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The Law of Arrest, Search & Seizure for Nevada Lawyers

Special Thanks
To United States Magistrate Judge Peggy Leen
For Authorizing the Publication of Original Work By
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Salus populi Supreme lex esto

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I. PREFACE

This manual is designed as a quick reference guide, research tool and training aide for law enforcement and practicing attorneys on the law of search and seizure. The manual is periodically updated, but the user is ultimately responsible for verifying the continued viability of the cases and procedures. Everyday, courts across the nation issue opinions on these matters. The user should be particularly concerned with United States Supreme Court, Ninth Circuit Court of Appeals and Nevada Supreme Court opinions. Before using information from the manual in pleadings, counsel **must** review the authority for changes. Academies and other training programs should ensure they also have procedures in place for updating their materials in response to new case law or statutes and disseminating this information to line staff.

It would take many volumes and thousands of pages to fully explore search and seizure law and this manual only scratches the surface of search. Some areas are not discussed at all (booking-strip searches, mail searches, drug testing cases, etc.) and other areas are mentioned only briefly (probation officer searches, border cases). The situations which are covered in some detail are those which occur most frequently – levels of contact, vehicle searches, preparation of search warrants and some exceptions to the warrant requirement.

Not all 4th Amendment situations have been decided by the U.S. Supreme Court and thus we have to look at decisions by State Supreme Courts or by various Federal Courts to help assess proper police action. If there are a substantial majority of courts that agree on ruling for a certain type of fact situation, those cases are cited in this manual as the probable correct answer, whether the ruling is for or against the police action. If there is a substantial split of opinion, then cases holding both opinions are cited. The material contains frequent reference to cases and citations for those cases.

The manual was first designed as an educational supplement to the many hours of training in search and seizure law provided at the Las Vegas Metropolitan Police Department Academy and in-service training and classroom training at all other police agencies. It was then modified for use by prosecutors and other legal or judicial persons as a quick reference guide and with a table of authorities added. This particular printing has been updated with relevant case authority from 2005 through early 2009.

This work is dedicated to the men and women of the State of Nevada law enforcement agencies.

II. THE FOURTH AMENDMENT IN A NUTSHELL

A. THE FOURTH AMENDMENT

All analysis of constitutional search and seizure issues must proceed from the language of the Fourth Amendment, which states:

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

B. WHO IS PROTECTED BY FOURTH AMENDMENT?

The rules in this outline apply to all interactions between police and persons within the U.S. whether the persons are citizens, criminals, or aliens who are legally in this country. But, in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056 (1990), the Fourth Amendment was held not to apply to the search and seizure by U.S. agents of property owned by a non-resident alien and located in a foreign country. (1060-1066), The Court specifically left undecided the question of whether the Fourth Amendment applied to aliens illegally in the U.S. (1065), distinguishing its prior opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479 (1984), stating that that opinion assumed, but did not decide, such application.

C. FIRST QUESTIONS – IS THE POLICE ACTIVITY A "SEARCH" OR A "SEIZURE"

Since the Fourth Amendment protests only against "searches" and "seizures,' and then only against unreasonable ones, the first question in any legal analysis must be whether the action in question is, in fact, a search or a seizure. (See also, part E, below),

In *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149 (1987), set forth more fully in Section V. D., below, officers lawfully present in an apartment without a warrant conducted an additional, and unlawful, "search" when they moved a stereo to check its serial number.

In *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834 (2005), the U.S. Supreme Court held that a narcotic detector dog sniff of a vehicle during a

routine traffic stop was not an unreasonable search subject to the Fourth Amendment: it revealed no information other than possession of a substance that there was no right to possess.

Merely placing a key into a lock to see if it fits is not a "search," although it can be the "beginning of a search" if the search is carried out immediately without a warrant. See *U.S. v. Salgado*, 250 F.3d 438, 456-57 (6th Cir.2001) (holding that insertion of key found in vehicle used to transport drugs into lock in the defendant's apartment door was not a search); *U.S. v. Lyons*, 898 F.2d 210, 212-13 (1st Cir.1990) (holding that insertion of key obtained from the defendant in a search of his person into the lock securing a rented storage compartment not to be a search); *U.S. v. DeBardeleben*, 740 F.2d 440, 444-45 (6th Cir.1984) (holding that insertion of key found in the defendant's possession after his arrest into the door and trunk locks of a car found in a parking lot and suspected to belong to the defendant not to be a search); but see *U.S. v. Portillo-Reyes*, 529 F.2d 844, 847-48 (9th Cir.1975) (stating insertion of key obtained from search of suspected drug smuggler into door lock of vehicle suspected as a drug "load car" parked in the area to be the "beginning of the search," where the search of the vehicle occurred immediately upon the unlocking of the door).

Once officers have lawfully seized papers, and other such items, they may examine them without the necessity of a separate warrant. There is no legitimate expectation of privacy in the contents of items that have previously been viewed under lawful authority. *U.S. v. Burnette*, 698 F.2d 1038, 1039 (9th Cir. 1983), cert. *denied*, 461 U.SA. 936. Note that this does not apply to items that require additional technology to examine, such as computers (See, Section VI. K., below) and may not always apply to inventory searches (see, *U.S. v. Khoury*, 901 F.2d 948 (11th Cir. 1990).

A person is only "seized" when that person submits to authority or is actually physically controlled – if a person flees from the police and drops or throws away an item, that item can be seized without a warrant. *California v. Hodari* D., 499 U.S. 621, 111 S.Ct. 1547 (1991).

For more discussion, see Open View and Plain View, below.

D. WHAT IS PROTECTED: THE "RIGHT" PROTECTED BY THE FOURTH AMENDMENT IS AN EXPECTATION OF PRIVACY

INTRODUCTION

The concept of privacy is extremely important for law enforcement persons to understand. One obvious reason is that the court may suppress evidence and the criminal may go free if there is a "right" (i.e. expectation) of privacy by a person who has committed a crime, and the police do not comply with the various rules of the 4th Amendment regarding the contact or discovery of evidence with the person. A second reason is that there are a number of lawful police practices which can be done in which the courts hold that a person has no expectation of privacy, in which case all evidence gathered by police is admissible. Law enforcement officers must learn the basic difference between these two situations.

Please see the sections on Open View, Standing, Trash Searches, Dog Sniff Prison and Jail cases, and Abandonment for further examples concerning whether a right to privacy exists or is violated.

In summary, the 4th Amendment expectation of privacy must be "reasonable" and "legitimate." If not, the suspect has no 4th Amendment claim to make to suppress evidence. In addition, assuming there is a valid 4th Amendment expectation of privacy, the accused person must prove to the court that his or her own expectation of privacy was violated. This is explained in the section of this manual concerning "standing."

In the section on "standing" the cases explain that in order to try to get evidence suppressed a person must have authority, dominion, access and control (i.e. the right to invite or exclude other persons) from the place (i.e. building, vehicle, storage space, safe deposit box, luggage, etc.) searched by police.

In a series of cases starting with *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507 (1967) the Court said that the Fourth Amendment protects "people not places." It is not a physical area "per se" that is protected from government (police) intrusion, but an individual's "legitimate and reasonable expectation of privacy".

Note: the expectation must be both legitimate and reasonable.

"Reasonable" is a subjective concept - what would common sense indicate was private to an average person?

"Legitimate" is an objective concept - as a policy matter, how much privacy is our society willing to recognize, as interpreted by the courts depending on the facts and circumstances.?

Examples:

- An inmate in prison may have a "reasonable" expectation (the cell is a home away from home) but does not have a "legitimate" expectation of privacy.
- 2) A person smoking a joint on a public park bench doesn't have a "reasonable" or "legitimate" expectation.

Two recent cases from the Nevada Supreme Court illustrate this concept:

In *Young v. State*, 109 Nev. 205, 849 P.2d 336 (1993) police in Carson City set up a hidden video camera in a public restroom in an effort to capture proof of lewd acts. The stalls in the restroom were doorless. In citing, *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507 (1967), the Nevada Supreme Court said that although persons using the stalls would expect some right to exclusive occupancy, it was also true that they risked observation by someone who looked over or around the partitions so there was no reasonable expectation of privacy. Also, because the stalls were being used for sexual acts instead of their intended purpose, there was no legitimate expectation of privacy.

In *Alward v. State*, 112 Nev. 141, 912 P.2d 243 (1996) Sheriff's deputies in Fallon investigated the death of a young woman in a tent located on a public campground. Police were called by Alward who said that he heard a shot and found the victim dead. The tent belonged to the victim's mother, but both the victim and Alward had been using it. Police first entered and confirmed that the victim was dead. Certain items were in plain view. Later, after the victim had been removed, police entered the tent two different times without a warrant and thoroughly searched it, finding several other items, not in plain view, that were used to convict Alward.

The Nevada Supreme Court said that the first entry and items seen in plain view at that time were admissible because of the "emergency" doctrine. However, the later entries and searches were not part of the emergency and Alward had standing to contest the search because he had a reasonable and legitimate expectation of privacy in the tent. That privacy does not depend on the quality of the place (tent as opposed to house) nor does it depend on ownership (Alward did not own the tent). Nevertheless, Alward did have access, control and authority over the tent. Therefore, a search warrant should have been obtained.

In the case of *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297 (1999) the court held that after finding drug paraphernalia on the driver of a car, police could search the car for drugs including the handbag of a female passenger because passengers have a reduced expectation of privacy with property they transport in cars.

However, a search of the passenger's person remained improper because the person herself has a heightened expectation of privacy. These cases turned on the unique, significantly heightened protection afforded against searches of one's person. "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car. (303, 1302)

The U.S. Supreme Court said, "to determine whether police action violates the 4th Amendment the court looks first to see if the action was an illegal search or seizure under common law when the 4th Amendment was framed. Otherwise, the court evaluates search and seizure under a standard of reasonableness by assessing the degree of intrusion on privacy against the degree needed to protect legitimate government interests."

An example of this rule is found in the case of *U.S. v. Carroll*, 87 F.3d 1315 (8th Cir.1996). The defendant sent letters to an inmate in a correctional facility which were opened and read by the officers there. The court noted that all mail sent to a prison which is not legal (from attorney or court), official or privileged may be inspected by the correctional facility.

The Court found that the defendant (author of the letters) had no expectation of privacy because that expectation terminates upon delivery of the letter. He might think he had a "reasonable" expectation of privacy since most letters sent through the Postal Office can't be opened without justification, but there was no "legitimate" expectation of privacy because of the need of the prison to interdict letters with inmates to prevent plans for escapes or other criminal activity.

Please see section on Prison and Jail cases in this manual, for additional cases.

E. THE DIFFERENCE BETWEEN SEARCH & SEIZURE

Many lawyers, judges and police officers talk about "search and seizure" as though it is all one thing. However, the term encompasses two different and distinct concepts as represented in *U.S. v. Jacobsen*, 466 U.S. 109 (1984) and *U.S. v. Avery*, 137 F.3d 343 (6th Cir. 1997).

- 1. A "search" is a police intrusion on a legitimate expectation of privacy.
- 2. A "seizure" can be of both a person and/or property. A "seizure" of the **person** occurs when police interfere with an individual's freedom of movement. A "seizure" of **property** is an interference with a person's right to possess or control the item.

The 4th Amendment rules set forth by the U.S. Supreme Court and other courts are different in the following two police actions:

- 1. Seizures of the person (stop and frisk and arrests).
- 2. All other searches and seizures (interference with privacy or possession).

THE CARDINAL RULE is different for #1 & #2

#1 Seizures of persons need justification but generally don't need a search warrant even if there is time to get a warrant. There are two main exceptions when an arrest or search warrant is required in an arrest situation, and these expections are discussed later in the sections on the Payton Rule and Steagald Rule.

#2 All other types of privacy intrusions into places or seizures of items usually need a warrant. The U.S. and Nevada Supreme Courts have stated repeatedly that searches without a warrant are presumed to be unlawful and police need to be prepared to testify in court and demonstrate (with legal argument by the D.A.) that an exception applies. *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982 (1991) and *Phillips v. State*, 106 Nev. 763, 801 P.2d 1363 (1990). These concepts are discussed in detail later in this outline.

F. THE SUPREME COURT AND THE EXCLUSIONARY RULE

For about 100 years after 1791, few U.S. Supreme Court cases were decided concerning the meaning of the Fourth Amendment. Between 1886 and 1914 a series of cases were decided ending with *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341 (1914) that applied the exclusionary rule in all Federal courts, so that evidence seized in violation of the Fourth Amendment would be excluded.

In 1961, the U.S. Supreme Court decided *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 extended the application of the exclusionary rule based on violations of the Fourth Amendment to apply in State court proceedings as well. The theory used by the Court to justify this ruling was that the exclusionary rule would deter unlawful police conduct by removing the incentive to act unlawfully. Note: no scientific or statistical study, either before or since *Mapp*, has ever proved or disproved this theory of the Court.

G. FRUIT OF THE POISONED TREE

In 1963, the U.S. Supreme Court in *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407 (1963) and held that if there is a 4th Amendment violation by police, the evidence that was immediately recovered is thrown out, but also all the evidence that is derived from that evidence is also thrown out. Thus, this is referred to as the Fruit of the Poisonous Tree. For this reason, a defense lawyer will focus on the earliest aspect of the police contact with the defendant and try to find fault with the police conduct. This rule means that, in most cases, if police commit a Fourth Amendment violation, it will poison or "taint" evidence obtained later in the same investigation even if police, after committing the violation, then followed lawful Fourth Amendment procedures before seizing the evidence.

An example of this rule is found in the case of *Arterburn v. State*, 111 Nev. 1121, 901 P.2d 668 (1995). In that case, police were investigating a person for theft of a motor vehicle and learned that Arterburn was associated with the suspect. Arterburn was seen near the car parked at a motel, and police stopped him. Arterburn was taken to the police station for questioning, and at the station, he consented to a search of his person. This search recovered drugs on his person for which he was eventually convicted. The Nevada Supreme Court held that even if the consent to search at the station was lawful, the drugs would be suppressed because the prior actions of the police amounted to his "arrest" without probable cause and the consent was the "fruit" of the 4th Amendment violation. (See this outline "Levels of Contact" as to why this was an "arrest.").

The U.S. Supreme Court has followed the same theory on many occasions. For example, in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975) the Court held that the *Wong Sun* rule was still good law and that a confession made by a subject shortly after an illegal arrest was thrown out even though correct Miranda warnings were given after the illegal arrest.

However, over the years, U.S. Supreme Court has been reluctant to use strict application of the *Wong Sun* rule (i.e. fruit of poisoned tree) and have even carved out exceptions to the rule.

Note: these situations in which a prior in time 4th Amendment violation does not result in suppression of all subsequent evidence in the same investigation are the exception, not the rule, and the burden is on the police and prosecution side to prove the exception.

- (1) INDEPENDENT SOURCE DOCTRINE: Segura v. U.S., 468 U.S. 796, 104 S.Ct. 3380 (1984) established that if there is an illegal police activity which leads to discovery of the evidence, but there is also a **legal and valid independent source** by which police recovered the evidence, then the evidence will not be suppressed. (See "Premises Freeze" in Search Warrant Section).
- (2) **INEVITABLE DISCOVERY DOCTRINE:** *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984). If the evidence would have been discovered anyway, it will not be suppressed based on illegal police conduct. The theory of the exclusionary rule is that police should not profit from their misconduct. This rationale is furthered by putting the police in the same position, but not a worse position than if no misconduct had occurred.

Inevitable discovery requires a showing that:

- 1. Either at the time of the misconduct, or after the misconduct, there was an independent line of police investigation underway which developed facts not as a result of the misconduct and would have led to the discovery of the evidence; or
- In the alternative, that there was a standard procedure (such as inventory) in effect that would have turned up the same evidence.

Therefore, the inevitable discovery doctrine is **not** simply that evidence is admissible if the police could have gotten the evidence lawfully, but did not. It

requires more than an argument about things that in retrospect the police could have done. The burden is on the prosecution to show by a preponderance of the evidence that the police would have discovered the evidence by lawful means. (Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501) For example:

In U.S. v. Allen, 159 F.3d 82 (4th Cir. 1998) the court stated,

"We reject the contention that inevitable discovery applies where police have probable cause and then search without a warrant (but argue that they "could have" gotten a search warrant) because then there would never be a reason for police to seek a search warrant." See also, *U.S. v. Brown*, 64 F.3d 1083 (7th Cir. 1995.

In *U.S. v. Kennedy*, 61 F.3d 494 (6th Cir. 1995), cocaine was found by police without a warrant in a misrouted suitcase, and the Court held that the cocaine would have been found by the airline when it searched the suitcase for identity of the owner.

In *U.S. v. Larsen*, 127 F.3d 984 (10th Cir. 1997), the court held "inevitable discovery applies whenever an independent investigation would have inevitably led to the discovery of the evidence whether or not the investigation was ongoing at the time of the illegal police action." An independent investigation is not valid if made as a result of things learned by illegal police action.

The Nevada Supreme Court and other jurisdictions have upheld the inevitable discovery doctrine in *Yeoman v. State*, 92 Nev. 368, 550 P.2d 1273 (1976), *Clough v. State*, 92 Nev. 603, 555 P.2d 840 (1976) and *Carlisle v. State*, 98 Nev. 128, 642 P.2d 596 (1982), *U.S. v. Woody*, 55 F.3d 1257 (7th Cir. 1995),

(3) ATTENUATION: A court will admit evidence recovered after police misconduct if the prosecution can show that there is no significant relationship between the unlawful conduct and the discovery of the evidence. *Nardone v. U.S.*, 308 U.S. 338, 60 S.Ct. 266 (1939) Factors in determining the significance of the relationship include, (a) the time proximity between the misconduct and discovery, (b) whether there are other intervening circumstances, and (c) the purpose and flagrancy of the police misconduct. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975) These factors have been recognized by the great majority of courts with results differing based on the facts of each case. *U.S. v. Wilson*, 36 F.3d 1298 (5th Cir. 1994), *U.S. v. Shephard*, 21 F.3d 933 (9th Cir. 1994).

In *U.S. v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054 (1978) the Court refused to suppress the testimony of a live witness whose identity was learned as a result of a 4th Amendment violation. The factors were:

- (a) the passage of time between illegal search and contact with witness.
- (b) the fact that witness was testifying of her own free will, and
- (c) the fact that the police illegality was not designed or intended to discover the identity of witnesses. See also *U.S. v. McKinnon*, 92 F.3d 244 (4th Cir. 1996).

In *U.S. v. Crews*, 445 U.S. 463, 100 S.Ct. 1244 (1980) the defendant was arrested in violation of the 4th Amendment. A booking photo was used in a photo lineup and a witness to the crime identified Crews. The Court suppressed the photo lineup identification, but did allow the witness to testify at trial and identify Crews based on her recollection from the time of the crime because the ability to identify him came before the police misconduct. Thus, the defendant's face was not the "fruit" of the illegal arrest.

Later, the Court more specifically held that "[T]he body or identity of a defendant in a criminal proceeding is never itself suppressible as the fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search or interrogation occurred." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479 (1984).

In *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640 (1990) the defendant was arrested in his home in violation of the 4th Amendment. The police had probable cause for the arrest but in violation of the Payton rule (see "Arrest" section of this outline), the officers did not get a warrant. Harris was Mirandized and provided officers with a confession at his home. The defendant was then transported to the police station where he was Mirandized again and confessed a second time. The first confession was suppressed as the fruit of the Payton violation but the second was not the "fruit" of the illegal arrest.

Note: this case is different from *Brown* v. *Illinois* where there was no probable cause for the arrest and Miranda warnings at the police station didn't cure the "taint" because the confession was immediately tied or connected to the illegal due to lack of probable cause "arrest."

In *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006), police violated the knock and announce rule upon executing a valid search warrant.

The Court noted that attenuation can occur when the causal connection is remote. But the Court held that attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. Therefore, the exclusionary rule did not apply where the purposes of the knock and announce rule (protection of life, property, and privacy) had nothing to do with the seizure of the evidence.

- **(4) IMPEACHMENT:** In *U.S. v. Havens*, 446 U.S. 620, 100 S.Ct. 1912 (1980) the Court ruled that evidence obtained in violation of the 4th Amendment, although suppressed in the prosecution's case in chief, could be used in rebuttal to contradict false evidence (i.e. defendant's testimony) introduced by the defense. "There is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility." See also *Walder v. U.S.*, 347 U.S. 62, 74 S.Ct. 354(1954).
- (5) **GRAND JURY PROCEDURES:** The U.S. Supreme Court has specifically held that, in federal proceedings, although evidence seized in violation of the 4th Amendment is inadmissible at trial, such evidence can be presented to a grand jury in order to obtain an indictment. *U.S. v. Calandra*, 414 U.S. 338, 94 S.Ct. 613 (1974) This holding was reaffirmed in *U.S. v. R. Enterprises*, 498 U.S. 292, 111 S.Ct. 722 (1991).

This holding should not be applied to Nevada law, however. Nevada Grand Juries have different rules of operation than federal Grand Juries. Pursuant to NRS 172.135(2), a Nevada Grand Jury can receive none but legal evidence, to the exclusion of hearsay and secondary evidence. This is completely different from the federal rules, which allow federal Grand Juries to receive, and to indict based upon, hearsay.

H. STATE AUTHORITY TO INCREASE SEARCH AND SEIZURE PROTECTION

It is a basic principle of search and seizure law that a state can place more, but not less, restrictions on police conduct than is required by the 4th Amendment. For example, a state could not pass a law that says police can search someone's house without a warrant based on reasonable suspicion. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983) and *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446 (1983).

This extra restriction on police can be done by legislation or by state supreme court decision. Nevada has chosen to limit police authority more than what the 4th Amendment requires in some situations including NRS 171.123 (placing 60 minute limit on "Terry Stops"); *State v. Greenwald*, 109 Nev. 808, 858 P.2d 36 (1993) which prohibits searching the passenger compartment of a car when an occupant is arrested even though such a search is lawful per the U.S. Supreme Court and most states when done contemporaneously with the arrest and *State v. Harnisch (Harnisch II)*, 114 Nev. 225, 954 P.2d 1180 (1998) which placed some limits on ability of police to search a vehicle with probable cause but without a search warrant.

Increased state restrictions on law enforcement have no effect whatsoever on the extent of searches and seizures done by federal police (FBI, ATF, DEA and others) within the state if the case goes to federal court. Also, the state restrictions do not affect the admissibility of evidence seized by local or state police when the case is tried in federal court. "Evidence seized by local authorities was admissible in a federal criminal proceeding if it was obtained in a manner consistent with the protections provided by the U.S. Constitution (4th Amendment) and federal law, and whether evidence was seized in contravention of a state constitution or state law did not control." U.S. v. Singer, 943 F.2d 758 (7th Cir. 1991); U.S. v. Eastland, 989 F.2d 760 (5th Cir. 1993); U.S. v. Medina-Galaviz, 166 F.3d 349 (10th Cir. 1998); U.S. v. Le, 173 F.3d 1258 (10th Cir. 1999); U.S. v. Clyburn, 24 F.3d 613 (4th Cir. 1994); U.S. v. Yi, 977 F.2d 594 (9th Cir 1992)

I. EXCLUSIONARY RULE AND THE OBJECTIVE TEST

Oftentimes, there is more than one legal justification for a search involving the same set of facts. The law does not require an officer to select the "best" justification for the search; as long as there is a valid legal justification for the search, it will be upheld. In U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973) the U.S. Supreme Court affirmed the standard of "objective reasonableness" when determining the legality of a search. The Court further held that the officer's underlying intent in carrying out the search is not relevant to the analysis stating, "the focus is to be on the [officers'] actions not their motives." Scott v. U.S., 436 U.S. 128, 139 98 S.Ct. 1717, 1724 (1978). The facts in Robinson illustrate this principle. The suspect was searched incident to a lawful arrest; the search was later challenged on grounds that the officer's motivation for the search did not coincide with the legal justification for the search-incident-to-arrest exception. The Court rejected this argument, holding that since the custodial arrest gave rise to the authority to search, it was of no consequence that the officer did not indicate any subjective fear or have reason to believe that the suspect was armed. Robinson, at 223-226. See also: U.S. v. Villamonte-Marquez, 462 U.S. 579, 103 S.Ct. 2573 (1983)

Therefore, where a search conducted by an officer may be invalid under an "inventory theory," it may be justified as a "search incident to arrest" or "probable cause search" regardless of the officer's **subjective** motivation at the time the search is conducted. So long as the officer's **conduct** does not violate the subjects Fourth Amendment rights, the evidence will be admissible.

The Nevada Supreme Court echoes the U.S. Supreme Court ruling on this issue. In *State v. Greenwald*, 109 Nev. 808, 858 P.2d 36 (1993), the court held that where an officer claimed to conduct an inventory search that in effect was a valid search incident to arrest, the search would not be invalidated. *Greenwald* 109 Nev. at 811. It is important to note, however, that *Greenwald* also holds that where an officer merely uses an inventory search as a ruse to search every nook and cranny for evidence of a crime, that search will be invalidated. *Id.* at 810-811.

In *Surianello v. State*, 92 Nev. 492, 497 553 P.2d 942, 945 (1976) the court said that because probable cause to arrest (or reasonable suspicion to stop) is determined by objective facts, it was immaterial that the officer testified that he didn't think he had enough facts for an arrest; his action was nonetheless lawful if the court determines that the legal justification (R/S for a stop or P/C for an arrest) was present. For a detailed discussion of this issue see, *People v. Woods*, 981 P.2d 1019, 1027 (Cal. 1999).

J. MISTAKES BY POLICE IN SEARCH & SEIZURE

Occasionally, police are mistaken about the facts and circumstances surrounding a particular case and make decisions based on erroneous information. When this occurs, a defense motion to suppress is frequently the result. Suppression of the evidence, however, is far from an automatic result. At that point, the State carries the burden of proving that the mistake was reasonable and was not the result of police negligence.

