individual ran from the scene, also apparently wounded.

Shortly afterward, police found Lee approximately eight blocks away. He was suffering from a gunshot wound to the chest and stated he had been the victim of an attempted robbery. When he was taken to the same hospital as Watkinson for treatment, Watkinson immediately identified him. Lee was charged with the robbery and assault of Watkinson.

[103] 394 U.S. 721 (1969).

The prosecution made a motion to the court to require Lee to undergo surgery to remove the bullet believed to be lodged under his collarbone. At a hearing, the surgeon testified that the procedure would take less than an hour, and that there was a very small chance of nerve damage and an even smaller chance of death, considerably less than one percent. At a second hearing, and upon further investigation, the surgeon now stated that the bullet was just under the skin and would be simple to remove.

The Court ordered the surgery. However, upon studying X-rays just prior to the scheduled procedure, the surgeon found that the bullet was much deeper than expected, so the risk was much higher than estimated. Upon that discovery, Lee returned to court, and the court then enjoined the surgery. That decision was affirmed upon appeal, and the prosecution appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Must an individual be forced to undergo a relatively risky surgical procedure to retrieve evidence?

HOLDING: No

DISCUSSION: The Court sought to balance the prosecution's need for the evidence in Lee's body with Lee's right of privacy. They found that the prosecution had a great deal of evidence concerning Lee's guilt, and because of that, the need for the actual bullet was not great.

The U.S. Supreme Court affirmed the denial of permission to undertake the surgery.

SEIZURE- BASIC CONCEPTS

Reasonable Expectation of Privacy / Standing

Jones v. U.S., 362 U.S. 257 (1960)

FACTS: Jones was "arrested in an apartment in the District of Columbia by federal narcotics officers, who were executing a warrant to search for narcotics." Upon the discovery of the narcotics, Jones "had admitted to the officers that some of these were his and that he was living in the apartment." Before the trial, Jones challenged the warrant "on the ground that the warrant had been issued without a showing of probable cause." The Government, however, challenged Jones' standing "to make this motion because [Jones] alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an 'invitee or guest.'" In a hearing, Jones "testified that the apartment belonged to a friend, Evans, who had given him the use of it, and a key." He had a few items of clothing there, but his "home was elsewhere" and that he "paid nothing for the use of the apartment." Jones stated he had slept at that apartment "maybe a night." Evans was away from town at the time of the search.

The trial court denied Jones motion to suppress, holding that he lacked standing, and the Court of Appeals agreed, ruling that even if Jones "had standing, it would hold the evidence to have been lawfully received."

Jones appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Does a individual have to claim ownership of contraband in order to claim standing to object to a search of that residence?

HOLDING: No

DISCUSSION: The Court noted that "[i]n order to qualify" to challenge a search, the individual must have been aggrieved or a victim of the search, "as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." The evidentiary rules "appl[y] the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.'"[104]

The Court noted, however, "prosecutions like this one have presented a special problem." In order to "establish standing," defendants must "claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." Those defendants who have wanted to argue a "conventional standing requirement" have "been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him." Further "[a]t the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises."

The Court found that to hold that a defendant's "failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." Further, the "prosecution here thus

[104] Hatch v. Reardon, 204 U.S. 152 (1907).

subjected [Jones] to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." In addition, the Court stated that "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

The Court examined the warrant affidavit and determined that it was "insufficient to establish probable cause because it did not set forth the affiant's personal observation regarding the presence of narcotics in the apartment, but rested wholly on hearsay." The Court had held that an officer "may rely upon information received through an informant, rather than upon [the officer's] direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." In this case, the officer "swore to a basis for accepting the informant's story" – ie: that the "informant had previously given accurate information," and "[h]is story was corroborated by other sources of information." Jones was already known to the police to be a user of narcotics. The Court found no reason to find that the warrant itself was defective.

Jones' conviction was vacated and remanded.

Katz v. U.S., 389 U.S. 347 (1967)

FACTS: Katz was convicted of transmitting wagering information out of state. At the trial, the Government was permitted to introduce evidence of Katz's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of a public telephone booth from which he had placed his calls.

Katz appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the listening in to one side of a phone conversation, that takes place in an enclosed phone booth, a violation of the Fourth Amendment?

HOLDING: Yes

DISCUSSION: The Fourth Amendment protects people, not simply areas, against unreasonable searches and seizures, and its reach cannot depend upon or absence of a physical intrusion into any given enclosure.

> What a person knowingly exposes to the public, even in his own home, is not a subject of Fourth Amendment protection. What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment. A person in a telephone booth may rely upon the protection of the Fourth Amendment and is entitled to assume that words he utters into the mouthpiece will not be broadcast to the world.

Searches conducted without search warrants are, per se, unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. Probable cause alone is never enough to justify a warrantless search.

The U.S. Supreme Court reversed the conviction.

Smith v. Maryland, 442 U.S. 735 (1979)

FACTS: On March 5, 1976, in Baltimore (MD), a robbery occurred. Afterward, the victim "began receiving threatening and obscene phone calls from a man identifying himself as the robber." At one point, the caller told her to come to the porch and she saw a 1975 Monte Carlo (that she described to the police as being involved in the robbery) "moving slowly past her home." A few days later, police spotted a man fitting her description, driving a similar car, and were able to trace the car to Michael Smith.

The next day, a pen register was installed on Smith's home telephone – but no court order was obtained. Within a day or so, a call from Smith's telephone to the victim was indicated. The police obtained a search warrant for his residence with that information. Eventually, they found a personal phone book with the victim's name and address and he was arrested. The victim identified him in a subsequent line up.

Smith was indicted for robbery and moved to suppress the evidence from the pen register, arguing that the police should have had a warrant prior to the installation. The trial court denied the motion, and the evidence was admitted. Eventually, he was convicted. He appealed to the state court, but his conviction was affirmed, with that court holding that "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence to search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company."

Smith appealed to the U.S. Supreme Court, which accepted certiorari.

ISSUE: Is there an expectation of privacy in the phone numbers a person dials?

HOLDING: No

DISCUSSION: The Court started with the "Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." In Katz, the court had laid out "two discrete questions." "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy" and the second "is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable.'" In other words, there is both a subjective and an objective element.

In this situation, the Court noted that the "pen register was installed on telephone company property at the telephone company's central offices." The Court differentiated the pen register from the recording device used in Katz, in that "pen registers do not acquire the contents of communications" – but simply record the numbers dialed. (In effect, it is what telephone companies do every day, in order to do accurate billing for long-distances calls, for example.)

The Court rejected Smith's claim – stating that it doubted "that people in general entertain any actual expectation of privacy in the numbers they dial" In addition, "telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." They further understand that the telephone company keeps a record of numbers dialed.

Even if Smith considered that material *subjectively* private, it was not information that the general public would *objectively* consider to be private.

The U.S. Supreme Court affirmed the judgment.

Mancusi v. DeForte, 392 U.S. 364 (1968)

FACTS: In 1959, DeForte was an official with a New York Teamsters union. He was accused of misusing his office to extort money from owners of juke boxes. Before he was indicted, the local District Attorney's office "issued a subpoena duces tecum" for books and records and the union refused to comply. State officials then "conducted a search and seized union records from an office shared by DeForte and several other union officials." They had no warrant and took the documents over DeForte's objections.

Eventually that material was admitted at trial and DeForte was convicted. He appealed to the state courts, which denied his appeal. He then brought a federal habeas corpus proceeding. The District Court denied the writ, but the Second Circuit reversed the lower court and "directed that the writ issue." The matter was appealed to the U.S. Supreme Court and it accepted certiorari.

ISSUE: Does an individual have a reasonable expectation of privacy (and thus standing) against a search of their office space by the police, without the consent of their employer?

HOLDING: Yes

DISCUSSION: The Court noted that the Fourth Amendment guarantees the right to be secure in one's "persons, houses, papers, and effects" and further stated that "houses" "is not to be taken literally" and that the protection of the [Fourth] Amendment may extend to commercial premises." Further, anyone with a "possessory interest in the premises might have standing." The "Amendment does not shield only those who have title in the searched premises," but anyone who has a "reasonable expectation of privacy in the area in question." So, the "crucial issue" in this case "is whether, in light of all the circumstances, DeForte's office was such a place."

DeForte's office space was not private, but "shared with other union officers." He could, however, "reasonably have expected that only those persons and their personal or business guests would enter the office," and that the records would not be touched by anyone who was not authorized. The Court held, therefore, that DeForte had standing to object to the search.

The Court further held that the subpoena duces tecum in this case "could not … qualify as a valid search warrant" as it was "issued by the District Attorney himself."

The U.S. Supreme Court upheld the District Court's issuance of the writ of habeas corpus.

Brown v. U.S., 411 U.S. 223 (1973)

FACTS: Brown managed a warehouse in Cincinnati; Smith was a truck driver for the same company. During 1968 and 1969, the company had experienced a lot of loss, which it attributed to pilferage. West, a company buyer/supervisor, "recovered a slip of paper he had seen drop from Brown's pocket," on which, in Brown's handwriting, he saw "a list of warehouse merchandise, together with a price on each item that was well below wholesale cost." Law enforcement was notified and they began a surveillance of the warehouse. Some 10 days later, Brown and Smith were seen "wheeling carts containing boxes of merchandise from the warehouse to a truck," and the surveillance team took photos.

The truck took off. The police stopped it, arrested the occupants, and took the truck into custody. The goods in the truck proved to have been stolen.

Following the arrest, and after being advised of their rights, Brown and Smith "made separate confessions" as to their involvement in the crime, along with another individual, Knuckles. As a result of their confessions, the police searched Knuckles store, in Manchester, Kentucky, pursuant to a warrant. Prior to the trial, Smith, Brown and Knuckles moved for suppression. The trials were severed and the trial court agreed to suppress the evidence as it related to Knuckles.

At the trial for Smith and Brown, the prosecution introduced evidence found at Knuckles' store. They objected, but were overruled, and eventually, they were convicted. The Sixth Circuit Court of Appeals affirmed the trial court. The U.S. Supreme Court accepted certiorari.

ISSUE: Does a person have automatic standing to challenge a search of an area that they do not own, and when they are not present at the time?

HOLDING: No

DISCUSSION: Smith and Brown argued that they had "'automatic' standing to challenge the search and seizure at Knuckles' store." The Court, however, held that "there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

The U.S. Supreme Court affirmed the conviction.

Rakas v. Illinois, 439 U.S. 128 (1978)

FACTS: In Bourbonnais, Illinois, a police officer received a call about a robbery of a clothing store, and describing the getaway car. The officer spotted a vehicle matching the description. He followed it, and when backup arrived, they stopped it. The occupants, the driver, Rakas, and two females were ordered out of the car, and the officers searched it. They found a box of rifle shells in a locked glove box and a sawed-off shotgun under the front passenger seat. At that point, Rakas and the two females were arrested.

All three moved to suppress the evidence, stating that they did not own the car but were merely passengers. (The driver was the owner of the vehicle.) They did not claim to own any of the items seized. The prosecutor challenged their standing to object to the lawfulness of the search. The trial court denied the motion, and Rakas (and the rest) were convicted of the robbery. As it was not necessary, the court did not address the search and seizure – probable cause issue.

ISSUE: May a non-owner (or possessor) of items that are contraband or evidence challenge the search and seizure of such items?

HOLDING: No

DISCUSSION: The Court discussed the issue of standing – the capacity of an individual to be a party in a particular lawsuit. In this case, Rakas was simply a passenger; he did not own or otherwise

control the vehicle. Rakas had compared the search to the one done in Jones v. U.S., where the Court stated that a person "legitimately on the premises" might challenge the validity of a search. However, the Court distinguished the two by finding that Jones had a reasonable expectation of access and privacy to a location that was not actually his home, and they were not willing to extend the protection to Rakas, a simple passenger in another's vehicle. The Court found that Rakas did not have a legitimate expectation of privacy in the particular areas that were searched within the vehicle.

U.S. v. Salvucci, 448 U.S. 83 (1980)

FACTS: Salvucci and Zackular were charged with multiple counts of possession of stolen mail, in violation of federal law. The check were discovered by Massachusetts police "during the search of an apartment rented by … Zackular's mother," "pursuant to a warrant."

Salvucci and Zackular initially requested suppression, arguing that the affidavit "was inadequate to demonstrate probable cause." The District Court agreed, and suppressed the evidence, and the prosecution responded that the two men "lacked 'standing' to challenge the constitutionality of the search." When the District court reaffirmed its decision, the Government appealed. The Court of Appeals affirmed – holding that the men "were not required to establish a legitimate expectation of privacy in the premises searched or the property seized because they were entitled to assert 'automatic standing' to object to the search and seizure under Jones v. U.S.[105]"

The Supreme Court accepted certiorari to "resolve the controversy."

ISSUE: Does the rule in Jones v. U.S. still stand?

HOLDING: No

DISCUSSION: In Jones, the Court "recognized that the exclusionary rule should only be available to protect defendants who have been the victims of an illegal search or seizure," but also found "it necessary to establish an exception" in those "cases where possession of the seized evidence was an essential element of the offense charged, the Court held that the defendant was not obligated to establish that his own Fourth Amendment rights had been violated, but only that the search and seizure of the evidence was unconstitutional."

However, the Court noted that "[i]n the 20 years which have elapsed since the Court's decision in Jones, the two reasons which led the Court to the rule of automatic standing have … been affected by time," and the Court has become "convinced not only that the original tenets of the Jones decision have eroded, but also that no alternative principles exist to support retention of the rule."

In the case at bar, the Court "simply decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." The Court found that the "automatic standing rule of Jones has outlived its usefulness" … and that the "doctrine now serves only to afford a windfall to defendants whose Fourth Amendment rights have not been violated."

[105] 357 U.S. 493 (1958).

Because the Court received this case as a "challenge to a pretrial decision suppressing evidence," the Court had not yet had the opportunity to decide if the two men could "establish a legitimate expectation of privacy in Zackular's mother's home."

The Court reversed the decision and remanded the case.

Rawlings v. Kentucky, 448 U.S. 98 (1980)

FACTS: Bowling Green police officers, with an arrest warrant for Lawrence Marquess for drug trafficking, arrived at Marquess' home. At the time, Marquess' housemate and four visitors were present, including Rawlings. Officers unsuccessfully searched the home for Marquess. In the course of the search, officers smelled marijuana smoke and saw marijuana seeds in plain sight. Two officers left to obtain a search warrant for the house, while the remaining officers detained the occupants. (They were told they would be allowed to leave if they would consent to a body search, two did so and were allowed to leave.) Officers returned with a search warrant for the entire house. An officer read the warrant to the remaining three occupants of the house, and also read them Miranda warnings. At that time, Rawlings was seated on the couch, next to one of the females, Cox. Cox's purse was on the couch between them.

Officer Rainey instructed Rawlings to stand to be searched, and another officer instructed Cox to empty her purse onto the table. A large quantity of controlled substances, including LSD and methamphetamine, fell from the purse. Cox told Rawlings to "take what was his" and he claimed ownership of all of the drugs. Rawlings was also in possession of $4,500 in cash and a knife. He was arrested. Rawlings stated at trial that he had asked Cox to "carry" the bag containing the drugs for him, and she had agreed. He claimed that the search of the purse invaded his privacy. The Kentucky courts found that Rawlings had no expectation of privacy in Cox's purse.

Rawlings appealed, and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Does an individual have an expectation of privacy in a purse belonging to someone else?

HOLDING: No

DISCUSSION: In examining the facts of this case, the Court found that Rawlings put the drugs in Cox's purse, having only known her a couple of days. He had no access to her purse prior to that time. He had no right to exclude others from her purse. Another individual had been in the purse earlier that same day, searching for a hairbrush. Rawlings admitted he did not expect privacy in the purse. For these reasons, the Court held that he did not have either a subjective or objective expectation of privacy in a purse belonging to another.

Rawlings' conviction was affirmed.

U.S. v. Knotts, 460 U.S. 276 (1983)

FACTS: Knotts and his two co-defendants came under suspicion when the 3M company (St. Paul) notified a narcotics investigator that Armstrong had been stealing chemicals that could be used to manufacture illicit drugs. He was placed under surveillance, and they learned that Armstrong was delivering chemicals he had purchased from another location to a co-defendant Petschen.

With the permission of the second company, Hawkins Chemical Company, the officers "installed a beeper inside a five gallon container of chloroform, a precursor chemical. When Armstrong made the purchase of the chemical, as expected, the officers followed along behind his vehicle, "maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper." In due course, the container was put into Petschen's vehicle and the convoy proceeded into Wisconsin. There, the driver began to take evasive maneuvers, and the agents dropped back, ending their visual surveillance. They also lost contact with the beeper, but with the help of a helicopter, they were able to obtain the signal again, after about an hour. At that time, the signal was stationary and was determined to be at a cabin owned by Knotts.

The officers kept the cabin under surveillance and eventually obtained a search warrant. They found a clandestine lab and enough supplies to produce a large quantity of amphetamine. They also found the chloroform container.

Knotts was charged and convicted of conspiracy to manufacture illegal drugs, but the Eighth Circuit Court of Appeals reversed the conviction. The U.S. Supreme Court accepted certiorari.

ISSUE: Does the use of a tracking device on a piece of evidence constitute an invasion of privacy?

HOLDING: No

DISCUSSION: The Eighth Circuit found the "monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated [Knotts] reasonable expectation of privacy, and that all information derived after the location of the cabin was a fruit of the illegal beeper monitoring." However, the Court noted that the "governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways," and the Court had previously addressed the "diminished expectation of privacy" in automobiles.

The Court held that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," nor was there any expectation of privacy in the "movements of objects such as the drum of chloroform outside the cabin in the 'open fields.'" In addition, "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."

The Court found that the use of the beeper did not "invade any legitimate expectation of privacy on [Knott's] part" and that as such, "there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment."

The U.S. Supreme Court reversed the judgment of the Eighth Circuit.

Arizona v. Hicks, 480 U.S. 321 (1987)

FACTS: On April 18, 1984, a bullet was fired through the floor of Hicks' apartment striking and injuring a man in the apartment below. Police officers arrived and finding no one at home at the Hicks' apartment, entered Hicks' apartment to search for the shooter, for other victims, and for weapons. They found and seized three weapons, including a sawed-off rifle, and in the course of their search also discovered a stocking-cap mask.

One of the officers noticed two sets of expensive stereo components, which seemed to be out of place in the squalid and otherwise ill-furnished apartment. Suspecting that they were stolen, he read and recorded their serial numbers, moving some of the components, including a Bang and Olufsen turntable that he recognized was extremely unusual and expensive, in order to do so. The officer then reported his findings by phone to his headquarters. On being advised that the turntable had been stolen in an armed robbery, he immediately seized the turntable. It was later determined that some of the other serial numbers, on the remaining equipment, matched numbers on stereo equipment taken in the same armed robbery. A warrant was obtained to seize that equipment as well.

Defendant moved to suppress the stereo equipment, claiming the moving of the stereo was an additional but unrelated search to the original purpose of the entry. The state court accepted the suppression, the prosecution appealed, and the appellate state courts affirmed the suppression. The case was further appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is moving an item to view a number on a hidden part of the item a violation of the Fourth Amendment?

HOLDING: Yes

DISCUSSION: The officer's moving of the equipment did constitute a "search." The officer's warrantless entry onto the premises to search for the shooter, victims, and weapons was a lawful entry into the apartment. Moving the equipment was a separate intrusion into an area of privacy unrelated to the original exigencies that justified the warrantless entry.

The moving of the stereo requires probable cause to believe it is evidence of a crime. Therefore, the search is illegal, because the entry was unrelated to the original objective of the entry. The Court distinguished, however, merely looking at an object that is already exposed to view, which is not a "search" for Fourth Amendment purposes.

The U.S. Supreme Court affirmed the decision of the Arizona court.

Minnesota v. Olson, 495 U.S. 91 (1990)

FACTS: On July 18, 1987, just before 0600, a "lone gunman robbed an Amoco gasoline station in Minneapolis, Minnesota, and fatally shot the station manager." An officer, hearing the report, immediately suspected Joseph Ecker and drove to his residence, " and the officer, and his partner, "arrive[ed] at about the same time that an Oldsmobile arrived." The driver of the Olds took "evasive action" and lost control, and the two men in the car fled on foot. Ecker, who was later confirmed to have been the gunman, was captured, but the second man escaped.

In the "abandoned Oldsmobile," the officers "found a sack of money and the murder weapon" and a title document and other documents with the name Rob Olson. The next morning, a woman called the station and said that "a man by the name of Rob drove the car in which the gas station killer left the scene and that Rob was planning to leave town by bus." She called back again, a little later that same morning, with further details and an address for two other women (Louanne and Julie) that he'd told of his plans. When they arrived at the address, they learned it was a duplex, and that the upstairs unit was occupied by Louanne and Julie Bergstrom (mother and daughter). They were not home, but the officers spoke to

Helen Niederhoffer (Louanne Bergstrom's mother), who lived in the lower unit, and she told the officers that Olson had been staying with the Bergstroms.

At about 1445, Niederhoffer called and told police that Olson had returned to the unit and police were sent to surround the house. The detective-in-charge called the unit and spoke to Julie, and told her that Rob should come out. He overheard a male voice in the background say "tell them I left," and she did so. Shortly afterward, and "[w]ithout seeking permission and with weapons drawn, the police entered the upper unit and found [Olson] hiding in a closet." Shortly after his arrest, Olson made an "inculpatory statement at police headquarters."

Eventually Olson was convicted of murder, armed robbery and assault. The Minnesota Supreme Court reversed his conviction, ruling that he "had a sufficient interest in the Bergstrom home to challenge the legality of hit warrantless arrest there, that the arrest was illegal because there were no exigent circumstances to justify a warrantless entry" and that, as a result, his statement was tainted an inadmissible. The government appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Does an overnight houseguest have some expectation of privacy in that house?

HOLDING: Yes

DISCUSSION: Minnesota argued that "Olson's relationship to the premises does not satisfy the 12 factors which in its view determine whether a dwelling is a 'home.'" The Court, however, found that "proposed test" to be "needlessly complex." Instead, the Court found that "Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." The Court noted that "[s]taying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society" and that "[w]e will all be hosts and we will all be guests many times in our lives." As such, the Court found that an overnight houseguest has a reasonable expectation of privacy in the home of a host.

The Court upheld the reversal of Olson's conviction.

Kyllo v. U.S. , 533 U.S. 27 (2001)

FACTS: In 1991, Agent Elliott of the U. S. Dept. of the Interior began to suspect that Kyllo was growing marijuana in his triplex house in Florence, Oregon. Because growing marijuana indoors requires the use of high-intensity lighting, the agent elected to use a thermal imager to scan the house. Thermal imaging units detect infrared radiation, "heat", and display it as an image based upon relative warmth in an area. The scan, done from a vehicle across the street from the front and then the back of the house, indicated that the garage roof and a side wall of the house were relatively hot compared to the rest of the house and considerably warmer than the neighboring homes. The agent concluded that Kyllo was using grow lights. Based on tips, utility bills and the results of the scan, Elliott requested and received a federal search warrant of the house and found an indoor growing operation involving more than 100 marijuana plants.

Kyllo requested a suppression of the evidence, and was denied. He entered a conditional guilty plea and filed this lawsuit. The appellate court remanded the case back to the District Court for an evidentiary hearing concerning the intrusiveness of the thermal imaging device and the District Court upheld the validity of the search warrant. The appellate court eventually (after a change in the composition of the court) affirmed the District Court opinion, holding that Kyllo had no subjective expectation of privacy

because he made no effort to conceal the heat escaping from the home. The Court also stated that the imaging device "did not expose any intimate details of Kyllo's life …."

Kyllo appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is there a reasonable expectation of privacy in the heat escaping from a residence?

HOLDING: Yes

DISCUSSION: The Court explored the issue of appropriate surveillance and noted that the Court had "previously reserved judgment as to how much technological enhancement of ordinary perception from a vantage point, if any, is too much." The Court stated that the question to be dealt with "is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." The Court continued, stating that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search – at least where (as here) the technology is not in general public use." In this case, the Court stated that it "must take account of more sophisticated systems that are already in use or in development." The Court took pains to distinguish this opinion from Dow Chemical, which "involved enhanced aerial photography of an industrial complex, which does share the Fourth Amendment sanctity of the home."

Finally, the Court held that the line must be that when "the Government uses a device that is not in general use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

The U.S. Supreme Court reversed the decision.

NOTE: This case effectively overrules LaFollette v. Commonwealth, 915 S.W.2d 747 (1996), which held that a FLIR (Forward-Looking Infrared) may be used to detect heat waste emanating from a residence, and that such information may be used to support a warrant. However, this does not mean that FLIR units may not be used for other legitimate law enforcement purposes.

Minnesota v. Carter, 525 U.S. 83 (1998)

FACTS: A police informant saw some people, through the window of an apartment, bagging white powder. An officer then observed people for several minutes in a bagging operation through the apartment window. While officers were obtaining a warrant to enter the apartment, two men, later identified as Carter and Johns, left the building and got into a car. When the car was stopped, police found cocaine and cocaine paraphernalia.

A subsequent search of the apartment uncovered cocaine residue on the kitchen table. Thompson, the apartment lessee, said she had allowed Carter and Johns to use her apartment for their bagging operation for an amount of cocaine. Carter and Johns were in the apartment for about two and one-half hours and had never been to the apartment before. Carter and Johns moved to suppress all evidence, arguing that the officer's looking through the apartment window was an unreasonable search, thus violating their Fourth Amendment rights. The Court disagreed and denied the suppression; Carter was convicted. He appealed, and the Minnesota appellate courts found that he did have an expectation of privacy and suppressed the evidence. The U.S. Supreme Court eventually accepted certiorari.

ISSUE: Does a visitor for a short time (not overnight) have an expectation of privacy in another's home?

HOLDING: No

DISCUSSION: The Supreme Court held that Carter and Johns had no legitimate expectation of privacy in the apartment as they were in the apartment one time, for a short time, and were there for a commercial purpose only. Since they had no expectation of privacy, there was no need to determine whether the officer's looking through the window was a search.

The Court distinguished these cases from Minnesota v. Olson,[106] when they held that a social overnight guest in one's home would have an expectation of privacy in the premises. They said that overnight guests in a home may challenge the legality of a search, but one who is merely present with the consent of the householder could not.

The U.S. Supreme Court reversed the decision.

U.S. v. Knights, 534 U.S. 112 (2002)

FACTS: Knights was sentenced to probation for a drug offense by a California court. The order subjected Knights to the possibility of warrantless search at any time, by any probation or law enforcement officer. Knights agreed to this provision.

During that time, Knights (and a friend, Simoneau) became the primary suspects in a series of vandalism and arson incidents against Pacific Gas & Electric that eventually totaled well over a million dollars in damage. Det. Hancock of the Napa County Sheriff's Department had noticed a correlation between the date of Knights' court appearance on the charge of theft of PG&E services and the incidents of vandalism. He and Simoneau had also been stopped near a PG&E line, in possession of gasoline. Immediately after a major arson fire at a PG&E location, Det. Hancock began a surveillance of Knights' residence and at the time, Simoneau's truck was parked in front. At about 3 a.m., Simoneau emerged carrying three cylindrical objects, which Det. Hancock believed were pipe bombs. Simoneau walked across the street to the Napa River and Hancock heard three splashes; Simoneau returned without the objects. He then drove a distance away, parked in a driveway, and walked away. Hancock entered the driveway and observed, in the truck, a Molotov cocktail, explosive materials, a gasoline can and two brass padlocks that fit the description of those removed from a PG&E transformer vault that had been damaged. Det. Hancock then decided to return and search Knights' residence, since he was aware of the provisions of Knights' probation. During the search of Knights' residence, Hancock found detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia and another brass padlock, stamped "PG".