For example, in *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106 (1971), police were investigating a robbery and developed Hill as a suspect. They went to Hill's apartment and a man who fit Hill's description answered the door and allowed the police to enter. The man denied that he was Hill (and, in fact, he was not), and denied knowledge of any guns in the apartment, but the police, who spotted a gun and ammunition in plain view, arrested the man, searched the apartment, and seized guns, stolen property, other evidentiary items used to convict Hill at trial. The U.S. Supreme Court found that under these facts, the mistake was objectively reasonable and upheld the search. Although, the Court stated that "good faith" alone would not have justified the police action.

The Ninth Circuit makes an important distinction to the Supreme Court's ruling in *Hill*. In *U.S. v. Delgadillo-Velasquez*, 856 F.2d 1292, 1296-97 (9th Cir. 1988, the court found that where police had P/C to arrest a suspect but had no reason to believe they were at the suspect's apartment, nor had a matching physical description of the suspect a Fourth Amendment violation occurred.

Other examples include:

An officer stopped a car based on a computer entry indicating that the driver had an outstanding warrant when, in fact, the warrant had been quashed. Because the error was not **created** by the police, the evidence was not suppressed. *Arizona v. Evans*, 514 U.S. 1,115 S.Ct. 1185 (1995). See also, *U.S. v. Santa*, 180 F.3d 20 (2d Cir. 1999)(reliance on statewide computer base.)

Even where police personnel are responsible for the error, the exclusionary rule does not apply when police mistakes are the result of negligence rather than systemic error or reckless disregard of constitutional requirements. *Herring v. U.S.*, 555 U.S. ____, 129 S.Ct. 695 (2009). Drugs and gun found during search incident to arrest were not subject to suppression even though arrest was based on a warrant inadvertently appearing in police database but which had been recalled five months earlier. *Id.*

In *U.S. v. Shareef*, 100 F.3d 1491 (10th Cir. 1996), the opposite result was reached when police relied on a mistake made by a police dispatcher. The court reasoned that while a dispatcher is not a law enforcement officer, she is clearly a part of the law enforcement team, a status quite different from the court employee discussed in *Evans. U.S. v. Shareef* 100 F.3d at 1503.

Police entered a residence based on consent from a person who, based on questioning by police, appeared to have common authority over the premises. It was later discovered that the person did not have common authority over the premises, nevertheless, the search was upheld as valid. *Illinois v. Rodriguez*, 497 U.S. 177,110 S. Ct. 2793 (1990); see also, *Snyder v. State*, 103 Nev. 275, 738 P.2d 1303 (1987)(search determined valid where police made a reasonable effort to obtain facts pertinent to the search.)

Police had a search warrant for the third floor apartment at a certain address. Unknown to police, the third floor had been divided

into two separate apartments, both of which were searched and drugs were found in the "wrong" apartment. The evidence was not suppressed on the basis that the mistake occurred despite reasonable efforts by police to investigate and learn the correct facts. The mistake occurred despite reasonable efforts by police to investigate and learn the correct facts. *Maryland v. Garrison*, 480 U.S. 79,107 S.Ct. 1013 (1987).

K. "GOOD FAITH"

The U.S. Supreme Court has long held that an officer's "good faith" is irrelevant in deciding whether an individual's Fourth Amendment rights have been violated. Subjective "good faith" is not helpful in a court's inquiry because the Supreme Court has determined that an **objective** test must be employed in deciding motions to suppress. *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382 (1991). If **subjective** "good faith" alone were the only test, an individual's Fourth Amendment protections would be greatly diminished; people would be secure in their persons, houses, papers and effects only to the extent that the police exercised its discretion." *Beck v. Ohio*, 379 U.S. 89, 91 85 S.Ct. 223, 226 (1964).

However, in limited situations, **objective** "good faith" is a term that may result in admission rather than suppression of evidence. In order for "good faith" to apply, courts must review the outward actions of the officer(s), without relying on the officer's **subjective** intent. Most of the cases in this area involve an officer's reliance on bad law or a bad ruling from a judge or magistrate.

In *Michigan v. DeFillipo*, 443 U.S. 31, 99 S.Ct. 2627 (1979) and *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160 (1987) police officers made arrests or searches acting pursuant to a state statute which was later held by the courts to be unconstitutional. In both cases, the U.S. Supreme Court upheld the police action because of the officer's reliance on a statute that was valid at the time of their reliance upon it. The Court placed two specific limits on its ruling that would yield a contrary result, 1) if the legislature wholly abandoned its responsibility to enact constitutional laws, or 2) if a reasonably well trained officer should have known that the statute was unconstitutional. *Illinois v. Krull* 480 U.S. at 355.

In *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) the Court held that where police got a search warrant signed by an impartial judge, and the facts submitted by the police in the affidavit were true (not intentionally or recklessly false) then no suppression would occur; the result would not change even if another judge found after the search that there was not enough P/C.

Again, the Court limited its decision to cases where a reasonably well trained officer would not have realized that there was insufficient P/C.

The Nevada Supreme Court has upheld the *Leon* decision, citing it as recently as 1997 in *Powell v. State*, 113 Nev. 41, 930 P.2d 1123 (1997). In other jurisdictions, state supreme courts have upheld the Leon decision on a ratio of about four to one.

III.

SITUATIONS WHERE THE FOURTH AMENDMENT DEFENSE IS NOT APPLICABLE

The following are examples of facts and circumstances where the U.S. Supreme Court and other courts have applied the "expectation of privacy" test and concluded that no Fourth Amendment privacy intrusion occurred. These are Open View, Standing, Trash Searches, Dog Sniff, Prison and Jail Cases, Abandonment and Standing. Additionally, the Fourthh Amendment does not apply to searches and seizures done by private citizens unless those searches are instigated by police or performed under police direction.

A. OPEN VIEW

The Supreme Court has said that "what a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. U.S.*, 389 U.S. 347, 351, 89 S.Ct 507, 511 (1967). See also, *Lewis v. U.S.*, 385 U.S. 206, 210, 87 S.Ct. 424, 427 (1966); *U.S. v. Lee*, 274 U.S. 559, 563, 47 S.Ct. 746, 748, (1921). Open view is another way of saying that there is no "reasonable and legitimate expectation of privacy."

In order for the "open view" doctrine to apply, evidence or facts do not need to be literally lying out in the open. So long as the nature of the items or areas in question are sufficiently public to prevent an individual from demonstrating a "legitimate expectation of privacy," police activity will not be deemed a search. Open view is simply a legal term for a valid police discovery of information that helps develop probable cause or reasonable suspicion.

"Open view" and "plain view" are not the same thing. "Open view" concerns warrantless searches or gathering of information. "Plain view" is a theory concerning warrantless seizures of evidence. Open view observations by police are not deemed searches under the Fourth Amendment even if police are looking for evidence of crimes. It is a seizure, however, when items of contraband or evidence that are in "plain view" are seized. Plain view seizures can be executed without a warrant as long as the officer has a lawful right to be where he is upon seeing the item and it is immediately apparent the item is subject to seizure. "Plain view" is discussed later in this outline. The following are examples of "open view."

1. VISUAL SIGHTING

a. Open Fields – In *Oliver v. U.S.*, 466 U.S. 170, 104 S.Ct. 1735 (1984), Defendant had posted a "No Trespassing" sign and fenced his property. Officers walked around a locked gate and along a road for several hundred yards and discovered a field of marijuana. This activity was deemed a warrantless search and upheld by the Court. The Court held that while the Fourth Amendment protects "persons, houses, papers and effects, it does not extend to"open fields." *Oliver v. U.S.* at 176.

The "open fields" doctrine typically applies to any unoccupied or undeveloped area outside the curtilage of the property. An "open field" may actually be a thickly wooded area, but there is no reasonable expectation of privacy as long as it is outside the "curtilage."

b. Curtilage – In *U.S. v. Dunn*, 480 U.S. 294,107 S.Ct. 1134 (1987), the Supreme Court set forth the following factors to determine whether an area falls within the "curtilage" of the property:

- 1) Proximity of area to the home
- 2) Whether area is included in enclosure which surrounds a home
- 3) Nature of uses to which area is put
- 4) Steps taken to protect area from observation by passers-by

In *Dunn*, a barn located approximately fifty (50) yards from the fence surrounding a residence on almost two hundred fifty (250) acres of property was outside the curtilage.

The following are examples of cases where the four *Dunn* factors have been applied. U.S. v. Benish, 5 F.3d 20 (3rd Cir. 1993)(Marijuana growing approximately 100 meters from the residence not protected from observation and not in an area used for intimate activities - not within the curtilage of residence); U.S. v. Defendant's Kremer, 108 F.3d 339 (9th Cir. 1996)(unpublished opinion)(Area in-between the fence and the woods - not within the curtilage because it could not be conveniently accessed from the home and because there is no apparent reason to go there) U.S. v. Jenkins, 124 F.3d 768 (6th Cir. 1997) (Several acre backyard in a rural area largely enclosed by a fence, the occupants mowed, planted, and maintained all of the area in question – held to be within the curtilage); U.S. v. Diehl, 276 F.3d 32 (1st Cir. 2002) (Officers came within eighty-two (82) feet of camp on a seventeen (17) acre tract of land in a rural area with a one half acre clearing and detected marijuana – officer found to have invaded the curtilage)

c. Aerial Surveillance – In California v. Ciraolo, 476 U.S. 207,106 S.Ct. 1809 (1986), the suspect had erected a six foot outer fence and a ten (10) foot inner fence around his back yard to prevent observation from the ground. The police flew over in an airplane at 1000 feet and looked with the naked eye and discovered marijuana plants growing. The Court held that since any member of the public flying in public airspace could have seen the same thing, there was no intrusion on the suspect's reasonable expectation of privacy. In People v. Mayoff, 729 P.2d 166 (Cal 1986), the California court declined to follow the U.S. Supreme Court decision in Ciraolo. In Mayoff, officers repeatedly flew over agricultural areas and photographed Defendant's land. The California court considered this activity as "intensive warrantless government intrusion into a zone of heightened constitutional privacy." People v. Mayoff at 171.

In *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693 (1989), police hovered four hundred (400) feet above the suspect's residence in a helicopter to discover marijuana. The Court determined this activity did not constitute a search since any member of the public could have done the same thing.

However, where police hovered in a helicopter a mere fifty (50) feet above Defendant's residence, the court found a Fourth Amendment violation. The distinction between this case and *Ciraolo* rested on the police using nonnavigable airspace in order to conduct the search. *Comm. v. Oglialoro*, 547 A.2d 387 (Pa. 1990).

2. APPROACHING A RESIDENCE

- **a. Looking in Windows** –Looking through an uncurtained window is not a search as long as the house is approached by means available to the public and the place had no "No Trespassing" signs. *U.S. v. Taylor*, 90 F.3d 903 (4th Cir. 1996); see also *U.S. v. Ward*, 166 F.3d 336 (4th Cir. 1998)(unpublished) and *U.S. v. Hersh*, 464 F.2d 228 (9th Cir. 1972).
- **b.** Areas Outside the Residence After knocking on the front door and getting no answer, it is not a search to go around the back of a house to see if there is another door as long as there is no gate or wall in the way and both doors are readily accessible from a public place such as a driveway. *U.S. v. Garcia*, 997 F.2d 1273 (9th Cir. 1993); see also *U.S. v. Daoust*, 916 F.2d 757 (1st Cir. 1990).

No search was found where FBI agents went up a driveway and approached a garage where they discovered evidence of stolen cars. The Court upheld the FBI action because there were no "No Trespassing" signs and the route was one any private individual could have taken to approach the residence.

U.S. v. Evans, 27 F.3d 1219 (7th Cir. 1994). See also, *People v. Camacho*, 3 P.3d 878 (Cal. 2000).

In *U.S. v. Fields*, 113 F.3d 313 (2d Cir. 1997) police went into a side yard area of an apartment building that was a common area for other tenants and looked in a window of the defendant's apartment with a five (5) to six (6) inch opening. The court ruled that there was no 4th Amendment expectation of privacy.

Police officers serving search warrant for firearms at suspect's house looked in the window of a truck outside the house and saw gun parts. The court held this is an "open view" observation that did not violate the Fourth Amendment. *U.S. v. Martin*, 806 F.2d 204 (8th Cir. 1986); see also *U.S. v. Wesley*, 918 F. Supp. 81 (W.D. New York, 1996).

3. OTHER SENSORY ISSUES

a. Hearing – Courts have consistently found that a search does not occur where police overhear with the naked ear evidence of criminal activity. In *U.S. v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978) evidence of an overheard phone conversation at an unenclosed telephone in a public place was not suppressed. In *U.S. v. Aquapito*, 620 F.2d 324 (2nd Cir. 1980) and *U.S. v. Hessling*, 845 F.2d 617 (6th Cir. 1998) police listened to conversation in adjoining hotel room without electronic equipment (naked ear)) and both courts found no Fourth Amendment violation. For similar cases see: *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994) and *State v. Ortiz*, 600 N.W. 2d. 805 (Neb 1999). However, in cases where police use electronic equipment to augment hearing to gain information, virtually all courts hold that this is a Fourth Amendment privacy violation. See *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507 (1967).

b. Touch – Many courts disagree about whether touching or manipulating a person's luggage constitutes a Fourth Amendment violation. The differences turn on whether a person has an objectively reasonable expectation of privacy in the item being touched. The following cases demonstrate how factual subtleties change the result. In *U.S. v. Gault*, 92 F.3d 990 (10th Cir. 1996) a police officer lifted a gym bag that was protruding five inches into the aisle of a train. The court ruled that this action was not a search. In *U.S. v. Ward*, 144 F.3d 1024 (7th Cir. 1998), officers removed and handled a bag from the luggage compartment of a bus that the passenger had checked in prior to departure. Again the court found no violation.

However, in *Bond v. U.S.*, 529 U.S. 334, 120 S.Ct 1462 (2000), the U.S. Supreme Court ruled that police could not manipulate a passenger's bag placed directly above the passenger's head without consent because such action

would violate the passenger's right to privacy. Here, the Court held that although bus passenger may have had an expectation that his bag might be handled by a bus employee or other passenger, he did not have expectation that employee or other passenger would feel the bag in an exploratory manner.

c. Smell – An officer smelling marijuana coming from packages or baggage was not deemed a search. *Sims v. State*, 425 So.2d 563 (Fla. 1983).

*Dog Sniff cases are addressed specifically later in this outline.

4. USE OF TECHNOLOGY

- **a. Flashlights** the use of flashlights in police investigation is not considered a search. In *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983), the Supreme Court held that using a flashlight to see something at night which would have been in the open during the day did not violate the Fourth Amendment. Other courts have consistently followed this ruling. In *State v. Herbert Wright*, 104 Nev. 521, 763 P.2d 49 (1988), the Court held shining a flashlight into a car was not a violation. In *State v. Calvillo*, 792 P.2d 1157 (N.M. 1990), the court found shining a flashlight into a residence was not a search. For similar results see: *U.S. v. Willis*, 37 F.3d 313 (7th Cir. 1994), and *U.S. v. Ortiz*, 63 F.3d 952 (10th Cir. 1995).
- **b.** Thermal Detection Devices After a long line of conflicting cases on this issue, the U.S. Supreme Court has determined that the use of thermal detection or FLIR devices constitutes an intrusion on an individual's privacy. *U.S. v. Kyollo*, 533 U.S. 27, 121 S.Ct. 2038 (2001). The Court held, where "the Government uses a device that is not in general public 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. *U.S. v. Kyollo* 533 U.S. at 40.
- c. Vision Enhancement There is a split in authority on whether the use of a telescope or binoculars constitutes a search. The use of these devices was upheld in *U.S. v. Ward*, 546 F.Supp. 300 (W.D.Ark.1982), *U.S. v. Christensen*, 524 F.Supp. 344 (N.D.III.1981), *Saylor v. State*, 185 Ga.App. 634, 365 S.E.2d 493 (1988), *U.S. v. Allen*, 633 F.2d 1282 (9th Cir.1980), and *State v. Citta*, 625 A.2d 1162 (N.J. 1990), but was disallowed in *U.S. v. Taborda*, 635 F.2d 131 (2d Cir.1980); *State v. Barnes*, 390 So.2d 1243 (Fla.App.1980); *State v. Kender*, 60 Haw. 301, 588 P.2d 447 (1979); and 1166 *U.S. v. Kim*, 415 F.Supp. 1252 (D.Haw.1976). However, in both *Taborda* and *Kim* the courts indicated that had the observations been limited to activities

outside the home, such as a balcony, the surveillance would have been okay. Therefore, the use of vision enhancing equipment will likely not be considered a search unless the equipment is used to view inside of areas that would otherwise not be visible with the naked eye.

d. Tracking Devices – Courts have long followed the rule set forth in *U.S. v. Knotts*, 460 U.S. 276, 281 103 S.Ct. 1081, 1085 (1983), that "a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." In *Knotts*, police put a beeper on a suspect's car and used the beeper to trail the car, because there is no legitimate expectation of privacy in public movements, there is no search and no Fourth Amendment violation.

5. PUBLIC UTILITY AND BUSINESS RECORDS

- **a. Phone Company Records (Pen Registers)** a search does not occur when the Government uses a device to record the numbers dialed from a person's phone. In *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577 (1979) the Court held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties (i.e. the phone company.) Consequently, the use of a pen register is not a search and no warrant is required.
- **b. Bank Records** the Government's use of bank records does not constitute a search under the Fourth Amendment. In *U.S. v. Miller*, 425 U.S. 435, 440, 96 S.Ct. 1619, 1622 (1976), the Supreme Court held that since the records were accessible to the bank, there is no reasonable expectation that they would be free from government surveillance. See also, *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494 (1974).
- **c. Business Records** an individual customer does not have a privacy interest in the records of the business he patronizes. Thus, the use of company records does not constitute a search. In *In re Grand Jury: Subpoena Duces Tecum*, 827 F.2d 301 (8th Cir. 1987), the court held that Western Union customers had no privacy interest in Western Union company records. In *U.S. v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993) the court held that the government could subpoena business records, credit card, and phone company records. Defendant did not have standing to challenge the government's activity because the subpoena was issued for the company, not for the defendant.

In Commonwealth v. Cote, 556 N.E.2d 45, 50 (Mass., 1990) the court held that there was no expectation of privacy in messages taken down by a

contracted answering service, as use of such service involved a voluntary conveyance of information to a third party.

B. STANDING

This term means that the only person who can complain about an alleged police violation of the Fourth Amendment is a person whose own reasonable and legitimate expectation of privacy was intruded upon. This means that the person must have authority, dominion, control and access to the place or item searched. In determining an expectation of privacy property rights are one of several factors used.

Cautionary Note: Illegal actions by officers may result in civil and/or criminal liability for the officer even though the Fourth Amendment's exclusionary rule might not apply because of a lack of standing by a particular suspect.

In bringing forth a suppression claim based upon a standing issue the proponent of the suppression motion has the burden of showing a violation of his own Fourth Amendment rights. In order to have standing, it is the burden of the accused to demonstrate that the accused had ownership and control or permission from the owner to have temporary authority and control over the property/item.. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978) and *U.S. v. Ponce*, 947 F.2d 646 (2nd Cir. 1991) "Must show standing by a preponderance of the evidence." *U.S. v. Carr*, 939 F.2d 1442 (10th Cir. 1991). The [proponent] can't rely on the government's pleadings or theory of the case but must present his own evidence or use evidence presented by the government in proving his case *U.S. v. Zermeno*, 66 F.3d 1058 (9th Cir. 1995).

Because the accused must have standing, the job of rebutting this issue falls upon the police officer/investigator who must gather evidence of this issue at the time of the search and or seizure.

In cases with a search warrant, police should always look for items which tend to show a suspect's dominion and control (i.e. receipts for utilities, leases or deeds, photographs, and addressed letters). In cases where police do not have a search warrant but instead use one of the exceptions to the warrant requirement it is important for the police to obtain information from the suspect as to whether that person has control, dominion and/or authority to possess the item or the place to be searched. If none of these apply, the suspect will fail with a standing claim.

These investigations should be commenced before the person is arrested, or, if arrested, after Miranda warnings. Officers should ask the suspect if he owns the place or item to be searched. If the answer is "Yes" the officer should ask to find where proof, documenting that claim, exists. Beware of situations where the suspect says that the place or item is not owned by the suspect. If the person denies ownership, it is a serious mistake for police to immediately search/seize the location or item. Denying ownership is not the same as a statement by suspect that the place or item "..is not mine and I have no connection with it." (This shows abandonment.) The reasons for doing a thorough and complete investigation are shown in cases 12, 13 & 14 in this section. If the person disclaims ownership, police should ask, "Who is the owner?" "Did the owner give you permission to have temporary control and authority over the place or item?" "What is the address, location, phone number, place to contact the (alleged) owner so that we can confirm what you say?" Officers should record, or make complete and accurate notes these conversations so that, if the suspect later claims to have had permission from the owner to use or possess the property, the officers could rebut this claim of privacy, by using the suspects lack of meaningful (or inaccurate) answers, at the suppression hearing.

- (1) In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978), officers stopped a car matching the description of a car used in an armed robbery and ordered the passengers out. The car was searched and a sawed-off rifle was found under the seat and ammunition was found in the locked glove compartment. The court held that the passengers had no standing to contest to the search of the vehicle when they didn't own the car and did not claim to own the items seized. Because the items seized were in areas where a passenger would not legitimately expect privacy, the passengers lacked standing even though they were in the car with the permission of the owner. Same holding in *Scott v. State*, 110 Nev. 622, 877 P.2d 503 (1994) although the Nevada Supreme Court said in *Scott* that a person other than the owner might have a 4th Amendment privacy interest in a car (i.e. The owner of a vehicle leaves town for two weeks and let a friend use the vehicle).
- (2) In *McKee v. State*, 112 Nev. 642, 917 P.2d 940 (1996), the owner of a car was a passenger in it when the car was stopped by the police. The car was subsequently searched and several pounds of methamphetamine were recovered. Since the owner of the vehicle did not give up possession of the vehicle to the driver, the driver had no expectation of privacy in the vehicle. As such, the Court found that the driver lacked standing to contest to the search of the vehicle and the seizure of the methamphetamine.

Although a passenger may lack standing to object to a *search* of a vehicle, a passenger does have standing to claim that a traffic stop was unconstitutional. *Brendlin v. California*, 127 S.Ct. 2400, 2403 (2007) ("We hold that a passenger is seized [when a traffic stop occurs] and so may challenge the constitutionality of the stop."). A passenger may challenge a stop of a vehicle on Fourth Amendment grounds even if they have no possessory or ownership interest in the vehicle. *U.S. v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000).

- (3) In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556 (1980), police officers lawfully entered a house where Rawlings was a guest. Prior to the officers entry into the residence Rawlings had stored drugs in a woman's purse (without her consent). Police subsequently searched the purse and found the drugs. Rawlings admitted ownership of the drugs. Court held no standing even though Rawlings claimed ownership of the drugs because Rawlings had no expectation of privacy in the woman's purse and no right to exclude others from the purse.
- (4) In *U.S. v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547 (1980), the Court stated that it is not inconsistent for the prosecution to claim that a person has no standing to contest the search for and seizure of an item and still contend at trial that the defendant has possession and control of the item. *Salvucci* repudiated the concept of "automatic standing" a defendant has the burden to show a violation of his own reasonable exceptation of privacy.
- (5) To compensate for the loss of "automatic standing," the Court held in *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1968), that testimony presented at a suppression hearing cannot be admitted as evidence of guilt at trial.
- (6) In *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990), an armed robbery/murder occurred. In their subsequent investigation Police developed probable cause that *Olson* was the getaway driver. Without first obtaining a warrant, officers entered an apartment where *Olson* was staying as an overnight guest to arrest him. The lower court found no exigent circumstances existed for failing to obtain a warrant, and the evidence obtained after the police entered was suppressed. The U.S. Supreme Court held that *Olson*'s status as an overnight guest is alone sufficient to demonstrate that he had an expectation of privacy in the house. As such, *Olson* had standing to raise Fourth Amendment claims of an illegal search and or seizure. It should be noted that a person does not automatically have standing just because he is "legitimately on the premises", but as noted in this opinion, an overnight guest does have an expectation of privacy, even though the owner of the house retains ultimate control over who lawfully enters the premises..

- (7) In *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469 (1998), the Defendant was a drug dealer who arrived and stayed at the home of another person for two reasons in order to conduct a business transaction and to package cocaine. A police officer approached the drawn window blinds and noticed the Defendant packaging cocaine. In determining a lack of standing on the Defendant's part, the Court noted that Defendant was merely permitted to use the premises, and that he had no expectation of privacy while there. As a result of the Defendant's lack of standing, the Court did not need to determine whether or not the officer's observations through drawn window blinds constituted a search. This case also notes that there is a distinction between the privacy expectations of a residence and a business property. The Court indicated that the Defendant was at this property to conduct a business transaction (packaging cocaine) and that as such his privacy expectations were diminished.
- (8) In *U.S. v. Gordon*, 168 F.3d 1222 (10th Cir. 1999), a drug dealer paid another person to rent a motel room for him. The drug dealer then sold drugs out of the room. As the drug dealer entered this room purely as a place to conduct business, he had no expectation of privacy and no standing to contest a search. This case cited *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469 (1998).
- (9) In U.S. v. Padilla, 508 U.S. 77, 113 S.Ct. 1936 (1993), a highway patrol officer in Arizona stopped a car in which Areiniega was the sole occupant. A search of the car revealed 560 pounds of cocaine in the trunk. Subsequent investigation proved that the defendant (Padilla) was part of a conspiracy to distribute that cocaine. The U.S. Supreme Court held that Padilla did not have standing to contest the search of the car merely because Padilla was a co-conspirator, rejecting a "Co-Conspirator Exception" delineated by the The Court ruled Ninth Circuit. that the Defendant needed reasonable/legitimate expectation of privacy in the place searched and that his rights were not violated by the search itself.
- (10) At least three U.S. Circuit Courts have held that a person has no standing to contest the search of a rental car when: 1) it was rented by someone else; 2) the defendant's name did not appear on the rental documents; and, 3) the agreement states that the renter had no authority to give control of the vehicle to another person. See: U.S. v. Boruff, 909 F.2d 111 (5th Cir. 1990); U.S. v. Wellons, 32 F.3d 117 (4th Cir. 1994); U.S. v. Jones, 44 F.3d 860 (10th Cir. 1995); U.S. v. Bastidas, 142 F.3d 1233 (10th Cir. 1999). However at least two courts have held that if the driver of a rental car had the permission of the lessee to drive the vehicle, that the driver then had a legitimate possessory interest in the vehicle and thus an expectation of privacy. See: U.S. v. Muhammed, 58 F.3d 353 (8th Cir. 1995) and, U.S. v. Kye Soo Lee, 898 F.2d 1034 (5th Cir. 1990).