Knights was arrested and charged. He moved for suppression of the evidence found during the search. The District Court accepted the suppression on the basis of the search being investigatory rather than for probationary purposes. The Ninth Court of Appeals affirmed this decision. (The California Supreme Court had rejected the distinction and had consistently upheld such searches.) The U.S. Supreme Court accepted certiorari.

[106] 495 U.S. 91 (1990).

ISSUE: Are search conditions placed upon probationers limited to searches with a probationary purpose?

HOLDING: No

DISCUSSION: The Court stated "there are dual concerns with a probationer." The first is "the hope that he will successfully complete probation and be integrated into the community." The second reason, however, is the legitimate concern that the probationer "will be more likely to engage in criminal conduct than an ordinary member of the community." The Court concluded that all that is required is that there was a "degree of individualized suspicion" that there is a "sufficiently high probability that criminal conduct is occurring…." While "the Fourth Amendment ordinarily requires the degree of probability embodied in the term probable cause, a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable," such as in the case of probationers, who have a "significantly diminished privacy interest." The same logic also led the Court to conclude that a warrant is unnecessary when there is a diminished expectation of privacy.

The U.S. Supreme Court upheld the search.

O'Connor v. Ortega, 480 U.S. 709 (1987)

FACTS: In July, 1981, Dr. Dennis O'Connor, Director of Napa State Hospital, became concerned about problems with Dr. Magno Ortega. Dr. Ortega was responsible for the training of young physicians in the psychiatric residency. Dr. Ortega went on leave while a team made an investigation of the allegations and eventually, he was terminated.

During the investigation, the team entered Ortega's office "to secure state property." During that search, they discovered that Ortega had taken his computer home. They searched the office thoroughly and seized a number of items that were later used in his hearing to impeach a witness. They had also seized papers relating to private patients. Ortega eventually filed suit against the hospital officials and the the lower courts held that the search violated his right to privacy.

ISSUE: Does an employee have an expectation of privacy in their workplace?

HOLDING: No

DISCUSSION: The Court stated that Ortega's rights were violated "only if the conduct of the Hospital officials at issue in this case infringed an expectation of privacy that society is prepared to consider reasonable." The Court outlined the areas related to work that are within an employer's control and stated those areas are the province of the employer, even though an employee may be allowed to place personal items there. This would not extend to closed luggage, such as handbags and briefcases, however. The Court also stated that employees may expect privacy against intrusions by law enforcement but that employees never have a reasonable expectation of total privacy in their place of work when supervisors are involved.

The U.S. Supreme Court reversed the lower court's decision.

Riley v. California / U.S. v. Wurie, --- U.S. --- (2014)

FACTS: In the first case, Riley was stopped in Los Angeles police for expired registration tags, it was then learned that his license was also suspended. His car was impounded and searched pursuant to the agency's inventory policy. Two handguns were found, and Riley was then arrested for the concealed weapons. Riley was searched and items associated with gang activity were found. The officer seized Riley's smart phone from his pocket, "accessed information on the phone and noticed that some words (presumably in text messages or a contacts list)" also suggested involvement in gang activity.
Two hours later, a detective specializing in gangs "further examined the contents of the phone," looking for potential evidence such as photos or videos. He found, in particular, a photo of Riley standing in front of a vehicle suspected of being involved in a recent shooting. Riley was charged in that shooting, with enhancements for committing the crimes to benefit a criminal gang. Riley moved to suppress the evidence obtained from the phone, which was denied. Riley was convicted and the California appellate courts affirmed his conviction.

In the second case, Wurie was observed by Boston police during routine surveillance making an "apparent drug sale from a car." He was arrested, taken to the station and two phones were seized. One, a "flip phone," was 'repeatedly receiving calls" from a number identified on the phone's external screen as "my home." They opened it and saw, as the phone's wallpaper, a woman and a baby. They were able to track the number to an apartment building. There, they saw that Wurie's name was on the mailbox and through a window, saw a woman who appeared to be the one in the photo. They secured the apartment, obtained a search warrant and eventually found drugs, weapons and cash. Wurie, a felon, was charged with distribution of drugs and possession of the firearms. He moved for suppression and was denied. He was convicted but upon appeal, the First Circuit Court of Appeals reversed his conviction.

In both cases certiorari was requested and the U.S. Supreme Court granted review.

ISSUE: May a cell phone be routinely searched incident to arrest?

HOLDING: No

DISCUSSION: The Court noted that both cases "concern the reasonableness of a warrantless search incident to a lawful arrest." In Weeks v. U.S., the Court had ruled that it had long been recognized that it was permissible to "search the person of the accused when legally arrested to discover the seize the fruits or evidences of crime."[107] Although usually called an exception, in fact, the Court agreed, that was "something of a misnomer," since "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." Since that time, the scope of such searches has been debated, with three specific cases illustrating the parameters of the argument.

In Chimel v. California, the Court "laid the groundwork for most of the existing search incident to arrest doctrine."[108] In Chimel, the Court agreed it was reasonable to search the person to remove any weapons or items that might be used to aid in an escape. It further noted it was "entirely reasonable for the arresting officer to search for and seize any evidence … to prevent its concealment or destruction." In U.S. v. Robinson, the court applied the rule to the contents of a cigarette package found on the person

[107] 232 U.S. 383 (1914).
[108] 395 U. S. 752 (1969).

of an arrested subject and ruled that a "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."[109] That was clarified in U.S. v. Chadwick, however, which ruled that a locked footlocker in the possession of the arrested subject could not be searched incident to arrest.[110] Finally, in Arizona v. Gant, the Court emphasized that "concerns for officer safety and evidence preservation underlie the search incident to arrest exception."[111]

Moving to the specific issue of "how the search incident to arrest doctrine applies to modern cell phones," the Court noted that they "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Although such phones were unknown just ten years ago, now, it noted "a significant majority of American adults now own such phones." Even though Wurie's was a "less sophisticated" phone than Riley's, that model had only "been around for less than 15 years." Both were based on technology that was "nearly inconceivable" when Chimel and Robinson were decided.

The Court noted that balancing tests created in earlier cases simply did not apply 'with respect to digital content on cell phones" and found little to no risk of harm or destruction of evidence "when the search is of digital data." Although an arrested subject loses a great deal of privacy rights, "cell phones … place vast quantities of personal information literally in the hands of individuals."

Further, the Court agreed:

> Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Although the Government in both cases suggested that there might be indirect ways that searching the phone might protect officers, the Court found that there had been no proof in either case that such "concerns are based on actual experience.' To the extent that a particular case might have such an issue arise, the Court found it to be "better addressed" by treating it as a specifically articulated exigency based upon specific facts.

In both cases, the Government focused primarily, however, on the destruction of evidence prong. In both cases, it was argued that:

> … that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing").

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[109] 414 U. S. 218 (1973)
[110] 433 U. S. 1 (1977)
[111] 556 U.S.332 (2009); A further exception allowed under Gant, searching for evidence related to the crime of arrest, stemmed from "circumstances unique to the vehicle context."

In addition, it argued that encryption is a security feature in some phones, used along with passwords/codes. When locked, the information is inaccessible unless the password is known. In the case of remote wiping, the primary concern is not with the arrested subject, who cannot access the phone, but with third parties. However, the Court noted that it had been given no evidence that "either problem is prevalent" – as it had been provided with "only a couple of anecdotal examples of remote wiping triggered by an arrest.' With respect to searching a phone before the password triggers the phone to lock down, the Court noted that law enforcement officers are "very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity."

> Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

The Court noted that remote wiping can be prevented by disconnecting the phone from the network, by turning it off, removing the battery or placing the phone in a Faraday bag to isolate it from signals. While this is not necessarily a "complete answer to the problem," it is, at least a reasonable response, already in use by some law enforcement agencies. The Court agreed, however that if there truly is an exigent circumstances, especially one with life-or-death consequences, "they may be able to rely on exigent circumstances to search the phone immediately."[112] Or, if the phone is unlocked, secure it so that it does not automatically lock.[113] The theoretical threat of a remote wipe of the data, alone, is <u>not</u> sufficient, however, to be considered an exigent circumstances, particularly since it can be, as a rule, prevented by alternative means.

The Court agreed that although an arrested subject has "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." Despite the assertion that a search of a cell phone, in the context of an arrest, is "materially indistinguishable" from the search of other items in their possession.

The Court continued:

> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only narrow intrusion on privacy. Most people cannot lug around every

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[112] <u>Missouri v. McNeely</u>, 133 S.Ct. 1552 (2013).
[113] See <u>Illinois v. McArthur</u>. 531 U.S. 326 (2001).

> piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in Chadwick, rather than a container the size of the cigarette package in Robinson.
>
> In addition, a cell phone can contain "many distinct types of information" that together can be used to reconstruct "the sum of an individual's life." The Court contrasted a note with a person's phone number to a "record of all … communications" – and in some cases, the content of that communications, with that same individual, as might be found on a cell phone. Normally, a person would not carry about "sensitive personal information" every day, but now, that is done routinely. The Court noted that the vast majority of adults 'keep on their person a digital record" of their lives, from the "mundane to the intimate." Not only in quantity is it different, but also in quality – for example, an Internet browsing history, historic location data, various apps that might suggest a person's private life.
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> In U.S. v. Kirschenblatt, it was observed that : it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him."[114] However, "If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."
>
> To further complicate matters, a cell phone may be used to access a wealth of data located elsewhere, in what is called "cloud computing." In fact, it may not even be readily known whether a particular piece of data is one the phone itself … or located elsewhere and simply being access through the phone. Arguing that such data would be access with would be analogous to "finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house."

The Court noted that agencies should, of course have protocols, but that "the Founders did not fight a Revolution to gain the right to government agency protocols." All of the options argued before the court were found to be unfeasible and unacceptable, The Court emphasized. However, that it was not holding that a cell phone is immune from search, only that a warrant will generally be required prior to a search, unless another recognized exigent circumstance applies.

The Court concluded:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.
>
> …
>
> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," The fact that technology

[114] 16 F.2d 202 (2nd Cir. 1926).

> now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.

The Court reversed the judgment in Riley and affirmed the judgment in Wurie.

PROBABLE CAUSE

Draper v. U.S., 358 U.S. 307 (1959)

FACTS: On the day in question, Marsh was an experienced narcotics agent (29 years), stationed in Denver; Hereford was a paid informant considered accurate and reliable. On September 3, 1956, "Hereford told Marsh that James Draper …recently had taken up abode at a stated address in Denver and 'was peddling narcotics to several addicts' in that city." Several days later, he told Marsh that Draper had gone to Chicago and picked up heroin, and would be bringing it back to Denver, by train on one of two stated days. He also provided a detailed description of Draper.

Marsh and a Denver PD officer went to the train station at the time indicated. They did not see Draper at that time, but the next morning, Draper did arrive. He had the "exact physical attributes and [was] wearing the precise clothing described by Hereford, straight from an incoming Chicago train and start walking 'fast' toward the exit." Draper was "carrying a tan zipper bag." Marsh and the Denver officer "overtook, stopped and arrested" Draper. During the search they found two envelopes of heroin and the syringe.

Draper was charged with various narcotics offenses. The evidence was admitted over his objections; he appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: May an officer act based upon information given by a informant with a proven record of reliability?

HOLDING: Yes

DISCUSSION: The Court stated that the "crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh 'probable cause' within the meaning of the Fourth Amendment, and 'reasonable grounds' within the meaning … to believe that [Draper] had committed or was committing a violation of the narcotic laws."

Draper argued that "(1) that the information given by Hereford to Marsh "was 'hearsay' and, because hearsay is not legally competent evidence in a criminal trial, could not legally have been considered, but should have been put out of mind, by Marsh in assessing whether he had 'probable cause' and 'reasonable grounds' to arrest [Draper] without a warrant, and (2) that, even if hearsay could lawfully have been considered, Marsh's information should be held insufficient to show 'probable cause' and 'reasonable grounds' to believe that [Draper] had violated or was violating the narcotic laws and to justify his arrest without a warrant."

However, the U.S. Supreme Court quickly determined that it was appropriate for the agent to consider the hearsay testimony of a reliable informant and affirmed the conviction.

Exclusionary Rule

Mapp v. Ohio, 367 U.S. 643 (1961)

FACTS: On May 23, 1957, three Cleveland police officers arrived at Mapp's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Upon their arrival at the house, the officers knocked on the door and demanded entrance, but Mapp, after telephoning her attorney, refused to admit them without a search warrant.

Some three hours later, the officers (now with four additional officers) again sought entrance. When Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened. Mapp was halfway down the stairs from the upper floor to the front door when the officers, "in this highhanded manner, broke into the hall." She demanded to see the search warrant. A paper, which the officers claimed to be a warrant, was held up by one of the officers. They struggled over the document, and Mapp was restrained.

Still in handcuffs, Mapp was forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers. The search continued to a child's bedroom, the living room, the kitchen, and a dinette. The basement of the building and a trunk found there were searched. She was eventually charged and convicted with possession of obscene materials located in that trunk. At trial, no search warrant was produced, nor was the failure to produce one explained or accounted for. The State argued that even if the search was made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial. Mapp was convicted.

Mapp appealed, and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is evidence seized in violation of the Fourth Amendment admissible at trial?

HOLDING: No

DISCUSSION: The Court reviewed the history of the development of the Exclusionary Rule as applied to federal courts and state courts, citing a number of cases. The Court concluded that to deter unlawful police conduct, evidence seized in violation of the Fourth Amendment is not admissible at trial.

The U.S. Supreme Court reversed the conviction and remanded the case.

Nix v. Williams, 467 U.S. 43 (1984)

FACTS: On December 24, 1968, Pamela Powers, age 10, was abducted from a YMCA in Des Moines, Iowa. In the same time period, Williams was seen leaving the building carrying a large bundle wrapped in a blanket. A witness stated he had seen two legs protruding from the blanket. The next day, Williams' car was found, 160 miles away, in Davenport, Iowa. Later, several items of Powers' clothing and a blanket were found at a rest stop between Des Moines and Davenport. Police obtained a warrant for Williams and initiated a large-scale search of the areas on either side of the highway.

Williams surrendered to police in Davenport. Des Moines police informed his attorney that they would pick up Williams in Davenport and bring him back to Des Moines, without interrogating him. However, on the return trip, one of the detectives spoke to Williams about Power's body being out in the snow, how it may prove impossible to find, and about how her parents deserved to give her a Christian burial. Det. Leaming told Williams he didn't expect an answer, that he simply wanted him to "think about it."

As the car approached Grinnell, Williams asked the detectives if the girl's shoes had been found, and directed them to a point, but the shoes were not there. He repeated the question, this time asking about the blanket at the rest stop, but again, they did not find the blanket, as it had already been located. Finally, as the approached Mitchellville, Williams agreed to show them where the child's body had been left. The officers involved in the search stopped at 3 p.m., when they joined Williams and the detectives at the rest stop. Later, after the body was discovered, it was found that the team was only two and one-half miles from the child's body and the area was within the area scheduled to be searched.

At his trial for first-degree murder, Williams requested but was denied suppression of the body and all related evidence as the "fruit" of an improper interrogation. The appellate court decided that the admission was improper. The U.S. Supreme Court accepted certiorari and affirmed that holding, however, the Court stated that although Williams' incriminating statements could not be used, the location of the body and other evidence "might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams."

At the second trial, the prosecution entered into evidence the child's body, clothing and other evidence that had been found. The trial court agreed that the state had proved that the evidence would have been discovered "within a short time" and in "essentially the same condition as it was actually found." The appellate court reversed the decision, and the prosecution appealed. The U.S. Supreme Court accepted certiorari a second time.

ISSUE: May evidence that would likely have been found independent of information gained improperly admissible?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the Exclusionary Rule, which rejects evidence collected by law enforcement through improper means. However, while "derivative evidence," that evidence which is spawned by illegally collected evidence, is impermissible, the "independent source" doctrine allows that evidence that is found independent of any police misconduct is admissible. As a balance, the Court concluded that the deterrent effect of the Exclusionary Rule has little basis when it would prohibit evidence that "would have been discovered by lawful means ..." and that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."

The U.S. Supreme Court reversed the appellate decision and remanded the case.

See also: *Wilson v. Com., 37 S.W.3d 745 (Ky., 2001) - connection between police misconduct and evidence seized so attenuated that the "taint" had been dissipated.*

Segura v. U.S., 468 U.S. 796 (1984)

FACTS: In January, 1981, New York drug enforcement officers "received information indicating that … Segura and … Colon probably were trafficking in cocaine from their … apartment." They began surveillance over the two at that time. On February 9, they saw a meeting between Segura and Rivudalla-Vidal, during which, it was later learned, the two men "discussed the possible sale of cocaine." On February 12, they agreed "that the delivery [of the cocaine] would be made at 5 p.m." at a designated location. The officers observed the transaction, during which Colon delivered "a bulky package" to another party, Parra, who had remained outside in a vehicle. The agents followed Rivudalla-Vidal and Parra back to an apartment and stopped them as they were about to go inside. Parra was found to be in possession of cocaine. After being advised of his Miranda rights, Rivudalla-Vidal "agreed to cooperate with the agents" and gave them futher information. The agents sought authorization to arrest Segura and Colon, but were told that due to the lateness of the hour, they would not be able to get a search warrant until the next day. They were instructed to "secure the premises to prevent the destruction of evidence."

They set up surveillance. At 2315, Segura arrived, alone, and was arrested. He stated he did not live in the building. The agents took him to his third floor apartment, and knocked – and a woman (Colon) answered. The agents proceeded inside, "without requesting or receiving permission." There were three other persons in the living room and they were "informed by the agents that Segura was under arrest and that a search warrant for the apartment was being obtained." The agents then "conducted a limited security check of the apartment to ensure that no one else was there who might pose a threat to their safety or destroy evidence." During that process, they saw, in plain view, scales, lactose and small cellophane bags, all indications of drug trafficking. They did not collect these items as evidence at the time, but did arrest Colon. During the search incident to her arrest, they found a loaded revolver and $2,000 in cash.

For reasons characterized as an "administrative delay," the warrant was not presented to the magistrate and signed until 5 p.m. the next day, approximately 19 hours after the entry took place. The search that ensued revealed close to three pounds of cocaine, ammunition fitting the revolver Colon possessed, more than $50,000 in cash and transaction records. All of these items, as well as the material found in plain view, were seized.

The defendants moved to have all of the evidence, including that found in plain view, suppressed; the District Court agreed. The court "ruled that there were no exigent circumstances justifying the initial entry into the apartment." The Court further "reasoned that [the] evidence would not necessarily have been discovered because, absent the illegal entry and 'occupation' of the apartment, Colon might have arranged to have the drugs removed or destroyed, in which event they would not have been in the apartment when the warrant search was made."

The Second Circuit Court of Appeals agreed that the "initial warrantless entry was not justified by exigent circumstances and that the evidence discovered in plain view during the initial entry must be suppressed." However, the Court did permit the "evidence seized under the valid warrant executed on the day following the initial entry," finding the District Court's reasoning "prudentially unsound" to suppress the evidence "simply because it could have been destroyed had the agents not entered."

Segura appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is evidence initially found during an unlawfully search admissible if collected under a valid search warrant not based upon the initial, invalid search?

HOLDING: Yes

DISCUSSION: The government chose not to appeal the decision concerning the items found during the initial sweep of the premises and the Court considered only "whether drugs and other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed." The Court noted that it had "been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.[115] "It is not to be excluded, for example, if police had an 'independent source' for discovery of the evidence.[116]"

The Court noted that "[t]he sanctity of the home is not to be disputed." "But," the Court continued, "the home is sacred in Fourth Amendment terms not primarily because of the occupants' possessory interests in the premises, but because of their privacy interests in the activities that take place within." The Court held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." However, a warrantless search is a different matter. "In this case, the agents entered and secured the apartment from within. Arguably, the wiser course would have been to depart immediately and secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody were in the apartment." However, the "initial entry – legal or not – does not affect the reasonableness of the seizure." The individuals with the most interest in the premises (Segura and Colon) were under arrest, so their interest in the property was negligible. In addition, "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant" and thus "constituted an independent source for the discovery and seizure of the evidence now challenged."

The U.S. Supreme Court affirmed the judgment and held that the drugs, the cash records and the ammunition were properly admitted.

U.S. v. Leon, 468 U.S. 897 (1984)

FACTS: After an investigation, which included an anonymous tip, officers applied for a warrant to search three houses and the automobiles of three suspects, of which Leon was one. The warrant was issued and the searches yielded large quantities of drugs and other evidence. During a suppression hearing, the Court found the warrants, while accurate on their face, were unsupported by probable cause. As such, the evidence was suppressed. The cases were eventually dismissed for lack of evidence.

The prosecution argued that since the officers who executed the warrant were acting in good faith, in reliance of a warrant, it was inappropriate to suppress the evidence. The U.S. Supreme Court accepted certiorari.

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[115] Nardone v. U.S., 3028 U.S. 379 (1937).

[116] Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920); see also Wong Sun, supra; U.S. v. Crews, 445 U.S. 463 (1980); U.S. v. Wade, 388 U.S. 218 (1967); Costello v. U.S., 365 U.S. 265 (1961).

ISSUE: Is there a "good faith" exception to the Exclusionary Rule?

HOLDING: Yes

DISCUSSION: The Exclusionary Rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. The deterrent purpose of the Exclusionary Rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. Evidence obtained from a search should be suppressed only if the law enforcement officer had knowledge, or should have known, that the search was unconstitutional. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill a greater degree of care toward the rights of an accused.

> When an officer, acting with objective good faith, has obtained a search warrant from a judge or magistrate and acted within its scope, there is no police illegality to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the warrant is technically sufficient. Once the warrant is issued, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.
>
> Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime, we have expressed a strong preference for warrants and declared that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail. Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination.
>
> Deference to the magistrate is not boundless. First, a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for the police. A magistrate failing to manifest that neutrality and detachment acts as an adjunct law enforcement officer, and cannot provide valid authorization for an otherwise unconstitutional search. Third, the warrant must be based on an affidavit that provides the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

The U.S. Supreme Court reversed the decision.

See also: U.S. v. Baxter, 889 F.2d 731 (6th Cir 1989)

U.S. v. Murray, U.S. v. Carter, 487 U.S. 533 (1988)

FACTS: On April 6, 1983, at about 1345, Boston officers had Murray, Carter and others under surveillance. They observed Murray driving a truck and Carter a green camper into a "warehouse

in South Boston." They left about 20 minutes later and as they left, the agents saw "within the warehouse two individuals and a tractor-trailer rig bearing a long, dark container." Murray and Carter later turned over the truck and camper to other drivers who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Marijuana was found in both vehicles. Once they got this information, the officers in South Boston forced entry into the warehouse. There was no one in the warehouse, but they saw, in plain view, "numerous burlap-wrapped bales that were later found to contain marijuana." The officers took no further action, but left the bales as they were and they "did not reenter [the warehouse] until they had a search warrant." They did not mention the prior entry when they applied for the warrant, nor did they use any of their observations made in the entry in the application. They received the warrant some 8 hours after the entry and seized 270 bales of marijuana and lists of customers.

Murray and Carter requested suppression of the evidence found in the warehouse. The trial court denied suppression and they were convicted. The First Circuit Court of Appeals affirmed the convictions; both appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Does the "independent source" doctrine permit the introduction of evidence found during an unlawful search, if later found again during a valid warrant search?

HOLDING: Yes

DISCUSSION: The Court noted that the "exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search"[117] and of testimony concerning knowledge acquired during an unlawful search."[118] In addition, "the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the produce of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint."[119] However, as the exclusionary rule was being developed, the Court also "announced what has come to be known as the 'independent source' doctrine."[120]

The "dispute [in this case] is over the scope of this doctrine." Murray and Carter argued that "it applies only to evidence obtained for the first time during an independent lawful search." The prosecution, however, argued "that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." The Court concluded however, that "the Government's view has better support in both precedent and policy."

In this case, the Court noted that "[k]knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry." "But," the Court continued, "it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply." Applying the exclusionary rule in the way argued by Murray and Carter "would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one." The Court found that "while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." The Court concluded by stating that "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tained one (which may well be difficult to establish where the seized

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[117] Weeks v. U.S., 232 U.S. 383 (1914)
[118] Silverman v. U.S., 365 U.S. 505 (1961).
[119] Nardone v. U.S., supra; Wong Sun v. U.S., supra.
[120] Silverthorne Lumber Co. v. U.S., supra.

goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply." So, the "ultimate question … is whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue here."

The U.S. Supreme Court determined that the agents had not revealed what they learned in the warehouse to the magistrate, nor did they include in the warrant affidavit anything learned there. The Court remanded the case back to the District Court (the trial court) to determine if the "agents would have sought the warrant if they had not earlier entered the warehouse."

CONSTRUCTIVE POSSESSION

Ulster County Court v. Allen, 442 U.S. 140 (1979)

FACTS: On March 28, 1973, three adult men (including Allen) and a 16 year old girl were riding together in a vehicle, in New York, when they were stopped for speeding. The officer spotted two handguns "positioned crosswise in an open handbag on either the front floor or the front seat of the car on the passenger side" where the girl was seated, and she admitted the purse was hers. The officers pried open the trunk and found a machine gun and over a pound of heroin. (The vehicle belonged to the driver's brother, and had been borrowed earlier that day; none of the occupants of the vehicle had a key.)

All four were charged and eventually convicted of possession of the handguns found inside the car, but were acquitted of possession of the contents of the trunk. All four objected to the introduction into evidence of the guns and the drugs, "arguing that the State had not adequately demonstrated a connection between their clients and the contraband." Relying on a New York statute that permitted the assumption that the "presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle", the state court upheld the conviction. (The presumption did not apply when the weapon was found "upon the person" of one of the occupants of the vehicle.) The three men argued that "the guns were found on the person of" the girl.

Following their conviction, the three men appealed, arguing that the statute was unconstitutional. The conviction was affirmed. The New York appellate court "recognized that in some circumstances the evidence could only lead to the conclusion that the weapons were in one person's sole possession" but held that it was a jury question in each case. Allen filed a habeas corpus request and the District Court held that the "mere presence of two guns in a woman's handbag in a car could not reasonably give rise to the inference that they were in the possession of the three other persons in the car." The Second Circuit Court of Appeals affirmed and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is it reasonable presume that passengers in a vehicle are aware of visible weapons, and are thus jointly in legal possession of those weapons?

HOLDING: Yes

DISCUSSION: The Court noted that "[a]s applied to the facts of this case, the presumption of possession is entirely rational." The Court found that it was "highly improbable that she was the sole custodian of those weapons." The guns in question "were too large to be concealed in her handbag" and were readily accessible to the driver and even the two rear seat passengers. Instead, it was more likely that the other passengers tried to "conceal their weapons in a pocketbook in the front seat." The court equated it to a situation in which the "guns were lying on the floor or on the seat of the car in the plain

view of the three other occupants of the automobile," and that it was "surely rational to infer that each of the [men were] fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over the weapons."

The U.S. Supreme Court reversed the judgment of the lower court.

Maryland v. Pringle, 540 U.S. 366 (2003)

FACTS: On August 7, 1999, a Baltimore County police officer stopped a vehicle for speeding. Inside the vehicle were Partlow, the owner and driver, Pringle, sitting in the front passenger seat and Smith, who was sitting in the back seat. When asked, Partlow produced his registration from the glove compartment. When he opened it, the officer spotted a "large amount of rolled-up money." The officer checked Partlow's record, via computer, and found it clean. He asked Partlow to step out of the car and gave him an oral warning. When a second officer arrived, Partlow was asked if he had "any weapons or narcotics" in the car, and he replied that he did not. He "then consented to a search of the vehicle." Officers found $763 in the glove compartment. When they pulled down the back seat armrest, which had been in the upright position between the seats initially, the found five plastic baggies of cocaine.

None of the men admitted ownership of the drugs or the money, and the officer arrested all three of the men. Later that day, Pringle waived his Miranda rights and gave a confession (oral and written) that "the cocaine belonged to him" and that the other two men in the car knew nothing of the drugs. Partlow and Smith were released.

At trial, Pringle requested a suppression of his confession, claiming that it came as a result of an illegal warrantless arrest that was not supported by probable cause. The trial court disagreed, however, and a jury convicted Pringle of possession with intent to distribute cocaine and possession of cocaine. A Maryland appellate court affirmed that decision, but the Court of Appeals of Maryland[121] reversed, holding that "absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs," that the evidence was "insufficient to establish probable cause for an arrest for possession."

Pringle appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: May an officer arrest all occupants in a vehicle for "constructive possession" of drugs hidden inside the passenger compartment of the vehicle?

HOLDING: Yes

DISCUSSION: The Court noted that the "probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends upon the totality of the circumstances." The Court found it to be "an entirely reasonable inference … that any or all three of the occupants had knowledge of, and exercised dominion over, the cocaine." The Court went on to state that "a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly."

Pringle had tried to argue that his arrest was merely "guilt by association," but the Court did not agree, stating there was a difference between the facts in Ybarra v. Illinois[122] and the instant case. In Ybarra,

[121] The Maryland Court of Appeals is the highest court in the Maryland state judicial system.
[122] 444 U.S. 85 (1979).

the defendant was a customer in a public tavern, but in this case, the defendant, Pringle, entered a small vehicle with two others and the Court found it "reasonable for the officer to infer a common enterprise among the three men."

The Court upheld the conviction.

MISCELLANEOUS SEARCH ISSUES

Muehler v. Mena, 544 U.S. 93 (2005)

FACTS: Officers Muehler and Brill (Simi Valley, CA, P.D.), along with others, were involved in an investigation of a "gang-related drive by shooting." During their investigation, they developed information that one of the gang members lived at 1363 Patricia Avenue and that the "individual was armed and dangerous, since he had recently been involved in the drive by shooting." Muehler requested and received a search warrant for that address. Because of the risk assessment, it was decided that SWAT would assist in securing the house prior to the search.

On February 3, 1998, at 7 a.m., the search warrant was executed. SWAT members entered Iris Mena's bedroom, where she was sleeping. She was awakened and handcuffed, along with three other people found on the property. They were all taken to a converted garage, outfitted as a bedroom. (At some point, Mena was allowed to dress, but apparently did not have on any shoes.) As the team fanned out to do the search, Mena and the others were guarded by one or two officers, who allowed them to move about but did not remove their handcuffs. Because the gang (the West Side Locos) was known to include illegal aliens, the officers had contacted the Immigration and Naturalization Service (INS) and an INS officer was with the team. During the search, the INS officer "asked for each detainee's name, date of birth, place of birth, and immigration status," and later asked for their actual papers. "Mena's status as a permanent resident was confirmed by her papers." During the search, the officers recovered a variety of items, including one handgun. After approximately three hours, Mena was released from the handcuffs and she was never formally arrested as a result of the search.

Mena filed suit under 42 U.S.C. §1983, alleging that the detention was "for an unreasonable time and in an unreasonable manner," that the warrant was overbroad, that the officers failed to "knock and announce," that they had needlessly destroyed property during the search, and that the questioning concerning her immigration status was inappropriate. The officers requested summary judgment based upon qualified immunity, and received it only on the issue of the warrant's breadth.

At trial, the jury agreed with most of Mena's arguments and the officers appealed. The Ninth Circuit affirmed the judgment, including the denial of qualified immunity, finding that it was a violation of the Fourth Amendment and objectively unreasonable to hold Mena for the length of time, and that, further, the questioning regarding her status was a separate violation. The officers appealed and the U.S. Supreme Court accepted certiorari.

ISSUES: 1) May law enforcement officers hold an individual in handcuffs for the duration of the time a search is being conducted of their property?

2) During the course of an otherwise lawful detention, may officers ask questions concerning immigration status?

HOLDINGS: 1) Yes
2) Yes

DISCUSSION: First, the Court addressed the issue of the handcuffing. In Michigan v. Summers,[123] the Court held that officers are permitted "to detain the occupants of the premises while a proper search is conducted." The Court noted that "[s]uch detentions are appropriate ... because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." Under the Summers standard, the Court reasoned, "Mena's detention was ... plainly permissible" because she was a resident of the home that was the subject of the search warrant.
The Court stated that "[i]nherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." The Summers case "itself stressed that the risk of harm to officers and occupants is minimized 'if the officers routinely exercise unquestioned command of the situation.'"

The Court concluded its discussion of this particular issue by stating that "[t]he imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to detention in the converted garage," and was, admittedly, "more intrusive" than the detention described in Summers. However, it also stated that "[t]his was no ordinary search." Given the circumstances known to the officers, and "[i]n such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants." In addition, "the need to detain multiple occupants made the use of handcuffs all the more reasonable."

Mena had also argued that even if the initial detention in handcuffs was reasonable, that the "duration of the use of handcuffs made the detention reasonable." However, while the court noted that the length of time could be a factor, but in this particular situation, the length of time and the circumstances were reasonable.

On the second issue, Mena argued, and the Ninth Circuit agreed, that the "officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention." They concluded that the "officers were required to have independent reasonable suspicion in order to question Mena concerning her immigrant status because the questioning constituting a discrete Fourth Amendment event." But, the Court stated, "the premise is faulty."
The Court noted that it had "held repeatedly that mere police questioning does not constitute a seizure."[124] The Court continued by saying that even with "no basis for suspecting a particular individual,"[125] that officers may ask questions and ask for consent to search property. The lower court had determined that the questioning did not lengthen Mena's detention, but was concurrent with it, and as such, there was no additional seizure. "Hence," the Court concluded, "the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status."

The Court vacated the Ninth Circuit's opinion, and remanded the case back for further proceedings consistent with its opinion.

NOTE: In this case, there was no allegation of anything beyond generalized physical discomfort from the handcuffs. Actual prolonged pain or physical injury as a result of handcuffs used improperly has been consistently held to be actionable.

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[123] 452 U.S. 692 (1981).
[124] Florida v. Bostick, 501 U.S. 429 (1991).
[125] Id.

SEARCH WARRANTS

Taylor v. U.S., 286 U.S. 1 (1932)

FACTS: "During the night, November 19, 1930, a squad (six or more) of prohibition agents while returning to Baltimore city discussed premises 5100 Curtis Avenue, of which there had been complaints 'over a period of about a year.'" At about 0230, they went to a garage at that address. As the officers approached, they "got the odor of whisky coming from within" and looked inside. They saw "cardboard cases which they thought probably contained jars of liquor." The officers broke in and found 122 cases of whisky. During the search, Taylor emerged from the houses on the same premises. He was arrested and eventually convicted. Taylor appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Absent specific exigent circumstances, must an officer get a search warrant for an area in which an individual would have an expectation of privacy?

HOLDING: Yes

DISCUSSION: The Court noted that "[a]lthough over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search." In addition, "[t]hey had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions" as "there was no probability of material change in the situation during the time necessary to secure such warrant."

The Court found "the action of the agents … inexcusable and the seizure unreasonable." The Court found that officers "may rely on a distinctive odor (in this case, of whisky) as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guaranties against unreasonable search."

The Court reversed Taylor's conviction.

Search Warrant Affidavit

Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct 1031 (1971)

FACTS: Carbon County (Wyoming) Sheriff Ogburn, acting on a tip, requested a warrant for Harold Whiteley for burglary and theft from a local business. The affidavit read as follows:

> *I, C.W. Ogburn, do solemnly swear that on or about the 23 day of November, A.D. 1964, in the County of Carbon and the State of Wyoming, the said Harold Whitely and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building…"*

The description of the business followed. The information on Whiteley and Daley was transmitted to other agencies. As a result of this BOLO, a Laramie police officer located and arrested Whitely and searched his vehicle, finding a number of items from the burglary. Whiteley challenged the introduction of the evidence, the trial court denied that objection, and the appellate court upheld that denial. He appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is a bare-bones conclusion sufficient to support a warrant?

HOLDING: No

DISCUSSION: The Court stated that while the Laramie officers were entitled to act upon the strength of the information they were given, that did not excuse what was otherwise an invalid warrant and the evidence obtained should have been excluded at trial.

The U.S. Supreme Court reversed the conviction.

Aguilar v. Texas, 378 U.S. 108 (1964)

FACTS: Two Houston police officers applied to a magistrate for a warrant to search Aguilar's home for narcotics. Their affidavit, in relevant part, recited that:

> *"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law."*

The search warrant was issued and narcotics were found. Aguilar challenged the introduction of the evidence, but the trial court allowed its admission. Eventually, he was convicted. Aguilar appealed, and the U.S. Supreme Court accepted certiorari.

ISSUES: Does an affidavit that provides no support for its conclusions provide sufficient basis for a finding of probable cause and issuance of a search affidavit?

HOLDING: No

DISCUSSION: In passing on the validity of the search warrant, the reviewing court may consider only information brought to the magistrate's attention.

The Court noted:

> Informed and deliberate determinations of magistrates are to be preferred over hurried action of officers who may happen to make arrests, and evidence sufficient to support a magistrate's disinterested determination to issue a warrant will not necessarily justify the officer in making search without warrant.
>
> The point of the Fourth Amendment is not that it denies law enforcement the support of usual inferences which reasonable men may draw from evidence but that it requires that such inferences to be drawn by neutral and detached magistrate instead of the officer engaged in the often competitive enterprise of ferreting out crime. An affidavit for a search warrant may be based on hearsay information and need not reflect direct personal observations of the affiant, but magistrate must be informed of some of the underlying circumstances on which informant based his conclusions and some of the underlying circumstances from which officer concluded that the informant, whose identity need not be disclosed, was "credible" or that his information was reliable. Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp.

The U.S. Supreme Court reversed the judgment.

Rugendorf v. U.S., 376 U.S. 528 (1964)

FACTS: Rugendorf was convicted of involvement in the theft of a large quantity of fur stoles and jackets, which had been "taken in a burglary in Mountain Brook, Alabama." An investigating FBI agent, Moore, submitted an affidavit that he "had reason to believe" that the goods were "concealed in the basement" of a Chicago home. He supported this belief with information that a CI "who had furnished reliable information in the past" had told him that he saw an equivalent number of such items in the basement and that he had observed that the "labels had been removed" and that he'd been told "that the furs were stolen." Moore also reported that another CI had identified Ruggendorf (among others) as having been involved in the theft and the disposition of the goods, and finally, that in checking, Moore had discovered the only theft of furs that had occurred in the U.S. in the previous six months was the one in question.

The search warrant was issued on the basis of the affidavit; 81 furs were recovered from Ruggendorf's basement. He moved for suppression. The opinion noted that 59 of the furs had come from the Mountain Brook theft and the remaining 22 had come from a theft in Shreveport (thereby indicating that the assertion that there had only been one theft in the search warrant was incorrect.)

The trial court permitted the introduction of the evidence, and eventually, Ruggendorf was convicted. He appealed; the U.S. Supreme Court accepted certiorari.

ISSUE: Is it necessary to identify confidential informants in a warrant affidavit for the affidavit to be held sufficient?

HOLDING: No

DISCUSSION: The Court noted that the warrant was valid on its face and that the information provided by the CI was detailed and accurate. The Court found that revealing the names of the informant, and other witnesses, was not required, under the facts as developed in the case. Although there appeared to be certain factual inaccuracies in the affidavit, they "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."

The U.S. Supreme Court affirmed the judgment.

Franks v. Delaware, 438 U.S. 154 (1978)

FACTS: On March 5, 1976, a young woman (Bailey) told police she had been raped in her home in Dover, DE. She gave a description of her assailant. That same day, Franks was arrested for a sexual assault of another woman (Brenda B.) that had occurred some days before. While awaiting a bail hearing, he expressed surprise that the hearing was about Brenda B. and stated that "I thought you said Bailey. I don't know her." (At that time, he had not received his Miranda warnings.)

On March 8, Office McClements mentioned the incident to Det. Brooks, who was working on the Bailey case. The next day, Brooks and Det. Gray "submitted a sworn affidavit to a Justice of the Peace … in support of a warrant to search [Franks] apartment." That affidavit related the statement, and also

"described the attempt made by police to confirm that [Franks] typical outfit matched that of the [Bailey] assailant." Co-workers of Franks had told police that the "normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket" and that he often wore a "dark green knit cap." These items of clothing matched the description provided by Bailey. The warrant was issued. During the search, the officers seized items of clothing that matched the description given by the victim, as well as a "single-blade knife." Franks was charged with Bailey's assault, as well.

Prior to trial, Franks moved to suppress the evidence found in the home, alleging that the "warrant on its face did not show probable cause and that the search and seizure were in violation of the Fourth and Fourteenth Amendments." He also, verbally, challenged the "veracity of the warrant affidavit" itself. Franks asserted that the two co-workers, who described his usual clothing, "would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was 'somewhat different' from what was recited in the affidavit." Franks "charged that the misstatements were included in the affidavit not inadvertently, but in 'bad faith.'" He further asserted that the information learned at the "courthouse statement to police had been obtained in violation of [Franks'] Miranda rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession."

Eventually, his motions were denied and he was convicted. The Delaware Supreme Court upheld the conviction. Franks appealed to the U.S. Supreme Court, which accepted certiorari.

ISSUE: Is a defendant entitled to a hearing if they present sufficient proof that a warrant may be invalid?

HOLDING: Yes

DISCUSSION: First, the Court noted that a "flat ban on impeachment of veracity could denude the probable-cause requirements of all real meaning." "If a police officer was able to use deliberately falsified allegations to demonstrate probable cause," and not be challenged, the warrant requirements would be meaningless.

The Court held that there is "a presumption of validity with respect to the affidavit supporting the search warrant." If a defendant wishes to challenge that warrant, they must first put forth an "attack that is more than conclusory and must be supported by more than a mere desire to cross-examine." They must allege a "deliberate falsehood or [a] reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." The defendant must "point out specifically the portion of the warrant affidavit that is claimed to be false; and they should [accompany it with] a statement of supporting reasons." This proof should take the form of, for example, "[a]ffidavits or sworn or otherwise reliable statements of witnesses" and if these can't be provided, then their "absence satisfactorily explained." The allegations must be more than simply "negligence or innocent mistake."

And, even if the defendant proves that the material is deliberately or recklessly false, if there "remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." However, "if the remaining content is insufficient, the defendant is entitled … to his hearing."

The U.S. Supreme Court reversed the judgment of the Delaware Supreme Court.

Illinois v. Gates, 462 U.S. 213 (1983)

FACTS: Bloomingdale police received an anonymous letter that included statements that the Gates (husband and wife) were engaged in selling drugs. The text of the letter follows:

> *This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.*
>
> *The brag about the fact they never have to work, and make their entire living on pushers.*
>
> *I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.*

Upon receiving this letter, the police initiated an investigation. They learned that Lance Gates did live at a particular address in Bloomingdale. Further investigation revealed a second possible address. The police also determined that Gates had a reservation to fly to Palm Beach, Florida, from Chicago on May 5. The police contacted Florida DEA agents, who met the plane and followed Gates to a Holiday Inn nearby. He went to a room registered to Susan Gates. The next morning, both Gates and the woman (later identified as Susan Gates) left the hotel in a Mercury station wagon, which was registered to Gates. They went northbound on an interstate highway. Driving time would be approximately 24 hours, from Palm Beach to Chicago.

A search warrant was obtained in Illinois based on this information. The judge determined that the information in the letter, corroborated by the officers' investigation, constituted sufficient probable cause. When the Gates arrived, the police were waiting. They searched the vehicle and found 350 pounds of marijuana. A search of the residence uncovered more marijuana, weapons and other contraband. The Gates requested and received suppression of the evidence, on the basis that the affidavit did not support probable cause. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is an affiant required to both reveal the basis of knowledge of an anonymous tipster and establish the reliability of that tipster?

HOLDING: No

DISCUSSION: Previous courts had created a two-pronged test for probable cause, from the Aguilar and Spinelli cases, requiring an affiant to reveal the "basis of the knowledge" of the anonymous tipster, how they came to know what they provided and then to establish the reliability or veracity of the informant

However, the Supreme Court held that Aguilar was too rigid a test, and that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules."

Instead, the Court adopted a test that considers the "totality of the circumstances." That test requires the issuing judge to "simply make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

The U.S. Supreme Court reversed the lower court's decision and remanded the case.

U.S. v. Jacobsen, 466 U.S. 109 (1984)

FACTS: On May 1, 1981, employees of a private freight carrier were examining a damaged package when they "observed a white powdery substance, originally concealed within eight layers of wrappings." They called a federal agent, who field-tested it and found it to be cocaine. The package was rewrapped and the agents obtained a warrant for the address where it was to be delivered. Eventually, they executed the warrant and arrested Jacobsen, and others. They were indicted and eventually, moved for suppression, arguing that the "warrant was the product of an illegal search and seizure." The motion was denied, and Jacobsen was convicted. He appealed, and the Eighth Circuit Court of Appeals reversed, holding that a warrant was required to have tested the white powder. The U.S. Supreme Court accepted certiorari.

ISSUE: May law enforcement officers use information from a third party confidante of the suspect, in obtaining a warrant?

HOLDING: Yes

DISCUSSION: First, the Court noted that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." Further, "[e]ven when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package."

The Court agreed that it was "well settled that when an individual reveals private information to another, he assumes the risk that his confidante will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information" even when "the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed." Since the package was already open, Jacobsen and the others could have no privacy interest in the contents, and "the agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment."

Next, the removal of the plastic bags from the tube and the "agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search" and thus "infringed [upon] no legitimate expectation of privacy." It was not a search "within the meaning of the Fourth Amendment." Next, the agents did seize the package, but asserting dominion and control over the package was reasonable under the circumstances.

The final question was whether the "additional intrusion occasioned by the field test" was an unlawful search or seizure. The "field test at issue could disclose only one fact previously unknown to the agent – whether or not a suspicious white powder was cocaine." The Court noted that the "concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from

the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." The Court held that a "chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy," as "privately possessing cocaine [is] illegitimate."

The Court held that the "law enforcement interests justifying the procedure were substantial; the suspicious nature of the material made it virtually certain that the substance tested was in fact contraband." Only a minute amount of the material was destroyed in the seizure. In short, "the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct." Any possible "protected possessory interest" infringed was "de minimis and constitutionally unreasonable."

The U.S. Supreme Court reversed the judgment of the Court of Appeals.

Knock and Announce

Wilson v. Arkansas, 514 U.S. 927 (1995)

FACTS: Arkansas State Police officers sought a warrant to search the home of Jacobs, a suspected drug dealer. They had probable cause, in that an informant had purchased drugs in the home. At that sale, the petitioner, Wilson, had waved a pistol in the informant's face and threatened to kill her if she were an informant. The affidavit set forth the essential facts, and noted that Jacobs had previous convictions for arson and firebombing. The warrant was issued, and officers went to the house. On arrival at the house, the officers found the door unlocked and walked in without knocking. As they entered, they announced themselves as police and that they had a warrant. Evidence was seized, and Jacobs and Wilson were arrested. Wilson tried to have the evidence seized in the home suppressed on various grounds, including the fact that the officers had failed to "knock and announce" before entering and that therefore the search was unreasonable. The motion was denied, and the Arkansas Supreme Court affirmed on appeal. Wilson then appealed to the U. S. Supreme Court, which accepted certiorari.

ISSUE: Is entering a dwelling to serve a warrant reasonable when officers do not knock and announce first and they have not established a risk either to themselves or of evidence destruction justifying an unannounced entry?

HOLDING: No

DISCUSSION: The Court observed that it has long been a tradition of the common law that officers seeking to invade a dwelling with a warrant must knock and announce their presence. Since knock and announce was the rule at the time of the adoption of the Fourth Amendment the framers would have been well aware of that and would have considered it to be part of the inquiry as to whether a search was reasonable or not. Not every entry must be preceded by an announcement. To get a "no knock" warrant, officers must state sufficient facts in their supporting affidavits to permit a neutral and detached magistrate to conclude that knock and announce would create an unreasonable risk of peril for the officers or destruction of the evidence sought to be seized with the warrant. In the majority of cases, however, entry without first knocking and announcing will be an unreasonable search and any evidence seized will be suppressed.

The U.S. Supreme Court reversed the lower court's decision.

U.S. v. Banks, 540 U.S. 31 (2003)

FACTS: North Las Vegas, NV, P.D. officers, along with the FBI, received information that Banks was selling cocaine from his home. They requested and received a search warrant. At about 2 p.m., they arrived at Banks' home. Officers in front called out "police – search warrant" and "rapped hard enough on the door to be heard by officers at the back door." After 15-20 seconds, they broke open the front door with a battering ram.

As it turned out, Banks was in the shower at the time and was unaware of the police presence until the "crash of the door, which brought him out dripping to confront the police." The search of the home "produced weapons, crack cocaine, and other evidence of drug dealing."

Banks argued in trial that the evidence should be suppressed, because "the officers executing the search warrant waited an unreasonably short time before forcing entry…." When the District Court denied this motion, Banks pled guilty, reserving his right to appeal on the issue.

The Ninth Circuit reversed the District Court and suppressed the evidence. Their opinion, however, set out a "nonexaustive list of 'factors that an officer reasonably should consider' in deciding when to enter premises identified in a warrant, after knocking and announcing their presence but receiving no express acknowledgment:

a) the size of the residence
b) location of the residence
c) location of the officers in relation to the main living or sleeping areas of the residence
d) time of day
e) nature of the suspected offense
f) evidence demonstrating the suspect's guilt
g) suspect's prior conviction and, if any, the type of offense for which he was convicted
h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary."

In addition, the Ninth Circuit also "defined four categories of intrusion after knock and announcement, saying that the classification 'aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances':

1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement;
2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency;
3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and
4) entries in which no exigent circumstances exist and forced entry to destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time."

The Ninth Circuit justices concluded that this case fell in the last category, stating that nothing indicated that there was any destruction of evidence, even though sound apparently easily traveled through the

small apartment, and that as such, the time allowed was insufficient. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is 15-20 seconds a reasonable period of time to wait before forcing entry with a search warrant, when the object of the search is drug-related?

HOLDING: Yes

DISCUSSION: The Court started its opinion "with a word about standards for requiring or dispensing with a knock and announcement, since the same criteria bear on when the officers could legitimately enter after knocking." The Court acknowledged that in previous cases they had "treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones." However, they had also, in those cases, "pointed out factual considerations of unusual, albeit not dispositive, significance."

The Court recognized that the law does permit a "no-knock" warrant when the officers have articulated appropriate circumstances, and that they had also permitted officers to "go straight in," under certain circumstances, even when they did not hold a specific, no-knock, warrant. The Court accepted that since "most people keep their doors locked, entering without knocking will normally do some damage…."

In this case, the Court agreed that the police argument that "announcing their presence (by initially knocking) started the clock running toward the moment of apprehension that Banks would flush away the disposable cocaine, prompted by knowing the police would soon be coming in," and that it was reasonable for the "officers to go in with force here as soon as the danger of disposal had ripened." While recognizing that "this call is a close one," the Court agreed that "after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer," and that various Courts of Appeal had "routinely held similar wait times to be reasonable…."

The Court disapproved of the "set of sub-rules" delineated by the Ninth Circuit, particularly their "four-part scheme for vetting knock-and-announce entries." Finally, they reiterated their belief that such cases must be considered, instead, on a "totality of the circumstances" analysis.

The U.S. Supreme Court reversed the Ninth Circuit's decision.

Hudson v. Michigan, 547 U.S. 586 (2006)

FACTS: The facts of the case were unremarkable and undisputed. Officers went to the home of Booker Hudson with a search warrant to seek drugs and firearms. Large quantities of drugs and a firearm were found. The issue had to do with the entry. When the officers arrived, they knocked and announced their presence, but waited only five seconds before entering through the unlocked front door. There was nothing happening that suggested that the officers were in unusual danger or that the evidence was in danger of imminent destruction prior to their entry.

Hudson requested suppression because of the violation. The trial court accepted the motion, but the appellate court reversed, finding "that suppression is inappropriate when entry is made pursuant to warrant but without proper 'knock and announce.'" (The government conceded, however, that that the officers had not waited long enough before going in.)

ISSUE: Is suppression the appropriate remedy for a violation of the "knock and announce: rule?

HOLDING: No

DISCUSSION: For many years, courts have suppressed evidence seized after officers violated the knock and announce requirements of the Fourth Amendment. In this case, the Court held that application of the Exclusionary Rule to suppress evidence recovered in such cases where the warrant was otherwise valid was disproportionate to the harm suffered by the defendant. The Court recognized, however, that there are costs to society when the Exclusionary Rule is applied, in that often serious crimes go unpunished and violent felons get to walk away.

In many such cases, the Court noted that law enforcement is obtaining evidence, by violating the law, that they would not otherwise have been entitled to collect. However, the purposes served by the "knock and announce" requirement are to minimize the chance of needless violence and property damage, and to give people an opportunity to compose themselves, and perhaps cover themselves, prior to acceding to the authority of the police and letting them in. The officer's right to search for and collect the evidence with a warrant is not affected by whether or not the officers properly knocked and announced. Suppression of evidence as a remedy for violating this rule is disproportionate to the harm and causes major harm to the public interest and safety.

The Court held that although suppression is not the appropriate remedy, that a violation of the Fourth Amendment requirement to knock and announce will hereafter be limited to lawsuits alleging a violation of a person's civil rights under color of state law pursuant to 42 U.S.C. §1983. The Court affirmed Hudson's original conviction.

Search Warrant Form

Groh v. Ramirez, 540 U.S. 551 (2004)

FACTS: Ramirez and his family lived on a ranch in Montana. In 1997, a citizen informed Agent Groh, of the ATF, about weapons he had seen at the Ramirez home, which included an automatic rifle, grenades, a grenade launcher and a rocket launcher. Groh requested and received a search warrant, based upon this information, detailing what he expected to find at the ranch in the search warrant affidavit.

However, the warrant itself, presented to the Magistrate Judge at the same time, did not detail the items sought. In the block intended for that information, Groh instead typed a description of the house. He failed to "incorporate by reference" the list included in the warrant affidavit, nor did the agent attach the affidavit that included the list to the actual search warrant.

The day after receiving the warrant, a team of officers went to the Ramirez property. Ramirez himself was not present, but his wife and children were at home. Groh spoke to Ramirez on the phone and described the objects of the search and also explained the purpose of the search to Mrs. Ramirez in person. (However, she claimed she was told only that they were looking for "an explosive device in a box.") Nothing was found during the search. Mrs. Ramirez was given a copy of the warrant itself, but not a copy of the affidavit, which had been sealed. Upon request, the next day, a copy of the page of the

affidavit that listed the items was faxed to the Ramirez's attorney. No charges were filed against the couple.

The agents were sued under Bivens v. Six Unknown Fed. Narcotics Agents[126], and 42 U.S.C. §1983, for a variety of claims, including one alleging a violation of the Fourth Amendment. The District Court gave the agents summary judgment, classifying it as comparable to a warrant with an incorrect address - and that it was sufficiently explicit if the executing officers can achieve the aim of the warrant. The Court of Appeals, however, held that the warrant was invalid because it did not detail the items to be seized. The appellate court placed responsibility on the leader of the search to read and be familiar with the warrant and to be satisfied that the warrant "is not defective in some obvious way." The appellate court emphasized the need for "the leaders of the search team [to] make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search, and that such copy has no missing pages or other obvious defects."

The appellate court reversed the dismissal of the agent. The U.S. Supreme Court accepted certiorari.

ISSUE: May a warrant description of property to be seized incorporate by reference another document (such as the search warrant affidavit), either explicitly or implicitly, when it is not included with the actual warrant?

HOLDING: No

DISCUSSION: The Court started its discussion by stating that the "warrant was plainly invalid." The Court added that "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." The Court reminded Groh that a warrant serves a "high function" and "that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection." The Court did not "say that the Fourth Amendment forbids a warrant from cross-referencing other documents," agreeing that most Courts of Appeal had allowed that, but did require the "supporting document" to accompany the warrant.