- (11) In *U.S. v. Cooper*, 133 F.3d 1394 (11th Cir. 1998) the Defendant had rented a car from Budget and was four days overdue on the return of the vehicle. Defendant was stopped by a Florida Highway Patrol officer for a traffic infraction. The Defendant provided the officer with the rental form showing that the car was overdue. The officer then contacted Budget, who then asked that the car be returned to Budget. The officer then towed and impounded the car and contraband was found. The court ruled that the driver still had an expectation of privacy in the car because: 1) he could have called in and asked for more time; 2) the contract he signed said that he would have to pay overtime; and, 3) prior to the phone call from the officer Budget had not yet made a complaint or taken private action for the repossession/return of the vehicle. Additionally, facts at the suppression hearing established that the Defendant had had prior dealings with Budget and was familiar with Budget's policy of charging for the vehicle if returned late by the Defendant.
- (12) In *U.S. v. Pena*, 961 F.2d 333 (2nd Cir 1992), the court reiterated that the borrower of an automobile can possess a privacy interest in the automobile. If the borrower of the automobile can show a legitimate reason for being in the automobile, a privacy claim will hinge on whether or not the borrower had a reasonable expectation of privacy in the area being searched.
- (13) In *U.S. v. Perea*, 986 F.2d 633 (2d Cir.1993), the Defendant entered a cab containing a duffle bag which was put in the cabs trunk by the Defendant's associate. The Police stopped the cab, and the taxi driver opened the trunk for the officers. The police subsequently removed and opened the bag which contained a large amount of narcotics. The Court ruled that the Defendant did not have a privacy interest in the trunk of the cab, because he did not have the right to exclude others from the trunk. However, the Court also found that the Defendant was lawfully in temporary possession of the bag and therefore could have a privacy interest in the bag and its contents. The Court sent this case back for a finding on whether or not the Defendant had 1. abandoned his interests in the bag (when he denied ownership); 2. provided the police consent to search the bag; or 3. whether or not there was a basis for a warrantless search of the bag.

Other Courts have also held that a person need not be the owner of the property for the privacy interest to be one that the Fourth Amendment protects, so long as the person has permission from the owner to temporarily possess the place or item and the right to exclude others from dealing with the property and conducts oneself in a manner consistent with these expectations. Same ruling and same rationale involving a suitcase in See *U.S. v. Benitez-Arreguin*, 973 F.2d 823 (10th Cir. 1992).

- (14) In *U.S. v. Austin*, 66 F.3d 1115 (10th Cir. 1995), the Defendant asked a civilian at an airport to watch his carry on bag for him. The Defendant then left the bag with the civilian for approximately fifteen minutes. During that fifteen minute time frame, the civilian became uncomfortable watching the bag and allowed airport police officers to remove and impound the bag. The Court ruled that as the Defendant had left his bag in the care of a civilian; that the civilian was in lawful possession of it and had the authority to exclude, or allow, others access to the bag. As such, the civilian also had authority to turn it over to the police. For these reasons the Court stated that the Defendant lacked a reasonable expectation of privacy in the bag, and it denied his Fourth Amendment claim.
- (15) In *U.S. v. Porter*, 107 F.3d 582 (8th Cir. 1997) an officer entered a bus in the course of a drug investigation. He encountered the Defendant who allowed the officer to examine his identification and ticket upon which Defendant's name was misspelled. Defendant told the officer that he had only one piece of luggage, but a check of Defendant's ticket revealed that two pieces of luggage had been checked.. The officer searched the first piece of luggage, and then located the second bag (as listed on Defendant's ticket) in luggage. The officer then asked Defendant if the second bag was his, and Defendant stated that: he had never seen the bag before; that the bag was not his; and, that the officer could go ahead and search the bag. Inside the bag was two kilograms of cocaine. The Court found that by denying ownership of the bag and by giving the officer permission to search the bag that Defendant had abandoned his interests in the bag. As the property was abandoned the search did not violate the Fourth Amendment and the evidence was admissible at trial.
- (16) Bond v. U.S., 77 F.3d 1009 (7th Cir. 1996). Defendant, subsequently convicted in drug conspiracy, had no expectation of privacy in hotel room in which he left a suitcase containing \$128,000, where he was not registered in the room and had no key to room. The fact that Defendant left the suitcase in the room under these facts, together with his disavowal of owning the suitcase just before it was searched indicate that the Defendant had abandoned the suitcase. As the suitcase was abandoned, the Defendant had no Fourth Amendment protections regarding its search.
- (17) In *U.S. v. Cunag*, 386 F.3d 888 (9th Cir. 2004), the 9th Circuit held that even if the occupant of a hotel room has procured that room by fraud, the occupant's Fourth Amendment expectation of privacy is not finally extinguished until the hotel justifiably takes affirmative steps to repossess the room. See also *U.S. v. Bautista*, 362 F.3d 584 (9th Cir. 2004).

C. TRASH SEARCH

In *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625 (1988) the Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the cartilage of the home. The Court went on to note that in this case there was no reasonable and legitimate expectation of privacy in garbage left on the street for collection. In this case the garbage was exposed to the public, animals, and a search by the garbage collector and as such there was no reasonable expectation of privacy in this trash.

U.S. v. Hedrick, 922 F.2d 396(7th Cir 1991) extended *Greenwood* to trash cans located on driveway fifty feet from house and twenty-five feet from sidewalk, even though these items were within the cartilage of the house. This search did not violate the Fourth Amendment as the garbage was readily accessible to members of the public and any expectations of privacy in the garbage would be unreasonable.

In *U.S. v. Redmon*, 138 F.3d 1109 (7th Cir. 1998) the court found that society would not accept as reasonable a claim of privacy for trash left for collection in an area accessible to the public (Outside garage in townhouse with common driveway for other residence).

In *U.S. v. Long*, 176 F.3d 1304 (10th Cir. 1999) the court held that a the Defendant had no expectation of privacy in a search of trash bags recovered from a trailer located close to public alleyway to which passersby had access. This was particularly true as the bags were readily accessible and visible to the public.

In *U.S. v. Hall*, 47 F.3d 1091 (11th Cir. 1995) the police took trash bags from a dumpster located on private property in a parking area reserved for the employees of the company whose trash was searched. The court stated that the owner of commercial property has an expectation of privacy in the areas surrounding the property only if the owner has taken affirmative steps to exclude the public.

D. DOG SNIFF CASES

As set forth above, the United States Supreme Court has decided *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834 (2005), holding that a narcotics detector dog sniff conducted on the exterior of a vehicle during a lawful traffic stop, that reveals no information other than the location of a substance that no individual has any right to possess, does not implicate the 4th Amendment.

However, the 4th Amendment applies if the dog enters the vehicle or the traffic stop is prolonged for the dog sniff.

In *U.S. v. Place*, 462 U.S. 696, 103 S.Ct. 2637 (1983), the Court found that exposure of items located in a public place to a trained drug sniffing dog did not constitute a search under the Fourth Amendment. As a basis for this finding, the Court noted that the sniff only discloses the presence of narcotics, and does not require going through the item itself.

In *U.S. v. Ludwig*, 10 F.3d 1523 (10th Cir. 1994) the court allowed the use of a police drug sniffing dog upon various cars located in a public (motel) parking lot. This Court found that random suspicionless dog sniffs are not searches under the Fourth Amendment.

The majority view is that police need no legal justification to do a dog sniff of a vehicle or luggage or other containers as long as there is no unjustified seizure (containers) or unjustified stop (cars) of the item sniffed. (When advising on this are make sure to see the section regarding roadblocks).

In *Gama v. State*, 112 Nev. 833, 920 P.2d 1010 (1996), the Court upheld the sniff and subsequent warrantless search of a vehicle after a police officer stopped a car for speeding (noting that he also believed the occupant of the vehicle was smuggling drugs) when the drug sniffing dog arrived on the scene prior to the time the citation was completed.

The same decision was reached in a case where the Florida Highway Patrol stopped cars for various traffic violations and had a drug sniffing dog arrive at the location within the time ordinarily used for license, registration and radio check. *U.S. v. Holloman*, 113 F.3d 192(11th Cir. 1997). See also *U.S. v.* \$404,905.00 in *U.S. Currency*, 182 F.3d 643 (8th Cir. 1999).

In *U.S. v. Rodriguez-Morales*, 929 F.2d 780 (1st Cir. 1991) the police stopped a car because the driver was leaning out the window yelling at another car. The driver had no license and the car was impounded. The court held that once a vehicle was impounded, that a drug sniffing dog could be used around the exterior of the vehicle with no Fourth Amendment violations.

All of these cases also hold that an alert by a dog with proper training and credentials constitutes probable cause for the procurement of a warrant..

In *U.S. v. Thomas*, 757 F.2d 1359 (2nd. Cir. 1985) a dog sniff of an apartment from a hallway outside his apartment door was held to be a search under the Fourth Amendment. The court reasoned that a residence has a much

higher expectation of privacy than a suitcase being shipped by airplane (as in Place) or a vehicle as in the other cases mentioned here. See also *State v. Ortiz*, 600 N.W.2d 805 (Neb. 1999).

In *U.S. v. Ayala*, 887 F.2d 62 (5th Cir. 1989) a drug dog sniff of a commercial self storage unit was considered lawful and not a violation of the Fourth Amendment.. See also, *U.S. v. Lingenfelter*, 997 F.2d 632 (9th Cir. 1993).

However it should be noted that a drug dog sniff of human beings may be unconstitutional (as it is indecent and demeaning) without probable cause or reasonable suspicion. See *Horton v. Goose Creek School District*, 690 F.2d 470 (5th Cir. 1982) and *B.C. v. Plumas School District*, 192 F.3d 1260 (9th Cir. 1999).

E. PRISON & JAIL CASES

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984) the U.S. Supreme Court held that a defendant has no reasonable expectation of privacy in his prison cell. The Court also noted that constant surveillance is needed to maintain prison order and security

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979) the Court noted that maintaining institutional security and preserving institutional order are essential goals that may require limitation or retraction of the retained rights of both convicted prisoners and pretrial detainees."

The cases on the issue of opening and/or reading mail coming to or from inmates provide that a prison or jail regulation detailing the authority to open and read incoming (other than legal) mail is appropriate. Criminal defense attorneys know that they are writing to an inmate and it is their responsibility to mark the envelope or use a pre-printed envelope naming them as an attorney.

In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974) it was noted that an inmate's legal mail may be opened by prison officials while in the presence of the inmate. This procedure would allow the prison to ensure that contraband did not arrive at the prison, and would not constitute censorship of the inmate's mail.. To facilitate the identification of legal mail, prison officials may require that such material be specially marked by the sender.. The privileged treatment accorded legal mail stems from its importance in protecting inmates' right of access to the courts.

In *Thornburgh v. Abbot*, 490 U.S. 401, 109 S.Ct. 1874 (1989), the court held that mail entering into the prison system could be restricted if it was reasonably related to a government penological interest. As such, books, magazines, and other materials may be restricted.

In *Martin v. Brewer*, 830 F.2d 76 (7th Cir. 1987) the court held that all mail, unless specially marked by a lawyer, can be open and read by prison officials prior to delivery. See also *Kensu v. Haigh*, 87 F.3d 172 (6th Cir. 1996).

In *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995) held that it is permissible for prison officials to open outgoing mail to examine for contraband, noting that inmates may send feces to people they dislike, but outgoing mail cannot be read. This type of search was permissible as it served a sufficient penological interest on behalf of the government.

In *U.S. v. Williams*, 951 F.2d 853 (7th Cir. 1992) the court found that ."[i]n an institutional setting letters may pose threats to security; thus the incoming and outgoing mail of prisoners may be subjected to surveillance to minimize their opportunity for developing escape plans. *Id.* at 856 (Citing Gaines v. Lane, 790 f.2d 1299, 1304 (7th Cir. 1977). *See* also *Madrid v. Gomez*, 899 F. Supp. 1146 (ND Cal. 1995) which allowed penological institution's to open and read non-legal mail because prison gang activity poses a threat to security. In *Smith v. Shrimp*, 562 F.2d 423, (7th Cir.1977) same decision reached in *Williams* was applied to jail (as opposed to prison) correspondence.

In *U.S. v. Eggleston*, 165 F.3d 624 (8th Cir. 1999) an inmate was given (and signed) a writing containing an "inmate telephone system notice." This notice warned the inmate that "phone calls made on these telephones in the jail are subject to monitoring and recording," except for calls made to an inmate's attorney. The form said "when you choose to make a call using one of these telephones, you are consenting to the monitoring or recording of the telephone conversation." Signature appears below the following line: "I have reviewed and understand the above information." The recording of the call could be used as evidence in court. The court found that if an individual consented to the police listening in on conversations, that all reasonable expectations of privacy would be lost and that the phone conversations would be admissible in court.

NRS 209.419 deals with the interception of an offender's phone communication. It is important to read this section of NRS which states, in part, that signs must be posted near phones, that notice must be provided to both parties of the phone call while it is going on (can use a "beep" instead), and alternate methods must be made for confidential communications to lawyers, reporters and officers.

F. ABANDONMENT

A person can't complain of a warrantless search of premises he has abandoned. *Abel v. U.S.*, 362 U.S. 217, 80 S.Ct. 683 (1960). For example, in *Obermeyer v. State*, 97 Nev. 158 (1981) the Court held that property found in the defendant's hotel room was lawfully seized where rental period had expired and the rent was past due and owing when the police entered and searched the room.

In *State v. McNichols*, 106 Nev. 651 (1990), the Court found that a Defendant had no reasonable expectation of privacy in a home from which he was evicted and upon which foreclosure proceedings were started. As such, the warrantless search of the premises was permissible.

However, police should be aware that the test for abandonment is not based solely on property law concepts such as payment of rent or mortgage. The non-payment of rent is a strong factor, but not the only factor. See *U.S. v. Diggs*, 649 F.2d 731 (9th Cir.1981). The true test is whether the person retains a reasonable/legitimate expectation of privacy. It is important therefore for police to check the standard operating procedure for the landlord, hotel or storage rental agency. See also *State v. Johnson*, 716 P.2d 1288 (Idaho, 1986) where the rental period had expired but the occupant had reasonable expectation of privacy because he stayed there and expected the landlord to resort to eviction procedures required by law.

In *U.S. v. Mulder*, 808 F.2d 1346 (9th Cir. 1987) an individual rented a hotel room for one day with a credit card and returned two days later and the hotel had billed the credit card for two days. As such it was determined that there was no abandonment in this case. See also *U.S. v. Owens*, 782 F.2d 146 (10th Cir. 1986) where a renter still retained an interest in his motel room because the motel had a policy of not immediately evicting those who stayed beyond checkout time. As such a search was not permissible as the renter still had a reasonable and legitimate expectation of privacy while staying slightly beyond check-out time especially considering the fact that his roommate called the desk and paid \$100 toward a continued stay. In *U.S. v. Kitchens*, 114 F.3d 29 (4th Cir. 1997) the court held that a guest may have a reasonable expectation of privacy after hotel/motel room rental period terminated if there is a pattern or practice by the management that would make the expectation reasonable.

In *U.S. v. Reyes*, 908 F.2d 281 (8th Cir. 1990) the court found abandonment where a bus station locker was searched twelve days after the expiration of rental period. It made no difference that the renter was in jail during that time and the business had placed an obstruction on the lock.

In *U.S. v. Oswald*, 783 F.2d 663 (6th Cir. 1986) the court found abandonment where the driver of a burning car left the car on the shoulder of the highway, departed the scene, did not notify authorities, and did not return to the scene within a reasonable time (several hours).

In *U.S. v. Tolbert*, 692 F.2d 1041 (6th Cir. 1982) the court found abandonment where an air traveler appeared willing to leave her baggage at the airport and subsequently denied (strenuously) owning the bags. However, failure to immediately retrieve a checked suitcase even when the person left the airport did not, by itself, constitute abandonment. *U.S. v. Rem*, 984 F.2d 806 (7th Cir. 1993).

In determining whether there has been an abandonment police should look at words spoken, acts done and other objective facts. *Bond v. U.S.*, 77 F.3d 1009 (7th Cir. 1996).

The great majority of courts hold that a disclaimer of ownership, dominion and access constitutes abandonment. *U.S. v. Thomas*, 12 F.3d 1350 (5th Cir. 1994); *U.S. v. Han*, 74 F.3d 537 (4th Cir. 1996), *U.S. v. Ferrer*, 999 F.2d 7 (1st Cir. 1993)and *Bond v. U.S.*. 77 F.3d 1009 (7th Cir. 1996). However, note that in all of the above cases, the suspect verbally and specifically denied ownership, and dominion, access or control of the item. In *State v. Taylor*, 114 Nev. 1071 (1998) Taylor was flying with a female companion and she had the ticket for a suitcase that had drugs hidden in it (found by drug dog). She consented to the police request of a consent search, which was upheld by the Supreme Court (see section on consent). The Court held that Taylor did have standing to contest the search because he denied that he knew the female companion even though he did not expressly deny ownership of the suitcase.

In analyzing an abandonment claim one should review the cases in the "Standing" Section regarding the expectations of privacy by a person who is not the owner of the item searched

The test for abandonment is an objective one, i.e., if a person leaves an item in a place where any member of the public could take it, the item is abandoned even though the person claims later (truthfully or not) that he intended at some point to retrieve the item. See *Smith v. U.S.*, 292 A.2d 150 (D.C. 1972), where the suspect was being chased by police and threw a gun into the street and kept on running. See also *State v. Burgos*, 449 A.2d 536 (N.J. 1982), where the suspect, being surveilled by police, put an aspirin tin containing rock cocaine under a car and kept going back and forth to the container as customers bought drugs and the court said that whether the suspect intended to retrieve and keep the item was irrelevant.

The existence of a police investigation, or even pursuit, does not of itself render the abandonment involuntary. See *U.S. v. Trimble*, 986 F.2d 384 (10th Cir. 1993) and *California v. Hodari D*, 499 U.S. 621, 111 S.Ct. 1547 (1991), but the abandonment must not be the result of a Fourth Amendment violation by police, such as seizure of the suspect without reasonable suspicion (Terry Stop) or probable cause (arrest). If so, the abandonment is a "fruit of the poisoned tree." *U.S. v. Hernandez*, 48 F.3d 858 (5th Cir. 1995).

In *U.S. v. Garzon*, 119 F.3d 1446 (10th Cir. 1997), a police officer entered a bus to conduct a *Bostick* type encounter. The officer told all the passengers that they would have to leave the bus with their personal belongings so that a drug dog could sniff the luggage. This order was made without probable cause or reasonable suspicion. The Defendant failed to obey the officer's unlawful order to remove his personal belongings from the bus and to parade them past a drug-sniffing dog. After the lower court ruled that the Defendant had abandoned his property, it was determined by this Court that the Defendant did not act unreasonably in disregarding the officer's unlawful order to remove his property from the bus in order to facilitate a search. As the property was not abandoned, the Defendant would retain the ability to argue any Fourth Amendment issues on remand.

G. SEARCH BY PRIVATE CITIZEN

The Fourth Amendment does not apply to private citizens as long as they are not employed by the government or acting as agents of governmental police. *Radkus v. State*, 90 Nev. 406, 528 P.2d 697 (1974).

Most states have statutes or court decisions deciding what makes a person a police officer: *PERS v. Washoe County*, 96 Nev. 718, 615 P.2d 972 (1980). However, under the 4th Amendment, any person who:

(1) is a government employee (*Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574 (1921))

and

(2) has a job involving traditional police functions (protect, gather evidence, investigate) will be considered "Police" in the sense that the Fourth Amendment will fully apply. *Dyas v. Superior Court*, 522 P.2d 674 (Calif. 1974), *In Re Fredrick B.*, 237 Cal. Rptr. 338 (1987). In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733 (1985) Justice O'Connor's concurring opinion stated that police officers are persons that have law enforcement responsibility (however, note that that in *T.L.O*, the search of student was conducted by a vice principal, not school security).

The Fourth Amendment does apply to citizens who are employed by the government, even when the government agency is not a law enforcement agency. For example, housing authority employees, social workers, postal workers, inspectors for health or fire departments, school security officers, and public park security officers are government employees, not private citizens. *See Dyas, supra, at* 677.

The Fourth Amendment is wholly inapplicable to a search or seizure, even an unreasonable one, conducted by a private individual not acting as an agent of the government or with the participation or knowledge of any government official. *State v. Miller*, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994). When determining whether a private citizen is acting as an agent of the State, a court must analyze the following two factors: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *U.S. v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982). See also *U.S. v. Cleaveland*, 38 F.3d 1092 (9th Cir. 1994). For example, private security guards, bail bondsmen, landlords, apartment managers, and airline employees may be considered private citizens. *See Dyas*, supra.

In *State v. Miller*, a twelve-year-old babysitter called the police to inform them she believed there were drugs inside the house. Police responded and asked to enter the house, the babysitter allowed the officer inside. The officer then asked where the drugs might be, the babysitter handed the officer a bag, the officer opened the bag and found drugs. The Nevada Supreme Court ruled the drugs were lawfully seized, explaining that the babysitter was not acting as an agent for the police. 110 Nev. at 697, 877 P.2d at 1049.

In *Radkus*, a murder suspect's sister was staying at the suspect's house and discovered a gun. The sister contacted police, allowed police to enter the house, and led them to where the gun was. The Nevada Supreme Court upheld the search, stating that the "Fourth Amendment simply does not apply where evidence is discovered and turned over to the government by private citizens." 90 Nev. at 408, 528 P.2d at 698.

In *U.S. v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652 (1984), Federal Express employees opened a damaged box and found newspapers covering a tube which contained plastic bags of white powder. Police were contacted, but before their arrival, Fed. Ex. put items back in the box. Police reopened and field tested for drugs. The Court upheld the search, stating, "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. It infringed no legitimate expectation." 466 U.S. at 120, 104 S.Ct. at 1660.

But note: police cannot merely retrace the footsteps of a private search and/or seizure. In *U.S. v. Johnson*, 22 F.3d 674 (6th Cir. 1994) a kidnapping victim searched the suspect's residence and found guns. Police then entered without a warrant and seized the guns from the closet where the victim had found them. The court suppressed the guns, explaining had the victim "retrieved the weapons herself and then turned them over to the police, an entirely private search and seizure would have occurred and the defendant would have no cause to complain." 22 F.3d at 679.

It would appear that in order to affirm a search by the police with the assistance of a private citizen, the police must have reason to believe that the citizen has common authority over the property being searched. Consider in *Miller* and *Radkus*, both private citizens had apparent common authority to search the residence, whereas in *Johnson*, the police should have known that a kidnapping victim did not have common authority to search a suspect's residence.

The Fourth Amendment does not apply to searches or seizures by private persons, even unreasonable searches or seizures by private persons, it only applies to searches or seizures by the government. *U.S. v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995). In *King*, the suspect sent letters to his wife who opened and read them and then gave them to the police. This was not only action by a private person, but the court also held that when letters were delivered and opened, the sender lost any expectation of privacy because the recipient could do whatever that person wanted with the letter.

In *U.S. v. Smythe*, 84 F.3d 1240 (10th Cir. 1996), the manager of a bus station called police to say that he had recovered a suspicious package from the bus and he wanted to know if he could open the container. The police said that they could not, but he could if it was his decision to do so. The manager asked the police to show up and observe the opening, and they did so without any further advice or suggestions. The package contained contraband. The court held that this was the action of a private citizen because the police did not orchestrate, instigate or encourage the search and the manager testified that he would have opened the package anyway even if the police did not respond to his call. Same result on similar facts in *U.S. v. Coleman*, 628 F.2d 961 (6th Cir. 1980).

In U.S. v. Leffal, 82 F.3d 343 (10th Cir. 1996), an airline freight employee decided to open a package he suspected might contain unarmed

explosives or drugs. He took the package to the airport police office and opened it in front of an officer, found contraband and gave it to the officer. The court ruled that this was action by a private citizen because the employee's motive was to further his own ends. Again, the key in *Leffal* was that the employee opened the package based on his own suspicion. A different result occurred in *U.S. v. Souza*, 223 F.3d 1197 (10th Cir. 2000), in which a UPS employee's search of a package containing drugs was deemed a government search, because it was done at the encouragement of drug enforcement agents who identified the package as suspicious, a drug enforcement initiated a conversation with the UPS employee and informed the employee a narcotics dog had alerted to the package, and then told the UPS employee that he could not tell him not to open the package. 223 F.3d at 1200.

Note: even if police are aware that a search was unreasonable, the police may be able to use the information obtained by the private citizen to obtain a search warrant and then search the property.