Groh attempted to justify the warrant, to make it reasonable, because the Magistrate authorized the search, Mrs. Ramirez was told the objects of the search and the search did not exceed the boundaries authorized by the warrant. The Court, however, did not agree that this was simply a "technical mistake or typographical error." In fact, the Court considered the warrant so deficient that it "must regard the search as 'warrantless' within the meaning of the previous" case law."

The Court found the search to be unconstitutional.

Having concluded that the search was unconstitutional, however, the Court then addressed whether Groh and his fellow officers were entitled to qualified immunity for their actions. The Court stated that "[g]iven that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. (In fact, they noted that the ATF policies themselves put agents on notice that they were responsible for ensuring that warrants were valid, "even when issued by a magistrate.") The Court emphatically stated that "even a cursory reading of the warrant in this case -- perhaps just a simple glance -- would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal."

[126] 403 U.S. 388 (1971).

The U.S. Supreme Court upheld the denial of qualified immunity.

Search Warrant Service

Los Angeles (CA) County v. Rettele, 550 U.S. --- (2007)

FACTS: "From September to December, 2001, Los Angeles County Sheriff's Department Deputy Dennis Watters investigated a fraud and identity theft crime ring." He had four suspects, all African American, and one who had a handgun registered in his name.

On Dec. 11, Deputy Watters got search warrants for two houses where he believed the suspects might be found. The warrant authorized searching the homes and three of the suspects for "documents and computer files." Deputy Walters had used several sources, including Department of Motor Vehicle files, mailing address listings, an outstanding warrant for one of the suspects and an Internet telephone directory to place the suspects as living at Rettele's home.

However, what the deputy "did not know was that one of the houses (the first to be searched) had been sold in September to Max Rettele." Rettele shared the house with his girlfriend, Sadler, and her 17-year old son, Chase Hall. All three of these individuals were Caucasian.

On December 19, the deputies involved in the search were briefed by Watters about the three suspects and about the weapon. Because they had not gotten permission for a nighttime search (a requirement under state law), the warrant could not be executed until after 7 a.m. At about 7:15 a.m. the deputies knocked on the door and Chase Hall answered. "The deputies entered the house after ordering Hall to lie face down on the ground." Their entry woke Rettele and Sadler. The deputies entered their bedroom and ordered them to get out of bed, but both protested that "they were not wearing clothes." Rettele attempted, but was not permitted to, put on sweatpants, and Sadler was likewise not permitted to "cover herself with a sheet." They were held at gunpoint, although at some point "Rettele was permitted to retrieve a robe for Sadler" and he was allowed to dress. Within a few minutes, they were permitted to sit on the couch in the living room. After a few more minutes, the "deputies realized they had made a mistake," apologized, "thanked them for not becoming upset," and left. They found the three suspects at the other house and arrested all three.

Rettele, Sadler and Hall (through Sadler) filed suit under 42 U.S.C. §1983 against Los Angeles County, the Sheriff's Office , Deputy Watters and others, alleging that their Fourth Amendment rights were violated by the deputies "obtaining a warrant in [a] reckless fashion and conducting an unreasonable search and detention."

The U.S. District Court found that the "warrant was obtained by proper procedures and the search was reasonable." In the alternative, the Court agreed that the rights allegedly violated were not clearly established and that, as a result, the deputies were entitled to qualified immunity." Upon further appeal, Rettele did not challenge that the warrant itself was valid, but "did argue that the deputies had conducted the search in an unreasonable manner." The Ninth Circuit reversed the lower court's opinion, holding that facts of the case indicated an unreasonable search and that the deputies "should have known the search and detention were unlawful."

The County (and the individual defendants) appealed; the U.S. Supreme Court accepted certiorari.

ISSUE: Does the discovery that occupants of a home subject to a search warrant are of a different race than those of the suspects require that the law enforcement officer immediately stop the search and not take action to temporarily secure those occupants?

HOLDING: No

DISCUSSION: The Court first addressed the Ninth Circuit's assertion that "[b]ecause [Rettele and the others] were of a different race than the suspects the deputies were seeking" that the deputies should have immediately recognized that they were not the suspects and that they "did not pose a threat to the deputies' safety." The Court found that to be an "unsound proposition" as the deputies would have "had no way of knowing whether the African-American suspects were elsewhere in the house." The Court looked to Michigan v. Summers[127] and agreed that it was reasonable to secure occupants during the execution of a search warrant. The Court found that "[u]nreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time."[128]

The Court found that the "orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies." In addition, the Court noted that the "Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach." In this case, the "deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger." They were not "required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with sheets." The Court did not give the deputies freedom to force the two "to remain motionless and standing for any longer than necessary." However, in this case, the "deputies left the home less than 15 minutes after arriving." There was no assertion "that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety." In fact, Sadler agreed that "once the police were satisfied that no immediate threat was presented," the couple were encouraged to get dressed.

The Court concluded that the "Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty." Further, it noted:

> Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity: and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

The decision of the Ninth Circuit was reversed and the case remanded for further proceedings consistent with this opinion.

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[127] 452 U.S. 692 (1981).
[128] Graham v. Connor, 490 U.S. 386 (1989); Muehler v. Mena, supra.

"No Knock" Warrants

Richards v. Wisconsin, 520 U.S. 385 (1997)

FACTS: Officers in Madison, Wisconsin obtained a search warrant to search Richards' hotel room for drugs and other items. The officers requested a "no-knock" warrant, but the judge deleted those provisions from the warrant.

Upon arriving, an officer dressed as a maintenance man knocked on the hotel room door. Richards peered out through the crack, with the chain still on the door, then slammed it shut. (Later he stated he saw a uniformed officer behind the officer at the door.) After waiting for several seconds, the officers began kicking and ramming the door, all the while identifying themselves as police. When they broke through the door, they found Richards attempting to leave through a window, and eventually found drugs hidden in the ceiling.

Richards asked to have the evidence suppressed because the officers failed to knock and announce their presence. The state argued that he knew who was at the door, and besides, a drug warrant automatically indicates exigent circumstances since there is a high probability that the drugs might be destroyed if officers delay in entering the premises. The trial court denied the suppression and the state Supreme Court affirmed that ruling. Richards appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is there a blanket exception to the "knock and announce" rule of serving warrants, when drugs are involved?

HOLDING: No

DISCUSSION: While the Court upheld the entry in this particular case, the Court refused to recognize a blanket exception for drug cases to the general knock and announce requirement. To justify a "no-knock" warrant, the officers must have a reasonable suspicion, specific to the situation, that knocking would be dangerous or futile or would allow the destruction of evidence. Just because drugs are suspected is not enough.

The U.S. Supreme Court upheld the conviction.

See also: Adcock v. Com., 967 S.W.2d 6 (Ky., 1998) – ruse is permissible to gain entry.

Miscellaneous Issues

Illinois v. McArthur, 531 U.S. 326 (2001)

FACTS: On April 2, 1997, Tera McArthur asked two officers to accompany her to the trailer she had shared with her husband, Charles, to keep the peace while she retrieved some belongings. The two officers, Asst. Chief Love and Officer Skidis remained outside while she went inside. When she returned, she advised Love to check the trailer because she had seen drugs, and that Charles had "slid some dope underneath the couch."

Love knocked on the door and requested permission to search the trailer. Charles refused. Love then sent Skidis (with Tera) to request a search warrant. Love also told Charles that he could not reenter the trailer unless he was accompanied. While waiting for the warrant, Charles was allowed to reenter the

trailer, accompanied by Love, to retrieve cigarettes and to make a telephone call. Within two hours, Skidis had returned with the warrant. Marijuana was found in the trailer and Charles was arrested. The Illinois courts upheld the suppression of the evidence, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is it lawful to deny entrance to a resident while a search warrant is being obtained?

HOLDING: Yes.

DISCUSSION: The Court analyzed the circumstances as outlined. They determined that the officers made a reasonable effort to balance their needs with the privacy rights of Charles McArthur. They had reason to believe that McArthur was aware of their suspicions and would destroy the drugs if given the opportunity. There was no delay in seeking the warrant. The restraint on Charles McArthur was "both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests."

The U.S. Supreme Court reversed the Illinois decision.

Michigan v. Summers, 452 U.S. 692 (1981)

FACTS: Police officers, executing a warrant on a residence to search for narcotics, encountered Summers leaving the house. They requested his assistance in entering the house and detained him during the search. Finding narcotics in the house, and learning Summers did own the house, the police arrested and searched Summers. Heroin was found in his coat pocket. Summers requested suppression, the trial court accepted that motion and the Michigan appellate courts affirmed that decision. The U.S. Supreme Court accepted certiorari.

ISSUE: Is the detention of an individual during the search of a residence lawful?

HOLDING: Yes

DISCUSSION: The Court stated that a search warrant for a home "carries with it, implicitly, the limited authority to detain the occupants of the premises while a proper search is conducted." The Court agreed that "[T]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

The U.S. Supreme Court reversed the decision of the Michigan courts.

See also: *U.S. v. Fountain, 2 F.3d 656 (6th Cir. Mich. 1993) - also applies to non-residents at the premises at the time of the search.*
U.S. v. Bohannon, 225 F3d 615 (6th Cir. Tenn. 2000) - also applies to individuals clearly approaching the location of the search.

Zurcher v. The Stanford Daily, 436 U.S. 547 (1978)

FACTS: On April 9, 1971, officers of the Palo Alto Police Department and the Santa Clara County Sheriff's Department (California) responded to a call from Stanford University Hospital, to remove a large group of demonstrators who had barricaded themselves inside the administrative offices. The officers tried to convince the demonstrators to leave, with no success. The officers then forced their way

into the area, and a group of demonstrators ran from the opposite side. Armed with "sticks and clubs," they assaulted the officers in that area; all nine of the officers suffered injury. The officers were only able to identify two of their assailants. There were no police photographers in the area but there was another individual present there, taking photographs. The next day, the Stanford Daily (the student newspaper) published a story and photographs, and it was apparent that the individual the officers knew had been at the site of the assault took the photos. The prosecutor sought and received a search warrant for the Daily's offices, for any negatives or film that might show the incident. The search only revealed the pictures that had already been published and nothing was taken from the offices.

The Daily and various staff members filed a lawsuit under 42 U.S.C. §1983. The District Court found that because the subject of the search was not a suspect in a crime, and that because the subject of the search was a representative of the press, that such a search was permitted "only in the rare circumstance where there is a clear showing that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." The trial court held that a warrant was inappropriate as a first step and the appellate court agreed. The U.S. Supreme Court accepted certiorari.

ISSUE: May a search warrant be issued on an innocent third party believed to be in possession of relevant evidence?

HOLDING: Yes (but see opinion)

DISCUSSION: The Court discussed how the Fourth Amendment should be applied to "third party" searches, when officers believe that evidence of a crime is in the possession of someone who is not implicated in the crime. The Court stated that "nothing on the face of the Amendment" prohibited third party searches, and that "valid warrants may be issued to search any property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." Finally, the Court concluded that "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."

The U.S. Supreme Court reversed the decision, holding that the "preconditions for a search warrant" were adequate to safeguard the interest of the third party.

Massachusetts v. Sheppard, 468 U.S. 981 (1984)

FACTS: On May 5, 1979, the badly burned body of Sandra Boulware was found in a vacant lot in Boston. An autopsy showed that she had died from multiple skull fractures caused by blows. Investigation led to a boyfriend, Osborne Sheppard. Sheppard's alibi fell through, when it was discovered that he was absent from the location where he claimed to be for several hours, sufficient to commit the crime, and that he had borrowed a vehicle during that time.

The police visited the owner of the car and received permission to search it. Blood and hair were found on the rear bumper and in the trunk, and wire in the trunk was similar to wire found on and near the body. The owner had used the car just previous to when Sheppard borrowed it and had not noticed any stains.

Det. O'Malley drafted a search warrant but had a difficult time finding the form normally used for search warrant. He found a form warrant for Controlled Substances, but deleted the portions that did not apply and substituted the correct information on the form. However, he neglected to delete other, non-

applicable, statements on the form. He took the form to a local judge, who made the changes he believed necessary to create a valid warrant, but also neglected to delete several relevant portions. The police found several incriminating items, not specifically listed on the warrant but described in the accompanying affidavit, and the search had been consistent with the scope allowed by the warrant. However, the judge had neglected to attach or otherwise reference the affidavit in the actual warrant form. Sheppard was indicted for murder.

The trial court denied Sheppard's request for suppression. While admitting the form of the warrant was somewhat defective, the court agreed that the officers acted in good faith in executing what they believed to be a valid warrant. The Massachusetts Supreme Court, however, agreed with Sheppard and suppressed the evidence, because Massachusetts had not yet recognized a good-faith exception to the Exclusionary Rule. The U.S. Supreme Court accepted certiorari.

ISSUE: Is an officer justified in relying on what is later found to be an invalid warrant?

HOLDING: Yes (in some cases)

DISCUSSION: The Court found that "[I]f an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason why he should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems." If anyone made a mistake in the situation, it was not the officer but the judge. The Exclusionary Rule was adopted to prevent the police from doing unlawful searches, not to control the actions of judges. Suppressing evidence when the judge makes the errors, not the police, does not serve the purpose of the Exclusionary Rule.

The U.S. Supreme Court reversed the decision.

Anticipatory Warrants

U.S. v. Grubbs, 547 U.S. 90 (2006)

FACTS: Grubbs had ordered a videotape of child pornography on the internet from what turned out to be an undercover postal inspector. Postal inspectors submitted an application for a search warrant for Grubbs' home to seek the videotape. The affidavit stated that the warrant would not be executed unless and until the videotape had been received by a person at the address in question. The affidavit concluded that based on the information set forth the item will be found after delivery. A postal inspector delivered the package, with Grubbs' wife signing for it. Postal inspectors detained Grubbs when he left the house shortly thereafter, and then executed the warrant. Grubbs was given a copy of the warrant, but it did not have the affidavit explaining when the warrant would be executed attached. The videotape was found, and Grubbs was arrested after he admitted ordering it.

Grubbs sought suppression of the tape in District Court on the basis that the warrant failed to list the triggering condition. The District Court denied the motion. Grubbs pled guilty but reserved his right to appeal the denial of the motion to suppress. The Ninth Circuit reversed, holding that the particularity requirement of the Fourth Amendment applied to conditions precedent to an anticipatory search warrant. Because the officers failed to present a document with the anticipatory condition listed, the warrant was inoperative. The U.S. Supreme Court accepted certiorari.

ISSUE: Is an anticipatory search warrant invalid if it fails to state the triggering condition on the warrant?

HOLDING: No.

DISCUSSION: Although it was not an issue preserved by appeal, the Court first addressed the question of whether anticipatory search warrants were categorically unconstitutional and held that they were not. The Court noted that most anticipatory warrants have a "triggering condition" that must be met before the warrant could be executed. The Court noted that when a warrant is ordinarily issued, the magistrate does so in anticipation that the item will still be there when the warrant is executed. In addition, it noted that a wiretap warrant is issued in anticipation that incriminating communications will be intercepted, but they have not happened yet. Anticipatory warrants are issued with the expectation that the contraband will be there when the warrant is executed. They were held to be no different than ordinary warrants, in that they require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is issued. It must also be probable that if the triggering condition occurs evidence of a crime will be found, and it must also be probable that the triggering condition will occur.

The Court then disposed of the Ninth Circuit's actual reasoning relatively quickly, by rejecting its effort to expand the application of the phrase "particularly described" to include more than the Fourth Amendment's actual application to the location to be searched and the items to be seized. It rejected outright Grubbs' contention that if there were a precondition to the validity of the warrant, it must be stated on the face of the warrant.

The U.S. Supreme Court reversed the judgment.

SEARCH - WARRANTLESS

Reasonable Suspicion – Terry Stops

Terry v. Ohio, 392 U.S. 1 (1968)

FACTS: Cleveland Police Detective Martin McFadden had been a policeman for 39 years, a detective for 35 years, and had been assigned to his beat in downtown Cleveland for 30 years. At approximately 2:30 p.m. on October 31, 1963, Officer McFadden was patrolling in plain clothes. Two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue, attracted his attention. McFadden had never seen the men before and he was unable to say precisely what first drew his eye to them. His interest aroused, Officer McFadden watched the two men. He saw one of the men leave the other and walk past some stores. He paused and looked in a store window, then walked a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. Then the second man did the same. This same trip was repeated approximately a dozen times. At one point, a third man approached them and engaged them in conversation. This man then left. Chilton and Terry resumed their routine for another 10-12 minutes, then left to meet with the third man.

Officer McFadden testified that he suspected the men were "casing a job, a stick-up," and that he feared "they may have a gun." Officer McFadden approached the three men, identified himself and asked for their names to which the men "mumbled something." Officer McFadden grabbed Terry, spun him around and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, Officer McFadden felt a pistol, which he retrieved. Officer McFadden proceeded to pat down Chilton, felt and retrieved another revolver from his overcoat. Officer McFadden patted down the third man, Katz, but found no weapon. Chilton and Terry were charged with carrying concealed weapons. (Chilton died before his conviction could be appealed.) Both were convicted, and appealed, and the appellate courts affirmed the conviction. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUES:
1) May an officer stop an individual briefly on reasonable suspicion that they are involved in illegal activity?
2) May an individual be frisked if the officer has reasonable suspicion that they are armed and present a danger?

HOLDINGS:
1) Yes
2) Yes

DISCUSSION: The Constitution forbids not all searches and seizures, but unreasonable searches and seizures. There is a "seizure" whenever police officer accosts an individual and restrains his freedom to walk away, and "search" when officer makes careful exploration of outer surfaces of person's clothing to attempt to find weapon.

> In justifying a particular intrusion, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, that reasonably warrants that intrusion. Those facts must be judged against an objective standard of whether the facts available to officer at moment of seizure or search would warrant man of reasonable caution in belief that action taken was appropriate. Intrusions must be based on more than hunches. Simple good faith on the part of the officer is not enough.

A police officer who had observed persons go through series of acts, each of them perhaps innocent in itself, but when taken together warranted further investigation, was discharging legitimate investigative function when he decided to approach them. The officer in this case had reasonable cause to believe that defendants were contemplating a crime, and thus had cause to stop and speak to them. Because he suspected them of an intent to commit armed robbery on the business, there was cause to believe they may be armed, thus the officer had cause to search them for weapons. McFadden did not exceed the reasonable scope of a proper search in patting down their outer clothing,

The sole justification for an officer's search of a person whom he has no cause to arrest is protection for officer and others nearby, and it must be confined in scope to intrusion reasonably designed to discover weapons. Although the facts of the Terry case involved a pat down of the outer clothing, the language of the court's decision did not limit a frisk to the outer clothing, such as a coat. The court said, "...it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. "The scope of the search must be strictly tied to and justified by the circumstances that rendered its initiation permissible."

The U.S. Supreme Court affirmed the decision.

See also: *U.S. v. Reed, 220 F.3d 476 (6th Cir. 2000)*
U.S. v. Harris, 192 F.3d 580 (6th Cir. 1999)
Pitman v. Com., 896 S.W.2d 19 (Ky.App., 1995)
Com. v. Banks, 68 S.W.3d 347 (Ky., 2001)
U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995) – Terry traffic stop
U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000) - Terry traffic stop
Adkins. v. Com., 96 S.W.3d 779 (Ky. 2003)

Sibron v. New York, Peters v. New York, 392 U.S. 40 (1968)

NOTE: These cases are considered companion cases to Terry v. Ohio.

FACTS: On March 9, 1965, Officer Martin (New York PD) was patrolling when he saw Sibron "continually from the hours of 4:00 P.M. to 12:00 midnight … in the vicinity of 742 Broadway." He observed Sibron talking to 6 or 8 person Martin knew to be narcotics addicts. He could not hear their conversation, nor did he see anything exchange hands. Late that evening, he saw Sibron with 3 more addicts, in a local restaurant. Martin approached Sibron and "told him to come outside." They went outside and Martin told Sibron, "You know what I am after." Sibron mumbled a reply and reached into a pocket. "Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin." Sibron was charged, took a conditional guilty plea and appealed.

In the second, companion case, an officer at home, overheard a suspicious noise outside his apartment. The officer saw Peters and another man "tiptoeing furtively about the hallway." He called for assistance and then pursued them. He caught "Peters by the collar," and Peters said he'd been visiting a girlfriend, but did not identify her. "The officer patted Peters down for weapons and discovered a hard object which he thought might be a knife but which turned out to be a container with burglar's tools, for the possession of which Peters was later charged." Peters asked for suppression and the court denied it, finding that the officer "had the requisite 'reasonable suspicion' under [New York statute] 180-a to stop and questions Peters and to 'frisk' him for a dangerous weapon in the apartment hallway." (The Court found the hallway to be a public place, as required by the statute.) Peters took a conditional guilty plea and appealed, and the New York state appellate court found it to be a justifiable stop under 180-a.

In their combined appeal, Peters and Sibron argued that 180-a was "unconstitutional on its face" because it authorized searches and seizures which violated their rights under the Fourth Amendment. The U.S. Supreme Court combined these cases, for purposes of argument, with Terry v. Ohio, and accepted certiorari.

ISSUE: Is simply speaking to narcotics addicts sufficient reasonable suspicion to warrant a seizure, and ultimately, a search?

HOLDING: No

DISCUSSION: The Court noted, initially, that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." The Court acknowledged that although the states are free to develop their "own law of search and seizure to meet the needs of local law enforcement," it may not "authorize police conduct which trenches upon Fourth Amendment rights."

With regards to Sibron, the Court determined that there was no probable cause to arrest Sibron when he was accosted and searched by Officer Martin and "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." However, the Court continued, the seizure and search "might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous." The record of the trial court was "totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." However, the Court found that "deficiency in the record [to be] immaterial," since the officer "obtained no new information in the interval between his initiation of the encounter in the restaurant and his physical seizure and search of Sibron outside." "Even assuming … that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin in admissible." Martin "with no attempt at an initial limited exploration for arms," Officer Martin thrust his hand into Sibron's pockets and took from him envelopes of heroin." Martin's own testimony showed "that he was looking for narcotics, and he found them." Instead, "[t]he search was not reasonably limited in scope to the accomplishment of the only goal which might conceiviably have justified its inception – the protection of the officer by disarming a potentially dangerous man." The Court found the search of Sibron to be unjustified, and the evidence should have been suppressed.

However, in Peters' case, the Court found that the search was appropriately justified, as a lawful search incident to arrest, finding that it is "difficult to conceive of strong grounds for an arrest, short of actual eyewitness observation of criminal activity."

The U.S. Supreme Court upheld Peters' search and arrest, but overturned Sibron's search and arrest.

Adams v. Williams, 407 U.S. 143 (1972)

FACTS: Sgt. Connolly was alone on patrol in Bridgeport, CT. At approximately 0215, he was approached by a person he knew who "informed him that an individual seated in a nearby vehicle [and] was carrying narcotics and had a gun at his waist." Connolly called for backup and approached the car. He tapped on the window and asked the occupant (Williams) to open the door, but instead, Williams

rolled down the window. Connolly reached in and "removed a fully loaded revolver from Williams' waistband." He had not been able to see it, but it was precisely where Connolly had been told it would be located. Connolly arrested Williams. After other officers arrived, he did a more thorough search, incident to the arrest, and found "substantial quantities of heroin on Williams' person and in the car." They also found a second handgun and a machete in the vehicle.

Williams argued that "absent a more reliable informant, or some corroboration of the tip" the officer's actions were unreasonable and thus everything seized was inadmissible. The trial court denied the suppression and he was convicted. Williams requested habeas relief through the U.S. District Court. This was also denied. The Second Circuit Court of Appeals, however, held that the search was unlawful, and the government appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: May an officer make a Terry frisk on the basis of a tip from a reliable and known informant?

HOLDING: Yes

DISCUSSION: The Court "recognized in Terry that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." The purpose of a "limited search" for weapons "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." (The court also noted that the carrying of such a weapon may, in fact, not be in violation of state law.)

In this case, Connolly knew the informant and had received useful information from him in the past. He gave information that was "immediately verifiable at the scene." The Court noted that "[i]nformant's tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability." "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." But in other situations, "for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime – the subtleties of the hearsay rule should not thwart an appropriate police response." In this case, Sgt. Connolly "had ample reason to fear for his safety." His reaching into the car for the weapon "constituted a limited intrusion designed to insure" the officer's safety, and was reasonable. Once he found the gun, an arrest was justified.

The U.S. Supreme Court upheld the conviction, finding that the "fruits of the search were therefore properly admitted" at Williams' trial

Ybarra v. Illinois, 444 U.S. 85 (1979)

FACTS: Police had a search warrant for narcotics for the "Aurora Tap Tavern" in Aurora, Ill. and for the person of "Greg", the bartender. Upon entering the tavern to execute the warrant, police announced their purpose and advised those present that they were going to conduct a "cursory search for weapons." All persons present, including Ybarra, a patron, were frisked.

On Ybarra's initial frisk, an officer felt what he described as "a cigarette pack with objects in it" in Ybarra's pocket. After frisking other patrons, the officers returned to Ybarra, frisked him again and retrieved the cigarette pack. Inside, the officers found six tinfoil packets containing heroin.

Ybarra argued that the search of his person, beyond a frisk for weapons, was unconstitutional. He was convicted, however, and the Illinois appellate court affirmed. The U.S. Supreme Court accepted certiorari.

ISSUE: Is the search of a customer in a public location (for which the officer has a search warrant) lawful, absent reasonable suspicion specific to that individual?

HOLDING: No

DISCUSSION: It is impermissibly broad to extend the general warrant of a premises to a full search of all individuals found on the premises, when the warrant does not particularly support such a search. In fact, even frisking the patrons, absent specific Terry rationale for such a search of each individual, is impermissible.

The U.S. Supreme Court reversed the decision.

Reid v. Georgia, 448 U.S. 438 (1980)

FACTS: In the early morning hours of August 14, 1978, Reid arrived at the Atlanta airport, on a flight from Ft. Lauderdale, Florida. As the passengers deplaned, Reid was observed by a DEA agent who was working the airport. A few steps away from Reid, separated by several other passengers, was another man, who carried a shoulder bag similar to the one Reid carried. As the men walked toward baggage claim, Reid glanced back at the second man occasionally. As they reached the main terminal, the second man caught up with Reid and spoke to him, and they proceeded together outside.

There, the DEA agent approached the pair, identified himself, and asked them for ticket stubs and identification, which they provided. The information indicated that Reid had bought the tickets on his credit card, and that they had stayed in Ft. Lauderdale only one day. The DEA later testified that they "appeared nervous." He asked them if they would return to the terminal and agree to a search of their bags, and both initially agreed. However, as they re-entered the terminal, Reid tried to run, but was quickly captured. He had abandoned his bag, which was found to contain cocaine.

Reid was charged and requested suppression. The Georgia trial court accepted his motion, "concluding that [the cocaine] had been obtained as a result of a seizure of him by the DEA agent without an articulable suspicion that he was unlawfully carrying narcotics." The appellate court reversed, holding that the stop was permissible under Terry, because Reid "in a number of respects, fit a 'profile' of drug couriers compiled by the [DEA]." They further stated that he had agreed to the search, and that once he fled and left the bag behind, there was sufficient probable cause to justify the search of the bag. Reid appealed to the U.S. Supreme Court.

ISSUE: May an individual fitting the description of a "drug courier" be briefly detained for investigation?

HOLDING: No (under the specific facts of this case)

DISCUSSION: The Court "recognized that in some circumstances a person may be detained briefly, without probable cause to arrest…, [but that] any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal behavior."

The Court noted that the appellate court's decision "rested on the fact that [Reid] appeared to the agent to fit the so-called 'drug courier profile,' a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." The Court found the facts, as known or observed by the agent, were not sufficient to support a reasonable suspicion of drug trafficking. Most of the facts "describe[d] a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." The Court further noted that "the manner in which the petitioner and his companion walked through the airport reasonablely could [not] have led the agent to suspect them of wrongdoing." "The agent's belief" … "was more an 'inchoate and unparticularized suspicion or 'hunch' than a fair inference in the light of his experience" and "is simply too slender a reed to support the seizure in this case."

The U.S. Supreme Court vacated the conviction and remanded the case to the Georgia courts, for further consideration consistent with the opinion.

Michigan v. Long, 463 U.S. 1032 (1983)

FACTS: While patrolling late at night, in a rural area, officers observed a vehicle speeding and traveling erratically. The vehicle then swerved into a ditch. Long, the only occupant, "appeared to be under the influence of something" when he met the officers at the rear of the car. Long did not respond to requests to produce a license and registration, but headed back for the open door of the car. The officers followed him to the car and spotted a hunting knife on the floorboard of the driver's seat. The officers stopped Long and patted him down, and found no other weapons. They looked into the car and spotted a plastic baggie protruding from under the armrest; the bag appeared to contain marijuana. Long was charged, and requested suppression. The Michigan appellate court ultimately reversed that decision, and suppressed the evidence. The U.S. Supreme Court accepted certiorari.

ISSUE: Are vehicles subject to a reasonable suspicion frisk for weapons?

HOLDING: Yes

DISCUSSION: The Court held that a Terry protective frisk was not restricted to the person of the suspect. The Court concluded that roadside encounters are especially hazardous, and that danger may arise from the possibility of weapons in the area near a suspect. For that reason, the Court found that extending the area of a "frisk" to the passenger compartment of a car is reasonable when there is a reasonable belief that there may be weapons in the vehicle.

The U.S. Supreme Court reversed the decision and remanded the case.

Arizona v. Johnson, 555 U.S. --- (2009)

FACTS: On April 19, 2002, Officer Trevizo and Detectives Machado and Gittings, members of a gang task force, were patrolling in Tucson "near a neighborhood associated with the Crips gang." They pulled over a vehicle when a check showed that the vehicle's registration had been suspended for a violation related to insurance. (The violation justified a citation.) The car had three occupants, the driver, a front-seat passenger and a back-seat passenger (Johnson). At the time of the stop, the officers had no suspicion of criminal activity.

When asked by Det. Machado, the occupants denied having any weapons. He had the driver get out. Gittings "dealt with the front-seat passenger, who stayed in the vehicle throughout the stop." Officer

Trevizo "attended to Johnson." She had noticed that as they approached, "Johnson looked back and kept his eyes on the officers," and he wore clothing "consistent with Crips membership." She also spotted a scanner in Johnson's pocket. He produced no identification, but when requested, he provided his name and date of birth. He volunteered his hometown as one known for a Crips gang, and told her that he'd served time for burglary. Wanting intelligence about his gang membership, she had him get out of the car. Suspecting (based upon the above observations) that he might have a weapon, she "patted him down for officer safety." During that frisk, she found a gun. He struggled, and was handcuffed. He was ultimately charged for possession of the gun, since he was a convicted felon, in state court.

Johnson requested suppression, but the trial court denied his motion. He was ultimately convicted. Johnson appealed to the Arizona Court of Appeals, which reversed his conviction, concluding that Officer Trevizo had no right to frisk Johnson. Arizona appealed, but the Arizona Supreme Court denied review. Arizona requested certiorari to the U.S. Supreme Court, which agreed to hear the case.

ISSUE: If a vehicle is stopped for a minor traffic violation, may a passenger be frisked when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

HOLDING: Yes

DISCUSSION: The Court quickly reviewed the precepts set forth in a line of cases beginning with Terry v. Ohio[129] and focusing specifically on three cases related to traffic stops: Pennsylvania v. Mimms[130], Maryland v. Wilson[131], and Brendlin v. California.[132] In Mimms, the Court noted, it was appropriate to have a driver get out of a vehicle, and further, to frisk that driver "if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'" In Wilson, the Court extended that rationale to passengers. However, the Wilson Court acknowledge that there might be no reason to stop or detain passengers if the driver has committed a minor vehicular offense, but it emphasized "the risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'" Finally, in Brendlin, the Court agreed that since a vehicle stop necessarily also stops the passenger, that a passenger "has standing to challenge a stop's constitutionality." Further, in an intervening case, in dictum, the Court had ruled that officers may frisk drivers and passengers upon "reasonable suspicion that they may be armed and dangerous."[133]

The Court concluded:

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert

[129] 392 U.S. 1 (1968).
[130] 434 U.S. 106 (1977).
[131] 519 U.S. 408 (1997).
[132] 551 U.S. 249 (2007).
[133] Knowles v. Iowa, 525 U.S. 113 (1998).

> the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.[134]

The Court agreed that a traffic stop "communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will." The Court, however, ruled that the officer "was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."

The judgment of the Arizona Court of Appeals was reversed, and the case remanded for further proceedings.

Brown v. Texas, 443 U.S. 47 (1979)

FACTS: Two officers observed Brown and another man walking away from each other in an alley, in an area known for drug trafficking. They stopped Brown and asked him to identify himself and explain his actions. One officer testified that Brown was stopped because the situation "looked suspicious and we had never seen that subject in that area before."

Brown was arrested under a Texas statute that made it a crime to refuse to identify oneself, and was eventually convicted. At trial, one of the officers admitted that they only reason Brown was stopped was to learn his identity, and no other charges were placed against him. Brown challenged the arrest, but was unsuccessful. Ultimately, the U.S. Supreme Court accepted certiorari.

ISSUE: Is a stop for the sole purpose of getting an identification lawful?

HOLDING: No

DISCUSSION: In the absence of any basis for suspecting Brown of misconduct, the balance between the public interest and Brown's right to personal security and privacy tilts in favor of freedom from police interference. The guarantees of the Fourth Amendment do not allow stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity,

As a result the Court held that detaining Brown and requiring him to identify himself "violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe Brown was engaged or had engaged in criminal conduct."

The U.S. Supreme Court reversed the conviction and invalidated the statute.

U.S. v. Hensley, 469 U.S. 221 (1985)

FACTS: On December 4, 1981, "two armed men robbed a tavern in" St. Bernard, a suburb of Cincinnati. Some days later, Officer Davis "interviewed an informant who passed along information that … Hensley had driven the getaway car during the armed robbery." Davis put out a "wanted flyer" to nearby agencies, which "warned other departments to use caution and to consider Hensley armed and dangerous." One of the agencies that received the flyer was Covington PD, and some of the officers at that agency were familiar with Hensley. They "periodically looked for him at places

[134] Muehler v. Mena, 544 U.S. 93 (2005).

in Covington he was known to frequent." On December 16, Officer Eger spotted Hensley and asked by radio if he was the subject of an outstanding arrest warrant. Two other officers came up on the radio and stated that there "might be" an Ohio warrant. The officers, Cope and Rassache, "subsequently testified that they had heard or read the St. Bernard flyer on several occasions, that they recalled that the flyer sought a stop for investigation only, and that in their experience the issuance of such a flyer was usually followed by the issuance of an arrest warrant."

However, the "dispatcher had difficulty in confirming whether a warrant had been issued." As the dispatcher called, seeking the warrant, Cope spotted Hensley and pulled him over. Cope drew his weapon and approached the car, he then had Hensley and his passenger step out of the car. Officer Rassache arrived and recognized the passenger as a convicted felon, Green. He also saw the "butt of a revolver protruding from underneath the passenger's seat." Green was arrested. A further search of the car "uncovered a second handgun wrapped in a jacket in the middle of the front seat and a third handgun in a bag in the back seat." Hensley was then, also, arrested.

After state charges were dismissed, Hensley was indicted in the federal courts for being a felon in possession of a handgun. He moved to suppress the firearms "on the grounds that the Covington police had impermissibly stopped him in violation of the Fourth Amendment." The District Court, however, held the stop to be proper and he was convicted.

The Sixth Circuit reversed his conviction, noting that the Covington officers "could not justifiably conclude from the St. Bernard flyer that a warrant had been issued for Hensley's arrest," nor could they stop him while waiting to learn if a warrant had been issued. The Court found the stop of the car was improper "because the crime being investigated was not imminent or ongoing, but rather was already completed, [and] that the 'wanted flyer' was insufficient to create a reasonable suspicion that [Hensley] had committed a crime." The government appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: May officers make a stop based upon a wanted flyer put out by another department?

HOLDING: Yes

DISCUSSION: The Sixth Circuit "announced two prerequisites to such an investigatory stop and held that they were lacking: first, the crime being investigated was not imminent or ongoing, but rather was already completed; second, the 'wanted flyer' was insufficient to create a reasonable suspicion that [Hensley] had engaged in criminal activity."

The Court addressed each in turn. In previous cases, the Court suggested that "the police are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the criminal has completed his crime and escaped from the scene." The Court chose to "identify the limits" by "apply[ing] the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes." "The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct" and a "stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity."

However, "where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice."

Finally, the "law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." The Court concluded by holding that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion."

The second issue relates to the flyer, and other "officers of one police department in reliance on a flyer issued by another department indicating that the person is wanted for investigation of a felony." The Sixth Circuit had concluded that seizures based upon such flyers were not permitted – and the "holding apparently rests on the omission from the flyer of the specific and articulable facts which led the first department to suspect [Hensley's] involvement in a completed crime." However, "[n]either Hensley nor the Court of Appeals suggests any reason why a police department should be able to act on the basis of a flyer indicating that another department has a warrant, but should not be able to act on the basis of a flyer indicating that another department has a reasonable suspicion of involvement with a crime."

In U.S. v. Robinson, the Ninth Circuit concluded "that effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[135] The Court continued by noting that the "law enforcement interests promoted by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal."

In the case at bar, the Court noted that "[a]n objective reading of the entire flyer would lead an experienced officer to conclude that Thomas Hensley was at least wanted for questioning and investigation in St. Bernard" and would "justify a brief stop to check Hensley's identification, pose questions, and inform the suspect that the St. Bernard police wished to question him." An experienced officer would also reasonably believe that a warrant had been issued, and as such, holding him for a brief time to check on the warrant was also appropriate.

The Court concluded by stating that the "length of Hensley's detention from his stop to his arrest on probable cause was brief" and the evidence discovered during the stop was admissible.

The U.S. Supreme Court reversed the judgment of the Court of Appeals and the case was remanded for further proceedings.

U.S. v. Sharpe, 470 U.S. 675 (1985)

FACTS: A DEA agent noticed an overloaded pickup truck with camper, traveling with a Pontiac automobile. Savage was driving the truck; Sharpe was driving the car. The agent followed the vehicles for about twenty miles, then decided to make an investigative stop." He asked the state police for backup. A state trooper "caught up with the agent, and they proceeded to stop the vehicles." The Pontiac stopped, but the truck traveled some distance further, followed by the state trooper. Unable to reach the trooper by radio, the DEA agent called upon the local police agency for help.

In the meantime, the trooper had stopped the truck, questioned Savage, and told him he would be detained until the DEA agent arrived. The agent, leaving Sharpe with the local police, arrived at the truck

[135] 536 F.2d 1298 (9th Cir. 1976).

approximately fifteen minutes later. The agent confirmed his suspicion that the truck was overloaded, and upon smelling marijuana, the agent opened the rear of the camper and found a number of burlap-wrapped bales. The bales were found to contain marijuana. Savage was placed under arrest. The agent returned to the Pontiac and arrested Sharpe.

The trial court denied Sharpe's motion to suppress, but the Court of Appeals reversed. The U.S. Supreme Court accepted certiorari.

ISSUE: Is 45 minutes a reasonable length of time for a Terry stop, provided the officers can articulate a specific reason why the stop took that long?

HOLDING: Yes

DISCUSSION: The arrest/detention was lawful and reasonable. The Court found that the officers had an articulable and reasonable suspicion to make the initial stop. After that stop, the officers "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."

The U.S. Supreme Court affirmed the decision.

Illinois v. Wardlow, 528 U.S. 119 (2000)

FACTS: Upon seeing a caravan of police officers entering the neighborhood, an area known for heavy drug trafficking, Wardlow fled on foot. He was carrying an opaque package. Officers caught up with him and seized him. They executed a pat-down search of Wardlow and the package. Feeling a hard, heavy object in the shape of a handgun inside the package, they opened it to find a .38 revolver.

Wardlow was charged with possession of the weapon, and moved for suppression. The Illinois trial court denied that motion, but the appellate courts reversed that decision, holding that flight alone does not justify a Terry stop. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Is simply running when police are sighted sufficient to perform a Terry stop?

HOLDING: Yes

DISCUSSION: Under Terry, a stop is justified if the officer has a "reasonable, articulable suspicion that criminal activity is afoot…." In this case, Wardlow's presence in a high crime area combined with his sudden flight upon seeing police officer was sufficient to meet the standard.

The Court held that "[w]hile 'reasonable suspicion' is less demanding than probable cause, there must be at least a minimal level of objective justification for the stop." This case also serves to define how "reasonable suspicion" relates to probable cause, specifically pointing out that it is less than a preponderance of evidence.

The Court made the point that unprovoked flight is not "going about one's business," that it is, in fact, "just the opposite." Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or stay put and remain silent in the face of police questioning.

The U.S. Supreme Court reversed the decision of the Illinois courts and remanded the case.

U.S. v. Arvizu, 534 U.S. 266 (2002)

FACTS: Arvizu was stopped by Border Patrol Agent Stoddard at a checkpoint near the Arizona-Mexico border, north of the border town of Douglas, Arizona. Only two highways lead northward from Douglas. The checkpoint is located on Hwy 191. Agents work the checkpoint as well as rove the backcountry to locate illegal aliens that attempt to bypass the checkpoint. Electronic sensors in the area also help in locating illegal aliens.

On a day in January, 1998, Agent Stoddard received a report that a sensor on Leslie Canyon Road had triggered. This suggested that someone might be trying to circumvent the checkpoint. The time was also suspicious because it was a shift change, a fact he believed the alien smugglers knew. He headed toward the area, and on the way, received a report that another sensor in the area had also triggered. Agent Stoddard continued on, and spotted another vehicle. The timing was such that he believed it was the vehicle that had tripped the sensors. Stoddard pulled to the side of the road to observe the vehicle.

The vehicle was a minivan, a type of vehicle often used by the smugglers. As it approached Stoddard, it slowed dramatically. Stoddard saw five occupants, an adult male and female in the front and three children in the back. The driver was very stiff and appeared to be deliberately ignoring the Border Patrol vehicle. He also noted that the children in the very back seat appeared to have their feet on something on the floor. As the vehicle passed, Stoddard began to follow. At one point, the children in the vehicle began to wave in an abnormal pattern, apparently under instruction, and the waving continued on and off for several minutes.

As they approached the Kuykendall Cut Road intersection, the driver signaled a turn, and then turned off the signal. In a few moments, the driver again turned on the signal and made an abrupt turn onto the side road. Stoddard found the turn significant because this was the last point where a vehicle could avoid the checkpoint, and because the road was not really suitable for the minivan; four-wheel-drive vehicles normally traversed the rough road.

Stoddard did not recognize the minivan as local traffic, and there were no picnicking or sightseeing grounds in the area where the minivan was heading. He requested information on the vehicle's registration and learned that the registered address was in an area in Douglas known for alien and narcotic smuggling. At this point, Stoddard decided to make a vehicle stop. The driver, Arvizu, stopped, and Stoddard asked for permission to search the vehicle; Arvizu agreed. Stoddard found approximately 128 pounds of marijuana in the vehicle, including some in the duffel bag upon which the children's feet were resting.

Arvizu was convicted of intent to possess and distribute marijuana. The Court of Appeals reversed, holding that most of the factors relied upon by the District Court "carried little to no weight in the reasonable-suspicion calculus" leaving insufficient factors upon which to base the stop. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: May multiple suspicious (but not unlawful) factors be considered in making a Terry stop?

HOLDING: Yes

DISCUSSION: The Court held that officers (and the courts) must "look to the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." The Court went on to state that the "process allowed officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."

The Court examined the factors that were found wanting by the Circuit Court of Appeals, including, the timing, the type of vehicle (a minivan), the posture of the adult passengers, including their failure to acknowledge Stoddard's presence, the children's elevated knees, the odd waving of the children, the turnoff onto a rough road, and the address where the vehicle was registered. The Supreme Court found that while each of the factors questioned by the Court of Appeals might have been innocent in isolation, that "taken together, they warranted further investigation." In this situation, the Court found that Agent Stoddard's deductions from his observations and based upon his experience in the Border Patrol were reasonable and "sufficed to form a particularized and objective basis" for the stop of the vehicle.

The U.S. Supreme Court reversed the decision of the Ninth Circuit and remanded the case for further proceedings.

Anonymous Tips

Alabama v. White, 496 U.S. 325(1990)

FACTS: On April 22, 1987, Corporal Davis of the Montgomery (Alabama) Police Department received a phone call from an unknown person, who stated that Vanessa White would be leaving a particular address at a particular time in a specifically-described vehicle. The caller further stated that she would be going to Dobey's Motel and would be in possession of approximately an ounce of cocaine inside a briefcase. Davis proceeded to the address given, along with another officer, and watched White leave the building and get into the vehicle, and followed her to the motel. At that time, she appeared to be carrying nothing. With the help of a marked unit, Davis stopped the vehicle and asked White to step out, which she did. He explained that she was suspected of carrying cocaine, and requested permission to search, which she gave. He found a briefcase in the trunk, and White provided the combination. Davis found marijuana in the case and arrested White. During booking, a small amount of cocaine was found in her purse.

White asked for suppression of the evidence based on an invalid stop, and was denied. She was convicted. The appellate court reversed the conviction, and the higher court upheld that reversal. The State appealed the reversal, and the U.S. Supreme Court accepted certiorari.

ISSUE: Can a sufficiently-detailed and corroborated anonymous tip support a vehicle stop?

HOLDING: Yes

DISCUSSION: The Court compared this situation to Illinois v. Gates, stating that the standard for a vehicle stop was lower than that required for a search warrant: reasonable suspicion versus probable cause. Following the logic in Gates, the Court stated that "Gates gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." The

"independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller." The Court also took note that the tip not only included details of currently existing conditions, but also predicted the object's future actions, demonstrating "inside information – a special familiarity with [White's] affairs.

The U.S. Supreme Court reversed the lower court's decision.

Florida v. J.L., 529 U.S. 266 (2000)

FACTS: Miami-Dade officers received an anonymous tip that a young black male was standing at a particular bus stop, wearing a plaid shirt, and that he was in possession of a gun. A few minutes later, officers found J.L., wearing a plaid shirt, along with two other young men, standing at that location. The officers observed no suspicious conduct, nor did they see anything to lead them to suspect that J.L. had a weapon. They seized and frisked J.L., and found a firearm. Ultimately, the Florida courts found that the search was invalid and suppressed the evidence. The U.S. Supreme Court accepted certiorari.

ISSUE: Can an anonymous tip alone, with no other corroborating information, give reasonable suspicion to frisk for a gun?

HOLDING: No

DISCUSSION: The Court held that an anonymous tip that is unsupported by specific information about a firearm is not sufficient to satisfy the requirement of Terry that an officer have reasonable suspicion before initiating a search. In this case, the officers had nothing but an anonymous tip about an individual carrying a firearm. An exception strictly because a firearm is alleged would subject individuals to the potential for harassment by officers acting solely on anonymous tips that may, or may not, be credible. The Court insists on at least an indicia of reliability and credibility in anonymous tips.

The Court specifically stated that this case does not reach to areas where an individual has a diminished expectation of privacy, such as airports and schools.

The U.S. Supreme Court affirmed the Florida court's decision.

Search Incident To Arrest

Marron v. U.S., 275 U.S. 192 (1927)

FACTS: Marron's leased property was searched by a federal agent, pursuant to a "warrant for the search of that place, particularly describing the things to be seized – intoxicating liquors and articles for their manufacture." However, in addition to the "large quantities of liquor" found during the search, the agents discovered a ledger and utility bills. The search warrant return, however, only indicated that the liquor was seized. At trial, Marron moved for suppression of the papers, which the trial court denied.

Marron, among others, was indicted under the National Prohibition Act, and was eventually found guilty. The appellate court upheld the conviction and the U.S. Supreme Court accepted certiorari.

ISSUE: May officers seize evidence in close proximity to individuals who are lawfully arrested?

HOLDING: Yes

DISCUSSION: The Court noted that the "requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." In effect, "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." However, the Court noted that when the officers first entered, another man, Birdsall, "was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold." As such, the "officers were authorized to arrest for crime being committed in their presence, and "the officers were authorized to arrest for crime being committed in their presence." The officers then "lawfully arrested Birdsall." Pursuant to that arrest, the officers "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." The ledger was "in [Birdsall's] immediate possession and control."

The Court found that the seizure of the ledger and the bills was lawful as a search incident to arrest. The U.S. Supreme Court upheld the convictions.

U.S. v. Rabinowitz, 339 U.S. 56 (1950)

FACTS: On February 1, 1943, a printer possessing plates with which to forge "overprints" on cancelled stamps was arrested. He provided information that Rabinowitz, a stamp dealer, was one of his customers. With this information, postal employees went to the Rabinowitz business and bought 4 stamps. An expert provided an opinion that the stamps were, in fact, forgeries. On February 16, the agents obtained a warrant for Rabinowitz. At the time, the agents knew that Rabinowitz had committed the same offense a couple of years earlier. The agents executed the warrant at Rabinowitz's business, which was a "one-room office open to the public." They searched "the desk, safe, and file cabinets in the office" and found 573 stamps with forged overprints, along with others that were apparently genuine and which were later returned to Rabinowitz.

Rabinowitz was indicted, and moved to suppress, and the trial court denied the motion. After conviction, Rabinowitz appealed, and the Court of Appeals "reversed on the ground that since the officers had had time in which to procure a search warrant and had failed to do so the search was illegal, and the evidence therefore should have been excluded."

The U.S. Supreme Court accepted certiorari.

ISSUE: Does a search incident to arrest extend to everything within the room where the arrest is made?

HOLDING: Yes

DISCUSSION: The Court noted that a "search without warrant incident to an arrest is dependent initially on a valid arrest." The Court concluded that the arrest warrant was sufficient and as such, Rabinowitz was properly arrested. (In addition, even lacking a warrant, the arrest would have been valid because the "officers had probable cause to believe that a felony was being committed in their very presence.")

Finding the arrest valid, the Court moved on to consider the lawfulness of the searches of the other areas within Rabinowitz's immediate control. Earlier court decisions had "recognized that there is a permissible area of search beyond the person proper."

The Court addressed the issue of whether the officers were required to obtain a search warrant, in addition to the arrest warrant, since they had time to do so. The U.S. Supreme Court concluded that a search warrant was not a necessity, held that the motion to suppress was "properly denied by the District Court." The Supreme Court reversed the decision of the Court of Appeals and remanded the case back to the trial court for further proceedings.

U.S. v. Jeffers, 342 U.S. 48 (1951)

FACTS: On September 12, 1949, "Roberts came to the Dunbar Hotel in the District of Columbia … at about 3 p.m., sought out the house detective, Scott, and offered him $500 to let him into a room in the hotel occupied by [Roberts'] two aunts, the Misses Jeffries. He claimed that he had "some stuff stashed" there. Scott told him to "call back later in the evening," and then immediately contacted the Metropolitan Police. Lt. Karper arrived and went with Scott to the room. Since no one answered the knock, the two men obtained a key to the room from the assistance manager, and "they unlocked the door, entered the room and, in the absence of the Misses Jeffries as well as [Roberts], proceeded to conduct a detailed search thereof." They found "19 bottles of cocaine, of which only two had U.S. tax stamps attached, and one bottle of codeine, also without stamps." They seized the items and Karper turned the articles over to a federal agent. Jeffers was arrested the next day, and he "claimed ownership of the narcotics seized."

The Misses Jeffries had given Jeffers free rein of their room, but did not give him permission to store illegal narcotics there. Jeffers moved to suppress the evidence and was denied, and he was eventually convicted. The appellate court reversed the conviction and the Supreme Court accepted certiorari.

ISSUE: Must an officer articulate exigent circumstances to justify an entry into a residential area, without a warrant?

HOLDING: Yes

DISCUSSION: The Court noted that the "law does not prohibit every entry, without a warrant, into a hotel room." Further, "[c]ircumstances might make exceptions and certainly implied or express permission is given to such persons as maids, janitors or repairmen in the performance of their duties." The Government admitted, that there were no "exceptional circumstances present to justify the action of the officers" and that they "could have easily prevented any such destruction or removal by merely guarding the door." However, the Government further argued that "the search did not invade [Jeffers'] privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized."

The Court quickly found, that Jeffers did, in fact, have a property right and standing to contest the seizure of the narcotics, and that there was no exigency requiring immediate entrance into the room. Further, the U.S. Supreme Court found that the search and seizure was unlawful and affirmed the holding of the appellate court.

Ryburn v. Huff, 132 S.Ct. 987 (2012)

FACTS: Officers Ryburn and Zepeda (Burbank PD) were called to a local high school because a student, Huff was "rumored to have written a letter threatening to 'shoot up' the school. During their investigation, they learned Huff had been absent for two days and was frequently bullied. One of his classmates "believed that [Huff} was capable of carrying out the alleged threat." Because they had received training on the subject, the officers recognized "these characteristics are common among perpetrators of school shootings." They proceeded to his home to question him, but received no answer to their knocks or their call to the home phone. However, when they called Huff's mother on her cell phone, she answered and said she was actually at home and that Huff was with her.

Mrs. Huff refused to come outside and speak with the officers, and hung up on him. A few minutes later, though, both came out of the house and stood on the steps. "Officer Zepeda advised [Huff] that he and the other officers were there to discuss the threats." Mrs. Huff refused to allow them into the house to discuss the matter and Sgt. Ryburn, who was also present, found it "'extremely unusual' for a parent to decline an officer's request to interview a juvenile inside" and that she herself never asked why the officers were there. Sgt. Ryburn asked about guns in the house and Mrs. Huff immediately turned and ran back inside. Sgt. Ryburn, concerned went in behind her. Huff followed the officer and was, in turn, followed by Officer Zepeda, who did not want Sgt. Ryburn inside alone. The remaining two officers, who had been out of earshot also entered, believing that they had been given consent by Mrs. Huff to enter. They all remained inside for some 5-10 minutes, until Mr. Huff emerged and challenged their right to be there. The officers "ultimately concluded that the rumor about [Huff] was false. They did not search anyone or any place while inside the house.

The Huffs brought suit under 42 U.S.C. §1983, claiming that their Fourth Amendment rights were violated by the officers' entry. The District Court found in favor of the officers at a bench trial, concluding that the officers were entitled to qualified immunity "because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have led" the officers to believe there were weapons inside the house. The Court noted that in such a "rapidly evolving incident," the "courts should be especially reluctant ' to fault the police for not obtaining a warrant."

The Ninth Circuit, on appeal, upheld qualified immunity for the last two officers who entered, but reversed it as to the remaining officers. The Court of Appeals found no reason to believe the officers (or others inside the home) were in any danger, finding instead Mrs. Huff had "merely asserted her right to end her conversation with the officers and returned to her home."

The Government appealed and the U.S. Supreme Court granted certiorari.

ISSUE: May officer enter a home without a warrant if they reasonable believe that is necessarily to prevent harm to themselves or others?

HOLDING: Yes

DISCUSSION: The Court agreed with the lone dissenting judge in the Ninth Circuit. That judge noted that "the discrete incident that precipitated the entry in this case was Mrs. Huff's response to the question regarding whether there were guns in the house." She "faulted the majority for "'recit[ing] a sanitized account of this event,' that differed markedly from the District Court's findings of fact." Instead, she looked to "cases that specifically address the scenario where officer safety concerns prompted the

entry" and concluded that the officers "could have reasonably believed that [they were] justified in making a warrantless entry to ensure that no one inside" would post a risk to them.