In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733 (1985), a teacher suspected the defendant of smoking in the girls' bathroom and took her to the principal's office. The principal searched the defendant's purse and found marijuana. The defendant was prosecuted in juvenile court. The U.S. Supreme Court held that the Fourth Amendment did apply to searches by government officials such as the principal and not just to police officers. However, because the government official was not a law enforcement person, the Fourth Amendment requirement was "watered down." The principal needed only reasonable suspicion, not probable cause, for the search and needed no search warrant.

In *U.S. v. Attson*, 900 F.2d 1427 (9th Cir. 1990), the court held that the Fourth Amendment did not apply to a government doctor who drew a blood sample if the purpose in so doing was medical and non-investigative.

H. "SPECIAL NEEDS" SEARCHES: AIRPORT SEARCHES

Airline baggage searches have in the past, been a source of some confusion. Some courts held that the airlines were acting as private parties, and some held that they were government agents, because they were enforcing FAA regulations. Airport magnetometer searches, in which all prospective passengers must pass through a metal detector, are generally recognized as a search not impinging upon the Fourth Amendment. Although the Supreme Court has not specifically *held* that airport screening searches are constitutionally reasonable administrative searches, the Court has *suggested* that airport screening searches are constitutionally reasonable administrative

searches. See, City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000).

Furthermore, the Ninth Circuit has concluded that "where an airport search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger's election to attempt entry into the secured area of an airport." See, *U.S. v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (Overruling previous cases suggesting airport searches were constitutional based on consent of the passenger). In *Aukai*, the Court held that the scope of airport searches is not limitless and that such searches are constitutionally reasonable provided that they are: (1) no more extensive nor intensive than necessary, in light of current technology, to detect the presence of weapons or explosives; and (2) confined in good faith to that purpose. See, *Akuai*, 497 F.3d 955 at 962.

Since the formation, as a result of the September 11, 2001 attacks using commercial airliners, of the Transportation Security Administration (TSA) and the law and regulations that it enforces, there is no question but that airport baggage and personal searches are government action. Title 49, U.S. Code, Section 114(a) permits the TSA to screen all airline passengers and all carry-on and checked baggage.

Courts have held that because an airport search is applied to all persons, there is no reasonable expectation of privacy by any potential airline passenger in such searches. See, *Turner v. State*, 132 S.W.3d 504, 508 (Tx. App. 2004). Society recognizes such stops and searches as reasonable, and no subjective expectation of a passenger that he will not be searched is objectively unreasonable.

Further, a passenger who triggers an airport magnetometer has no right to avoid a secondary search by leaving the checkpoint area. In *U.S. v. Hartwell*, 296 F.Supp.2d 596 (ED Pa. 2003), a potential passenger's carry-on bag cleared the x-ray, but the passenger triggered a magnetometer alarm. The court restated the necessity and efficacy of such searches, and noted that there is no stigma attached to them. The court held that the passenger had impliedly consented to the search, and once he had given consent, could not withdraw it as to further searches based upon the searches consented to.

IV. SEARCHES AND SEIZURES OF THE PERSON

A. LEVELS OF CONTACT AND THE OBJECTIVE TEST

Anytime the police have contact with a citizen, other than waving hello on the street, there is a question of whether the Fourth Amendment applies and, if so, with what result. When police need to interact with citizens in circumstances where the citizen is not or may not be free to leave, what rule is used to determine the legality of police conduct?

Understanding the concept of "levels of contact" is essential to successful police work. This is because the correct way for a court to decide the lawfulness of police actions is to assess each thing that the police do, one step at a time, starting with the earliest point in time and moving forward until the end of the contact. At each point, the court asks:

What did the officer do? Does the officer need justification for the action? What justification is needed? Was the justification present?

This is very important because statistically, most arrests and recoveries of evidence begin with situations where there was no probable cause to arrest at the very beginning of the police-citizen interaction. If a 4th Amendment violation is found at any stage of the contact, all evidence may be suppressed due to "fruit of the poisoned tree." What determines whether the action which finally occurs will be lawful?

"Courts have acknowledged that three categories of police interactions exist: (1) the 'consensual encounter,' which is completely voluntary and for which a police officer needs no justification; (2) the 'detention,' which is a seizure strictly limited in length, scope and purpose, and for which a police officer must have an articulable suspicion that the civilian has committed or will commit a crime; and (3) the 'arrest,' for which a police officer must have probable cause." *Arterburn v. State*, 111 Nev. 1121, 1125, 901 P.2d 668, 670 (1995) (citations omitted). The problem is that although the theory establishing the three levels is well-recognized, the place where the line is drawn between levels in a particular case is often unclear. However, you must know the rules to win in court.

The easiest way to understand this situation is by remembering these rules of thumb:

- (1) In a consensual encounter, the police do not need any justification to approach any person. An encounter is consensual so long as a reasonable person would feel free "to disregard the **police** and go about his business." *California v. Hodari D.*, 499 U.S. 621, 628, 111 S.Ct. 1547, 1551-52 (1991).
- (2) Both investigative detentions ("Terry" stops) and arrests are seizures of the person. There is a difference between these two levels. "While the suspect was not free to leave, this does not mark the point where a Terry stop escalates into an arrest, since in neither a stop nor an arrest is a suspect free to leave." *U.S. v. Edwards*, 53 F.3d 616 (3rd Cir. 1995).
- (3) A person does not have to be physically touched to be seized, since a command or order from a police officer (wearing a uniform or displaying a badge) to which a person submits is a seizure. *See Hodari D, supra*. A person is seized, within the meaning of the Fourth Amendment, if, in view of all the circumstances surrounding the incident, a reasonable person would not believe he was free to leave. *State v. Stinnett*, 104 Nev. 398, 401, 760 P.2d 124, 127 (1988), *Florida v. Bostick*, 499 U.S. 621,111 S.Ct. 2382 (1991). Relevant factors include threatening presence of several officers, display of weapon, physical touching by police, and use of language or tone that commands rather than requests. See *U.S. v. Packer*, 15 F.3d 654 (7th Cir. 1994) and *U.S. v. Dockter*, 58 F.3d 1284 (8th Cir. 1995).

In *Packer*, police were suspicious of the defendant's parked car. Police parked patrol vehicles in front of and behind the defendant's car, shone a "take down" light into the defendant's car, and approached the occupants of the car with a flashlight and asked the occupants to put their hands in the air. The court ruled this was a Terry stop, relying upon *U.S. v. Lechuga*, 925 F.2d 1035, 1039-40 (7th Cir.1991) (police officer's placement of their vehicles directly in front of and directly behind defendant's vehicle is an investigatory stop); *U.S. v. Pavelski*, 789 F.2d 485, 488-89 (7th Cir.), *cert. denied*, 479 U.S. 917, 107 S.Ct. 322(1986).

In *U.S. v. Angell*, 11 F.3d 806 (8th Cir.1993), *cert. denied*, 512 U.S. 1239, 114 S.Ct. 2747 (1994), a police officer was investigating an unattended van parked in the middle of a rural public road when he encountered the defendants as they stopped at a nearby stop sign and ordered them to stay there, saying he wanted to talk to them. Although the police told defendants to stay there, this encounter was not a Terry stop, but rather was ruled to be a consensual encounter.

(4) The more restrictive and intrusive the level of police conduct (investigative detention or arrest) the more justification must exist for the police

conduct. In determining how to characterize the level of police intrusion on the citizen's Fourth Amendment rights (privacy, freedom of movement) the court will use an objective test. This means that the court will examine the words and actions of the officer(s) and judge the effect of the words and conduct on "a reasonable innocent person in the position of the citizen," to decide the level of contact. The subjective (internal) intentions or thoughts of the officer are not a factor unless that intention is communicated to the citizen. *See Bostick, supra.*

See the following sections on Non-Seizure Consensual Encounter, Stop & Frisk Investigative Detention and Arrest to determine the level of contact. The determination depends on factors regarding the degree of police force or authority, the duration of time of the contact and the amount of restriction of movement of the suspect.

The court also should compare these factors to the circumstances (seriousness of suspected crime, danger to police and/or citizens) surrounding the police contact. For example: police stopping suspects in violent or armed crime (police guns drawn, handcuffing, "proning out") does not necessarily convert a Terry Stop into an arrest. But the same police tactics in a stop for a non-violent crime might be construed by the court to make the contact an arrest.

B. LAWYERS' COURTROOM TACTICS

Raising the level of contact:

Court proceedings are solemn and not a "game" but to the extent that it is a contest between adversaries, the following applies. Since information which constitutes reasonable suspicion and/or probable cause often comes to police in a time continuum which may be seconds, minutes or hours, the defense tactic in court will be to try to portray the police-citizen interaction at the highest possible level as early as possible in the encounter.

Their hope is that the court will conclude that a "de facto" (actual) arrest occurred when probable cause had not yet appeared or that a "de facto" Terry Stop occurred without "reasonable suspicion." If the defense wins on the argument that a level of detention occurred without sufficient legal justification, suppression of all evidence and "fruits" (derivative evidence) will probably result.

Remember it is not just whether you say "you're under arrest" that counts. The court will look at the entire circumstances of the encounter from the viewpoint of a hypothetical "reasonable man" in the position of the "subject" to determine whether the subject was detained or arrested. The prosecutor will, of

course, argue to the contrary, but police should be mindful of the "game" being played on these issues.

Police are bound by absolute constraints of truthfulness in report writings and testimony. However, misunderstanding of the rules can result in sloppy reports and/or testimony which will ruin your case in a court of law.

For example, if the officer truthfully approaches a person who later becomes the defendant in an objectively non-seizure manner ("Hi there, would you mind talking to me for a few minutes?") and soon thereafter developed R/S then P/C or got consent for a search, the officer should not say in the report or in testimony that "I stopped the person" because a "stop" requires reasonable suspicion.

It is important that police be as specific as possible when writing arrest reports. If police conduct a stop based on reasonable articulable suspicion, the report should articulate all of the circumstances that were suspicious, as well as explain why those circumstances were suspicious. For example, if one of the circumstances for stopping an individual was that he was dressed in black clothing, that alone is not suspicious. However, if the individual was wearing black winter clothing and gloves in the middle of summer, that would be suspicious. The report should completely detail the full circumstances. Even if the officer can testify perfectly from memory, defense attorneys can point to the absence of important details in police reports and argue that the officer is now adding facts to his reports.

The reason that the issue of the initial stop is so important is because of the Fourth Amendment theory known as the "fruit of the poisonous tree." In attempting to get evidence suppressed, a competent defense attorney will always look at the first contact between the officer and the defendant and attempt to find a Fourth Amendment violation. If the defense attorney is successful in this, then anything derived from that initial contact would be suppressed regardless of the legality of the subsequent police conduct.

The "Fact-Isolation" Game:

Another "tactic" which the defense will use in court is the attempt to isolate (one from the other) the various factors which formed the basis of the stop. The defense may ask a question like "isn't it a fact that you stopped the defendant because he was standing on a street corner in a "high drug incidence" area? If your answer is "yes" and the District Attorney drops the ball by not questioning you more, the judge may conclude that this alone was not enough

and you made an illegal "stop." If the true answer is "yes - in part" then say so and go on to relate all the articulable circumstances that caused you to act.

Try not to become hostile when a defense attorney uses this technique in court because it is part of their professional duty to put this in issue. If a police officer has been properly trained and tells the truth and the DA handling the case is aware of the legal rules (set forth in this manual and other more extensive treatises) justice should be served.

C. NON-SEIZURE (CONSENSUAL ENCOUNTER): THE LOWEST LEVEL

Whenever possible an officer should initiate contact with a subject on the basis of a non-seizure (consensual) contact. After initiating contact, the officer should continue a low-level contact for as long as possible. (See following discussion on benefits of this approach.).

(1) Avoid a "show of authority", i.e.: say "Do you have a few minutes to speak with me?" instead of "You come over here!" Don't give Miranda warnings - these are usually an indication that the person is not free to leave.

In *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417 (1996) the U.S. Supreme Court ruled that it was not essential for an officer to tell a person that he was "free to go" after writing a traffic ticket in order to continue as a "consensual encounter" as opposed to a seizure. But, telling the person this even in a casual way does make a powerful point in court.

This is not like a Miranda warning which is rigid and lengthy. In a street encounter just a casual statement like, "Thanks for taking a few minutes to talk to me," or after a traffic stop, giving the driver his signed citation and having returned all license, registration, etc and saying, "Drive carefully and be sure to go to court on the date on the ticket." This should objectively indicate to a person that he or she can leave. If an officer then asks for consent to search, the person's response will be controlling.

However, under some circumstances consent may be deemed involuntary or coerced. In *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999), the Illinois Supreme Court ruled a search subsequent to a lawful traffic stop was unconstitutional. In that case, an officer concluded a traffic stop by returning the motorist's information and telling the motorist that no citations would be issued. However, the officer stood near the driver's side of the stopped car and his partner stood near the passenger side. The officer then paused for "a couple of minutes" without saying anything to the motorist and subsequently asked

permission to search the vehicle. The Court found that the totality of the circumstances, including the fact that the motorist asked whether he could refuse the search, showed that a reasonable person would conclude that he or she was not free to leave.

The Nevada Supreme Court enumerated the test that will be used to determine whether a seizure or detention has occurred in *State v. McKellips*, 118 Nev. 465, 49 P.3d 655 (2002). "The test provides that the police can be said to have seized an individual '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." *Id.* at 659 citing *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975 (1988).

The test is of an objective nature and will take into account all of the surrounding circumstances. "In evaluating the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained." *Commonwealth v. Strickler*, 757 A.2d 884, 889, 890 (Pa. 2000). "In making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor dictatating the ultimate conclusion as to whether a seizure has occurred. *Id.*

In *U.S. v. Buchanon*, 72 F.3d 1217, 1223 (6th Cir.1995) the Court held "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

In *U.S. v. Kirkpatrick*, 5 F.Supp.2d 1045 (Neb. 1998) the Court ruled that what began as a consensual encounter turned into an investigatory detention as a result of police conduct. In that case, Kirkpatrick was pulled over for a traffic violation. Subsequently, the officer returned Kirkpatrick's license and car rental agreement and issued a verbal warning. The officer then asked Kirkpatrick if he had any "large amounts of cash," guns, marijuana, or cocaine in his vehicle. The officer repeatedly requested to search Kirkpatrick's vehicle to which Kirkpatrick refused and asked if he could leave. Kirkpatrick then attempted to get out of the officer's cruiser and the officer told Kirkpatrick to close the door. The court stated, "It was at this point that Kirkpatrick would not reasonably have felt free to leave, thus requiring reasonable suspicion to justify [the officer's] renewed detention of Kirkpatrick." *Id.* at 1047.

See section in this manual on Automobile Consent searches

- (2) Avoid involuntary restraint or movement of the subject. (i.e.: patdown, touching, ordering "step over to the police car.").
- (3) Avoid lengthy contact the briefer the contact the less likely a court will call it a seizure.

The benefit of this approach is that it completely avoids Fourth Amendment suppression. Modern cases make it clear that an officer needs no legal justification to initiate or continue a non-seizure contact. Also - these cases evaluate the contact based on how the officer's words and actions would effect a reasonable innocent person.

Therefore, if an officer operates this way and contacts a person who is not innocent, the officer can gain information through sight, smell, hearing, asking questions, etc. which may give rise to reasonable suspicion for an investigative detention. Probable cause, arrest and recovery of evidence may follow.

Some Federal and State Case Examples of "Non-Seizure"

1. In *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547 (1991), a group of youths including Hodari fled at the approach of an unmarked police car. An officer wearing a jacket with "police" on it gave chase. The officer did not follow the suspect directly but took a roundabout route as a result of which Hodari, who was looking over his shoulder, almost ran into the officer. At this point Hodari threw down a rock of cocaine and tried to escape. The officer tackled him and recovered the rock.

The Court said that at the time Hodari threw down the rock he was not seized because in order for seizure to occur there must be either (1) application of physical force however slight by the officer or (2) submission by the subject to the officer's show of authority. The officer displayed authority by chasing Hodari and commanding him to stop, but Hodari did not submit.

Hodari D. has been followed by all federal courts and majority of state Supreme Courts: *U.S. v. Sealey*, 30 F.3d 7 (1st Cir. 1994), *Schultz v. Long*, 44 F.3d 643 (8th Cir. 1995) and *U.S. v. Santanamaria-Hernandez*, 968 F.2d 980 (9th Cir. 1992).

2. In *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382 (1991), the U.S. Supreme Court clearly recognized the difference between a consensual encounter and an investigative detention. Police on a drug task force approached Bostick where he was seated on a bus. The police officers did not display any

weapons. They asked Bostick for some identification. He provided it to the officers and they immediately returned it to him. Same procedure with his bus ticket. The police did not station themselves in a position which would block Bostick from getting up and leaving the bus. They asked him for consent to search his luggage, got consent and subsequently found drugs. Police conceded they had no individualized suspicion whatsoever concerning Bostick when they approached him.

The Court said: a consensual encounter does not trigger Fourth Amendment scrutiny. The question is not simply whether a reasonable person in the subject's position would feel "free to leave", because Bostick may not have wanted to leave the bus which was about to depart. The question is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter. The subjective thoughts or motives of the officers are irrelevant if not communicated to the subject. (Mental discipline works.) The Court noted that officers used a low-key approach and specifically told Bostick he could refuse consent to search his luggage. The Court also said the "reasonable person" standard presupposed a reasonable "innocent" person not a "guilty" one and so rejected Bostick's argument that he must have been seized because no reasonable person would consent to a search which would turn up proof of his guilt.

In People v. Bloxson, 517 N.W.2d 563 (Mich.App. 1994), the Court was confronted with similar facts as those in Bostick, however, found that an impermissible investigative seizure had occurred due to a lack of reasonable suspicion on the part of detectives. In Bloxson, detectives of a drug interdiction unit approached Bloxson who was seated on a bus. The detectives were casually dressed and did not display any weapons. One detective approached Bloxson and told him the reason behind the encounter. The detective then asked if Bloxson had any weapons and Bloxson replied that he did not. The detective noticed that Bloxson was nervous and that Bloxson's duffle bag was partially unzipped. The detective also noticed that Bloxson had his hand over the unzipped portion of the bag. The detective asked again whether Bloxson had any weapons and again Bloxson replied that he did not. The detective then asked permission to look in the bag to which Bloxson stated that he did not see any reason for the detective to do so. The detective then told Bloxson that he thought that he had something illegal in his bag. Bloxson then admitted that he had a gun in his bag. The Court ruled that under a totality of the circumstances approach, the detectives conduct communicated to the defendant, as it would to any reasonable person, that he was not free to decline the detective's requests. *Id.* at 567.

3. In *Stevenson v. State*, 114 Nev. 674, 961 P.2d 137 (1998) the Court followed the *Bostick* case. The defendant was on a bus which stopped at a Greyhound station in Winnemucca. Police entered the bus and an officer in civilian clothes but wearing a badge told the passengers that he was with a narcotics task force and needed to ask a few questions of the passengers before getting them on their way.

The officer got to Stevenson and asked for and received his ticket then returned the ticket. Stevenson consented to a dog sniff of his luggage and the dog alerted. The officer asked for consent to search the bag and Stevenson at first refused, then consented. The police found 15.6 grams of heroin.

The Supreme Court noted that the police in this case did not block the exit of any passengers from the bus and no display of force was used. The evidence showed that other people on the bus got off freely before dealing with the police.

- 4. This rationale was followed in *Allen v. City of Portland*, 73 F.3d 232 (9th Cir. 1995) where the court said "the proper focus in determining whether an arrest or detention occurred is not on the subjective belief of the police ... but whether a reasonable innocent person would not have felt free to leave after brief questioning."
- 5. In *Rowbottom v. State*, 105 Nev. 472, 779 P.2d 934 (1989), the Court held that no seizure of subject who voluntarily went to the police station to be interviewed and who was told by police that he was free to leave.
- 6. "A seizure does not occur simply because an officer approaches a person to ask a few questions or even requests to search an area even if the officer has no reason to suspect the person provided the officer does not indicate that compliance with his request is required." *U.S. v. White*, 81 F.3d 775 (8th Cir. 1996) and *U.S. v. Lambert*, 46 F.3d 1064 (10th Cir. 1995). One court noted that even though "very few people think themselves free not to stop when a policeman accosts them" as long as the officer asks rather than commands the protections of the Fourth Amendment do not attach. *U.S. v. De Berry*, 76 F.3d 884 (7th Cir. 1996). Same ruling in *U.S. v. Cardoza*, 129 F.3d 6 (1st Cir. 1997). The Nevada Supreme Court followed the rationale in these cases in upholding a consent search of the person after a non-seizure contact in *Burkholder v. State*, 112 Nev. 535, 915 P.2d 886 (1996).

D. STOP AND FRISK (INVESTIGATIVE DETENTION): MID-LEVEL CONTACT

(1) THE TERRY CASE AND NEVADA AUTHORITY

In 1968 the U.S. Supreme Court said in *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) that police could stop (conduct an investigative detention where the suspect was not free to leave) a person based on "articulable and reasonable suspicion" that the person "is committing, has committed or is about to commit a crime," even where there is not probable cause for an arrest.

If there is reasonable suspicion in addition to that which justifies the stop which causes the officer to believe the suspect may be armed, the officer can pat down clothing for weapons. Just because "stop" is legal and based on reasonable suspicion doesn't automatically mean that "frisk" is OK too. *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968).

Terry is codified in NRS 171.123 and NRS 171.1232 as follows:

171.123 Temporary detention by peace officer of person suspected of criminal behavior or of violating conditions of parole or probation: Limitations.

- 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
- 2. Any peace officer may detain any person the officer encounters under circumstances which reasonably indicate that the person has violated or is violating the conditions of his parole or probation.
- 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
- 4. A person must not be detained longer than is reasonably necessary to effect the purpose of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

171.1232 Search to ascertain presence of dangerous weapon; seizure of weapon or evidence.

- 1. If any peace officer reasonably believes that any person whom he has detained or is about to detain pursuant to NRS 171.123 is armed with a dangerous weapon and is a threat to the safety of the peace officer or another, the peace officer may search such person to the extent reasonably necessary to ascertain the presence of such weapon. If the search discloses a weapon or any evidence of a crime, such weapon or evidence may be seized.
- 2. Nothing seized by a peace officer in any such search is admissible in any proceeding unless the search which disclosed the existence of such evidence is authorized by and conducted in compliance with this section.

In Nevada, police officers may temporarily detain a suspect when officers have reasonable articulable suspicion that the suspect "has committed, is committing or is about to commit a crime." *Somee v. State*, 124 Nev. ____, 187 P.3d 152 (2008). The police officers may then conduct a limited pat-down search for weapons of a suspect who they reasonably believe is "armed with a dangerous weapon and is a threat to the safety of the peace officer or another." *Id.* Such reasonable belief, in both instances, must be based on specific articulable facts that warrant the search and seizure. *Id.*

In *Somee v. State*, 124 Nev. ____, 187 P.3d 152 (2008), the Court held that in determining whether an officer has reasonable articulable suspicion under the totality of the circumstances to justify a pat-down search, one factor a court may consider is whether the officer had reasonable articulable suspicion that the suspect was involved in narcotics activity. The Court refused to adopt an apparent per se rule in other Circuits linking drugs and guns.

(2) REQUESTS FOR IDENTIFICATION

The question arises as to whether the police, during a "*Terry* type stop" can lawfully require that the person identify him/her self. In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972) the Court found that a seizure of the person had occurred and implied that questioning as to the person's identity and a request for identification were not in violation of the Fourth Amendment.

In *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979), the police arrested Brown when he refused to identify himself. However, the Court noted that the investigative stop of Brown was invalid because police had no reason to stop him. The request for identification, refusal and arrest were "fruits of the poisoned tree." In *Kolander v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983) a

Calif. state law required a person lawfully stopped by police to produce a "credible and reliable id." The Court held that this language was unconstitutionally vague. Neither case held that it was unconstitutional for police to require identification from a person in a lawful "*Terry* Stop."

In *Martinelli v. City of Beaumont*, the 9th Circuit held that a California statute allowing arrest if a person refused to identify himself was unconstitutional. *Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987). In similar fashion, in *Carey v. Nevada Gaming Control Board*, the 9th Circuit ruled that compelling an individual to identify him or herself during a *Terry* stop violates the 4th Amendment. *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873 (9th Cir. 2002).

However, these holdings are now called into question. In *Hiibel v. Sixth Judicial Dist. Court of Nevada*, the U.S. Supreme Court upheld Nevada's "stop and identify statute," (NRS 171.123) stating that it did not violate the Fourth Amendment prohibition against unreasonable searches and seizures. *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 189, 124 S.Ct. 2451, 2460 (2004). The Court cautioned that under the principles set forth in *Terry v. Ohio*, "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." See also *U.S. v. Diaz-Castaneda*, 494 F.3d 1146 (9th Cir. 2007) (Police officer's request for passenger's identification during vehicle stop was valid where officer wanted to learn identity of passenger and whether passenger could drive truck once driver was arrested for driving on suspended licence; nor does an officer's check of a driver's license or ID card with radio dispatch constitute a search where ID was properly obtained during a valid stop).

In *Albright v. Rodriguez*, 51 F.3d 1531 (10th Cir. 1995) the Court ruled that if police made a valid *Terry* stop, and the person refused to identify himself, and if there was a state statute which allowed police to arrest for failure to identify, then the request for identification, refusal and arrest was constitutionally valid.

In *State v. Flynn*, 285 N.W. 2d 710 (Wisc. 1979), cert. denied 449 U.S. 846 the Court noted language in *Adams v. Williams* a stop and frisk case where the Supreme Court said that the officer in a brief (valid) stop "in order to determine (the suspect's) identity..may be most reasonable." The *Flynn* court noted that unless the officer is entitled to ascertain the identity of the suspect, the *Terry* stop can serve no useful purpose. Same ruling in *U.S. v. Basey*, 816 F.2d 980 (5th Cir. 1987), *State v. Landry*, 588 So.2d 345(La. 1991).

In *U.S. v. Vanicromanee*, 742 F.2d 340 (7th Cir. 1984) the Court held that mere detention is not an arrest; a police officer may, short of an arrest, detain an individual briefly in order to determine his identity momentarily while obtaining more information if the officer has articulable facts sufficient to give rise to R/S that the person had committed or is committing a crime.

It is also important to remember that officers will be strictly held to the requirement that a suspect, in no event, be held longer than 60 minutes. NRS 171.123(4). In *State v. McKellips*, 118 Nev. 465, 49 P.3d 655 (2002), the Court stated that after 60 minutes, an investigative detention turns into a de facto arrest for which probable cause is required. *Id.* at 660. See also *Barrios-Lomeli v. State*, 114 Nev. 779, 961 P.2d 750 (1998).

A related issue about police obtaining identification during a valid *Terry* Stop is whether police can pat down or search the person for documentable ID such as driver's license. The cases in this area are few and the validity of the practice is uncertain.

In *People v. Long*, 234 Cal. Rptr. 271 (1987), the officer had R/S to stop Long in a bar where he was with an under aged girl. The officer asked for ID and Long stated his name but said he didn't have any ID. The officer noted a wallet sized bulge in his rear pants pocket, again asked for written ID and Long said he had none. The officer directed Long to look through his wallet, which Long did, and the officer saw some plastic baggies containing drugs. The Court upheld the officer's demand for written ID, citing Flynn and *Adams v. Williams*. Same ruling in *People v. Loudermilk*, 241 Cal. Rptr. 208 (1987) where an officer had R/S to stop a person suspected of firing a gun. Pat down felt wallet but person refused to ID, and in *Harper v. State*, 532 So. 2d 1091 (Fla. 1988).

In *State v. Frazier*, 318 N.W. 2d 42 (Minn. 1982) an officer stopped a person and took her purse and reached in to get ID and found a gun. The gun was suppressed because the Court ruled that such a search was unconstitutional without giving the detainee an opportunity to voluntarily produce ID.

(3) WHAT CONSTITUTES A "STOP" AS OPPOSED TO "NON-SEIZURE?"

The *Hodari D*. case and the *Bostick* case define the pre-stop or pre-seizure area. Remember a "*Terry* stop" is a form of seizure - the person is not free to go. Drawing the line between a "*Bostick* encounter" and a "*Terry* stop" has to be done on a case by case basis. Remember, the defense lawyer will try to push the time of the "*Terry* stop" as early as possible in the contact when the officer has less articulable suspicion, hoping to persuade the court that the

officer made an illegal *Terry* stop and if so, wiping out the officer's case with a fruit of P.T. argument.

CASE EXAMPLES:

- 1. U.S. v. Garcia, 866 F.2d 147 (6th Cir. 1989), an important factor in distinguishing seizures from casual contacts is when the person is asked to accompany the police to a place where the person had not planned to go. An officer may approach a traveler in an airport and ask to speak to him, and continue that conversation until a reasonable person would no longer feel that the person was free to go. Once that point has been reached, the officer must have a reasonable articulable suspicion, or else the stop or detention is illegal, and fruits of that search must be suppressed. Garcia was not seizure because "there were only two agents present, no weapon was displayed, he was not physically touched, and the agents did not raise their voices or threaten him in any way."
- 2. *U.S.* v. *Glass*, 128 F.3d 1398 (10th Cir. 1997) has some factors that courts use in determining whether a police-citizen contact is a seizure. These factors include:
 - (a) Telling a person that he is a suspect for a particular type of crime
 - (b) The number of officers that are present
 - (c) Moving the conversation from public to private place or whether the contact is in a public or private place
 - (d) Whether the person is told that he need not talk to the officers
 - (e) Whether the person's egress was blocked
- 3. *U.S. v. Kim*, 27 F.3d 947 (3rd Cir. 1994) utilizing essentially the same factors in the *Glass* case which had been related in earlier US Circuit Court cases held that none of these factors alone is determinative regarding whether a 4th Amendment seizure of the person occurs.
- 4. A few federal cases (pre *Bostick*) gave strong weight in their analysis of seizure to a police officer's asking directly incriminating and focused questions, almost to the point of per se rule making such contacts a seizure. *U.S. v. Nunley*, 873 F.2d 182 (8th Cir.1989), *U.S. v. Jaramillo*, 891 F.2d 620 (7th Cir.1989). However, *Nunley* was modified by *U.S. v. Perdue*, 961 F.2d 723 (8th Cir. 1992) and *Jaramillo* was reversed by *U.S. v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994) (Both post *Bostick* cases).

- 5. U.S. v. Cardoza, 129 F.3d 6 (1st Cir 1997) Defendant was not "seized" within meaning of Fourth Amendment before police saw him with contraband, even though police cruiser turned wrong way up one-way street, making clear officer's intent to come into contact with him, and officers asked him what he was doing out at that time; reasonable person would not have concluded that he was not free to leave, as officers did not use flashing lights or sirens, and officers did not ask defendant to stop, or even to approach patrol car. The result, therefore, "is the directive that police conduct, viewed from the totality of the circumstances, must objectively communicate that the officer is exercising official authority to restrain the individual's liberty of movement before we can find a seizure occurred."
- 6. *U.S. v. Rodriguez-Franco*, 749 F.2d 1555 (11th Cir. 1985), held that INS agents approached a group of "Hispanic looking" persons in a mall and asked questions about citizenship and asked (not commanding) two persons to step over to a bench there was no Terry stop. (This type of police procedure might arguably have been improper had it been done by other than INS agents. See the next case).

In *Lopez v. Garriga*, 917 F.2d 63 (1st Cir. 1990) an INS agent asked questions of persons before boarding airlines in Puerto Rico. The Court held that INS agents at an airport gate may, without violating the Constitution, inquire about a prospective passenger's citizenship and destination. The mere posing of questions by a government official is not considered to be a seizure. The Court noted that under federal law, the INS has authority to ask questions of a person they think may be violating immigration laws.

- 7. Ozhuwan v. State, 786 P.2d 918 (Alaska, 1990), held that a Terry stop occurred when an officer partially blocked a person's car with the police car while activating the overhead lights.
- 8. *U.S. v. Waskal*, 709 F.2d 653 (11th Cir. 1983), held that a Terry stop occurred when police spoke to a person in an airport and took his ticket and asked him to go to a nearby office without returning the ticket.
- 9. *U.S. v. Tavolacci*, 895 F.2d 1423 (D.C. Cir. 1990), held no *Terry* stop where an officer knocked on a door to a person's train compartment, asked permission to ask questions and requested and received a train ticket and personal identification, then promptly returned them.
- 10. U.S. v. Torres-Guevara, 147 F.3d 1261 (10th Cir. 1998) Officers encountered the defendant at an airport and asked for and received her

identification and an airline ticket. The officers looked at these items returned them immediately and told her she was not under arrest and could leave.

The officers never touched or restrained the woman but asked her twice for consent to search for drugs. When the officer again asked for permission to search her she did not respond. The officer asked her again and she again did not respond. The officer then told her if she had drugs, she should turn them over.

Another officer asked "you have drugs, don't you?" When she put her head down instead of answering, he asked: "don't you?" She responded: "yes." Police detained her and had a female police officer search her and found the drugs

The Court ruled that this was a non-seizure encounter stating that asking incriminating questions does not per se make this an investigative stop although accusatory and persistent questioning, display of weapons, or commanding or threatening tone of voice would amount to an investigative detention.

(4) WHAT CONSTITUTES "REASONABLE SUSPICION?"

"Reasonable suspicion" is a term like "probable cause" which evades precise definition. Although the rules for police-citizen contacts are based on objective standards, a decision by a court that reasonable suspicion exists depends on the opinion by that judge (or in the case of an appellate court - a group of judges). The same articulable factors which might be no more than a "hunch" in one court's mind may amount to overwhelming reasonable suspicion in another court's mind. This is a human factor we all have to live with.

- 1. For example, in *U.S. v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980), involving an encounter between police and a suspected drug courier at an airport, three Supreme Court Justices thought that the contact between the police and Mendenhall was a non-seizure contact requiring no justification. Three other Justices thought it was a *Terry* stop, but that reasonable suspicion existed. Three other Justices thought it was a *Terry* stop, but was illegal because there was no reasonable suspicion.
- 2. In *U.S. v. Terry-Crespo*, 356 F.3d 1170 (9th Cir. 2004), the court considered the totality of the circumstances in determining whether an officer had a particularized and objective basis for suspecting wrongdoing by a suspect which would justify a *Terry* stop.

- 3. *U.S. v. Christian*, 356 F.3d 1103 (9th Cir. 2004), to determine whether a *Terry* stop was reasonable, a court must consider whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.
- 4. *U.S. v. Colin*, 314 F.3d 439 (9th Cir. 2002) reasonable suspicion to justify an investigatory stop is formed by specific articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity. *Colin* involved a traffic stop and a consent search of a vehicle. The court concluded that the officer had established reasonable suspicion to stop Colin's vehicle when the vehicle was observed to be drifting between lanes on the highway. The officer inferred that Colin may have been driving under the influence. It was not until after the stop and upon further inspection that the officer suspected Colin might be involved with drug trafficking. It was then consent was obtained to search for drugs, where no suspicion of drug trafficking existed prior to the stop. See also *U.S. v. Garcias-Rivera*, 353 F.3d 788 (9th Cir. 2003) (A law enforcement officer conducting an investigative stop may broaden the line of questioning if there are additional particularized and objective factors arousing suspicion).
- 5. U.S. v. Sigmond-Ballesteros, 285 F.3d 1117 (9th Cir. 2002) in reviewing a determination of reasonable suspicion to make an investigatory stop, a court must look at the totality of the circumstances of the case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing; while some factors may be susceptible to innocent explanation, and some factors are more probative than others, the inquiry is whether, taken together, they sufficed to form a particularized and objective basis for making the stop.

Officers should know the view of the vast majority of courts about the factors that may indicate REASONABLE SUSPICION and factors which have little or no support for REASONABLE SUSPICION or P/C.

a. NERVOUSNESS

1. In *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997) the Court ruled, "We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion "in all cases of this kind must be treated with caution."

"It it is certainly not uncommon for most citizens, whether innocent or guilty, to exhibit signs of nervousness when confronted by a law enforcement officer." *Id.* at 948. Same ruling on nervousness in *U.S. v. Peters*, 10 F.3d 1517, 1521 (10th Cir.1993) and *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998). See *U.S. v. McRae*, 81 F.3d 1528 (10th Cir. 1996) holding that nervousness along with other objective factors may contribute to reasonable suspicion.

2. *U.S. v. Christian*, 356 F.3d 1103 (9th Cir. 2004) police officers' demands for identification from detainee suspected of brandishing a firearm in an apartment building were reasonable, and thus, valid under the Fourth Amendment, where the officers had information that a man of a certain name was brandishing a gun in the building, and where, after the detainee gave that name to the officers as his name, the officers' records check turned up no evidence of a person of that name born on the date the detainee gave as his birthdate, and the detainee became nervous and fidgety when they asked further questions about his identity, arousing their suspicions that he was lying about his identity.

b. REFUSAL TO COOPERATE

3. In *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382 (1991) in addition to holding that the police contact was non-seizure, the Court also stated that the suspect's refusal to cooperate with police (i.e., answer questions and/or consent to search) would not have given the police reasonable suspicion let alone probable cause to seize the subject or search his luggage. Same decision by other Federal and State Courts: *U.S. v. Fletcher*, 91 F.3d 48 (8th Cir. 1996), *U.S. v. Torres*, 65 F.3d 1241 (4th Cir. 1995), *Karnes v. Skrutski*, 62 F.3d 485 (3rd Cir. 1995) and *Gasho v. U.S.*, 39 F.3d 1420 (9th Cir. 1994).

c. TRAINED OBSERVATIONS

- 4. Several US Circuit court cases hold that, objective facts, meaningless to the untrained, when used by trained law enforcement officers, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion. *U.S. v. Sholola*, 124 F.3d 803 (7th Cir. 1997); *U.S. v. Roberts*, 986 F.2d 1026 (6th Cir. 1993); *U.S. v. Deleon-Reyna*, 930 F2d 396 (5th Cir. 1991).
- 5. U.S. v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981), dealt with an investigation by the Border Patrol into smuggling aliens. Over several months, officers saw sets of footprints, one of which had a unique pattern, coming across the border and ending up near a highway which ran parallel to the border. The tracks led into obstacles which would have been visible during the day. The tracks turned eastward at the highway, then disappeared after a short distance.

The officers set up a vantage point at night, about 27 miles east of the location where most of the footprints disappeared into the highway. They estimated it would take about 1 ½ hours for a vehicle to pass their location, go to the pickup point and return to their location. They stopped a pickup with a camper shell which went past and then returned in that time frame.

The U.S. Supreme Court held: reasonable suspicion did exist on these facts to justify a stop of the truck. Prosecutors should read and cite this case often. It contains language telling courts that even "innocent" actions when viewed by police officers who have knowledge of the modes or patterns of certain types of criminal activity can give reasonable suspicion. "[A] trained officer draws inferences from data that might well elude an untrained person." *Id.* at 418. "The test for reasonable suspicion is not weighed in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* at 418.

- 6. U.S. v. Lender, 985 F.2d 151(4th Cir.1993) officers observed four or five men huddled on a corner in a known drug area. One of the men had his hand stuck out with his palm up, and the other men were looking down toward his palm. When the group saw the police, they began to disperse, and the defendant walked away from the officers with his back to them. Based on the hour of the day, the group's dispersal upon seeing the officers, the known character of the neighborhood, and the officers' practical experience in recognizing drug transactions, the court upheld the stop.
- 7. U.S. v. Mattarlo, 191 F.3d 1082 (9th Cir. 1999) Late at night, an officer was on a dark secluded country road and saw a pickup truck in the driveway of a fenced construction storage area, with the gate closed. The truck left the driveway with a three-foot square crate in the back. At that hour there was no business activity. The officer stopped the defendant.

The Court held, "The officer has an objective basis for his suspicions based on all the circumstances. It is not a matter of hard certainties, but of probabilities." *Id.* at 1087. This requires more than an officer's hunch, but a preponderance of the evidence to show proof of wrong doing is not required at this stage. Reasonable suspicion therefore can arise from information different in quality and content and even less reliable than that required for the establishment of probable cause. The officer's training and experience are factors to consider in determining if the officer's suspicions were reasonable. See section on "Basis for Frisk" for other part of *Mattarlo* case

8. U.S. v. Quinn, 83 F.3d 917 (7th Cir. 1996) an officer saw three men on a street corner in a high drug crime area. Upon seeing the officer, one threw a

plastic bag down and they split up and began to walk away. One man went one way and the other two went in the opposite direction. The officer ordered Quinn to stop and saw that he was carrying a leather jacket wadded up in his arms.

He ordered Quinn to accompany him back to the police car and to place the jacket on the car. As he did so, the officer heard a "thud" sound. He did a patdown search finding no weapons then patted the jacket and felt a hard object inside and removed a .22 rifle sawed-off and modified into a handgun. He arrested Quinn then went to the corner to retrieve the suspected crack cocaine.

The Court held the police action lawful, "the defendant's presence in a high crime area is an insufficient ground (by itself) upon which to conduct a search." Citing *U.S. v. Evans*, 994 F.2d 317 (7th Cir. 1993). However, courts may consider the defendant's presence in a high crime area as part of the totality of circumstances confronting the officer at the time of the stop.

d. DEFINING REASONABLE SUSPICION

- 9. *U.S. v. Perrin*, 45 F.3d 869, 872 (4th Cir. 1995) the court held "reasonable suspicion is a less demanding standard than probable cause not only because reasonable suspicion can be established with information that is different in quantity or content than that required to establish P/C, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show P/C." Citing *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416 (1990).
- 10. U.S. v. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985) is important for at least two points. The U.S. Supreme Court held that the "fellow officer" rule applies to *Terry* stops so that the officer actually making the stop could rely on a "wanted for investigation" flier issued by police in another state so long as the issuing police had reasonable suspicion. Also, this case extended the authority to make a *Terry* stop beyond reasonable suspicion that "criminal activity was afoot" (i.e., a presently occurring crime) to a serious crime (armed robbery) that had occurred weeks earlier.
- 11. In *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657 (1996) police in Milwaukee who were trained in drug interdiction saw a 1981 Oldsmobile with California plates in a motel parking lot in December. The police checked the registered owner through dispatch and then learned from the DEA that the registered owner was indexed in NADDIS (DEA computer database) as a "suspected" drug trafficker. Police learned from the motel manager that Ornelas and another man checked in at 4:00 a.m. without reservations. Police also knew that older model GM cars had large spaces in the doors and other locations.

- The U.S. Supreme Court said that these facts constituted reasonable suspicion. The Court said that although the mosaic which is analyzed for reasonable suspicion or probable cause is multi-faceted and one determination will seldom be useful precedent for another. A court should look at all the precedents in making a decision. The court should determine the "historical facts" (i.e., the specific facts of the case) and then make a legal decision as to whether the facts satisfy the constitutional standard.
- 12. In *State v. Sonnefeld*, 114 Nev. 631, 958 P.2d 1215 (1998) the Court ruled that a deputy sheriff had reasonable suspicion sufficient to make investigatory stop of vehicle based on his corroboration of bartender's detailed tip to dispatcher that inebriated customer had left the bar and was driving under the influence; bartender provided color of car, description of distinguishing roof rack, license plate number, physical description of driver and direction in which vehicle was heading, all of which were confirmed by the officer thereby establishing reasonable suspicion.
- 13. Other Nevada cases are *Wright v. State*, 88 Nev. 460, 499 P.2d 1216 (1972), *Jackson v. State*, 90 Nev. 266, 523 P.2d 850 (1974), *Nelson v. State*, 96 Nev. 363, 609 P.2d 717 (1980), and *Idelfonso v. State*, 88 Nev. 307, 496 P.2d 752 (1972). All of these required very little in terms of "articulable facts" to show Reasonable suspicion.

e. ANONYMOUS AND OTHER TIPS

- 14. Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412 (1990) held that an anonymous tip that a female would leave a particular apartment complex at a particular time, would drive a certain described car, would go to a certain destination and would be carrying drugs was enough for reasonable suspicion when police corroborated the details of the tip and stopped the car as it neared the destination. It made no difference that all the actions observed by the police were "innocent." Ms. White's subsequent consent to search, which turned up the dope, was not the fruit of an unlawful *Terry* stop.
- 15. In *U.S. v. Price*, 184 F.3d 637 (7th Cir. 1999) the Police received an anonymous tip stating that a white Mercury Cougar, with a license plate containing the letters "FLJ," would be delivering one kilogram of cocaine to a specific residence in Milwaukee. The tipster told the police that the car had left Sheboygan at about 9:00 p.m. (About 60 miles from Milwaukee) and also stated that the car would contain two black women, Charlene and Patricia, and one black man named Calvin (also gave last names) Police arrived at the vicinity of the suspect residence in an unmarked car at around 10:45 p.m.. The officers did

not verify who lived at the residence, and did not perform record checks of three people named by the tipster.

At approximately 11:20 p.m., a white Mercury Cougar arrived containing two black women and two black men. The driver double-parked the car and left the engine running. The license plate contained the letters "GJL." All four occupants got out and approached the residence. Police stopped them at the sidewalk and indicated that they were investigating a narcotics complaint. Several of the occupants produced ID confirming the names given by the informant. Later, narcotics were found. The Court held that the stop was based on reasonable suspicion, despite the fact that some of the details provided by the tipster were inaccurate, because the police were able to corroborate the tip by confirming various details before the stop. Citing *Alabama v. White*, 496 U.S. 325, 331, 110 S.Ct 2412 (1990)

16. In *U.S. v. Bell*, 183 F.3d 746 (8th Cir. 1999) police acted on a tip from Ms. Harris, who provided detailed information that criminal activity was afoot.

Harris was a close acquaintance of Bell who had previously provided accurate information about him. Harris's tip--that Bell and Ingram were driving to Little Rock to pick up crack cocaine from Linda Bee--was consistent with information received from other sources less than a month earlier and with more recent information that Bell and Ingram were selling drugs at 2314 Jean Street.

The tip was further corroborated when the officers saw a car matching the description Harris had provided traveling on U.S. Highway 65 in the direction of Pine Bluff. "Considering the totality of the circumstances, we agree with the district court that the stop did not violate Bell's Fourth Amendment rights." *Id.* at 749, citing *White*, 496 U.S. at 330, 110 S.Ct. 2412.

See *U.S. v. Fernandez-Castillo*, 324 F.3d 1114 (9th Cir. 2003) an unreliable tip, standing alone, does not give a police officer reasonable suspicion to effectuate a *Terry* stop. Here stop was upheld where the tip came from a Montana Department of Transportation employee who witnessed Fernandez-Castillo's erratic driving and reported it to the Highway Patrol as he was witnessing it, and the officer corroborated the tip by his own observations prior to the stop.

17. McMorran v. State, 118 Nev. 379, 46 P.3d 81 (2002) holding no reasonable suspicion where all the police had to go on was the bare report of an unknown, unaccountable informant. In this case police were acting on an anonymous telephone call that drugs were being sold out of an apartment, that

the occupants were armed with weapons of unknown type, and drove a red Pontiac Sunbird with California plates. The court held that reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in identifying a person. The anonymous tip here "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *Id.* at 86, citing *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375 (2000) (tip also lacking sufficient indicia of reliability).

f. INDIVIDUAL SUSPICION

- 18. Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979) was a case where police had a search warrant for a tavern and the bartender based on probable cause that he was selling drugs at the bar. Police entered the tavern during business hours to serve the search warrant, and patted down the patrons. One of the patrons was Ybarra who had dope in his pocket which was seized. The U.S. Supreme Court held: illegal search no reasonable suspicion that Ybarra was engaged in criminal activity and/or that he might have a weapon, just because he was in the bar. Reasonable suspicion and probable cause must be individualized.
- 19. A more recent case demonstrates the rule that reasonable suspicion must be individualized. The difference was whether the reasonable suspicion did or did not cover more than one person. In *U.S. v. Johnson*, 170 F.3d 708 (7th Cir. 1999) police were approaching a residence for a "knock and talk." As they arrived, a person exited the residence and was *Terry*-stop detained by police. The detention and pat down were held to be unlawful because there was no individualized suspicion as to that person.

g. REASONABLE MISTAKE OF FACTS

Two cases show that reasonable suspicion can be found in a case where the police were mistaken about the facts justifying the detention, but the facts believed by the police were found to be reasonable, i.e., the police had no reason to believe that the facts were incorrect when the stop was made.

20. In *Stuart v. State*, 94 Nev. 721, 587 P.2d 33 (1978) the officer noticed that the trunk lock on the vehicle was missing. After the stop was affected, the officer detected the odor of marijuana and noticed what appeared to be marijuana seeds on the floor in the front seat of the vehicle. The court said "The officer, in this case, had observed the missing trunk lock and, based upon training he had received at the Highway Patrol Academy, inferred that the vehicle might be stolen. Under these circumstances, we believe the officer's conclusion was reasonable and he was justified in stopping the vehicle for

routine questioning and investigation." *Id.* at 722. *See* also NRS 171.123(1) which authorizes a police officer to "detain any person whom such officer encounters under circumstances which reasonably indicate that such person has committed, is committing or is about to commit a crime."

Since the officer had lawfully attained the position from which he observed the marijuana in open view, and it was in a vehicle which could be searched without a warrant he had a right to seize it and the marijuana was properly admitted into evidence. NOTE: The vehicle was not actually stolen.

- 21. U.S. v. Alvarez, 899 F.2d 833 (9th Cir. 1990), an unidentified caller told police that a tall Hispanic male would rob a certain bank within 10 minutes and had explosives in the trunk of a white Mustang. Police saw a white Mustang backed into a parking space facing the bank with a Hispanic driver. The car pulled out when police arrived. Police stopped the car and patted down the driver. Police found two guns in the driver's waistband then searched the car and found guns and drugs in the trunk. Before trial, the caller was identified and it was shown that his "robbery plan" claim was false. The court upheld the search. Even an anonymous tip can provide probable cause or reasonable suspicion for Terry stop where police can corroborate all the details of the tip. The fact that all of the suspect's actions were "innocent" makes no difference. Police didn't know the tip was false and the police had an objectively reasonable and articulable basis for the stop.
- 22. But you must be careful about a stop based on wrong information. If the officer's (or police department's) negligence causes or produces the incorrect information which, on the surface, justifies the stop later on the court will probably say the stop is no good. For example: stop no good where police office called in wrong license number, or else dispatcher heard it wrong and told officer plates didn't match. Later determined that the plates did match. Evidence from the stop was tainted. *U.S. v. DeLeon-Reyna*, 898 F.2d 486 (5th Cir. 1990) same result in *Ott v. State*, 600 A.2d 111 (Md. 1992). (Note: this is still true even after the decision in *Arizona v. Evans* (see section on "police mistakes") because there the error was done by the court clerk's office not by the police department).
- 23. U.S. v. Dorais, 241 F.3d 1124, 1130-31 (9th Cir. 2001) "a mere mistake of fact will not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion that criminal activity was afoot." In this case the police stopped suspect's car after they had received a report from Dollar Rent-a-Car, the car's owner, that the car was "overdue." Had Dollar intentionally made a false police report, it would have been subject to criminal penalties under Hawaii law. Based on the report, the police were reasonable to

suspect that suspect may have been committing a crime because, under Hawaii law, a person who keeps a rental car for more than 48 hours after it is due commits a misdemeanor. Thus, the police had reasonable suspicion when they stopped the suspect's car. Here, facts known to the officer gave rise to a reasonable suspicion that a car was stolen. The ultimate determination that it was not did not make the stop improper. Same analysis in *U.S. v. King*, 244 F.3d 736 (9th Cir. 2001) involving traffic law violation.

h. UNPROVOKED FLIGHT FROM POLICE

24. In *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673 (2000) the majority of the U.S. Supreme Court held that, although a person standing in an area known for heavy narcotics trafficking, by that fact alone is not subject to a *Terry* stop. If the person flees from the police presence without provocation, that person can be *Terry* stopped. Police conducted a stop and did a patdown because, in the officer's experience it was common for weapons to be around drug transactions, and found a weapon on Wardlow, which was held admissible.