The Court agreed that "no decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case." The Court found that "on the contrary, some of our opinions may be read as pointing in the opposition direction." The Court looked primarily to Brigham City v. Stuart[136] which found that "officers may enter a residence without a warrant when they have 'an objectively reasonable basis for believing that an occupant is … imminently threatened with [serious injury]." The need to preserve and protect life "is justification for what would be otherwise illegal absent an exigency or emergency."

The Court noted that the Ninth Circuit majority - "far removed from the scene and with the opportunity to dissect the elements of the situation – confidently concluded that the officers really had no reason to fear for their safety or that of anyone else." They ignored the fact that the Huffs did not respond to the officers knocking on the door and did not answer their home telephone, that Mrs. Huff hung up on the officers and that she ran back into the house when asked about guns. The Court noted that the Ninth Circuit apparently believed "that conduct cannot be regarded as a matter of concern so long as it is lawful." Their "method of analyzing the string of events … was entirely unreasonable." The Court noted that "It is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."

The Court agreed that "reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving."[137] The Court summed up the case, stating "reasonable police officers in [this] position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent" and that the facts as described in this case, could have given the officers that reasonable belief.

The Court reversed the decision with respect to the officers remaining in the case and remanded the case for judgment in their favor.

Gustafson v. Florida, 414 U.S. 260 (1973)

FACTS: On January 12, 1969, at about 0200, Lt. Smith (Eau Gallie, FL) was patrolling when he saw a white Cadillac, bearing New York plates, driving through the town. He "observed the automobile weave across the center line and back to the right side of the road" several times. He also saw that the two occupants looked back, towards him, apparently saw him, and they drove behind a nearby store and out onto another street.

Smith activated his lights and "ordered the Cadillac over to the side of the road." He asked the driver, Gustafson, for his operator's license. Gustafson replied that he was a student and had left it in his dorm room. He was then arrested for his failure to have his license in his possession. (All parties conceded that this was a lawful arrest.)

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[136] 547 U.S. 398 (2006).
[137] Graham v. Connor, 490 U.S. 386 (1989).

Smith searched Gustafson's person and found marijuana cigarettes. (Smith later testified that he recognized them from his training at the police department.) Gustafson was tried and convicted, and appealed. Eventually, the California Supreme Court upheld the conviction. Gustafson appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Does a valid arrest for a minor offense negate the authority for a search incident to arrest?

HOLDING: No

DISCUSSION: Gustafson argued that the search following his arrest was unlawful because "the offense for which he was arrested was 'benign or trivial in nature.'" The officer was not required to "take [Gustafson] into custody, nor were there police department policies requiring full-scale body searches upon arrest in the field." The officer had expressed no concern for his safety. The Court, however, held that "the officer had probable cause to arrest [Gustafson] and that he lawfully effectuated the arrest and placed [Gustafson] in custody." "It is the fact of custodial arrest which gives rise to the authority to search," and "it is of no moment that Smith did not indicate any subjective fear of [Gustafson] or that he did not himself suspect that [Gustafson] was armed."

The U.S. Supreme Court affirmed the judgment of the Florida Supreme Court.

Chimel v. California, 395 U.S. 752 (1969)

FACTS: On September 13, 1965, three police officers arrived at Chimel's home with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to Chimel's wife, and asked if they might come into the house. She agreed. They waited 10 or 15 minutes until Chimel returned home from work. When Chimel entered the house, one of the officers handed him the warrant and asked for permission to "look around." Chimel objected.

Accompanied by the Chimel's wife, the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. In the search of the master bedroom and sewing room, the officers directed her to open drawers and "to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary." They seized numerous items - primarily coins, but also several medals, tokens, and a few other objects. The entire search took between 45 minutes and an hour. Chimel was convicted, and the appellate courts affirmed the conviction. The U.S. Supreme Court accepted certiorari.

ISSUE: Is the warrantless search of an arrested subject's entire house justified as incident to the arrest?

HOLDING: No

DISCUSSION: The Court noted that, when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist or effect his escape. In addition, the officer can search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

The officer can search the area "within [the arrestee's] immediate control" - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There

is no comparable justification for routinely searching any room other than that in which an arrest occurs - including all the desk drawers or other closed or concealed areas in that room itself.

The U.S. Supreme Court reversed the decision.

See also: *Com. v. Wood, 14 S.W.3d 557 (Ky.App., 2000)*
Richardson v. Com., 975 S.W.2d 932 (Ky.App., 1998)
U.S. v. Strahan, 984 F.2d 155 (6th Cir. 1993)
Collins v. Com., 574 S.W.2d 296 (1978) - search of room air conditioner in room where Collins was arrested held incident to arrest.

U.S. v. Robinson, 414 U.S. 218 (1973)

FACTS: On April 23, 1968, Officer Jenks of the District of Columbia Metropolitan Police Department, observed Robinson driving. Jenks knew that he had just checked on the status of Robinson's operator's permit four days before and found it revoked. He made a traffic stop of the vehicle. All three of the occupants got out of the vehicle. Jenks arrested Robinson for the offense.

In accordance with policy, Jenks searched Robinson. He found a cigarette package containing 14 capsules of heroin; he was eventually convicted for that offense. The District of Columbia Court of Appeals reversed the conviction. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Does a full search of a person exceed the scope of "search incident to arrest?"

HOLDING: No

DISCUSSION: Robinson argued that Jenks exceeded the scope of permissible search by going beyond a "frisk." The Court held that it was "well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." The Court explored the history of the concept and found very little had been written in case law and legal treatise on the subject. The Court was unwilling to limit the scope of such searches based upon the offense committed. However, the Court concluded that a full search following a lawful arrest was not only an exception to the warrant requirement but a reasonable search under the Fourth Amendment as well.

The U.S. Supreme Court reversed the Court of Appeals and reinstated the conviction.

New York v. Belton, 453 U.S. 454 (1981)

FACTS: Belton was a passenger in an automobile driven by another individual. The vehicle was stopped for speeding. In the course of the officer's questioning of the occupants, he discovered that none of the occupants owned the car or was related to the owner of the car. During this time, the officer smelled burned marijuana and spotted an envelope on the floorboard. The officer suspected that the envelope contained marijuana.

The officer ordered all of the occupants out of the car and arrested all of them for possession of marijuana. After searching each individual, the officer searched the passenger compartment of the car. He found a jacket, a jacket belonging to Belton. He unzipped a pocket and found cocaine. Belton maintained that the search of the jacket was unreasonable. Eventually, he was convicted, but the New York appellate court reversed the conviction. The U.S. Supreme Court accepted certiorari.

ISSUE: Is the search of a jacket, left inside a vehicle passenger compartment, lawful under the search incident to arrest doctrine, when the jacket does not belong to the arrested person?

HOLDING: Yes

DISCUSSION: Incident to arrest, it is lawful to search the person and the immediate area. When a policeman has made a lawful arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. The police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.

The U.S. Supreme Court reversed the appellate court, and upheld the conviction.

Wyoming v. Houghton, 526 U.S. 295 (1999)

FACTS: On July 23, 1995, a Wyoming Highway Patrol officer stopped a car, with a male driver and two female passengers in the front seat, for minor traffic violations. While questioning the driver, the officer noticed a syringe in his front shirt pocket. He asked the driver to get out and place the syringe on the car. When asked why he had the syringe, the driver with "refreshing candor," replied he used drugs.

At that point, the two female passengers were instructed to get out of the car and asked for identification. Houghton gave her name, falsely, as "Sandra James" and said she had no ID. During this time, another officer searching the car found a woman's purse, which Houghton stated belonged to her. He searched the purse and found identification that correctly identified Houghton, as well as two small cases. One case, a black wallet, Houghton claimed as hers, the other, a brown pouch, she claimed was not her property. The first case contained a small amount of liquid methamphetamine, with syringes, not enough for a felony in Wyoming. The brown pouch contained the same, but with enough methamphetamine to support the felony conviction at issue.

Houghton appealed her conviction on the basis that the officer knew the purse did not belong to the male driver, who was the only person arrested at the time the purse was searched. The Wyoming Supreme Court reversed her conviction. Eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is the search of a purse left in a vehicle lawful under search incident to arrest, when the purse does not belong to the arrested person?

HOLDING: Yes

DISCUSSION: Based upon a historical reading of the law, the Court stated that allowing vehicles to be searched for contraband upon probable cause implies that the containers inside the vehicles were also subject to search. Previous cases had not distinguished actual ownership of the particular item as important. "A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband *in* the car."

In conclusion, the Court stated that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." The U.S. Supreme Court upheld the conviction.

Thornton v. U.S., 543 U.S. 882 (2004)

FACTS: On the day in question, Officer Nichols (Norfolk, VA, PD) was in uniform but driving an unmarked police car. He first noticed Thornton when Thornton slowed down to avoid driving right next to Nichols' car. Suspicious, Nichols turned down a side street and allowed Thornton to pass, and Nichols then ran a check on Thornton's license plate. The vehicle's tags came back to a 1982 Chevrolet, not the Lincoln Town Car that Thornton was driving. Before Nichols could catch up to him, however, Thornton pulled into a parking lot, stopped, and got out of the vehicle. Nichols saw Thornton get out of the car and approached him, asking for his operator's license. He told Thornton that he knew the tags did not belong on the vehicle. Thornton appeared nervous, rambling, licking his lips and sweating. Nichols asked Thornton if he had any drugs or weapons on his person or in his vehicle, and Thornton said no. He then asked Thornton if he could pat him down, and Nichols agreed. Feeling a bulge in Thornton's front pants pocket, he again asked him about drugs. Thornton pulled out two bags, one containing three smaller bags of marijuana and the other containing a large amount of crack cocaine. Nichols arrestedThornton, handcuffed him and secured him in the police vehicle. He searched Thornton's vehicle and found a handgun under the seat.

Thornton was charged with a variety of federal drug and weapons charges. Thornton requested suppression of the handgun, but the District Court found that the search was appropriate, under New York v. Belton,[138]. but also noted that the weapon could have been found during an inventory search, which would have also been appropriate. Thompson was convicted. He appealed to the Fourth Circuit Court of Appeals but his conviction was upheld. The U.S. Supreme Court accepted certiorari.

ISSUE: May officers search the passenger compartment of a vehicle when the subject is arrested immediately after exiting the vehicle of their own volition?

HOLDING: Yes

DISCUSSION: Thompson challenged his conviction, arguing that Belton was limited to situations where the arresting officer encountered the arrestee while still in the vehicle, a proposed rule the Court called the "contact initiation" rule. The Court, however, disagreed, stating that "[t]here is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car." The Court went on to note that "[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." The Court saw little sense in applying "two different rules to what is, at bottom, the same situation."

The Court found it unreasonable to penalize an officer who decided that it was better to wait until after a suspect left a vehicle to make contact, by denying them the chance to search the suspect's vehicle, noting that it was necessary, of course, to make an arrest before a full search would be permitted. An arrestee's status as a "recent occupant" of a particular vehicle "may turn on his temporal or spatial relationship to the car at the time of the arrest and search."

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[138] Supra.

Finally, the Court stated that the "contact initiation" rule as proposed by Thornton would be "inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that Belton sought to avoid. The Court stated that "[s]o long as an arrestee is the sort of 'recent occupant' of the vehicle such as [Thornton] was here, officers may search that vehicle incident to the arrest."

The U.S. Supreme Court upheld the conviction.

Brendlin v. California, 551 U.S. 249 (2007)

FACTS: On Nov. 27, 2001, Deputy Sheriff Brokenbrough, along with her partner, made a stop of a vehicle displaying a temporary tag. The tag indicated that it was valid through November, but the deputies "decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed." Brokenbrough asked the driver, Simeroth, for her license. One of the deputies recognized the passenger, Bruce Brendlin, as "one of the Brendlin brothers" and asked the passenger to identify himself, as Brokenbrough knew that one of the two brothers had "dropped out of parole supervision."

Upon obtaining the passenger's identification, the deputy returned to the cruiser and verified that there was an outstanding warrant for that individual. While they were waiting for back-up, the deputy "saw Brendlin briefly open and then close the passenger door of the Buick." Once the deputies were able to remove Brendlin from the car and place him under arrest, they searched his person and found an "orange syringe cap." Simeroth was patted down and the deputies found "syringes and a plastic bag of a green leafy substance." She was also arrested. A search of the vehicle revealed "tubing, a scale, and other things used to produce methamphetamine."

Brendlin was charged with possession and manufacture of methamphetamine, because of the items found in the car. He moved for suppression of that evidence. Brendlin argued that "the officers lacked probable cause or reasonable suspicion to make the traffic stop." He did not argue that his rights were violated by the stop, but "claimed only that the traffic stop was an unlawful seizure of his person." The California "trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him." Brendlin took a conditional guilty plea and appealed.

The state appellate court reversed the trial court, finding that the traffic stop was, in fact, unlawful. The prosecution conceded that the "police officers lacked reasonable suspicion to justify the traffic stop because" the display of the temporary permit was legal. The California Supreme Court, however, reversed, finding that the legality of the original stop was immaterial, and that "a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he [the passenger, specifically] was the subject of the officer's investigation or show of authority."

Brendlin requested certiorari, and the U.S. Supreme Court accepted the case.

ISSUE: Is a passenger in a vehicle subject to a traffic stop "detained" for purposes of the Fourth Amendment?

HOLDING: Yes

DISCUSSION: The Court began its unanimous decision by stating that a "person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement."[139] A seizure may be made by a simple "show of authority" without physical force, but there is "no seizure without … [an] actual submission."

The Court stated that it had previously created a "test for telling when a seizure occurs in response to authority, and when it does not." In U.S. v. Mendenhall, the Court ruled that "a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"[140] The Court noted that the "law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver 'even though the purposes of the stop is limited and the resulting detention quite brief.'"[141] Further, the Court stated that while it had not yet "squarely answered the question whether a passenger is also seized," it had stated, "in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver."

To resolve the question in this case, the Court asked "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." The Court continued, stating that it thought "that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." Further:

> A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on 'privacy and personal security' does not normally (and did not here) distinguish between passenger and driver."[142] An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

The Court also agreed that it is "reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."[143] The Court agreed that the "risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

Finally, the Court noted that its decision "comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question" - leading to a "prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop."

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[139] Florida v. Bostick, 501 U.S. 429 (1991); Brower v. County of Inyo, 489 U.S. 593 (1989).
[140] 446 U.S. 544 (1980)
[141] Delaware v. Prouse, 440 U.S. 648 (1979). Whren v. U.S. , 517 U.S.806 (1996)
[142] U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976).
[143] Maryland v. Wilson, 519 U.S. 408 (1997); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Michigan v. Summers, 452 U.S. 692 (1981)

The Court disagreed with the premises of the California Supreme Court. Using the objective test described in Mendenhall "of what a reasonable passenger would understand," the Court noted that "[t]o the extent that there is anything ambiguous in the show of force was it fairly seen as directed only at the driver or at the car and its occupants, the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority." The Court also found that "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." In other words, "Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside."

The Court concluded its opinion by noting that holding otherwise would lead to the situation where "[h]olding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal." Further:

> The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of 'roving patrols" that would still violate the driver's Fourth Amendment right.

The Court concluded that "Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest." The Court vacated the decision of the California Supreme Court and remanded the case back to California for further proceedings consistent with the opinion.

Arizona v. Gant, 556 U.S. 332 (2009)

FACTS: On Aug. 25, 1999, Tucson (AZ) officers received a tip that drugs were being sold from a particular address. Officers did a knock and talk, and spoke to Gant, who identified himself and stated he expected the owner to return later. The officers left and checked Gant's record, and learned that he had an outstanding warrant for driving on a suspended OL, and that his license was still suspended.

Officers returned later, and arrested several occupants. Gant then arrived, driving, and got out of the car. The officers arrested and handcuffed Gant, first contacting him when he was 10-12 feet from his car. When additional officers arrived, Gant was secured in the back of a patrol car, handcuffed. The officers searched the car, finding a gun and cocaine in a jacket on the backseat of the car. Gant was charged with possession of the cocaine and possession of drug paraphernalia (the plastic bag). He moved for suppression, arguing that Belton[144] "did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle."

The trial court denied his motion, but ultimately, the Arizona Supreme Court "concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment." Arizona sought certiorari, and the U.S. Supreme Court granted review.

[144] New York v. Belton, supra; See also Thornton v. U.S., supra.

ISSUE: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to the arrest conducted after the vehicle's recent occupants have been arrested and secured?

HOLDING: Yes

DISCUSSION: The Court reviewed, at length, the precepts of Belton and Chimel v. California.[145] The Court acknowledged that the Belton opinion "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search" including situations where the arrested subject has left the scene. Further, the Court noted, "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." In the case at bar, the Court stated that "[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case." The Court specifically noted that in this case, there were five officers present, with three arrested subjects who were already secured in vehicles.

The Court ruled that Belton and Thornton "permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest.[146]" In addition, searches are permitted "when safety or evidentiary concerns demand."

The Court concluded, "officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search" and "[c]onstruing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." The Court stated:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

The Court upheld the decision of the Arizona Supreme Court.

BOOKING SEARCH

Illinois v. Lafayette, 462 U.S. 640 (1983)

FACTS: Lafayette was arrested for disturbing the peace and taken to the station. "There, without obtaining a warrant and in the process of booking him and inventorying his possessions, the police removed the contents of a shoulder bag [Lafayette] had been carrying and found amphetamine pills."

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[145] 395 U.S. 752 (1969)

[146] The term - offense of arrest - means the offense for which the individual is initially being arrested. In Gant's case, that would be the warrant for driving on a suspended OL, not the drug offenses for which he was ultimately charged.

Lafayette was charged with drug offenses. During a pretrial hearing, the trial court agreed to suppress the pills. The state appellate court agreed "holding that the shoulder bag search did not constitute a valid search incident to a lawful arrest or a valid inventory search of [his] belongings."

Illinois appeared to the Supreme Court, which granted certiorari.

ISSUE: May officers search the belongings and person of an arrested subject before they are jailed?

HOLDING: Yes

DISCUSSION: The Court agreed that "[c]onsistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station incident to booking and jailing the suspect." In such situations, "justification … does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search."

Further:

> Here, every consideration of orderly police administration - protection of a suspect's property, deterrence of false claims of theft against the police, security, and identification of the suspect - benefiting both the police and the public points toward the appropriateness of the examination of … the shoulder bag.

The Court continuing listing more reasons why such searches and seizures of possessions are appropriate, even necessary, noting the "these mundane realities justifies reasonable measures by police to limit … risks - either while the items are in police possession or at the time they are returned to the arrestee upon his release." In addition, it is not necessary that police be concerned about a particular container, since the "need to protect against such risks arises independent of a particular officer's subjective concerns."

Lafayette's case was remanded back to Illinois for further proceedings.

Search Incident to Citation

Knowles v. Iowa, 525 U.S. 113 (1998)

FACTS: An Iowa police officer issued Knowles a citation for speeding, 43-mph in a 25-mph zone. Iowa law permitted an officer to cite instead of making an arrest for any offense that is bailable. Iowa law further provides that issuing a citation instead of making an arrest does not affect an officer's authority to conduct an otherwise lawful search. Without either consent or probable cause, the officer searched Knowles' car, found marijuana and a "pot pipe", and arrested Knowles. Knowles was convicted and the Iowa Supreme Court upheld the conviction. Eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is a search of a vehicle passenger compartment permissible when the officer has probable cause to arrest, but only issues a citation?

HOLDING: No.

DISCUSSION: The U. S. Supreme Court, by unanimous decision, held that, although authorized by state law, the search violated the Fourth Amendment. Chief Justice Rehnquist reasoned that the two historical rationales for the "search incident to arrest" exception – (1) the need to disarm the suspect in order to take him into custody and (2) the need to preserve evidence for later use at trial – are not present in the citation situation.

The Court reversed the conviction.

Closely-Regulated Business (Warrantless searches)

U.S. v. Biswell, 406 U.S. 311 (1972)

FACTS: Biswell owned a pawn shop in New Mexico licensed to deal in sporting weapons. One day he was visited by a city police officer and a Treasury agent who requested the business books and entry into the locked gun storage area. Biswell asked about a warrant but was told that it was not needed, as such inspections were authorized. He was provided with a copy of the law. He allowed the two officers to enter the storeroom, where they found two sawed-off rifles. He was convicted of the charge of illegally possessing the weapons and appealed. The appellate court reversed the conviction. Eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Is a the search for (and seizure of) of illegal items found during a proper warrantless inspection of an area lawful?

HOLDING: Yes

DISCUSSION: The Court found that, "in the context of a regulatory system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute." The Court compared the close regulation of certain businesses, such as the liquor industry in Colannade Catering Corp. v. U.S., to the regulation of firearms sales, and agreed that the firearms industry is subject to the same level of pervasive governmental inspection. The Court balanced the interests of the respective parties and determined that when an individual chooses to engage in such a business, and accept a license to do so, the licensee is made aware of the possibility of such inspections. The Court also stated that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." Requiring a warrant would defeat that purpose.

The Court upheld the conviction.

Sweep Search

Maryland v. Buie, 494 U.S. 325 (1990)

FACTS: Following an armed robbery by two men, one of whom was wearing a red running suit, police obtained warrants for Buie and another man. Police went to Buie's homeand Buie was arrested coming up from the basement. Police entered the basement "in case there was someone else" and seized a red running suit, lying in plain view. Buie was charged and requested suppression.

The trial court denied the motion and Buie was convicted. The intermediate appellate court upheld the denial, but the state Supreme Court accepted the suppression. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Are items found in plain view during a "protective sweep" able to be seized?

HOLDING: Yes

DISCUSSION: The Fourth Amendment permits that, incident to an arrest, "the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest…." The Court emphasized that the purpose of such a search is not a full search of the premises, but "may extend only to a cursory inspection of those spaces where a person may be found."

The Court held that since the entry into the basement was lawful, any items located in plain view that were evidence of the crime could be seized. The U.S. Supreme Court upheld the conviction.

See also: *U.S. v. Johnson, 9 F.3d 506 (6th Cir. 1993)*
U.S. v. Rigsby, 943 F.2d 631 (6th Cir. 1991)

Crime Scene Search

Mincey v. Arizona, 437 U.S. 385 (1978)

FACTS: During a drug raid, an undercover officer was killed and Mincey (among others) was wounded. Other narcotics officers on the scene, pursuant to policy, called for medical assistance and searched for other victims in the apartment, but took no further action.

Homicide detectives arrived, secured the scene, and searched the property repeatedly over four days, seizing numerous items. Evidence discovered during this search was introduced at trial. No search warrant was obtained prior to the search. Mincey was convicted and appealed. The Arizona court upheld the conviction, and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the warrantless search of the "murder scene" permissible?

HOLDING: No

DISCUSSION: There is no "murder scene exception" to the general requirement for a search. There was no emergency or exigency that justified an immediate search; the officers had adequate time and reason to get a warrant. The property could easily have been secured to guard against tampering of evidence while waiting for the warrant. The U.S. Supreme Court overturned the conviction.

Thompson v. Louisiana, 469 U.S. 17 (1984)

FACTS: On May 18, 1982, deputy sheriffs arrived at Thompson's home in response to a call by her daughter of a homicide. Upon arriving, deputies went through the house and found Thompson's husband dead of a gunshot wound, and Thompson lying unconscious in another room, apparently the victim of a drug overdose. According to the daughter, Thompson had shot her husband, taken a number of pills in a suicide attempt, then changed her mind and called the daughter for help.

After having Thompson sent to the hospital for treatment, the deputies secured the scene. In a half-hour, homicide detectives arrived and conducted a search of the residence. During that search, three items were located that Thompson asked to have suppressed, a pistol found in the same room as her husband's body, a torn-up note in the trash, and another letter, an apparent suicide note, folded inside a Christmas card in an envelope in that same room.

Detectives admitted that they did not have valid consent to search the residence and that they had sufficient time to secure a warrant before commencing the search. The trial court accepted Thompson's motion to suppress, but ultimately, the state Supreme Court overturned the trial court. The U.S. Supreme Court accepted certiorari.

ISSUE: Does an invitation to come to a residence to render aid give a blanket consent for a search of the residence?

HOLDING: No

DISCUSSION: While acknowledging factual differences between this case and Mincey, the Court stated that the situation was ultimately the same. The Court stated that such an invitation did not diminish the expectation of privacy of the residents in the house. The U.S. Supreme Court found the evidence inadmissible.

Flippo v . West Virginia, 528 U.S. 11 (1999)

FACTS: Flippo and his wife were vacationing at a cabin in a state park. One night he called 911 to report that they had been attacked. The police arrived to find Flippo waiting outside the cabin, with injuries to his head and legs. After questioning him, an officer entered the building and found the body of Flippo's wife, with fatal head wounds. The officers closed off the area, took Flippo to the hospital, and searched the exterior and environs of the cabin for footprints or signs of forced entry. When a police photographer arrived at about 5:30 a.m., the officers reentered the building and proceeded to "process the crime scene." For over 16 hours, they took photographs, collected evidence, and searched through the contents of the cabin. At the crime scene, the investigating officers found on a table, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives. The photographs included several taken of a man (later identified as a friend of Flippo and a member of the congregation where Flippo was the minister) who appears to be taking off his jeans. The prosecutor introduced the photographs as evidence of Flippo's relationship with the man and argued that the wife's displeasure with this relationship was one of the reasons that motivated Flippo to kill her.

Flippo was indicted for his wife's murder and moved to suppress the photographs and negatives discovered in an envelope in the closed briefcase during the search. He argued that the police had obtained no warrant, and that no exception to the warrant requirement justified the search and seizure. The trial court denied the motion to suppress, approving the search as one of a "homicide crime scene" and Flippo was convicted. The West Virginia Supreme Court of Appeals denied discretionary review. Flippo appealed to the United States Supreme Court, which accepted certiorari.

ISSUE: Is there a crime scene exception to the warrant requirement?

HOLDING: No

DISCUSSION: In an unanimous opinion the U. S. Supreme Court reversed the lower courts for further proceedings, stating:

> A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirements. . . . The position of the trial court squarely conflicted with Mincey v. Arizona,[147] where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause of the Fourth Amendment. We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, . . . but we rejected any general 'murder scene exception' as "inconsistent with the Fourth and Fourteenth Amendments . . . ." The Court expressed no opinion on whether the search might be justified as consensual or the applicability of any other exception to the warrant rule.

The U.S. Supreme Court overturned the conviction.

Community Caretaker

Cady v. Dombrowski, 439 U.S. 128 (1978)

FACTS: On September 9, 1969, Dombrowski was a member of the Chicago, Illinois, police force. He possessed, at that time, a 1960 Dodge vehicle. On that date, he traveled to West Bend, Wisconsin, and during the evening hours, he was seen at two small taverns in the area. Sometime the morning of the 10th, his vehicle broke down and was to towed to his brother's farm, in an adjacent county. He returned to Chicago and rented another vehicle, and drove back to Wisconsin. That rented vehicle was seen on the farm in the early morning of the 11th, and later that morning, Dombrowski purchased two towels at a nearby store. During that evening, Dombrowski was seen drinking heavily and had a wreck. He was picked up by a passing motorist and taken into Kewaskum, where two local officers picked him up to take him back to the wreck scene. They noticed he appeared to be drunk and gave conflicting information about the wreck.

At the scene, they investigated the wreck. Believing Chicago officers were required to carry their weapons at all times, they searched Dombrowski and found no weapon. While waiting for a tow-truck, they searched the passenger area and glovebox of the rented vehicle, again finding no weapon. The vehicle was towed to a private garage, where it would be left outside. Dombrowski was taken to the West Bend police station and arrested for drunken driving. Because of his injuries from the wreck, he was then taken to the hospital. The officers stated he was impaired and "incoherent at times." While at the hospital, he fell into a coma, and was hospitalized, under guard. Another officer, Weiss, went back to the garage and again searched the rented vehicle, still believing there might be a weapon in the vehicle.