Two following cases hold that although unprovoked flight from police alone is not enough for reasonable suspicion, that the flight along with other factors, can support reasonable suspicion.

- 25. State v. Stinnett, 104 Nev. 398, 760 P.2d 124 (1988), police were on patrol in area with high incidence of drug crimes and saw several men huddled in front of abandoned residence. One of the group noticed the police, he ran toward the back of the residence chased by the police. A few minutes later, police entered the abandoned home and found suspect huddled in a closet with drugs nearby. Held: The suspect was not detained when he ran from the police. When the suspect was found inside the abandoned house, he was detained, but all the circumstances including his unprovoked flight justified an investigative detention.
- 26. In *U.S. v. Jackson*, 175 F.3d 600 (8th Cir. 1999) the Court ruled that it was reasonable for officer to tackle defendant to effect investigative stop when officers were responding to call that shots had been fired at address in high-crime neighborhood, defendant was behind area where shots were fired and nervously began to flee when officers approached in marked squad car, officers noticed that defendant appeared to be clutching something at his side as he ran, and continued to flee after officers announced that they were officers and told defendant to stop.

But see, *State v. Lisenbee*, 116 Nev. 1124, 13 P.3d 947 (2000) holding flight did not provide reasonable suspicion where flight was subsequent to

original submission to police authority, and after police determined that the subject was not the suspected burglar they sought. "[O]nce an individual is 'seized,' no subsequent events or circumstances can retroactively justify the 'seizure'." *Id.* at 1129, citing *Stinnett* at 401.

(5) PROFILING

Quite a bit of confusion exists in police circles concerning "profiling" but modern cases make the correct legal consequences quite clear. In a nutshell, when officers make a stop based on profiling, the fact that profiling was used has no legal significance at all. It doesn't help or hurt the validity of the stop.

- 1. In U.S. v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989), DEA agents stopped the suspect at Honolulu Airport because (1) he had paid \$2,100 cash for airline tickets, (2) he traveled under a name that did not match the name under which the phone number he used was listed, (3) his destination had been Miami which was a "source city", (4) he stayed in Miami only 48 hours, (5) he appeared nervous and (6) he had no checked luggage. DEA found 1 kilo of cocaine in his carry-on luggage after a trained drug sniffing dog alerted on the luggage and DEA obtained a search warrant. Held: Reasonable suspicion for a Terry stop existed. Although each factor taken alone was insufficient to justify a stop, when taken together they amount to reasonable suspicion. The "profile" factors shown here are "probative" and amount to reasonable suspicion even though none of them are "criminal". The fact that the person fit a "profile" did not in and of itself equal reasonable suspicion. Same ruling on this issue in U.S.v. Tiong, 224 F.3d 1136, 1140 (9th Cir. 2000); see also U.S. v. Arizu, 232 F.3d 1241 (9th Cir. 2000), rev'd, 534 U.S. 266, 122 S.Ct. (2002) and U.S. v. Sigmond-Ballesteros, 309 F.3d 545 (9th Cir. 2002) reconciling these cases.
- 2. In *Sokolow* the Court suggested that "the drug courier profile has little meaning independent of the objective facts" presented by the law enforcement officer as sufficient to demonstrate reasonable suspicion. See also *U.S. v. O'Neal*, 17 F.3d 239, 242 n. 5 8th Cir. 1994), *cert. denied*, 513 U.S. 960, 115 S.Ct. 418 (1994). In other words, the factors that the law enforcement officer uses to establish P/C or REASONABLE SUSPICION must be articulated (i.e., specified) based on the circumstances of each case. The profile itself does not provide any additional support for finding P/C or REASONABLE SUSPICION. Same ruling in *U.S. v. Malone*, 886 F.2d 1162 (9th Cir. 1989), *U.S. v. Moore*, 22 F.3d 241 (10th Cir. 1994) and *U.S. v. \$53,082 in US Currency*, 985 F.2d 285 (6th Cir. 1993) as well as numerous state supreme court cases.

- 3. See the section on "Pretext Stops" in this manual. The modern law, based on the *Whren infra* case from the U.S. Supreme Court and *Gama* case from the Nevada Supreme Court, make it clear that as long as an officer has any objective basis for making a stop, the officer's internal motives are irrelevant. This means that an officer can make a stop based on a "profile" but only so long as there is some other basis for the stop. There is no longer any such thing as an illegal pretext stop.
- 4. Use of indicators such as membership in certain racial groups in drug courier profiling has been sharply challenged. "Defendant's nationality (Mexican) and his friends' use of Spanish cannot support reasonable suspicion of smuggling drugs" according to *U.S. v. Garcia*, 23 F.3d 1331 (8th Cir. 1994).

(6) WHAT FORMS THE BASIS TO FRISK?

The right to frisk is not generally automatic with a valid "stop."

- 1. In *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968) and *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338 (1979) the U.S. Supreme Court said that the general rule is that a "frisk" is not always justified because the "stop" is justified. The officer has to be able to point to particular facts that made him think the suspect "may be" armed.
- 2. In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130 (1993), the "plain feel" case, Justice Scalia's concurring opinion makes it clear that the right to "frisk" does not automatically accompany the right to "stop." (This is the opposite of "search incident to arrest" rule which does automatically accompany any lawful custodial arrest.).
- 3. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), held that where a reliable informant told an officer that a person sitting in a parked car had a concealed weapon. The officer asked the person to step from the car, but instead Adams rolled down the window. The officer reached in the window to his waistband and felt, then seized, a gun. This was enough reasonable suspicion for a stop and frisk.
- 4. In *U.S. v. Mattarolo*, 191 F.3d 1082 (9th Cir. 1999) the Court ruled that an officer may conduct a limited protective search for concealed weapons if there is a reason to believe the suspect may have a weapon. "The officer must choose between being sure that the suspect is not armed and jeopardizing his own safety. An officer making a stop under the suspicious circumstances of the present case who failed to patdown the suspect for weapons within the limited scope of *Terry* could be taking substantial and unnecessary risks." *Id.* at 1087.

Distinguishing an earlier case by the Court where the stop in that case was in a bank parking lot during the daylight hours, not on a remote section of road at midnight. The person stopped was a suspected counterfeiter, not a suspect caught possibly in the act of committing a nighttime burglary and therefore more likely to be armed. See *U.S. v. Thomas*, 863 F.2d 622 (9th Cir. 1988).

In *Mattarolo*, the defendant got out of his car swiftly and walked quickly toward the squad car before the officer had the chance to get out of his car. This caused the officer to get out of his squad car quickly so as not to be trapped with the means of protecting himself consequently limited. Given the totality of the circumstances, the patdown search was fully justified and a provident procedure to follow.

- 5. In *U.S. v. Sinclair*, 983 F.2d 598 (4th Cir. 1993) the Court held that "the officer's reasonable belief may derive as much from his experiences in similar cases as from his knowledge of the dangerous propensities of the suspect at hand." *Id.* at 603.
- 6. In *U.S. v. Gibson*, 64 F.3d 617 (11th Cir. 1995) the Court said that where the officer had corroborated every item of information from an anonymous tipster about a certain suspect, the officer had reason to believe the tipster's statement that the suspect was armed.
- 7. In *U.S. v. Taylor*, 162 F.3d 12 (1st Cir. 1998) the Court ruled that Informant's tip that occupants of automobile were in possession of crack cocaine and weapons and were delivering narcotics exhibited sufficient indicia of reliability to justify investigatory stop of automobile and frisk of the occupants; informant had provided reliable information in the past, tip included such details as make and color of car and description of its occupants, and tip was corroborated in significant aspects by the officer.
- 8. In *U.S. v. Campbell*, 178 F.3d 345 (5th Cir. 1999) the Court ruled it was not unreasonable for police officer to draw his weapon, order armed bank robbery suspect to lie on ground, handcuff suspect with his hands behind his back, and frisk suspect during course of investigatory stop, even though suspect complied with officer's orders and robbery had occurred approximately 30 hours prior to stop; suspect matched description of armed bank robber and he was getting into driver's side of automobile matching description of getaway car, there were other people in area during stop, and there were only three officers to control three suspects.

REMEMBER - A FRISK CAN ONLY BE DONE FOR WEAPONS, NOT FOR ANY OTHER ITEMS OR CONTRABAND. HOWEVER, IF THE FRISK IS DONE WITH REASONABLE SUSPICION THAT A WEAPON IS PRESENT, BUT AFTER REMOVING THE ITEM THAT "FELT LIKE" A WEAPON, THE POLICE FIND THAT IT WAS NOT ACTUALLY A WEAPON, THE SEARCH AND SEIZURE IS STILL VALID

- 9. *U.S.* v. Raymond, 152 F.3d 309 (4th Cir. 1998), police stopped a car for speeding. Raymond was a passenger and the police ordered him out of the car. He got out clutching his stomach. The officer patted him down and felt a large disc like object which he thought might be a weapon. It turned out to be a 7" rock cocaine disk. The court ruled that the circumstances gave rise to an articulable suspicion that he might have been armed with a weapon. There was a reasonable basis for conducting a patdown search based on his strange exit from the car, as if he were attempting to conceal something under his jacket, and the awkward way in which he leaned against the car while talking to police.
- 10. U.S. v. Rahman, 189 F.3d 88 (2d Cir. 1999), the Court held that seizure of forged passports by agents was reasonable, where agents learned that vehicle used in bombing of office building in New York City had been rented by person listing his address as suspect's address, agents obtained warrant to search such address, agents observed suspect returning to the building at accelerated pace when they entered to search, suspect resisted being frisked, and agents felt firm rectangular object in his pocket that they could have reasonably expected was an explosive device, but turned out to be envelope containing passports.
- 11. U.S. v. Edwards, 53 F.3d 616 (3rd Cir. 1995), the Court ruled police were justified in conducting *Terry* protective patdown for weapons and opening envelope found in pocket of jacket on defendant's lap. Police responded to report of credit card fraud in progress, and were justifiably concerned that a small-caliber handgun could be concealed in an envelope, which measured four by six inches and felt from outside as if it held hard, bulky object. The object turned out to be stolen credit cars.
- 12. U.S. v. Strahan, 984 F.2d 155 (6th Cir. 1993), the Court recognized the rule that where an officer is doing a lawful "frisk" and feels an object that reasonably appears to be some sort of weapon, the officer can remove that item, and if it turns out that it was not actually a weapon, but is contraband, the seizure of the contraband is lawful. The bulge and hard item turned out to be money and a money clip.

13. In *U.S. v. Brown*, 188 F.3d 860 (7th Cir. 1999), the Court ruled that officer had articulable grounds for reasonable suspicion that person in a traffic stop might be armed and dangerous, to justify an initial patdown search; circumstances included officer's knowledge of FBI surveillance of the vehicle as a possible part of a large-scale drug operation, the smell of marijuana smoke from the car, driver's very nervous demeanor, his failure to make eye contact, his glancing back to the vehicle, where the other occupants rolled down the tinted windows during the traffic stop, and the fact that the stop occurred in a high crime area where there was gang and drug activity and had been recent shootings.

Nervousness, refusal to make eye contact or high crime area alone will not justify a *Terry* stop and patdown, but such behavior may be considered as a factor in the totality of circumstances.

The Court justified a patdown search following traffic stop which disclosed a hard object about the size of a ping-pong ball in suspect's groin area. "It was reasonable for officer to think object was the butt of a gun, even if officer would have been more reasonable to think the object was drugs." *Id.* at 866.

14. *U.S.* v. Campbell, 178 F.3d 345 (5th Cir. 1999), Court held removal, during course of investigatory stop, of contents of suspected armed bank robber's pocket was reasonable and within scope of permissible *Terry* frisk, where police officer had not ruled out possibility that large bulge, formed by over \$1,400 in currency and cardboard box containing gold chain, was a weapon.

Note: Officers should be aware that an item encountered and lawfully removed during a "frisk" does not generally give the right to open the item unless it might reasonably contain a weapon. Otherwise, if it is opened, evidence will be suppressed unless there was justification. (Remember: reasonable suspicion is enough to get weapons but probable cause, consent, or a search warrant is needed to get contraband or evidence. Beware of a pretext arrest to get authority to search) "The need to discover weapons cannot justify opening the matchbox." *Pace v. Beto*, 469 F.2d 1389 (5th Cir. 1972), same ruling regarding small pouch *People v. Martinez*, 801 P.2d 542 (Colo. 1990) and cigarette case in *C.H. v. State*, 548 So.2d 895 (Florida, 1989)

Please refer to the "Plain View" section in this manual under subject of "Immediately Apparent," for discussion on "single purpose" containers.

The theoretical distinction between "stops" and "frisks" (that each requires its separate justification) is sometimes blurred, although the court's decision is correct, for example:

15. In *Rusling v. State*, 96 Nev. 778, 617 P.2d 1302 (1980) a police officer saw a person with a car parked in the road, trunk and door open, walk across the street to a truck where a rubber hose led from the gas tank to a gas can. The suspect fled and the officer broadcast a description. Another officer stopped the suspect (based on matching description and location) about one hour later. The suspect was patted down and a gun was found. Defendant was charged with possession of a firearm by ex-felon. On the pat down issue, the court said:

"The officer need not be absolutely certain that the individual is armed." Citing *Terry*. The officer had reasonable grounds to anticipate danger to himself or the other officer. The suspect met the description of one who was possibly engaged in auto theft. The suspect fled and was hiding. The stop occurred late at night. All these factors led the officer to conclude reasonably that the suspect was involved in criminal conduct. Therefore, it was not improper for him to infer the possibility of a concealed weapon.

- 16. Certain types of crime may justify an "automatic" frisk Many, but not all, courts hold that certain types of criminal activity are commonly associated with weapons, thereby justifying a frisk for weapons if there is reasonable suspicion of that type of criminal activity.
- a. For example, "high level" drug dealing has been viewed this way in the following cases: *U.S. v. Brown*, 903 F.2d 540 (8th Cir. 1990), *People v. Lee*, 240 Cal. Rptr. 32 (1987), *U.S. v. Peay*, 885 F.Supp. 1 (DC D.C. 1995), *U.S. v. McMurray*, 34 F.3d 1405 (8th Cir.1994) and *U.S. v. Salas*, 879 F.2d 530 (9th Cir. 1989) *U.S. v. Price*, 184 F.3d 637 (7th Cir.1999).
- b. Violent domestic disputes can qualify, *People v. Barber*, 537 N.E.2d 1171 (Ill. 1989), *State v. Vasquez*, 807 P.2d 520 (Ariz. 1991).
- c. Armed robbery: *U.S. v. Abokhi*, 829 F.2d 666 (8th Cir.1987) and *U.S. v. Lang*, 81 F.3d 1405 (8th Cir. 1994).
- d. Burglary: U.S. v. Walker, 924 F.2d 1 (1st Cir. 1991), U.S. v. Moore, 817 F.2d 1105 (4th Cir. 1987).

(7) "PLAIN FEEL"

Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), is the so-called "plain feel" case. Uniformed police were on patrol at night near an apartment building known to them as a hotbed of drug dealings. Police had served several drug search warrants at that building and had citizen complaints of drugs being sold in the hallways. Dickerson was observed leaving the building and walked toward the marked police car. Upon seeing the police, he turned and abruptly walked the other way and entered an alley.

The officers made a "Terry stop" on Dickerson and also "frisked" him. While "frisking" Dickerson, one officer felt something in his pocket which the officer slid around and manipulated, then removed a plastic bag containing 1/5 gram of rock cocaine. (The legality of the "stop" and the decision to "frisk" were not an issue before the U.S. Supreme Court. It was assumed, but not directly held by the Court, that they were valid.) The issue is whether and when "plain feel" would allow officers to legally seize items other than suspected weapons.

The Court held as follows: assuming that there is a legal stop and a legal frisk, and during the frisk the officer feels an item that is not a suspected weapon, then if it is immediately apparent from the mass and contour that the item is probably contraband, the officer can legally seize it (without having to arrest the person and rely on search incident to arrest).

In *Dickerson*, the Court ruled that the rock cocaine would have to be suppressed, because the officer continued feeling and frisking after the officer already concluded no weapon was in the pocket - i.e., plain feel means immediately apparent.

In *U.S. v. Proctor*, 148 F.3d 39 (1st Cir. 1998) police had lawfully entered a premises and seized a large package of marijuana. About 15 minutes later. Two persons knocked on the door and were admitted entry. The officer patted them down and felt what he thought was a plastic bag containing marijuana. The Court upheld the frisk and also the seizing of the marijuana based on the officer's experience and the fact that the persons entered a drug house just after the drugs arrived.

In *State v. Conners*, 116 Nev. 184, 994 P2d 44 (2000) an officer lawfully stopped and frisked Satan Renee Conners. After ruling out a weapon the officer changed his grip on a pocket to determine what an object was and removed a small vial of methamphetamine. The item was suppressed based upon the Dickerson ruling.

In *State v. Scott*, 518 N.W.2d 347 (Iowa 1994), Officer Blad stopped a vehicle at the request of officers because the vehicle was seen leaving the area of a shooting. The defendant, the passenger in the vehicle, and the driver were ordered out of the car by Officer Blad. Officer Blad then conducted a pat down search of defendant's outer clothing. While conducting the pat down search for weapons, Officer Blad felt an object in the defendant's pocket which she believed was narcotics. Officer Blad knew right away that the object was not a weapon. Officer Blad then asked the defendant what was located in his pocket. The defendant responded that he the item was marijuana.

The defendant filed a motion to suppress based on *Minnesota v. Dickerson*, 113 S.Ct. 2130 (1993), which was granted by the district court. The State appealed and the the court held that Officer Blad did not overstep the bounds of a protective weapons search by asking the defendant what was located in his pocket. The court stated: "If the circumstances during an investigatory stop give rise to suspicions unrelated to the reason for the stop, an officer may broaden his or her inquiry and satisfy those suspicions." *Id.* at 350; *citing U.S. v. Barahoma*, 990 F.2d 412, 416-417 (8th Cir. 1993).

Westlaw computer research discloses that many federal courts have followed the rule established by *Minnesota v. Dickerson* and that more than 90% of State Supreme Courts which have dealt with the issue have adopted the same rule.

(8) WHAT LIMITS EXIST ON THE SCOPE AND INTENSITY OF THE STOP?

a. The General Rule

In *U.S. v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568 (1985), a DEA agent developed reasonable suspicion that one of two vehicles traveling in tandem on a highway was smuggling drugs. The agent got help from a state trooper and a passenger car was pulled over. The pickup truck suspected to contain the drugs could not be pulled over for several miles. The police units lost radio contact and the pickup truck and its driver were detained about 15 minutes before an agent arrived, smelled marijuana and developed probable cause. The criminal claimed that this time delay converted the "stop" into an "arrest" and since there was only reasonable suspicion and not probable cause, he claimed there was an unlawful arrest. The Court held: no arrest until after the sniff of marijuana scope of *Terry* stop was OK. The Court said a *Terry* stop was a temporary detention (as opposed to an arrest) and that the scope was lawful as long as the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.

NOTE: In *Sokolow*, the U.S. Supreme Court held that the investigative means used by police to confirm or dispel suspicion do not have to be the least intrusive means possible - only that they be "reasonable" means.

U.S. v. Owens, 167 F.3d 739 (1st Cir 1999) 50 minute detention of driver and passenger after stop of automobile for speeding was not so long as to convert investigative stop into de facto arrest. Length of detention was reasonable under the circumstances: driver did not have valid driver's license, need to determine whether passenger had authority to drive the automobile, and officers' diligent pursuit of means of investigation that would dispel their suspicions.

"The permissible scope of the detention depends on the facts and circumstances of each case, but in every case it must be temporary and last no longer than necessary to effectuate the purpose of the stop." *U.S. v. Sandoval*, 29 F.3d 537 (10th Cir.1994).

In *U.S. v. Hernandez*, 893 F.Supp. 952 (D.Kan. 1995), the defendant was stopped for absence of a tail light and a lane violation. The officer received defendant's driver's license and issued the defendant a written warning for both infractions. The officer then told the defendant: "That is all I have for you." As the defendant turned toward his vehicle, the officer asked the defendant if he could ask the defendant a few more questions and the defendant answered "yes." After a few questions, the defendant gave the officer permission to search the truck.

The defendant filed a motion to suppress based on the following: 1) reasonable suspicion to stop; 2) pretextual stop; 3) reasonable detention; 4) consent to search; and 5) voluntariness of defendant's statements. With regard to the issue of the reasonable detention, the court held that, based on the totality of the circumstances, a reasonable person in the defendant's position would have believed he was free to leave. The court reasoned that the trooper returned the defendant's belongings and received permission from the defendant to continue the stop.

This rule is the same as set forth in Nevada Law. But, note that Nevada places an absolute limit of 60 minutes for a *Terry* stop. See also *Washington v. State*, 94 Nev. 181, 576 P.2d 1126 (1978).

N.R.S. 171.1231. Arrest if probable cause appears. At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for an arrest appears. If, after inquiry into the

circumstances which prompted the detention, no probable cause for arrest appears, such person shall be released.

In *State v. McKellips*, 118 Nev. 465, 49 P.3d 655 (2002), officers were dispatched to a call regarding a traffic accident. Once at the scene, officers found a major accident which resulted in the death of a mother and her infant child. The defendant was located at the scene and filled out an accident statement. Fifteen minutes later, the defendant was placed in the back of a patrol car to continue filling out the statement. After fifteen more minutes, an officer had the defendant perform the Horizontal Gaze Nystagmus test. The defendant was once again placed in the back of a patrol vehicle. Another officer, who informed the defendant that he was not under arrest, then performed two more tests on the defendant. After approximately an hour and a half at the scene, the defendant then consented to blood and urine testing.

After being bound over to district court, the defendant filed a motion to suppress the results of his urine and blood tests. The district court granted the defendant's motion. On appeal, the State argued the district court erred in granting the defendant's motion to suppress because the district court erred in relying on the officer's subjective intent that the defendant was not free to leave the scene. The court held that, while the district court may have erred in considering the officer's subjective intent, it was harmless error. The court further held that once a detention exceeds the sixty-minute time limit under NRS 171.123, the detention ripens into a *de facto* arrest for which probable cause is necessary. The court then determined that probable cause supported the defendant's arrest and reversed the district court's order granting the defendant's motion to suppress.

If, in the course of the detention, further information comes to the knowledge of the officer which amounts to "P/C" to arrest (i.e., more facts than needed for reasonable suspicion), then you can arrest. In report writing, be sure to differentiate initial stop as investigatory detention and when and how it escalated into an arrest.

b. Non-Search Examination

In *U.S. v. Martin*, 806 F.2d 204 (8th Cir. 1986), where an officer looked through the window of a suspect's pickup truck and saw machine gun parts -- he could seize them without warrant, or in *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983), where police shined a flashlight into a person's car which was stopped at a routine traffic check point and saw white powder and balloons.

This rule was applied in *State v. Herbert Wright*, 104 Nev. 521, 763 P.2d 49 (1988).

c. Temporary Seizure of Items

Reasonable suspicion can support a temporary seizure (without a search) of personal items such as the suspect's suitcase in *U.S. v. Place*, 462 U.S. 696, 103 S.Ct. 2637 (1983) (although in Place, the 90-minute detention of the suitcase was too long for an investigative seizure with reasonable suspicion, but without probable cause).

An officer's removal of a suitcase from a baggage area conveyor belt, squeezing the bag and then sniffing the bag was neither a search nor a seizure. U.S. v. Garcia, 42 F.3d 604 (10th Cir. 1994). "The temporary moving of unattended luggage from one area of a bus to another to facilitate a dog sniff is not a seizure." U.S. v. Graham, 982 F.2d 273 (8th Cir. 1992) "The defendant's only interest was that the airline would place his luggage on the next airplane. The police process of taking the luggage from a cart to an office and having the dog sniff it was completed prior to the time the luggage would have been placed on the airline. There was no seizure of the luggage until after the dog alerted." U.S. v. Furukawa, 99 F.3d 1147 (9th Cir.1996) Same result in U.S. v. Ward, 144 F.3d 1024 (7th Cir. 1998).

d. Conducting a one-on-one at the scene or elsewhere.

NOTE: NRS 171.123 says in Nevada the "one on one" must be at the place where suspect is detained.

Although no emergency exception is listed in Nevada statutes, it would probably be permissible to transport the suspect (assuming reasonable suspicion) to the victim if the victim couldn't be transported.

A 39-minute detention of two sexual assault suspects, including transportation to a hospital to be viewed by the victim, was valid when based on reasonable suspicion. At least 25 minutes of the detention was due to completion of the victim's treatment at the hospital before viewing the suspects. Police were acting diligently to pursue a means of investigation, namely, display of the defendants to the victim while her memory was still fresh, which was likely to confirm or dispel their suspicion quickly, and this means of investigation obviously required the reasonable detention of the defendants." *State v. Mitchell*, 507 A.2d 1017, (Conn.1986).