Inside the vehicle, Officer Weiss found a book of Chicago police regulations and a flashlight that had drops of what appeared to be blood on it. Opening the truck, he found a number of items covered in type O blood; Dombrowski had type A. These items included clothing, including police uniform trousers, a nightstick with "Dombrowski" stamped on it, a raincoat, a towel, and a car mat. The blood on the mat was still moist. These items were collected as evidence.

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[147] Supra.

Eventually Dombrowski informed the police that "he believed there was a body lying near the family picnic area at the north end of his brother's farm." They located the body of McKinney, and he was later found to have been struck over the head and shot, dying in the early morning hours of the 11th. McKinney had type O blood.

Dombrowski was convicted of murder. His conviction was upheld by the Wisconsin Supreme Court. He filed a habeas corpus petition (a petition to test the legality of the detention) based upon the alleged constitutional violation. The District Court denied the petition, but the Court of Appeals reversed, holding that the searches if the vehicle were unconstitutional. The U.S. Supreme Court accepted certiorari.

ISSUE: Is a search of a vehicle, in the interest of general public safety, unconstitutional?

HOLDING: No

DISCUSSION: The Court reasoned that the Dombrowski's wrecked vehicle represented a nuisance, and that the search of the vehicle was done for a proper reason, the concern of the officers for the safety of the general public that might be endangered by someone finding a weapon in the car. The vehicle was to be left outside in an unguarded location. At the time of the search, the officer had no idea that a murder, or any other crime, had been committed. The Court recognized that posting a guard on the vehicle might not have been feasible for the officers in Kewaskum, Wisconsin. The Court concluded that a "caretaking" seizure of the car, and search within for a weapon believed to be inside, was a reasonable and appropriate under the circumstances.

The U.S. Supreme Court upheld the conviction.

See also: *Mills v. Com., 996 S.W.2d 473 (Ky., 1999)*
Gillum v. Com., 925 S.W.2d 189 (Ky.App., 1995)
Blankenship v. Com., 740 S.W.2d 164 (Ky.App., 1987)
Todd v. Com., 716 S.W.2d 242 (Ky., 1986)

HOT/FRESH PURSUIT

Warden of Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967)

FACTS: About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took $363 and ran. Two cab drivers in the vicinity, attracted by the shouts of "hold-up", followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to the police who were proceeding to the scene of the robbery. In less than five minutes, the police arrived at the house. An officer knocked and announced their presence. Mrs. Hayden answered the door, and the officers told her they believed that a robber had entered the house. They asked to search the house and she offered no objection. (The court held that the issue of consent by Mrs. Hayden for the entry need not be decided because the officers were justified in entering and searching for the felon, for his weapons and for the fruits of the robbery.)

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile, an officer was attracted to an

adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer, who was "searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All of these items were introduced against Hayden at his trial, and he was convicted. He appealed; the U.S. Supreme Court accepted certiorari.

ISSUES: Is the warrantless entry into a house, in hot pursuit of a fleeing subject, lawful? And if so, many items of evidence be seized while inside the residence?

HOLDINGS: Yes

DISCUSSION: When police were informed that armed robbery had taken place and that a suspect had entered a certain house less than five minutes before they reached it, officers acted reasonably when they entered the house. The officers began to search for the suspect and for weapons which he had used in robbery or which might be used against them. The permissible scope of the search could be as broad as reasonably necessary to prevent danger that suspect at large in house might resist or escape.

The Fourth Amendment does not require police to delay in course of investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons that could be used against them or to effect escape. Language of the Fourth Amendment does not support any distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband.

The U.S. Supreme Court upheld the conviction.

SEARCH - VEHICLES

Vehicle Stops

U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975)

FACTS: On March 11, 1973, the Border Patrol checkpoint near San Clemente, California was closed because of weather. However, two officers were observing northbound traffic, using their headlights to illuminate the passenger compartments. The pursued and stopped a vehicle driven by Brignoni-Ponce, "saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent." The questioned the occupants and learned that all three were in the U.S. illegally. All three were arrested; Brignoni-Ponce was charged with transporting illegal immigrants. He moved to suppress the testimony, and the trial court denied the motion. Eventually, he was convicted, and appealed. The Ninth Circuit Court of Appeals reversed the conviction and the government requested certiorari, which was accepted. The U.S. Supreme Court accepted certiorari.

ISSUE: May officers ask about immigration status during an otherwise valid traffic stop?

HOLDING: Yes

DISCUSSION: The Court reviewed its previous holdings in Terry v. Ohio and Adams v. Williams, and how in both cases "the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous." In each case, as well, the "limited searches and seizures … were a valid method of protecting the public and preventing crime." In this situation, the Court noted that "because of the importance of the governmental interest at stake, the minimal intrustion of a brief stop, and the absence of practical alternatives for policing the border, [the Court held] that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, [the officer] may stop the car briefly and investigate the circumstances that provoke suspicion."

The Court further permitted the officers to "question to driver and passengers about their citizenship and immigration status, and … may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."

However, the Court held that "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference" – but that random stops are not reasonable. The Court continued that "[f]or the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens."

The Court concluded that "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." In this case, the officers used only one factor, the apparent Mexican ancestry of the occupants and that was not sufficient to justify the stop and the detention of the occupants.

The U.S. Supreme Court affirmed the judgment of the Ninth Circuit.

Delaware v. Prouse, 440 U.S. 648 (1979)

FACTS: A New Castle County, Delaware police officer stopped Prouse's vehicle. As he approached, the officer smelled marijuana. The officer saw marijuana on the floor of the vehicle. At a hearing to suppress the evidence, the officer testified that he did not observe any traffic or equipment violations or any suspicious activity. The officer said that he made the stop to check the license and registration, testifying that; "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." Prouse was eventually convicted and appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Can law enforcement officers stop vehicles without any cause?

HOLDING: No

DISCUSSION: Stopping an automobile and detaining the driver simply to check his driver's license and automobile registration are unreasonable actions under the Fourth Amendment. If the officer has articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is in violation of the law, the stop would be reasonable. The Court mentioned that pulling a vehicle over is different from a traffic checkpoint. Questioning of all traffic at roadblock-type stops is permissible, as are weigh stations and checkpoints for commercial motor vehicles.

The U.S. Supreme Court reversed the conviction.

Navarrette v. California, 134 S.Ct. 1683 (2014)

FACTS: On August 23, 2008, 911 dispatch for the California Highway Patrol (CHP) in Mendocino County, CA, received a call from the CHP dispatcher in adjacent Humboldt County. Humboldt County relayed a tip from a 911 caller, which was broadcast to CHP officers at 3:47 p.m., as follows:

> Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.

At 4 p.m., a CHP officer heading northbound toward the area passed the truck; he made a U-turn and made the stop at 4:05 p.m. A second officer arrived on scene and the two officers approached the truck; they immediately smelled marijuana. A search of the truck revealed 40 pounds of marijuana. Navarette was driving; his passenger bore the same last name. Both were arrested.

Both moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment as it lacked reasonable suspicion. The California trial courts disagreed and upheld the stop. Both Navarettes took a conditional guilty to transporting marijuana and appealed. The California Court of Appeal affirmed the plea; the California Supreme Court denied review. The Navarettes sought certiorari to the U.S. Supreme Court, which accepted review.

ISSUE: Might an anonymous 911 caller provide sufficient information to support a traffic stop?

HOLDING: Yes

DISCUSSION: The Court began by noting that the "Fourth Amendment permits brief investigative stops – such as the traffic stop in this case – when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[148] Reasonable suspicion depends upon "both the content of information possessed by police and its degree of reliability."[149] Although a "mere hunch" is not enough, it requires "considerably less" than probable cause.[150]

With respect to anonymous tips, the Court noted that it had already rejected "the argument 'that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person.'"[151] A true anonymous tip, standing alone, rarely provides any information as to the "Informant's basis of knowledge or veracity" because an ordinary caller does "not provide extensive recitations of the basis of their every observations." But, under some circumstances, "an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop."

The Court contrasted its holdings in Alabama v. White[152] and Florida v. J.L.[153] In the first, it had agreed that "the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity." In the latter, however, the bare-bones tip, which essentially just placed a described suspect (allegedly with a gun) at a location, a bus stop, where people would, of course, be likely to stand. The tip provided no basis for the informant's knowledge of "concealed criminal behavior" – the gun – or any prediction of the suspect's future behavior that might be corroborated to "assess the tipster's credibility." In the latter, the Court concluded the tip was "insufficiently reliable."

In the current case, the first question is "whether the 911 call was sufficiently reliable to credit the allegation that" the Navarettes ran the caller off the road. Even "assuming for present purposes" that the call was truly anonymous, the Court found "adequate indicia of reliability" to support the stop.

> By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability.[154]

Unlike cases where the tip concerns something hidden, like drugs or firearms, this claim involved personal and direct knowledge of the subject's wrongdoing. Further, the Court continued:

> There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because "substantial contemporaneity of event and

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[148] U.S. v. Cortez, 449 U. S. 411 (1981); see also Terry v. Ohio, 392 U. S. 1 (1968).
[149] Alabama v. White, 496 U. S. 325 (1990).
[150] U.S. v. Sokolow, 490 U. S. 1 (1989).
[151] Adams v. Williams, 407 U. S. 143 (1972).
[152] Supra.
[153] 529 U. S. 266 (2000)
[154] Illinois v. Gates, 462 U. S. 213 (1983)); Spinnelli v. U.S., 393 U. S. 410 (1969).

> statement negate the likelihood of deliberate or conscious misrepresentation." A similar rationale applies to a "statement relating to a startling event"—such as getting run off the road—"made while the declarant was under the stress of excitement that it caused." Unsurprisingly, 911 calls that would otherwise be inadmissible hearsay have often been admitted on those grounds. There was no indication that the tip in J. L. (or even in White) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller's veracity here.[155]

In addition, the caller used the 911 system, and most, if not all, such emergency systems include "some features that allow for identifying and tracking callers, and thus provide some safeguards against making false reports with immunity." They "can be recorded, which allows victims with an opportunity to identify the false tipster's voice and subject him to prosecution." Federal FCC mandates require cell phones to relay the phone number to 911 and most now identify the caller's "geographic location with increasing specificity." Although not perfect, it would be reasonable for an officer to "conclude that a false tipster would think twice before using such a system." The use of 911 was one of the relevant circumstances that supported the reliance of the officers.

The Court agreed, however, that "even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" The Court agreed that the reported behavior supported a reasonable suspicion of impaired/drunk driving. A number of cases supported the idea that "the accumulated experience of thousands of officers suggest that these sorts of erratic behaviors are strongly correlated with drunk driving." Not all traffic infractions do, of course, such as minor speeding or failure to use a seatbelt, but "a reliable tip alleging the dangerous behaviors" reported in this case, certainly do. "Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.[156] Further, "the experience of many officers suggests that a driver who almost strikes a vehicle or another object – the exact scenario that ordinary causes 'running off the roadway' is likely intoxicated." Although it is certainly true that it might have been caused by a momentary distraction, a finding of reasonable suspicion does not have to "rule out the possibility of innocent conduct."[157]

Finally:

> Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving. . It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time. Extended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication, but the 5-minute period in this case hardly sufficed in that regard. Of course, an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving. Once reasonable suspicion of drunk driving arises, "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.". This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.

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[155] Internal citations removed for brevity.
[156] The Court cited to several training manuals and documents for law enforcement.
[157] U.S. v. Arvizu, 534 U.S. 266 (2002)

The Court acknowledged this situation was a "close call," but agreed that "under the totality of the circumstances," the "indicia of reliability" was enough to find reasonable suspicion to justify the investigative stop.

The Supreme Court upheld California's ruling.

Pretext Stops

Whren v. U.S., 517 U.S. 806 (1996)

FACTS: Officers patrolling a "high drug area" in an unmarked car observed Brown, the driver of a truck, waiting at stop sign for unusually long time, then turning suddenly without signaling, and finally speeding. Officers stopped the vehicle. Upon approaching the truck, officers saw plastic bags containing crack cocaine in Whren's hands – Whren was in the passenger seat.

Whren argued that the officer's reason for approaching the car was pretextual, and that the drugs should be suppressed. Whren was eventually convicted. The Court of Appeals affirmed and Whren appealed. The U.S. Supreme Court accepted certiorari.

ISSUE: Is a "pretext stop," which is defined as a stop for a minor reason when the officer subjectively believes that other crimes are being committed, valid?

HOLDING: Yes

DISCUSSION: The officers had probable cause to make the initial traffic stop. Whren argued that because the traffic code consists of a "multitude of applicable traffic and equipment regulations," that officers could always find a reason to stop any car, and as such, the test should be what a reasonable officer would do under the circumstances. In other words, would a reasonable officer have made that particular stop? The Court recognized that it would be almost impossible to define "standard police practices," as they would differ dramatically from place to place, and held that if the officers could identify valid reasons for the stop, that such stops were permitted without considering the subjective intent of the officers involved.

The U.S. Supreme Court upheld Whren's conviction.

See also: *U.S. v. Ferguson, 8 F.3d 385 (6th Cir. 1993)*
U.S. v. Bradshaw, 102 F.3d 204 (6th Cir. 1996)
U.S. v. Wellman, Jr., 185 F.3d 651 (6th Cir. 1999)
U.S. v. Bailey, 302 F.3d 652 (6th Cir. 2002)
U.S. v. Garrido-Santana, 360 F.3d 565 (6th Cir. 2004)
U.S. v. Littleton, 15 Fed.Appx. 189 (6th Cir. 2001)

Vehicle Exception (Carroll) Search

Carroll v. U.S., 267 U.S. 132 (1925)

FACTS: On September 29, 1921, undercover prohibition agents met with Carroll in an apartment in Grand Rapids, for the purpose of buying illegal whiskey. Carroll left in order to get the

whiskey. He returned and said that his source was not in, but that he would deliver it the next day. He did not return, however.

On October 6, while patrolling the road leading from Detroit to Grand Rapids, the agents saw Carroll in the same Oldsmobile roadster going eastward from Grand Rapids towards Detroit. They gave pursuit, but lost the car. On December 15, again while on patrol on the same road, saw Carroll in the same Oldsmobile roadster coming from Detroit to Grand Rapids. They gave chase and stopped Carroll, searched the car, and found 68 bottles of illegal whiskey behind the upholstery, the filling of which had been removed. Carroll was arrested. In addition, the road from Detroit to Grand Rapids was heavily used to introduce illegal whiskey into the country.

The agents were not expecting to encounter Carroll at that particular time, but when they met Carroll there they believed (the Court found the agents had probable cause) that he was carrying liquor, and hence the seizure and search of the vehicle. Carroll was convicted and appealed; the U.S. Supreme Court accepted certiorari.

ISSUE: Is the search of a vehicle in a public place, upon probable cause that the vehicle contains contraband, lawful?

HOLDING: Yes

DISCUSSION: In light of the facts, it is clear that the officers had probable cause for the search and seizure. The Court made extensive references to preceding cases and to statutes and stated that, "... recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper ... warrant may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

The reasoning of Carroll concerning the need to permit warrantless search "where it is not practicable to secure a warrant" suggested that a warrantless search of a car would be permissible with respect to any type of object for which a warrant to search could be obtained were there time to secure a warrant. Subsequent cases discussed the warrantless search in Carroll based on the mobility of the vehicle, noting that the "opportunity to search is fleeting since a car is readily moveable."

The Court said that the "right to search and the validity of the seizure are not dependent on the right to arrest." In Carroll, the police had probable cause that the auto contained contraband but yet no lawful basis for taking custody of the occupants of the vehicle so as to prevent its leaving while a search warrant was sought.

The U.S. Supreme Court affirmed the conviction.

See also: *Wydman v. Com. 512 S.W.2d 507 (1974)*
Estep v. Com., 663 S.W.2d 213 (1984)

Chambers v. Maroney, 399 U.S. 42 (1970)

FACTS: On May 20, 1963, two men, each of whom displayed a firearm, robbed a service station in North Braddock, Pennsylvania. A witness to the robbery had told police the four male robbers were driving a blue station wagon and that one was wearing a green sweater and another a trench coat.

Within the hour, a station wagon fitting the description was stopped, and the four men inside were arrested. Chambers was wearing a green sweater. (There was also a trench coat in the car.) The car was driven to the police station, where it was thoroughly searched. Two handguns were found hidden in a compartment, a right glove with change inside (as had been done at the robbery), and business cards for another service station that had been robbed recently.

Chambers was eventually convicted in both robberies. He appealed, and eventually, the U.S. Supreme Court accepted certiorari.

ISSUE: Was the search of the vehicle after it had been taken to the station, lawful under the vehicle exception doctrine?

HOLDING: Yes

DISCUSSION: While the Court acknowledged that a search incident to arrest would not have been appropriate, the Court stated that the theory of a Carroll vehicle exception search is a totally different premise on which to base a search. Based on the facts, the vehicle could have been searched at the scene of the original arrest, and as such, there was no practical difference in searching the car at the station. The Court held that "for the purposes of the Fourth Amendment, there is a constitutional difference between houses and cars."

The U.S. Supreme Court upheld the conviction.

Cardwell v. Lewis, 417 U.S. 583 (1974)

FACTS: Lewis was a suspect in the murder of a man in Ohio who had been shot. The victim's automobile had been pushed over an embankment by another vehicle. A vehicle similar to Lewis's car had been seen leaving the scene, and the police learned that body repair work had been done on the front end of Lewis' car on the day after the murder The Columbus, Ohio police wanted to examine the exterior of Lewis' car to see if the foreign paint found on the victim's car and tire tread marks found at the scene matched Lewis' car. The police had probable cause to believe that his car had been used in the crime, but did not request a search warrant. Instead, a warrant for Lewis' arrest had been obtained. The police asked Lewis to come in to talk, which he did. He parked his car in a nearby public parking lot. After Lewis was arrested, the police towed his car to their impoundment lot. Tests confirmed that the paint on his car matched that left on the victim's car and the tire treads matched the prints at the crime scene. Lewis appealed his conviction, arguing that the seizure and examination of his car was a search in violation of the Fourth and Fourteenth Amendments. Ultimately, the U.S. Supreme Court accepted certiorari.

ISSUE: Was the search of the exterior of the vehicle without a warrant lawful?

HOLDING: Yes

DISCUSSION: The Court, in a series of cases dating back to Carroll v. United States, had long recognized a distinction between the warrantless search of a movable vehicle and a home or building, in light of the obvious fact a vehicle could easily be removed from the jurisdiction before a warrant could be obtained. The Court reasoned such a search was less intrusive on the rights protected under the Fourth Amendment. There was a lesser expectation of privacy in a motor vehicle because of its function as transportation and that it usually was not used as a residence or repository of personal effects. It travels

about on public roads in plain view of the general public. Citing Katz, the Court stated that what a person knowingly exposes to the public is not a subject of Fourth Amendment protection.[158] Since the "search" was limited to the exterior surfaces of a vehicle left in a public parking lot, the Court "fail[ed] to comprehend what expectation of privacy was infringed." Therefore, where probable cause exists, the warrantless examination of the exterior of a car is not unreasonable.

The Court upheld the conviction.

Maryland v. Dyson, 527 U.S. 465 (1999)

FACTS: A deputy sheriff in St. Mary's County received a tip from a reliable informant that Dyson, a known drug dealer, had gone to New York in a rented car to buy drugs and would be returning that night. A description of the vehicle, including the license number, was provided. When Dyson returned in the rented car, he was stopped and the vehicle was searched without a warrant. Crack cocaine was found in a duffel bag in the trunk. Dyson sought to suppress the cocaine as it had been discovered in a warrantless search. He argued among other things that there were no exigent circumstances and the police had plenty of time to get a warrant, but that they had not done so. The Maryland court ruled that there was no exigency that prevented or even made it difficult to get a search warrant prior to the search and suppressed the evidence. The Maryland appellate court upheld that decision. Ultimately, the U.S. Supreme Court accepted certiorari.

ISSUE: Is it necessary to find exigent circumstances to avoid getting a warrant for a search of a vehicle when there is probable cause that the vehicle contains contraband?

HOLDING: No

DISCUSSION: The U. S. Supreme Court rejected this argument. The Court stated that the automobile exception has no separate exigency requirement. The automobile exception is based on the "ready mobility" of the vehicle and the "reduced expectation of privacy resulting from its use as a readily mobile vehicle, "which" justified application of the vehicular exception"[159]. Citing the more recent Pennsylvania v. Labron, which had a nearly identical fact pattern to this case, the Court restated the rule that "[I]f a car is readily mobile and probable cause exists to believe it contains contraband, a warrant is not needed"[160] There is no exigency requirement that must be met to justify a search of an automobile without a warrant.

The U.S. Supreme Court reversed the Maryland decision.

Carroll - Containers

U. S. v. Chadwick, 433 U.S. 1(1977)

FACTS: On May 8, 1973 Amtrak officials in San Diego observed Machado and Leary load a footlocker onto a train bound for Boston. Their suspicions were aroused when they noticed that the trunk seemed unusually heavy for its size. It was also leaking talcum powder, a substance often used to mask the

[158] Supra.
[159] California v. Carney, supra.
[160] Supra.

odor of drugs. Machado also fit a drug-courier profile used by the railroad. The railroad officials notified DEA in San Diego who in turn notified DEA in Boston.

In Boston, DEA agents did not have a search or arrest warrant, but they did have a drug dog. The agents observed Machado and Leary as they claimed their baggage and the footlocker. The agents released the drug dog near the footlocker and he alerted on it. Chadwick met Machado and Leary at the station, and together they lifted the 200-pound footlocker into the trunk of Chadwick's car. At that point, while the trunk of the car was open and before the car engine had been started, the officers arrested all three. A search incident to arrest produced the keys to the footlocker from Machado. All three were taken to the Federal Building in Boston. The agents followed with Chadwick's car and the footlocker. At all times, the footlocker remained in the possession and control of the agents. About an hour and a half later, the agents opened the footlocker. It contained large amounts of marijuana. The agents did not have consent of respondents to search, nor did they have a warrant. Chadwick (and his colleagues) were charged and requested suppression. The trial court accepted the motion, and the appellate court affirmed. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is the search of a footlocker, for which officers have sufficient probable cause to believe contains contraband, found inside a vehicle, lawful without a warrant?

HOLDING: No

DISCUSSION: The Fourth Amendment protects people, not places. By placing personal effects inside a locked footlocker, defendants showed that they expected privacy. There being no exigency, it was unreasonable for the Government to conduct a search of the footlocker without a warrant, even where the agents lawfully seized the footlocker at the time of the arrest of its owners and there was probable cause to believe that it contained contraband. A footlocker's mobility did not justify dispensing with warrant by analogy to the "automobile exception" once agents had seized it and had it under their exclusive control. Since defendant's principal privacy interest was not in the container itself, but in its contents, seizure of the locker did not diminish their legitimate expectation that its contents would remain private. Search incident of arrest of luggage after the arrest cannot be justified as incident to the arrest if the search is remote in time or place from the arrest.

The U.S. Supreme Court affirmed the decision.

See also: *California v. Acevedo (elsewhere in this document)*

Arkansas v. Sanders, 442 U.S. 753 (1979)

FACTS: An officer of the Little Rock P.D. received word from an informant that Sanders would arrive at a particular gate, at a particular time, carrying a green suitcase with marijuana. Both the officer and the informant knew Sanders well, having worked on a case involving Sanders before, a case that resulted in Sanders conviction.

Sanders arrived, as expected, and met with a man later identified as Rambo. While Rambo stood by, Sanders retrieved a suitcase from baggage claim; he then handed the case to Rambo. Sanders went outside and entered a taxi, where he had earlier placed his carry-on luggage. In a few minutes Rambo joined him, placing the suitcase in the trunk. The taxi drove away.

Officers pursued and stopped the taxi, and the taxi driver opened the trunk at their request. Without asking permission, officers opened the case and found almost ten pounds of marijuana, packaged in separate bags. Sanders was charged and requested suppression, but the trial court denied the motion. The Arkansas Supreme Court reversed that ruling, holding that suppression was warranted. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: May officers lawfully open a suitcase in the trunk of a vehicle under Carroll?

HOLDING: No

DISCUSSION: The Court stated that this case indicated the line that must be drawn between a Carroll search and the Chadwick prohibition on searching luggage inside a vehicle. The Court discussed the facts of this case, and how the luggage had been safely removed from the vehicle and secured, eliminating the exigency of the search. The Court distinguished between searches *of* automobiles and searches of containers *within* vehicles. Where - as in the present case - the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search of the suitcase until after judicial approval has been obtained. In conclusion, the Court found "no justification for the extension of Carroll … to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police."

The U.S. Supreme Court affirmed the Arkansas Supreme Court's decision.

U.S. v. Ross, 456 U.S. 798 (1982)

FACTS: Acting on a tip about a drug sale, officers stopped the car that had been "tipped" and arrested the driver, who also matched the tip given. The officers opened the trunk, found a closed paper bag, and inside discovered plastic packages of a white powder, later found to be heroin.

The officers then drove the car to headquarters, and searched the car a second time. On the second search, a zippered pouch was found, containing a good deal of cash.

Ross was charged, and eventually convicted, despite his motion to suppress the evidence. The appellate court reversed, however, holding that the trunk should not have been searched without a warrant. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: May officers search a vehicle with probable cause to believe the vehicle contains packages of contraband? May they then move the vehicle to another location and search it a second time?

HOLDING: Yes (to both)

DISCUSSION: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. A search of a vehicle is not unreasonable if based on objective facts that would justify the issuance of a warrant.

The U.S. Supreme Court reversed the decision, and remanded the case.

See also: *Hazel v. Com., Ky., 833 S.W.2d 831 (1992).*

U.S. v. Johns, 469 U.S. 478 (1985)

FACTS: Pursuant to an investigation of a suspected drug smuggling operation, United States Customs officers, by ground and air surveillance, observed two pickup trucks as they traveled to a remote private landing strip and the arrival and departure of two small airplanes from that strip. The officers smelled the odor of marijuana as they approached the trucks and saw, in the back of the two trucks, packages wrapped in dark green plastic and sealed with tape, a common method of packaging marijuana. The officers were unaware of the packages until they approached the trucks.

After making several arrests, including Johns, the officers took the pickup trucks to DEA headquarters. The packages were removed from the trucks. Three days later, and without obtaining a search warrant, DEA agents opened some of the packages and took samples, the samples proved to be marijuana. Johns was charged. He requested suppression, claiming that the search of the packages that had been recovered from the vehicles and placed in storage, three days after the seizure of the vehicles, required a warrant. The Court of Appeals affirmed the suppression, and upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Is the warrantless search of packages several days after their seizure from a vehicle that police had probable cause to believe contained contraband a violation of the Fourth Amendment?

HOLDING: No

DISCUSSION: The record shows that the officers had probable cause that not only the packages but also the trucks themselves contained contraband.

The warrantless search of the packages was not unreasonable merely because it occurred three days after the packages were seized. Because the officers had probable cause to believe that the trucks contained contraband, any expectation of privacy in the vehicles or their contents was subject to the officers' authority to conduct a warrantless search. The warrantless search was not unreasonable merely because the officers returned to the DEA headquarters and placed the packages in storage temporarily rather than immediately open them.

Since the Government was entitled to seize the packages and could have searched them without a warrant originally, the warrantless search three days later after the packages were placed in the warehouse was reasonable and consistent with the Court's precedent involving searches of impounded vehicles.

A vehicle lawfully in police custody may be searched on the basis of probable cause to believe it contains contraband and there is no requirement of exigent circumstances to justify such a warrantless search.

The U.S. Supreme Court reversed the decision, and remanded the case.