(9) USE OF WEAPONS OR HANDCUFFS IN DETENTION

Numerous cases have held that display of weapon or handcuffing suspect does not in and of itself convert a "detention" into an "arrest" (although these things tend to push in the direction of arrest-see "levels of contact" factors) but you must be able to articulate why these means were employed (things such as suspicion directed at crime of violence, detection occurred at night, isolated area, officer alone, risk of flight). Handcuffs okay, *U.S. v. Bautista*, 684 F.2d 1286 (9th Cir. 1982). Same result in *U.S. v. Blackman*, 66 F.3d 1572 (11th Cir. 1995) and also in *U.S. v. Tilmon*, 19 F.3d 1221 (7th Cir. 1994).

Placing suspect in police car did not equal an arrest. *State v. Braxton*, 495 A.2d 273 (1985). Same result in *U.S. v. Cannon*, 29 F.3d 472 (9th Cir. 1994).

In *U.S. v. Merritt*, 695 F.2d 1263 (10th Cir. 1982), the Court held that pointing a gun at a suspect stopped on a reasonable suspicion of criminal activity does not necessarily turn the encounter into an arrest requiring probable cause. A pickup truck believed to contain a murder fugitive and 2 other persons was surrounded by at least 12 officers, and as many as three pointed guns at the suspects.

This show of force was not unreasonable, considering the potential danger faced by the officers. One of the persons believed to be in the truck was wanted for murder, and the police had been advised that he was dangerous and heavily armed. Also, the police had just been to a house where the suspect was thought to reside, and observed a large assortment of deadly weapons and ammunition. The same circumstances supported a "frisk" of the pickup truck for weapons.

Merritt has been followed in numerous other cases: *U.S. v. Hardnett*, 804 F.2d 353 (6th Cir. 1986)(C/I said 4 armed men were in car); *U.S. v. Roper*, 702 F.2d 984 (11th Cir. 1983) (bail jumper); *U.S. v. Perate*, 719 F.2d 706 (4th Cir. 1983); *U.S. v. Jones*, 759 F.2d 633 (8th Cir. 1985); *U.S. v. Trullo*, 809 F.2d 108 (1st Cir. 1987), *U.S. v. Alvarez*, 899 F.2d 833 (9th Cir. 1990) (possible bank robbery and explosives); *U.S. v. Taylor*, 857 F.2d 210 (4th Cir. 1988) (reasonable suspicion stop and police knew person had been convicted for assault with intent to murder and robbery); *U.S. v. Tilmon*, 19 F.3d 1221 (7th Cir. 1994) (reasonable suspicion stop of bank robber who threatened use of explosives; *U.S. v. Cole*, 70 F.3d 113 (4th Cir. 1995) (police suspected car occupants had a large amount of drugs and might be armed).

In *Houston v. Clark County*, 174 F.3d 809 (6th Cir. 1999), the Court held that it was valid for the officer, after a reasonable suspicion stop to handcuff a suspect in a serious violent crime, but the length and manner of the officer's conduct must be related to the initial basis for the stop; Same ruling in *U.S. v. Campbell*, 178 F.3d 345 (5th Cir. 1999), valid for officer (with reasonable suspicion for the stop) to draw gun and handcuff the suspect who was in a car with the license number of a recent armed robbery.

In *U.S. v. Navarrete-Baron*, 192 F.3d 786 (8th Cir. 1999), the Court held that police officers did not exceed scope of *Terry* stop when they handcuffed occupants of automobile and placed them in separate patrol cars while officers searched automobile; there were two suspects and only two officers at scene, detention did not last for unreasonably long time, and in light of dangerous nature of suspected crime of drug trafficking and good possibility that driver or passenger had weapon, their confinement with handcuffs in back of patrol cars during search was reasonably necessary to maintain status quo, protect officers, and allow them to conduct search immediately and without interference.

In *U.S. v. Maza-Corrales*, 183 F.3d 1116 (9th Cir. 1999), drug enforcement agents' temporarily detaining defendant with the use of handcuffs for 15 to 30 minutes while questioning him, was reasonable and did not escalate into a full-blown arrest, given relatively small number of officers present at scene, fact that weapons had been found and more weapons potentially remained hidden, fleeing persons were on the loose, uncooperative persons were inside the residence, an armed lookout was outside and blew a car horn when DEA came.

The Court held that "intrusive and aggressive police conduct will not be deemed an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers. When we make such judgments, common sense and ordinary human experience rather than bright-line rules serve as our guide, and we recognize that "we allow intrusive and aggressive police conduct without deeming it an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."

See same case in "protective sweep" section immediately following

(10) EXTENDING THE FRISK TO A RESIDENCE

It should be noted that all courts hold that a person's home has an extremely high expectation of privacy and warrantless entries are viewed dimly. (See following sections on emergency and search warrants). However, in some limited circumstances a "protective sweep" of a premises can be made on reasonable suspicion.

In *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990), the Court allowed police to make a protective sweep of a residence after lawful entry with an arrest warrant as long as there was reasonable suspicion of danger to police to justify the protective sweep. Items in plain view during the protective sweep could be seized. This authority is in addition to the right to conduct a full search of area immediately adjoining area of arrest. (SITA).

In *U.S.* v. *Hoyos*, 868 F.2d 1131 (9th Cir. 1989), the defendant attempted to escape arrest by entering the house. Also, the officers were aware that several suspects had not yet been arrested and could possibly be in the area of the residence.

The Court ruled that the protective sweep exception to the requirement of a search warrant to enter a residence may apply if the arrest occurs outside. "This is not surprising because the distinction is logically unsound. If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect the reasonableness of the officer's conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room."

U.S. v. Henry, 48 F.3d 1282 (DC Cir. 1995) Police acted reasonably in conducting protective sweep of defendant's apartment after his arrest just outside apartment's open door, where police informant had previously advised officers that defendant would have weapons and that defendant's "boys" might be with him in apartment; sweep did not violate defendant's Fourth Amendment rights.

"The officers' awareness that Henry had a previous weapons conviction and could be dangerous did not itself directly justify the sweep. Once Henry was in custody, he no longer posed a threat to the police. But the informant's advice coupled with the arrest just outside the open door, was sufficient to lead a reasonably prudent policeman to fear that he was vulnerable to attack.

While it is true that the officers could not be certain that a threat existed inside the apartment, this does not impugn the reasonableness of their taking

protective action. It is enough that they "have a reasonable basis for believing that their search will reduce the danger of harm...."

In *U.S. v. Meza-Corrales*, *supra*, the Court held that U.S. Drug Enforcement agents had justification to conduct their initial protective sweep (a search warrant had not yet been obtained) of defendant's residence to ensure that no potentially dangerous persons were hiding inside residence. (See facts of case)

"Meza-Corrales's argument that Bridges' sounding of the horn of the Blazer, the discovery of loaded handguns, and the sighting of fleeing people, all had absolutely no connection with what was going on inside the residence and with the people who lived there, simply because they all physically occurred outside the residence, is patently ridiculous."

In *Hayes v. State*, 106 Nev. 543, 797 P.2d 962 (1990), police arrested the suspect outside of his residence. Suspect shouted to inside of house "the cops are here" and police had some reason (from C/I) to believe the arrestee had guns around. The court said the protective sweep (which discovered dope in plain view) was unlawful since in the court's opinion the police could have withdrawn with the suspect who was arrested for a non-violent felony. The court did recognize and agree with the *Maryland v. Buie, supra*, concept, but held that the facts in Hayes were not sufficient to allow such a sweep. This was a split decision by the Court.

In *U.S. v. Burrows*, 48 F.3d 1101 (7th Cir. 1995), police had an arrest warrant for Burrows who lived in a housing project having an established reputation for violence. The arrest warrant was for a violent crime. When police arrived at his apartment, they saw movement in an upstairs window and the occupants refused to let the police enter. Police entered with a pass key from the manager and found and arrested Burrows in one room. Then, because there were other occupants and the previously stated circumstances, the police did a protective sweep in less than 5 minutes, during which they found a gun in a closet. The Court upheld the protective sweep under these facts.

Other cases also upheld protective sweeps

- *U.S. v. Richards*, 937 F.2d 1287, 1291 (7th Cir.1991) (noting that an "ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings").
- U.S. v. James, 40 F.3d 850 (7th Cir.1994) (finding no 4th Amendment violation where officer quickly searched bedroom closet and jacket located

therein. Officers had encountered multiple individuals in the dwelling, arrested one suspect just outside the bedroom, and had found a semiautomatic rifle in the bedroom.)

- *U.S. v. Barker*, 27 F.3d 1287 (7th Cir.1994) Held officer had reasonable belief that area swept harbored dangerous individuals because a second officer's prior dealings with defendant indicated that firearms and multiple individuals could be present.
- *U.S. v. Mendoza-Burciaga*, 981 F.2d 192 (5th Cir.1992) noting that officers, who had arrested two narcotics coconspirators in high-speed chase and two more just outside a house, "would be in great danger" if additional armed individuals remained inside the home, and finding that officers' warrantless entry and protective sweep constituted "minimally necessary steps to secure the house" for purposes of ensuring safety and safeguarding evidence.
- *U.S. v. Kimmons*, 965 F.2d 1001(11th Cir.1992) Ok'd sweep in case involving bank robbery conspiracy where two participants were arrested away from the premises and had ordered defendant out of his house and arrested him, but were unsure of the whereabouts of a fourth coconspirator.

(11) WHERE IS THE LINE BETWEEN A "STOP' AND AN "ARREST?"

- 1. In *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643 (1985), the U.S. Supreme Court said that although there is no "bright line rule" to answer this question, at some point in the investigation police procedures can become so qualitatively and quantitatively intrusive regarding a suspect's freedom of movement and privacy that an "arrest" occurs. The Court said this occurs when the police, without P/C or a warrant, forcibly require a person to go to a police station where he is detained even briefly for investigation.
- 2. "There is no bright line rule ... therefore whether an arrest has occurred depends on all the circumstances. Pointing a weapon, ordering him/her to lie on the ground, handcuffing and placing in a police vehicle for a brief period of time either singly or in combination does not always convert a (*Terry*) stop into an arrest requiring P/C ... police need not use the least intrusive means of responding to an exigent situation ... as long as their actions are reasonable." *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). Same rationale in *U.S. v. Torres-Sanchez*, 83 F.3d 1123 (9th Cir. 1996) and *U.S. v. Blackman*, 66 F.3d 1572 (11th Cir. 1995).

3. In *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), two black businessmen were seen leaving a restaurant by a police officer. The officer thought the two men matched the description of two armed robbers in multiple robberies, although the court noted that the actual size and weight of Washington and Hicks were several inches and 50 pounds different from the suspects. The officer called for a backup and followed the rental car to a hotel. A radio check said the rental car was not stolen. At the garage in the hotel, the police got out and one of them pointed a gun at the two men, ordered them to put their hands up and handcuffed them, then searched their persons and the car. No weapons or contraband was found. The two men sued the police under 42 U.S.C. 1983.

The Court held that "in determining whether the use of intrusive techniques turns a stop into an arrest, we examine the reasonableness of the police conduct in light of a number of factors, such as 1) where the suspect is uncooperative or takes action that raises a reasonable possibility of danger or flight, 2) where the police have information that the suspect is currently armed, 3) where the stop closely follows a violent crime and, 4) where the police have information that a crime that may involve violence is about to occur. Some combination of these factors may also justify the use of aggressive police action without causing an investigatory stop to turn into an arrest.

In the present case the police action constituted an arrest with no probable cause, (also arguably no reasonable suspicion to justify a *Terry* stop either) thereby making the officers and police department liable for damages. 42 U.S.C. 1983.

E. ARREST: THE HIGHEST LEVEL OF CONTACT

It is important to distinguish arrest from *Terry*-type detention. (Arrest is only legal if made on probable cause).

1. STATUTORY DEFINITION

NRS 171.124 provides that an officer may arrest for felony or gross misdemeanor with or without a warrant, day or night, if there is "reasonable cause" to believe a subject has committed a felony or gross misdemeanor.

2. THE U.S. SUPREME COURT CASE LAW

The U.S. Supreme Court says: "probable cause" is a term dealing with everyday probabilities, not legal technicalities. *Draper v. U.S.*, 358 U.S. 307, 79 S.Ct. 329 (1959). The question is whether a person of reasonable caution would believe an offense was being or had been committed -- not a question of the "good faith" of the officer but a need to articulate facts causing reasonable belief.

The "objective test" is used to determine whether and when an arrest occurs. A court may consider that there was an arrest even though the suspect was not told "you are under arrest". Factors such as show of authority, involuntary restraint or movement and passage of time are important.

In *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979), police lacked probable cause to arrest -- went to suspect's neighbor's home and asked him in a compulsive way to go to police station where he was placed in interrogation room -- wasn't told he was free to go -- the trip from the residence to the police station was several miles and took 1 hour -- Held -- although he wasn't told he was under arrest, wasn't booked and wouldn't have had an arrest record if the interrogation proved fruitless -- this was same as an "arrest", because the police told him he needed to go to the police station, he acquiesced, and the trip took an hour and went many miles from his residence. His subsequent confession to a crime was suppressed as a "fruit" of the "arrest" without probable cause.

Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983), police suspected defendant as drug courier, approached and asked to speak to him and requested to see his ticket and driver's license--noted that names didn't match -- asked him to go to nearby room while retaining his ticket and license. Held -- this constituted a "seizure". 15 minutes after initial stop he consented to search of suitcase. Court ruled that this police conduct effectively constituted an "arrest" and required probable cause. Since there was no probable cause, although there was reasonable suspicion, the illegal arrest tainted the consent.

3. NEVADA CASES

In Arterburn v. State, 111 Nev. 1121, 901 P.2d 668 (1995), officers conducted a traffic stop on the Defendant's vehicle and questioned the Defendant regarding a stolen vehicle in the near vicinity. When the Defendant replied that he knew the suspect and the circumstances surrounding the stolen vehicle, the officer asked the Defendant whether he would be willing to accompany the officer to the sheriff's department to do an interview, to which

the Defendant agreed. The two traveled to the sheriff's department in a patrol car. At the sheriff's department, the Defendant was informed that he was not under arrest, was free to leave, and signed a written waiver of rights form. Held – the Defendant was not free to leave at the time of the initial detention and the detention did not terminate prior to the Defendant being asked to go the station. Therefore, the decision to go the station was not voluntary and the detention exceeded the length, scope and purpose of the traffic stop and became an arrest for which probable cause was required. Since the officer had no probable cause for an arrest, the confession and subsequent seizure of narcotics were suppressed.

Probable cause to make a warrantless arrest exists if the facts and circumstances known to the officers at the moment of the arrest would warrant a prudent man in believing that a felony had been committed by the person arrested. *Thomas v. Sheriff*, 85 Nev. 551, 459 P.2d 219 (1969).

The "probable cause" test is based on the totality of the circumstances known to the officer. Presence or absence of probable cause to arrest must be determined in light of all circumstances, and it is immaterial that each circumstance, taken by itself, may be consistent with innocence. *Minor v. State*, 91 Nev. 456, 537 P.2d 477 (1975).

4. STANDARD FOR PROBABLE CAUSE

Basically, the same standard (quantity of proof) is needed for arrests as for searches, so the *Illinois v. Gates*, 462 U.S. 213, 104 S.Ct. 33 (1983), totality of the circumstances test applies - i.e.: a fair probability, but not necessarily a certainty.

In *U.S. v. Ornelas*, 517 U.S. 690, 116 S. Ct. 1657 (1996), the Court ruled: Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are common sense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' "As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules.". We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence.

In *U.S. v. Covarrubias*, 65 F.3d 1362 (7th Cir.1995), the court held that "Police have probable cause to arrest if at the moment of the arrest the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the suspect had committed an offense. While probable cause requires more than mere suspicion, we do not require it to reach the level of virtual certainty."

In *Brinegar v. U.S..*, 338 U.S. 160, 69 S.Ct. 1302 (1949), the Court held, "probable cause requires less than (the amount of) evidence that would justify a conviction but more than mere suspicion." In *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584 (1969), the Court held that "only the probability and not a prima facie showing of criminal activity is the standard of probable cause." In *Gerstein v. Pugh*, 420 U.S. 103, 95 U.S. 854 (1975), in ruling on a magistrate's determination of probable cause after a warrantless arrest, the Court held that "a probable cause determination does not require the fine resolution of conflicting evidence that a reasonable doubt or preponderance (more than 50% probability) demands."

In *Greene v. Reeves*, 80 F.3d 1101 (6th Cir. 1996) police arrested parents for promoting sexual performances by a minor based on their sending of a postcard with a photograph of the genital area of their unclothed minor daughter. The court upheld the arrest stating that, "the probable cause standard does not mean that the (evidence of the suspected criminal act) is more likely than not."

In *U.S. v. Hoyos*, 892 F.2d 1387 (9th Cir. 1990), *cert. denied*, Hoyos v, U.S., 498 U.S. 825 (1990), reversed, other grounds, *U.S. v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001), the court stated that the test for probable cause is whether the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime. A court may consider both the experience and collective knowledge of all officers involved in the investigation and their respective levels of expertise. A court may also consider any reasonable inferences drawn from the officers' collective knowledge.

In *U.S. v. Ocampo*, 937 F.2d 485 (9th Cir. 1991) the court held that probable cause evaluation depends on the totality of the facts of the case even though there is an innocent explanation for each fact.

Note: In *Terry* v. *Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) the police detective with more than 20 years experience saw Terry and his partners walk from a street corner to look in the front window of a jewelry store without entering to shop about a dozen times in twelve minutes.

Even though this action was superficially innocent, the Supreme Court agreed that under all the circumstances there was reasonable suspicion that they were casing the store for an armed robbery.

Although *Terry* involved reasonable suspicion, *Ocampo* and numerous other cases hold that obvious criminal behavior, such as pointing a gun at a victim, is not required for a finding of probable cause.

5. SOURCES OF PROBABLE CAUSE

a. Reliable Confidential Informant

See the section in this manual on search warrants to learn factors that make an informant reliable.

In *Roviaro v. U.S.*, 353 U.S. 53, 77 S.Ct. 623 (1957), the U.S. Supreme Court held that the government's privilege against disclosing the identity of informants must give way when disclosure of the informant's identity or the contents of his communications is relevant and helpful to the defense of an accused or essential to a fair determination of the cause.

A defendant bears the burden of showing that a supposed informant could provide information that would be relevant and helpful to his defense. *U.S. v. Prueitt*, 540 F.2d 995, 1003-1004 (9th Cir. 1976), *cert. denied, sub nom. Temple v. U.S.*, 429 U.S. 1083 (1977); the fact that an informant participated in the crime is not, in itself, enough to sufficient for disclosure. *U.S. v. Kelly*, 449 F.2d 329, 330 (9th Cir. 1971). *U.S. v. Anthony*, 444 F.2d 484, 487 (9th Cir. 1971), *cert. denied*, 406 U.S. 959.

In *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056 (1967), the court reasoned that a strong proven reliable informant with first-hand information is enough for probable cause. "The Court has never required a rule of compulsory disclosure of an informant where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake" Even an informant of lesser reliability can be enough if the informant predicts future actions and details. *Draper v. U.S.*, 358 U.S. 307, 79 S.Ct. 329 (1959).

In *Hamilton v. Sheriff*, 92 Nev. 591, 555 P.2d 489 Nev. (1976), police officer who was given information to the effect that two men were headed in a particular direction in a particular automobile and were transporting marijuana, who received the information from an informant whom he had known for approximately a year and from whom he had received accurate information on two prior occasions, and who noted that informant was able to describe with

considerable accuracy the circumstances surrounding the particular incident had probable cause to stop the vehicle.

In *U.S.*. v. Fixen, 780 F.2d 1434,(9th Cir., 1986), the court held the arrest was lawful and based on probable cause. "The informer, enlisted by the police, met with the defendant to arrange delivery of some cocaine; he then told police that the source of supply was a Latin male from Los Angeles. The defendant was surveilled traveling to Los Angeles where, in a series of moves apparently designed to discourage detection, he appeared to obtain a brown paper bag from a Latin male. Upon his arrest, cocaine was found in the bag." Although verification of facts from the informer's story was largely of "innocent" behavior, credibility was enhanced by the accuracy and detail of the information given.

Generally, police/DA are not required to disclose informant's identity.

Defendants always want to know the identity of an informant for obvious reasons such as threats to make the informant change his story or to lie about information given to police, and sometimes more drastic means. The following cases explain the view of federal courts on the issue of informant disclosure.

In *U.S. v. Fixen* (supra), the trial court refused identifying the cinfiudential informant and the 9th Circuit upheld that ruling. "A proper balance depends on the particular circumstances of each case, consideration of crime charged, possible defenses, possible significance of the informer's testimony, and other relevant factors."

Although the informer's privilege must give way where the disclosure of the informant's identity "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the burden is on the defendant to demonstrate the need for the disclosure.

A trial court need not require disclosing the identity of a reliable informant where the sole ground for seeking that information is to establish the existence of probable cause for arrest. *Fixen*'s request for disclosure expresses his concern there may not have been an informant or that police lied as to the information related to them. An in camera hearing (without presence of defendant or his lawyer) could have served to allay these fears:

Through disclosure of the informer's identity to the trial judge, and such subsequent inquiries by the judge as may be necessary, the Government can be

protected from any significant, unnecessary impairment of secrecy, yet the defendant can be saved from what could be serious police misconduct.

Nonetheless, a district court need not conduct an in camera hearing whenever the identity of an informant is requested.

In *U.S.*. *v. Gordon*, 173 F.3d 761 (10th Cir. 1999), the court held that a defendant seeking to force disclosure of an informant's identity has the burden to show the informant's testimony is relevant or essential to the fair determination of defendant's case. "Where it is clear that the informant cannot aid the defense, the government's interest in keeping secret the informant's identity must prevail over the defendant's asserted right of disclosure."

The informant's role in Gordon's arrest was extremely limited. He did not detain Gordon, and did not participate in or witness Gordon's detention or the transaction in which Gordon purportedly agreed to transport cocaine in exchange for money. We have refused disclosure in similar cases where the informant has limited information, was not present during commission of the offense, and cannot provide any evidence that is not cumulative or exculpatory.

In *U.S. v. Mangum*, 100 F.3d 164 (DC Cir. 1996), Mangum argued that he needed to interview the confidential informant in order to determine whether the informant might have planted the gun in the knapsack in order to help secure an arrest and curry favor with the government. He never cited any specific facts supporting his motion to disclose the identity of the informant, but merely wanted to interview the informant because the informant might possess information that could exculpate him.

The court found that the defendant was not entitled to know the confidential informant's identity "because there is no evidence in the record supporting the Defendant's speculation that the informant actively participated in the offense." He failed to meet his burden by "showing that the informant's testimony is necessary to his defense so as to justify placing the informant's safety in jeopardy."

"Mere speculation that the confidential informant may possibly be of some assistance is insufficient to meet this burden. To overcome the public interest in protection of the informant," the defendant must show that the informant was "an actual participant in or a witness to the offense charged," and identity is "necessary to the defense."

In U.S. v. Fields, 113 F.3d 313 (2d Cir. 1997), the court held that the government is not generally required to disclose the identity of confidential

informants. Its interest in protecting anonymity of informants who furnish information regarding violations of law is strong-- withholding an informant's identity improves the chances that the person will continue providing information and encourages potential informants to aid the government.

The defendant bears the burden of showing the need for disclosure of a confidential informant's identity, and must establish that, absent such disclosure, he will be deprived of his right to a fair trial.

Even if, as the defendants claim, the informant's information was uncorroborated and constituted the bulk of the probable cause upon which the police relied, the district court's in camera interview of the confidential informant, conducted with a view to matters defense counsel identified in writing as potentially relevant, adequately protected defendants' rights. An in camera interview of an informant that finds no substantial inconsistency with police testimony can mitigate any concern that the informant's testimony would in fact be useful to the defense

U.S. v. Kime, 99 F.3d 870 (8th Cir. 1996) held that in order to override the government's privilege of nondisclosure, defendants must establish beyond mere speculation that the informant's testimony will be material to the determination of the case. The Defendant argued that the disclosure of the informant's identity was necessary to test the veracity of his or her information and the quantum of probable cause behind the affidavit offered in support of the application for the interception of wire and oral communications. However, the court reasoned that the offered no basis other than bald speculation for his assertion that such a disclosure and an opportunity to interview the informant would allow him to impeach the informant's affidavit testimony. The movant's burden "requires more than mere speculation that the testimony of the informant might prove to be helpful to the defense."

b. Information from Victim or Witness

Illinois v. Gates, supra, held that citizen-informant is presumed to be reliable, unlike a criminal confidential informant.

In Easton v. City of Boulder Colorado, 776 F.2d 1441(10th Cir. 1985), the court held that "when examining informant evidence used to support claim of probable cause for warrant for arrest, or warrantless arrest, skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from criminal milieu, is appropriately relaxed if informant is identified victim or ordinary citizen witness.

Because citizen witnesses are presumptively reliable, the officers in this situation had no duty to examine further the basis of the witness' knowledge or talk with any other witnesses. The proposition that private citizen witnesses or crime victims are presumed reliable does not "dispense with the requirement that the informant ... furnish underlying facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator."

U.S. . v. Butler, 74 F.3d 916 (9th Cir.1996) followed the rule of *Illinois* v. Gates, supra, that probable cause is determined by the totality of the circumstances: it can be based on hearsay, or on information relayed through official police channels, and through the collective knowledge of police officers involved in an investigation even if some of this information was not known by the arresting officer. If an unquestionably honest citizen comes forward with a report of criminal activity which, if fabricated, would subject him to criminal liability rigorous scrutiny of the basis of knowledge is unnecessary.