California v. Acevedo, 500 U.S. 565 (1991)

FACTS: On October 28, 1987, Officer Coleman of the Santa Ana Police Department received a call from a DEA agent in Hawaii. The agent told Coleman that he had seized a package of

marijuana from Federal Express, which was to have been delivered to Daza, in Santa Ana. The agent then sent to package to Coleman, who was to allow Daza to claim the package at the Federal Express office. Daza claimed the package, and returned to his apartment. Shortly afterward, he left, and was observed disposing of a box and paper in an outside trash container. Coleman went to get a search warrant. A few minutes later, St. George left the apartment, carrying a knapsack. He was stopped, and the knapsack was found to contain over a pound of marijuana.

A little later, Acevedo arrived at the apartment. He stayed a few moments, then left with a full paper bag. The bag was approximately the size of one of the wrapped marijuana packages. He placed the bag in the trunk of his car. At that moment, the officers stopped him and searched the package, finding marijuana.

Acevedo was convicted and appealed. The California appellate court, facing confusing rulings in earlier Supreme Court cases, found for Acevedo. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is a package in the trunk of a car, for which probable cause exists to believe contains contraband, subject to search without a warrant?

HOLDING: Yes

DISCUSSION: The Court outlined the history of search as it relates to automobiles, from Carroll forward. The Court concluded "[I]f destroying the interior of an automobile is not unreasonable, we cannot conclude that looking inside a closed container is." The Court extended the interpretation of the Carroll doctrine in Ross to apply to all searches of containers found in an automobile, stating that "the police may search without a warrant if their search is supported by probable cause." The Court however, limited the decision by stating that probable cause to search a particular package for contraband does not necessarily extend to probable cause to search the entire vehicle.

The U.S. Supreme Court reversed the California court's decision.

Recreational Vehicles/Mobile Homes

California v. Carney, 471 U.S. 386 (1985)

FACTS: DEA had information that defendant was exchanging marijuana for sex in a motor home parked in a regular parking lot in downtown San Diego. DEA observed a youth enter the motor home with Carney and stay for over an hour. Agents stopped the youth when he left the motor home and the youth stated he had received marijuana in return for allowing Carney sexual contact. The youth, at the agent's request, went back to motor home, knocked on the door, and Carney stepped out. Agents went inside and observed marijuana immediately, and a further search revealed additional marijuana. Carney was arrested, and claimed that the search of the motor home without a warrant violates the Fourth Amendment because the vehicle has a dual use as a dwelling. He eventually took a plea, which the appellate California court upheld. However, the California Supreme Court reversed, holding the search to be unreasonable. Ultimately, the prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is a motor home a vehicle or a dwelling for Fourth Amendment purposes?

HOLDING: It depends.

DISCUSSION: A warrant is not required when a vehicle is being used on the highways or is capable of that use and found stationary in a place not regularly used for residential purposes. The vehicle was so situated that an objective observer would conclude that the vehicle was being used as a vehicle, not a residence.

The U.S. Supreme Court reversed the decision and held, under these circumstances, that the RV was a vehicle.

See also: *U.S. v. Markham, 844 F.2d 366 (6th Cir. 1988)*

ROADBLOCKS

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990)

FACTS: In early 1986, the Michigan State Police established a sobriety checkpoint. A task force, appointed by the police director, created guidelines concerning checkpoint operations, site selection and publicity. Under those guidelines, all vehicles passing through a checkpoint would be stopped and the driver checked for intoxication. If the officer detected such signs, the motorist would be pulled out of the traffic flow and further examined, and if appropriate, arrested. All other drivers would be allowed to continue. On the first day of the first checkpoint, in Saginaw County, 126 vehicles passed through the checkpoint in 75 minutes, with the average delay being 25 seconds. Two drivers were further held for field sobriety testing, and one of the two was arrested. (A third vehicle drove through the checkpoint without stopping; it was later stopped and the driver arrested for DUI.)

The checkpoints were suspended pursuant to an injunction filed in another county.

Following a hearing, the trial court found the checkpoints violated the Fourth Amendment. The Michigan Court of Appeals affirmed that decision. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Is a brief stop of a motorist to check for drunk driving unlawful?

HOLDING: No

DISCUSSION: The Michigan courts relied upon language in previous Supreme Court cases to perform a balancing test between the rights of the motorists and the needs of the State to curb drunken driving. However, while the Court agreed that the stops were seizures, it determined such stops were reasonable, given the limited intrusion on law-abiding citizens and the tremendous problem with impaired driving in the United States.

The U.S. Supreme Court reversed the decision, and upheld the stop.

City of Indianapolis v. Edmond, 531 U.S. 32 (2000)

FACTS: Indianapolis police directives set guidelines for roadblocks for the specific purpose of drug interdiction. Signs were posted giving notice of a narcotics checkpoint, and persons stopped at such checkpoints were advised they were being stopped briefly at a drug checkpoint and were

asked to produce a driver's license and vehicle registration. Edmond and Palmer were stopped at one of the narcotics checkpoints; neither was arrested. Both filed a class action lawsuit (with themselves as representative members of the class) claiming that such stops are unreasonable under the Fourth Amendment. The appellate court agreed, and found the stop to be unreasonable. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: Do roadblocks set up expressly for the purpose of narcotics interdiction violate the reasonableness of seizures under the Fourth Amendment?

HOLDING: Yes

DISCUSSION: The Court declined to allow a roadblock that has, as its primary purpose, the uncovering of evidence of general criminal wrongdoing (in this case, narcotics interdiction). To allow such actions would remove the requirement of individualized suspicion in detaining persons. Checkpoints have previously only been recognized as limited exceptions to the general rule of no detention without that particularized reasonable suspicion necessary. Traffic roadblocks intended to catch offenders who are an "immediate, vehicle-bound threat to life and limb," such as sobriety checkpoints, remain permissible, as they bear a "close connection to roadway safety." Roadblocks have been, and still are, effective tools for determining if a person is licensed and a vehicle registered. The Court specifically held that a DUI roadblock is also important to highway safety and thus reasonable under the Fourth Amendment. In addition, the Court also noted that this does not prevent law enforcement authorities setting up an emergency roadblock to catch a fleeing criminal or to thwart imminent danger such as a terrorist attack.

The Court also said that this decision does not prevent law enforcement officers, while conducting a lawful roadblock, from arresting a motorist for a crime unrelated to the reason for the roadblock. For example, while conducting a roadblock to check license and registration, if the officer smelled marijuana, the officer would then have appropriate cause to check the vehicle for further evidence of marijuana possession.

The Court upheld the decision.

Illinois v. Lidster, 540 U.S. 419 (2004)

FACTS: On August 23, 1997, a bicyclist was struck and killed by an hit and run driver. About a week later, local officers set up a checkpoint near the location, hoping to get information on the incident from the "motoring public" who frequented that roadway. Traffic was routed into single lines, and officers would spend 10-15 seconds speaking to the occupants about the fatality and giving them a flyer about the incident. Lidster drove his minivan toward the checkpoint, but as he approached, he swerved, nearly hitting an officer. The officer smelled alcohol (an alcoholic beverage) on Lidster's breath, and directed him to a side street, where another officer gave him a field sobriety test and arrested him. Lidster was convicted of DUI.

Lidster challenged the stop, claiming that "the government had obtained much of the relevant evidence through use of a checkpoint that violated the Fourth Amendment." The trial court rejected his challenge, but the appellate courts held that the stop was in violation of Indianapolis v. Edmond[161] and declared it unconstitutional. Upon appeal, the U.S. Supreme Court accepted certiorari.

[161] 531 U.S. 32 (2000).

ISSUE: May officers conduct brief, information-seeking, traffic checkpoints when investigating a particular crime?

HOLDING: Yes

DISCUSSION: The Supreme Court held that Edmond did not govern this type of situation. The Court found that this checkpoint "differ[ed] significantly" from Edmond, because the primary purpose was not to determine if the occupants of the vehicles were involved in a crime, but to ask for "help in providing information about a crime in all likelihood committed by others." The Court noted that "voluntary requests play a vital role in police investigatory work" and that while it is necessary to stop a vehicle before the officer can ask for the motorist's assistance, the need offsets the involuntary nature of the initial seizure, and is no more than many other traffic delays a motorist encounters regularly. The Court found it absurd to allow the police to stop a pedestrian to ask such questions, but not allow the same with a motorist. Finally, the Court agreed that the "Fourth Amendment's normal insistence that the stop be reasonable in context will still provide an important legal limitation on police use of this kind of information-seeking checkpoint."

The U.S. Supreme Court held that the checkpoint in this case was constitutional.

Miscellaneous Vehicle Issues

Pennsylvania v. Mimms, 434 U.S. 106 (1977)

FACTS: While on routine patrol, two Philadelphia police officers observed Mimms driving an automobile with an expired license plate. The officers stopped the vehicle for the purpose of issuing a traffic citation. One of the officers approached and asked Mimms to step out of the car and produce his owner's card and operator's license. Mimms alighted. The officer noticed a large bulge under his sports jacket. Fearing that the bulge might be a weapon, the officer frisked Mimms and discovered in his waistband a .38-caliber revolver loaded with five rounds of ammunition. Mimms was arrested and convicted of a weapons offense. The Pennsylvania Supreme Court found that the weapon was seized unlawfully. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUES: May officers order the driver of a vehicle that has been lawfully stopped, to get out of the vehicle?

HOLDINGS: Yes

DISCUSSION: The Court noted that ordering Mimms out of his car exposed little more than was already exposed. The additional intrusion was not a serious intrusion on the sanctity of the person, and hardly rises even to the level of a petty indignity. The Court agreed that ordering Mimms out was reasonable and thus permissible under the Fourth Amendment. The bulge in Mimms jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any officer of reasonable caution would likely have conducted the pat down.

The U.S. Supreme Court reversed the decision and remanded the case.

Maryland v. Wilson, 519 U.S. 408 (1997)

FACTS: An officer attempted to stop a car for speeding. During his pursuit of the car, he noticed two passengers in the car. The passengers were looking out the back window of the car and repeatedly ducked out of sight and reappeared. With the car stopped, the driver met the officer at the rear of the car. The officer noticed that the front seat passenger, Wilson, was sweating and appeared very nervous. When the officer ordered Wilson from the car, some crack cocaine fell to the ground. Wilson moved to suppress the cocaine, claiming the officer's ordering a passenger out of a car was unreasonable.

The trial court upheld the suppression, and the Maryland appellate court held that Mimms did not apply to passengers. The prosecution appealed and the U.S. Supreme Court accepted certiorari.

ISSUE: On a traffic stop, is it reasonable to order or remove a passenger from the vehicle?

HOLDING: Yes

DISCUSSION: A vehicle that is lawfully stopped gives cause to the driver having committed an offense, but not necessarily that a passenger has committed any wrongdoing. While there is not the same basis for ordering a passenger out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal.

The U.S. Supreme Court reversed the Maryland decision and remanded the case for further proceedings.

INVENTORY

Cooper v. California, 386 U.S. 58 (1967)

FACTS: Cooper was convicted in a state court proceeding for "selling heroin to a police informer." One piece of evidence was a "small piece of a brown paper sack seized by police without a warrant from the glove compartment of an automobile which police, upon [Cooper's] arrest, had impounded and were holding in a garage." (The search took place a week after Cooper's arrest.)

Cooper appealed, arguing that the search was unlawful. The California appellate courts refused the appeal, and Cooper appealed directly to the U.S. Supreme Court, which accepted certiorari.

ISSUE: May officers search a car being lawfully held for a forfeiture proceeding?

HOLDING: Yes

DISCUSSION: The Court discussed the various theories under which a search of the car might be lawful. The search was certainly not incident to an arrest, but, the state argued that the search was pursuant to a forfeiture proceeding which had not been concluded at the time the search was held.

The court noted that the search of the car "was closely related to the reason [Cooper] was arrested, the reason his car had been impounded, and the reason it was being retained" – narcotics. The official forfeiture "did not take place until over four months after it was lawfully seized." The Court found it

unreasonable to expect that that "police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."

The Court held that it was not "unreasonable under the Fourth Amendment to examine or search of a car validly held by officers for use as evidence in a forfeiture proceeding."

The U.S. Supreme Court upheld the search.

South Dakota v. Opperman, 428 U.S. 364 (1976)

FACTS: Local ordinances prohibited parking in certain areas of downtown Vermillion, South Dakota, during the overnight hours. After Opperman's car received two tickets for being parked in the prohibited area, it was towed to the city impound lot. At the tow lot, an officer noticed a watch on the dashboard and other items of personal property in view in the car. At the officer's direction, the car was unlocked and inventoried, using a standard form designed for that purpose.

The passenger compartment of the car was inventoried, including the glove compartment, which was unlocked. Marijuana in a plastic bag was found in the glove compartment. All of the property was secured in the property room. Later that day, Opperman appeared to claim his property. Subsequently, he was arrested for possession of marijuana. He was convicted. The South Dakota Supreme Court reversed the conviction, holding that the marijuana had been obtained in violation of the Fourth Amendment. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Is property found during an inventory search admissible as evidence?

HOLDING: Yes

DISCUSSION: The Supreme Court decided that because of the lesser expectation of privacy in vehicles, no exigent circumstances are necessary to search a vehicle lawfully in police custody. An inventory routinely follows an impoundment for three reasons, outlined by the Court: protection of the owner's property, protection of the police from claims or disputes about the property, and the protection of the public (and the public) from potential danger. The Court equated this to the "community caretaking" function held by the police in similar areas. As such, the search was "reasonable" under the circumstances.

The U.S. Supreme Court reversed the decision.

Colorado v. Bertine, 479 U.S. 367 (1987)

FACTS: Officer arrested Bertine for DUI. After Bertine was taken into custody, and before the tow truck arrived for his vehicle, another officer, pursuant to policy, inventoried the contents of the van. In that inventory, he opened a backpack and found drugs, paraphernalia and cash, and charged Bertine for its possession. Bertine challenged the seizure, and the trial court agreed, suppressing the evidence. The intermediate appellate court found the search unconstitutional under Colorado law, and the Colorado Supreme Court affirmed, but based its decision on the U.S. Constitution. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Is an inventory search lawful?

HOLDING: Yes

DISCUSSION: The inventory search was lawful. The doctrine behind an inventory search is the protection of an individual's property while in custody, and to guard the officers from hazardous items in the vehicle or container. There was no evidence that the officers acted for any other reason than to secure the contents of the van, for safekeeping.

The U.S. Supreme Court reversed the Colorado decision.

Florida v. Wells, 495 U.S. 1 (1990)

FACTS: Following an arrest for DUI, Wells consented to a search of his vehicle, which was being impounded. Marijuana cigarette butts (roaches) were found in the car and the officers discovered a locked suitcase with marijuana in the trunk.

Wells pled no contest, but retained his right to appeal the admission of the evidence from the locked suitcase. The state Supreme Court held that the evidence should have been suppressed, as the officers' agency, the Florida Highway Patrol, had no policy on the opening of such containers during an inventory. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUE: Absent a specific agency policy on inventory, or other exigent circumstances, should an officer open closed containers during an inventory search?

HOLDING: No

DISCUSSION: Both the state and the United States Supreme Court agree that when an agency does not have a specific policy on when and how inventories of vehicles will be conducted, random searches, particularly of closed containers, are prohibited. An inventory policy, however, that is closely followed to avoid so much latitude that the inventory search becomes "a purposeful and general means of discovering evidence of crime," is permissible.[162] The Court agreed that opening containers to secure items of value, and to protect officers from danger, can be permitted, when these aims cannot be achieved otherwise.

The U.S. Supreme Court affirmed the Florida decision.

SCHOOL SEARCHES

New Jersey v. T.L.O., 469 U.S. 325 (1985)

FACTS: Teacher found high school students smoking in lavatory, a violation of school rules. Both students were taken to Assistant Vice Principal's office, where T.L.O. denied smoking. The VP demanded her purse and searched it, finding cigarettes and rolling papers. Further search revealed marijuana, a pipe, plastic bags, a large amount of cash, an index card recording students who owed T.L.O. money and two letters that implicated her in marijuana dealing. T.L.O. was brought up on delinquency charges. T.L.O. appealed on the grounds that the search was a violation of her Fourth Amendments rights. The New Jersey Supreme Court agreed and suppressed the evidence found in her purse.

[162] Colorado v. Bertine, supra.

New Jersey requested certiorari, which the United States Supreme Court accepted.

ISSUE: May school officials search a student's purse (or other bag) upon reasonable suspicion that the purse contains contraband?

HOLDING: Yes

DISCUSSION: The U.S. Supreme Court held that although public school officials are included in the "government officials" to whom the Fourth Amendment applies, these school officials are not as limited as law enforcement officers. School officials need only justify a search of a student's possessions by finding "reasonable grounds" for suspecting that a search will "turn up evidence that the student has violated either the law or the rules of the school."

The United States Supreme Court reversed the decision and remanded the case.

Safford Unified School District #1 v. Redding, 555 U.S. --- (2009)

FACTS: In October, 2003, Savana Redding, age 13, was called to the office of her middle school (Safford Middle School) by Wilson, the assistant principal. "There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette." She agreed the planner was hers, but stated she'd loaned it to a friend, Glines, several days before. She stated none of the items in the planner were hers.

Wilson then showed Redding "four white prescription strength ibuprofen 400 mg-pills, and one over the counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission." She denied any knowledge of the pills and denied the allegation that she'd been giving them to fellow students. She "agreed to let Wilson search her belongings." Wilson and Romero (a school clerk) then searched her backpack and found nothing.

> At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretchpants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit on her daughter's behalf against the school district, Wilson, Romero and Schwallier for conducting the strip search, in violation of the Fourth Amendment. The individual defendants requested summary judgment on the basis of qualified immunity. The District Court agreed that there was no Fourth Amendment violation and a panel of the Ninth Circuit Court of Appeals affirmed the decision. However, the Ninth Circuit, sitting en banc, disagreed, and reversed that decision, finding that the "strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in New Jersey v. T.L.O."[163] Further, it found that the right was clearly established by that case, and as such, summary judgment for Wilson was inappropriate. (Romero and Schwallier, however, were awarded summary judgment, as they were not acting as independent decisionmakers at the time.)

[163] 469 U.S. 325 (1985).

The School District requested certiorari and the U.S. Supreme Court agreed to review the case.

ISSUE: Does the Fourth Amendment prohibit public school officials from conducting a search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.

HOLDING: Yes (but see discussion)

DISCUSSION: The Court began:

> The Fourth Amendment "right of the people to be secure their persons . . . against unreasonable searches and seizures" generally requires a law enforcement officer to have probable cause for conducting a search. "Probable cause exists where 'the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed,"[164] and that evidence bearing on that offense will be found in the place to be searched.

Further:

> In T. L. O., we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.". We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

The Court noted that it was necessary to determine the "reliable knowledge element of reasonable suspicion," as it had "attempted [in past cases] to flesh out the knowledge component by looking to the degree to which known facts imply prohibited conduct." It concluded that "[p]erhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability.'"[165] As such, it concluded that the "lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing."

The Court reviewed the evidence available to Wilson about prescription drug trafficking in the school. Prior to his contact with Redding, Wilson had already talked to Glines, searched her belongings and confiscated the day planner. Glines had produced the pills and a razor blade from her pockets. She specifically stated that Redding had given her the ibuprofen, and she denied knowing anything about what was inside the day planner. Specifically, "Wilson did not ask [Glines] any followup questions to determine whether there was any likelihood that [Redding] presently had pills: neither asking when [Glines] received the pills from [Redding] nor where [Redding] might be hiding them." Schwallier recognized the ibuprofen as being of prescription strength, and learned, through a phone call, that the blue pill was an over-the-counter medication. Glines was subjected to the same type of search as that described by Redding, and no additional pills were found.

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[164] Brinegar v. U.S., supra.
[165] Illinois v. Gates, 462, supra.

Wilson knew that both Glines and Redding were part of an "unusually rowdy group at the school's opening dance" a few months earlier, and that both were connected with alcohol and cigarettes. As such, the Court agreed that "[Glines'] statement that the pills came from [Redding] was thus sufficiently plausible to warrant suspicion that [Redding] was involved in pill distribution." Further, the Court agreed, the suspicion was sufficient to "justify a search of [Redding's] backpack and outer clothing." Neither search was "excessively intrusive." From this point, however, the Court noted that the described search (whether it be called a strip search or something else) subjected Redding to a search that violated "both subjective and reasonable societal expectation of personal privacy," and required "distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."

The Court noted that the "content of the suspicion failed to match the degree of intrusion" of the search. Wilson knew that the suspected drugs were the equivalent of taking 2 Advil (the ibuprofen) or 1 Aleve (the naproxen). As such, "[h]e must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills."

The Court also noted that it was illogical to conclude that such relatively nondangerous contraband would "raise the specter of stashes in intimate places."

The Court noted:

> In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. [The Court thought] that the combination of these deficiencies was fatal to finding the search reasonable.

The Court acknowledged that parents and school officials both "are known to overreact to protect their children from danger…." The Court made it clear that such searches "require the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts."

However, the Court further concluded that given the divergence of court opinions on the meaning of T.L.O. and its authority for such searches, that it was further appropriate to require a grant of immunity for the individual school officials (Wilson, Romero and Schwallier) in this case. The school district, however, remained as a defendant in the case and the case was remanded for further consideration of the action against the school district.

STRIP SEARCHES

Florence v. Board of Chosen Freeholders of County of Burlington, --- U.S. --- (2012)

FACTS: In 1998, Florence was arrested in Essex County, NJ. He was sentenced to pay a fine in monthly installments. In 2003, after he fell behind in his payments, a bench warrant was issued. He caught up his payments but "for some unexplained reason, the warrant remained in a statewide computer database." When he was stopped for a traffic offense two years later, he was arrested for the (presumably) outstanding warrant and taken to the Burlington County Detention Center.

At the jail, he was subjected to a delousing shower and was examined for "scars, marks gang tattoos, and contraband" pursuant to the jail's procedures. He also claimed he was instructed to "open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals" although there was some question as to whether the last was actually part of the normal practice. Florence did share a cell with other inmates following his admission. He was transferred to the Essex County Correctional Facility six days later and was further examined by officers there, a process that "applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history." He was released the next day when the charges against him were dismissed.

Florence sued the jails and related other parties under 42 U.S.C. §1983, claiming violations of his Fourth and Fourteenth Amendment rights. He claimed that "persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process." He argued instead that such searches could only be done " if they had a reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband." The District Court certified the case as a class-action, with the class being identified as "individuals who were charged with a nonindictable offense under New Jersey law" processed at the facilities named in the lawsuit, and who were "directed to strip naked even though an officer had not articulated any reasonable suspicion they were concealing contraband."

Ultimately the District Court granted summary judgment in Florence's favor, finding such searches unreasonable. Upon appeal, however, the Third Circuit Court of Appeals reversed, finding that the jail procedures "struck a reasonable balance between inmate privacy and the security needs of the two jails." Florence requested certiorari and the U.S. Supreme Court granted review.

ISSUE: May jails do a thorough search, including requiring inmates to disrobe, during initial intake?

HOLDING: Yes

DISCUSSION: The Court began by noting that the term "strip search" is imprecise.

> It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position. In the instant case, the term does not include any touching of unclothed areas by the inspecting officer. There are no allegations that the detainees here were touched in any way as part of the searches.

The Court continued, stated that "the difficulties of operating a detention center must not be underestimated by the courts."[166] The Court had maintained the "importance of deference to correctional officers" in such matters. In Bell v. Wolfish[167], the Court had held that searching inmates after "contact visits" was appropriate since that served to deter the smuggling of contraband inside the facility. Subsequent cases had consistently upheld the right of detention facilities, and the Court noted that "these

[166] Turner v. Safley, 482 U.S. 78 (1987).
[167] 441 U. S. 520 (1979).

cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." The Court agreed that "some type of strip search of everyone who is to be detained" is common practice in facilities across the country.

With respect to individuals arrested for minor offenses, the Court noted that some of the lower courts "have held that corrections officials may not conduct a strip search of these detainees, even if no touching is involved, absent reasonable suspicion of concealed contraband." The Court agreed, however, that jails "have a significant interest in conducting a thorough search as a standard part of the intake process." Such reasons include the need to detect lice or contagious diseases, wounds and injuries. The Court also noted the need to determine gang affiliations because such "rivalries spawn a climate of tension, violence, and coercion." Finally, "detecting contraband concealed by new detainees … is a most serious responsibility." Such contraband, including weapons, drugs and alcohol, as well as more common items, such as cigarettes and lighters, "disrupt the safe operation of a jail." Scarce and desirable items "have value in a jail's culture and underground economy."

Despite Florence's assertion that it was unreasonable to search individuals arrested for minor offenses, the Court noted that the "record provides evidence that the seriousness of an offense is a poor predictor of who has contraband …." Further, "it would be difficult in practice to determine whether individual detainees fall within the proposed exemption." In fact, the Court noted that "people detained for minor offenses can turn out to be the most devious and dangerous criminals," and provided a list of such incidents over recent years. Further, someone being arrested for a minor offense has reason to hide contraband, fearing a more serious charge should the contraband be found and further could be coerced by other inmates to hide such items upon intake.

Finally, the Court noted the difficulties of classifying inmates by their "current and prior offenses before the intake search." In addition, "jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset," they often do not even have access to the inmate's criminal history at the beginning and what they do have might be inaccurate. Trying to determine, in a few minutes, whether an inmate should or should not be searched presents practical problems for jail officials, and "to avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population."

The Court upheld the decision of the Third Circuit Court of Appeals.

NOTE:

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General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Information relating to the publications of the agency, may be found at http://docjt.ky.gov/publications.asp.

In addition, The Department of Criminal Justice Training has a new service to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, rank, agency, and a day phone number should the assigned attorney needs clarification on the issues to be addressed.

Questions or suggestions for updates or other publications should be directed to Shawn M. Herron, at 521 Lancaster Ave. (Schwendeman Building), Richmond, Ky 40475 or to Shawn.Herron@ky.gov.

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NOTES

While many of these cases involves multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates.
All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

Miranda v. Arizona, 384 U.S. 436 (1966)
Terry v. Ohio, 392 U.S. 1 (1968)

NOTES REGARDING UNPUBLISHED CASES

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Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) citation.

Sixth Circuit cases that are noted as "Unpublished" or that are published in the "Federal Appendix" carry the following caveat:

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Unpublished Cases carry the Westlaw (WL) citation.

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Students attending courses at the Department of Criminal Justice Training may use the Kentucky Virtual Library (KVL), as well as, other online scholarly research sites for any class research assignments. The steps to obtain research materials from KVL are listed within this document.

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http://www.kyvl.org/

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1. Go to your public library's web site.*
2. Look the section of the site labeled research, online databases or virtual resources. (This will vary from library to library.)
3. Click through to the list of resources or a specific databases (for example: EBSCOhost).
4. Enter your library card number.

Requesting a Username/Password via Phone

While the instructions above will work with many public libraries in Kentucky, there are still several libraries that will simply link to the KYVL website, where you will be required to enter a specific KYVL-created login. In this case, you will need to contact the library directly to obtain a username and password.*

Helpful hint: All KYVL logins have the same format, a 10-character username and 8-character password. Double check the username and password your library gives you to make sure it follows these guidelines.

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If you are unable to obtain a login via the above methods, you can request this information directly from KYVL by filling out the form located HERE (https://kyvl.custhelp.com/app/ask) Please note that KYVL staff will only be available to provide logins during regular business hours. Any request submitted after 4:30 PM Monday - Friday will not be fulfilled until the next business day.

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- *The Kentucky Criminal Law Manual*
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- *Open Records Decisions*
- *U.S. Supreme Court (summary)*

Check out our website for a full list of available materials, plus links to other sites of interest.

Our legal inquiry email is available for officers and agencies with specific legal question concerning state and federal statutes, current case law and general issues related to law enforcement by contacting us at:

docjt.legal@ky.gov

Please remember to include your name, rank, agency and a contact number should we need further information regarding your inquiry.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Please allow two to three business days for us to review and respond to your inquiry.

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