Tangwall v. Stuckey, 135 F.3d 510 (7th Cir. 1998) held that when an officer received his information from some person--normally the putative victim or eye witness--whom it seems reasonable to believe is telling the truth, the officer has probable cause. The court stated that no deep-seated logic or rationale underlies this principle, probable cause is a common sense determination, measured under a reasonableness standard.

Sharrar v. Felsing, 128 F.3d 810 (3rd Cir. 1997) held that "even if the officer heard the victim's claim that another person attacked her it was reasonable for the officer to assess her demeanor, find her story credible, and rely on her subsequent identification of her husband as the attacker. When an officer has received a reliable ID by a victim of his or her attacker, the police have probable cause to arrest. See also, *Lee v. Sandberg*, 136 F.3d 94 (2d Cir. 1997).

c. Official Channels

Whitley v. Warden, 401 U.S. 560, 91 S.Ct. 1031 (1971) held that an officer who does not personally possess sufficient information to constitute probable cause may nevertheless make a valid arrest if he acts upon the direction or as a result of a communication from a fellow officer and the police, as a whole, possess sufficient information to constitute probable cause. People v. Freeman, 668 P.2d 1371 (Colo. 1983). This is generally referred to as the "fellow officer rule."

In *Doleman v. State*, 107 Nev. 409, 812 P.2d 1287 (1991), police arrested a murder suspect based on information from an informant and citizen witness (facts are somewhat complicated). Even though the arresting officer may not have been aware of each and every fact included in the probable cause, collectively he and the other officers involved in the investigation did possess probable cause and this made the arrest valid. This decision extends the "fellow officer rule" to its fullest.

d. Personal Observations by police

This is the most common ingredient of probable cause - what an officer sees, hears, smells, feels or tastes may give probable cause by itself or as corroboration of information received from informant.

e. Discrepancy between information received and suspect

This does not automatically mean that there is no probable cause. Some discrepancies normal due to human nature. *Brown v. U.S.*, 365 F.2d 976 (D.C. Cir. 1966), where police had description of robber as black male, driving maroon 1954 Ford and about a mile away, minutes later, police saw car which was 1952 maroon Ford and had occupant with different clothing and height was 6" off -- Held: probable cause existed, despite the discrepancy to stop the car and arrest occupant.

U.S. v. Tilmon, 19 F.3d 1221 (7th Cir.1994) held that police had probable cause to arrest Tilmon for bank robbery once he stepped out of car and officers could compare him with description of robber, due to fact that police already identified his distinctively marked car; although defendant wore different clothes from those described by robbery eyewitnesses, and two hours had passed since robbery.

In *Lallemand v. University of Rhode Island*, 9 F.3d 214 (1st Cir. 1993) an affidavit which set forth victim's version of rape and followed it with description of victim selecting arrestee's photograph from picture array and positively identifying him as the man who raped her provided probable cause for arrest, even though there were discrepancies between arrestee's appearance and description of the perpetrator.

In *U.S. v. Valez*, 796 F.2d 24 (2nd Cir. 1986), the observing officer's description of cocaine seller was adequately detailed, despite his silence on matter of seller's facial hair, and defendant, who was in immediate area of drug transaction, sufficiently fit description to give another officer probable cause to arrest defendant within short space of time following transaction.

6. NO NEED TO "PRESERVE" PROBABLE CAUSE

Frequently an officer stops (or arrests) a person for a small offense and then continues the investigation and finds probable cause for a major crime. In such cases, the officer often doesn't "charge" the person with the initial, sometimes petty, offense. In the past some judges have ruled that this makes the entire arrest bad because the officer didn't "preserve the probable cause." This is not the law. In *Scott v. State*, 110 Nev. 622, 877 P.2d 503 (1994) the defendant was in a car stopped for an improperly affixed license plate. After the stop it was determined that Scott was an ex-felon and had a gun. He was arrested for that, but no citation was issued. The Nevada Supreme Court said this made no difference in the validity of the stop. In *U.S. v. Woody*, 55 F.3d 1257 (7th Cir. 1995) the court said, "An arrest may be perfectly reasonable even if the police officer ultimately does not charge the suspect with the offense giving rise to the officer's probable cause determination.

7. WHEN WARRANT NEEDED IN ARREST SITUATION

The Supreme Court said in *U.S. v. Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976), that probable cause is sufficient for a lawful arrest in a public place, even if the arresting officer had time to get an arrest warrant. See also, Florida v. White, 526 U.S. 559, 119 S.Ct. 1555 (1999) (Fourth Amendment did not require police to obtain warrant before seizing an automobile from public place when they had probable cause to believe that it was forfeitable contraband), U.S. v. Levine, 80 F.3d 129 (5th Cir. 1996) (Warrantless arrest of bank robbery suspect, in whose bag tellers had placed "bait money" with radio transmitters, was supported by probable cause); U.S. v. Snow, 82 F.3d 935 (10th Cir.1996) (Law enforcement personnel may arrest a person without warrant if there is probable cause to believe that person committed crime); U.S. v. DeMasi, 40 F.3d 1306 (1st Cir.1994) (The Supreme Court has refused to attach significance to the fact that the police had ample time to get an arrest warrant but declined to do so. For an arrest in a public place the only requirement is probable cause); Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (2003) (a warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause); Atwater v. Lago Vista, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001) (stating that "if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

There are two situations where a warrant must be obtained in arrest situations (unless police can prove an emergency or consent exception exists)

both involving entry into premises to arrest. These are the "*Payton* Rule" and the "*Steagald* Rule", *infra*.

(a) THE PAYTON RULE

In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980), the Court held that police cannot make a warrantless non-consensual entry into a suspect's home to make an arrest unless exigent circumstances exist.

In *Payton*, police developed p/c to arrest suspect for murder occurring two days earlier. Police went to suspect's home where lights were on and music playing. When nobody answered their knock at the door, police made entry. Payton wasn't home but shell casing from the murder weapon was in plain view and was seized.

The U.S. Supreme Court ordered this evidence suppressed stating that the privacy interest in a home was very high and police needed either an arrest warrant for Payton or a search warrant for his home in order to enter uninvited.

Although the U.S. Supreme Court has not decided all possible subissues that arise after *Payton* - the following rules have been applied by high ranking State and Federal courts:

(1) **Officers do not need both a search warrant and arrest warrant.** Where police officers discover probable cause to arrest while executing a lawful warrant to search suspect's home, the officer is not required to first obtain a separate arrest warrant, but can arrest suspect immediately in his/her home. See *Mahlberg v. Mentzer*, 968 F.2d 772, 775 (8th Cir. 1992) ("an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and sanctity of the home, and justify the same level of constitutional protection"); *Jones v. City of Denver*, 854 F.2d 1206 (10th Cir. 1988) (Under Federal law, arrests made while officers were legally on premises pursuant to search warrants do not require separate arrest warrants).

The opposite is not necessarily true - an arrest does not necessarily justify a full search of the premises at which the arrest is made. The Nevada Supreme Court has held in situations where no exigent circumstances exist, it is certainly reasonable to require that the police obtain a warrant prior to searching a vehicle or house. See *Howe v. State*, 112 Nev. 458, 916 P.2d 153 (1996) (Held that a surveillance team who witnessed defendant take a garbage bag out the back door and place it in a garbage pail and conveyed that information to police officers knocking on defendant's door, the fact that defendant was sweating while talking to police officers and officers smelled a marijuana odor in the

house was not exigent circumstances to justify a warrantless search of the residence).

The Nevada Supreme Court had defined exigent circumstances as "those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Id.* at 466. Exigent circumstances must be genuine. See *Dunnuck v. State*, 786 A.2d 695 (MD 2001).

- (2) **Home Defined**. Whether a particular place is to be deemed a suspect's "home" will depend upon whether the suspect's association with a particular place provides that suspect with a reasonable expectation of privacy such that he would be justified in believing that he can retreat there, and be secure against governmental intrusion. Such factors to consider include, but are not limited to:
 - a. Length of stay
 - b. Regular use (i.e. sleeps there on a regular basis)
 - c. Relationship to other occupants
 - d. Storing possessions there or receives mail there and
 - e. Payment of rent.

See People v. White, 512 N.E.2d 677 (Ill. 1987).

(3) **Possible** *Payton* **Violations**. The Nevada Supreme Court has held that the *Payton* Rule can be violated even if police don't physically enter the home. See *Walters v. State*, 106 Nev. 45, 786 P.2d 1202 (1990) (Court suppressed statements made by Walters during a 100 mile drive back to the police station even though the police had given Walters his Miranda rights because he was arrested outside his home without an arrest warrant - police had used a helicopter and bullhorn to order defendant out of his home and arrested him on his front lawn).

***(Note: The U.S. Supreme Court overruled this decision in *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640 (1990), holding statements made by a suspect after waving his Miranda Rights were admissible even after a Payton violation as the "Payton rule was designed to protect physical integrity of home, not to grant suspect additional protection for statements made outside of home." *Id.* at 14.).

Other courts have also held an arrest or seizure occurs within a person's home when officers, by means of physical force or show of authority, have in some way restrained liberty of a citizen. See *U.S. v. Azzawy*, 784 F.2d 890 (9th Cir. 1985) (Defendant was arrested within his home without a warrant when police surrounded defendant's trailer and ordered him out with a bullhorn), and *U.S. v. Maez*, 872 F.2d 1444 (10th Cir. 1989) (Defendant was not arrested in a public place when SWAT surrounded his trailer with rifles and ordered him out).

- (4) **Place of Business**. The *Payton* Rule applies to non-public business premises as well as residences. In U.S. v. *Driver*, 776 F.2d 807, 809-810 (9th Cir.1985), the court found a reasonable expectation of privacy and held unlawful a nonconsensual entry and nonexigent, warrantless arrest in a closed office area located on the upper level of a public furniture showroom, noting the area was not exposed or visible to the public and the drug-related arrest was not based on any regulation of the business activities. An occupant of an interior office not open to the general public has a right to be free from warrantless arrest therein absent consent or exigent circumstances
- (5) **Reasonable Belief Defendant Resides There**. Most courts hold in addition to the warrant requirement, police also need "reasonable belief" (which equates to "probable cause" in the 9th Circuit, see *U.S. v. Gorman, infra*) to believe a particular premise is that of the suspect and that the suspect is "home" at the time of police entry. See *U.S. v. Risse*, 83 F.2d 212 (8th Cir. 1996) (Absent exigent circumstances or consent, an arrest warrant does not justify entry into a third person's home to search for the subject of the arrest warrant). The suspect's home means he has common authority or some other significant relationship to the premises even if the premises is owned by a (third) person" *Id.* at 215.

In *Valdez v. Pheters*, 172 F.3d 1220 (10th Cir. 1999), the Court held that the proper inquiry is whether there is a reasonable belief that the suspect resides at the place to be entered ... and whether the officers have reason to believe that the suspect is present. In *U.S. v. Edmonds*, 52 F.3d 1236 (3rd Cir.1995) although "the information available to the agents clearly did not exclude the possibility that the suspect was not in the apartment, the agents had reasonable grounds for concluding that he was there.

However, the 9th Circuit has held that the "reason to believe" standard of *Payton* embodies the same standard of reasonbleness inherent in "probable cause." *U.S. v. Gorman*, 314 F.3d 1105 (9th Cir. 2002). In other words, to arrest a suspect in his own residence under *Payton* officers must have an arrest or

search warrant for the person plus "probable cause" to believe the suspect resides there and is currently present.

However, the distinction may be semantic as both standards are based on 4th Amendment "reasonableness" and common sense under the totality of circumstances. *U.S. v. Diaz*, 491 F.3d 1074 (9th Cir. 2007). In *Diaz*, the 9th Circuit found this reasonableness standard was met where Diaz himself had told government agents that he was usually home during the day. Agents also knew that Diaz worked at home as a mechanic. Agents had visited Diaz's home several times before, and he was absent only one of those times. All of this information suggests that Diaz, on an ordinary day, would be home during daylight hours, which is when the agents came to arrest him. The Court rejected the argument that police must have some specific evidence that the suspect was present at the specific time. Other information and clues existed that Diaz may not be home (no one answered a knock on the door and agents did not see Diaz's vehicle) but this did not alter the decision.

- (6) **No need to have warrant in hand**. Whenever possible officers should have a copy of the arrest warrant, but as long as a fellow officer confirms that the written signed warrant is in existence, this is sufficient. *U.S. v. Buckner*, 717 F.2d 297 (6th Cir. 1983) (Court held that a police arrest of a robbery suspect at his mother's residence was valid even though the police did not have a warrant for his arrest because officer's had knowledge of a valid state bench warrant for unrelated charges). See also FED. R. CRIM. P. 4(d)(3); *U.S. v. Turcotte*, 558 F.2d 893, 896 (8th Cir.1977); *U.S. v. Holland*, 438 F.2d 887, 888 (6th Cir.1971) (The fact that the officers did not have the arrest warrant in hand is of no consequence.)
- (7) **Misdemeanor warrants**. Whenever possible, officers should not make a forced entry into the home in order to serve a misdemeanor arrest warrant. However, NRS 171.138 does state that a peace officer may make entry into a house in order to arrest a suspect on a misdemeanor warrant. See also, *Jones v. State*, 513 So. 2d 8 (Ala. 1986) (Police officer had authority to arrest defendant in his Florida home for a misdemeanor committed outside his presence, even though the actual arrest warrant may not have been in the police officer's possession); *Lyons v. State*, 787 P.2d 460 (Okla. 1989).

In *Hatley v. State*, 100 Nev. 214, 630 P.2d 1225 (1984), the Nevada Supreme Court implied that police could make an in home arrest on a misdemeanor warrant as long as it was not a pretext to gain evidence reference an unrelated felony investigation. See also, *U.S. v. Clayton*, 210 F.3d 841 (8th Cir. 2000) (*Payton* rule applies with equal force to misdemeanor warrants).

(8) **Use of Ruse**. NOTE: You cannot use a ruse to gain entry into premises to avoid the Payton warrant requirement. See *Jones v. State*, 513 So.2d 8 (Ala. 1986); *Lyons v. State*, 787 P.2d 460 (Okla. 1989); *Howe v. State*, 112 Nev. 458, 916 P.2d 153 (1996); *Dunnuck v. State*, 786 A.2d 695 (MD 2001). However, the majority of cases on this issue hold that you can use a ruse to get the subject whom you wish to arrest (without a warrant) to exit the residence.

The rationale of these cases is rock-solid. The purpose of the Payton rule is to prevent warrantless police entries into a residence to arrest. Since police can legally arrest outside a residence with probable cause and without a warrant, what difference does it make if police use a ruse to get the suspect to leave the premises instead of waiting outside until the suspect left on his own? The answer is obvious - no difference and no Payton violation.

The following cases upheld use of a ruse to get person out of premises:

In *U.S. v. Rengifo*, 858 F.2d 800 (1st Cir. 1988), a government agent's telephone call to defendants' motel room warning them that there had been "problems" with a cocaine delivery and that it would be best if they left the room and the area did not improperly avoid requirement for arrest warrant by artificially creating exigent circumstance.

In *U.S. v. Vasiliavitch*, 919 F. Supp. 1113 (ND III. 1996), the Court found that a warrant was not required to arrest defendant pursuant to probable cause in his apartment building parking lot, even though officers used ruse that his vehicle had been damaged to get him to leave his apartment, because at the time the officers used the ruse, defendant was standing in threshold of his apartment building and could have been arrested without warrant, and ruse was reasonable as officers testified that it was used for safety considerations. The Court stated that "courts have found no constitutional violation when police officers use tactics of misinformation to solve crimes." *Id.* at 1117. The Court noted the most prominent case is the Supreme Court's 1969 decision in *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420 (1969) in which Justice Marshall held that an officer's misrepresentation to a murder suspect that his co-conspirator had confessed to the killings was insufficient to make an otherwise voluntary confession inadmissible. The ruse in *Frazier* was substantially more serious in its scope and its consequence than the ruse used in *Vasiliavitch*.

Courts have upheld the use of subterfuge to trick a defendant into leaving his home on many other occasions under circumstances very similar to the ones here. *People v. Witherspoon*, 576 N.E.2d 1030 (Ill. 1991) ("The use of deception to lure a defendant from his home in order to effectuate an arrest without a warrant has been held not to violate fundamental fairness" *Id.* at 332.).

(b) THE STEAGALD RULE

Steagald v. U.S., 451 U.S. 204, 101 S.Ct. 1642 (1981), the U.S. Supreme Court held that while an arrest warrant does permit entry into the suspect's own home to effect the arrest, it does not allow police to enter a third person's home in search of the suspect. Absent either consent or exigent circumstances, police must have a separate search warrant authorizing them to enter the third person's home.

- (1) The search warrant will require not only a showing of probable cause that the suspect is inside the third person's residence, but a showing of why it is reasonable to seek the search warrant and make the entry to arrest as opposed to waiting for suspect to depart and arrest elsewhere. See *U.S. v. Bervaldi*, 225 F.3d 1256, 1267 (Fla. 2000).
- (2) The *Steagald* rule also applies to business offices and other areas where there is a high reasonable and legitimate expectation of privacy. See *U.S. v. Driver*, 879 F.2d 530 (9th Cir. 1985) (Court found that a place of business has a reasonable expectation of privacy and held unlawful a nonconsensual entry and non-exigent, warrantless arrest in a closed office area located on the upper level of a public furniture showroom, noting the area was not exposed or visible to the public and the drug-related arrest was not based on any regulation of the business activities).

Civil Liability

In addition to suppression of evidence, police and/or District Attorneys may be civilly liable for *Payton-Steagald* violations.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986), Pembaur, a doctor, was indicted by grand jury for welfare fraud. Subpoenas were issued for two of his employees and when they failed to appear, warrants were issued for their arrest. The two employees were located at Pembaur's clinic, but he, Pembaur, refused to allow the officers into the clinic in order to serve the warrants. The officers called the District Attorney who advised the officers to "go in and get" the two employees. The officers complied. Pembaur filed a suit under 42 U.S.C. 1983 alleging a violation of his Fourth and Fourteenth Amendment rights. He sued the County, the officers and the District Attorney for 20 million dollars.

The U.S. Supreme Court Held: The DA was implementing "official policy." In this case, the DA had the final authority in such matters, therefore, the municipality "officially" sanctioned the unconstitutional and tortuous

conduct. Thus, the County was liable. (<u>Important note</u>: County and police policy usually resulted in District Attorney making these decisions and a state law granted the District Attorney the authority to give such legal instructions. Such laws and regulations do not exist in Nevada.)

F. PRETEXT ARREST

NOTE: For cases on pretext traffic stops please see section on Automobile Stops and Searches in this manual

Since the U.S. Supreme Court in *Whren v. U.S.*, 517 U.S. 806, 116 S.Ct. 1769 (1996) and the Nevada Supreme Court in *Gama v. State*, 112 Nev. 833, 920 P.2d 1010 (1996) have adopted the "no such thing as pretext" rule for stops, the status of the rule for arrests is unclear. The Court's decisions say that a police officer's motive or subjective thoughts are irrelevant if the officer has a legal basis for the stop.

At the present time there are no clear cut cases from federal or state decisions on the issue of a pretext arrest, i.e.: a valid arrest based on probable cause where the arresting police have an additional subjective reason for making the arrest.

However, the only state high court to reject *Whren* outright is the Washington State Supreme Court. The only intermediate state appellate court to outright reject *Whren* is the New York Appellate Division First Department. In almost every other state, the objective standard acclaimed by Whren has been adopted as law by at least some court. See also *Petrel v. State*, 675 So. 2d 1049 (Fla. Dist. Ct. App. 1996); *People v. Thompson*, 283 Ill. App. 3d 796 (Ill. 1996); *State v. Hollins*, 672 N.E. 2d 427 (Ind. Ct. App. 1996); *State v. Predka*, 555 N.W.2d 202 (Iowa 1996); *State v. George*, 557 N.W.2d 575 (Minn. 1997); *Gama v. State*, 112 Nev. 833, 920 P.2d 1010 (1996); *State v. McCall*, 929 S.W.2d 601 (Tex. Ct. App. 1996); *State v. Ladson*, 979 P.2d 833 (Wash. 1999).

Some pretext arrests lead to custody and/or interrogation for the "other" (usually greater) crime, while others are used to justify a police search of a premises or vehicle.

The cases on this subject are conflicting. Some say that as long as there is a legal basis for the arrest, the additional subjective police reason is not improper but other cases disagree.

There are not enough cases in this subject for this manual to give directions or opinion on the validity of pretext arrests. The following cases have different results, often based on complex factual and legal factors.

In Gama v. State, 112 Nev. 833, 920 P.2d 1010 (1996), the Nevada Supreme Court recognized that the "would" test as applicable to claims of pretext was discredited by the Supreme Court's ruling in Whren v. U.S., 517 U.S. 806, 116 S.Ct. 1769 (1996). *Id* at 1012-13. In Whren, the Court held that the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective. Whren, 517 U.S. at 808-819 (1996). In so doing, the Court recognized that subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis. Id. at 813. Based on Whren 's holding, the Nevada Supreme Court in Gama stated that it was constrained to overrule Alejandre v. State, 111 Nev. 1235, 903 P.2d 794 (1995) and Taylor v. State, 111 Nev. 1253, 903 P.2d 805 (1995) to the extent that each required application of the "would" test to pretext claims under the Fourth Amendment and the Nevada Constitution, article 1, section 18 (protecting against unreasonable seizures and searches). Gama, 112 Nev. at 836. The Nevada Court then determined that the "could" test was the proper test to apply where a claim of pretext is made. *Id.* at 836-37.

In *U.S. v. Willis*, 61 F.3d 526 (7th Cir. 1995), the court said that if an arrest is used merely as a pretext to search for evidence, there is a 4th Amendment violation. However, the Circuit Court's test for reviewing the lawfulness of a stop or arrest that is alleged to be pretextual was set forth in *U.S. v. Trigg*, 878 F.2d 1037 (7th Cir. 1989) which requires an objective analysis of the circumstances; if there was probable cause to make the stop, and if the stopping officer was acting with authority, the stop is not pretextual. "[S]o long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional." *Id.* at 1041; see also *U.S. v. Quinones-Sandoval*, 943 F.2d 771 (7th Cir. 1991); *U.S. v. Rivera*, 906 F.2d 319 (7th Cir.1990).

In *Terrell v. Petrie*, 763 F. Supp. 1342, (E.D. Va. 1991) the Court held that, "It is clearly established that an arrest effected as a pretext for an otherwise unlawful search is constitutionally defective." *Id.* at 1345. The Court further noted that considering this issue have developed an objective test to determine whether an arrest is merely a pretext. The Court should consider two questions. First, was there an ongoing investigation unrelated to the count charged in the arrest warrant? Second, would a reasonable officer have made the arrest in the

absence of the pretextual motive? The Court cited to both *U.S. v. Belcher*, 577 F. Supp. 1241 (E.D.Va. 1983) and *Horne v. Commonwealth*, 230 Va. 512 (1986).

Terrell involved an arrest that was ostensibly based upon a state-issued warrant for failure to pay \$60 in court costs in 1982. Plaintiff, who worked for the IRS, claimed the arrest was a pretext to search for illegal drugs. IRS employees, who conducted the search or were supervisors, conceded that they suspected Terrell of drug activity. Thus, the court found the arrest to be pretextual and in violation of the 4th Amendment. NOTE: The Court based its argument solely on law dated pre-Whren.

In *Hatley v. State*, 100 Nev. 214, 678 P.2d 1160 (1984), the defendant was arrested on a misdemeanor bench warrant. He claimed that the police were nevertheless using it as an impermissible "pretext" to arrest appellant on the burglary charge. "This contention, if true, would at least arguably entitle appellant to relief." *Id.* at 217. See also *Taglavore v. U.S.*, 291 F.2d 262 (9th Cir.1961) (where police officers use misdemeanor warrant as a pretext to arrest a defendant for a felony narcotics offense and to search the defendant for narcotics, both the arrest and the ensuing search were found to be illegal).

In *U.S. v. Hudson*, 100 F.3d 1409 (9th Cir. 1996), the court stated an arrest may not be used as a pretext to search for evidence without a search warrant which would ordinarily be required by the Fourth amendment, but did uphold a felony arrest with an arrest warrant at a residence where the federal police thought that the arrestee might have contraband. In making the arrest, federal police did a search incident to arrest, found methamphetamine and a gun, got a search warrant and obtained more contraband and evidence.

This case is an example of the confusion that can exist concerning pretext arrests.

In *U.S. v. Causey*, 834 F.2d 1179 (5th Cir. 1987), police suspected Causey in a bank robbery but had no P/C to arrest and question him on that case. Police did have a bench warrant for his FTA on a petit larceny charge and arrested him on that. He was Mirandized and confessed to the robbery. The Court upheld the confession, holding that decisions of the U.S. Supreme Court make it clear that the officer's subjective intent or motivation is irrelevant. What counts is whether there was an objective basis for the officer's actions. See also *U.S. v. Cannon*, 29 F.3d 472 (9th Cir. 1994)

In *U.S. v. Trigg*, 878 F.2d 1037, 1041 (7th Cir.1989), the Court concluded. "We believe that the reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable

cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is reasonable under the Fourth Amendment. In other words: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional. The same ruling was held in *U.S. v. Kordosky*, 921 F.2d 722 (7th Cir. 1991).

In *Holland v. City of Portland*, 102 F.3d 6 (1st Cir. 1996), police subjective motives in arresting motorist, as alleged pretextal to investigate more serious crimes, did not affect validity of an arrest based on motorist's admitted statutory violation in refusing to provide identifying information (license) to police.

In *Scarborough v. State*, 621 So.2d 996 (Ala. 1992), the court upheld the arrest of a person suspected of murder based on a misdemeanor arrest warrant.

In Scarborough, police lacked probable cause to arrest defendant for murder as the only information available to them was that defendant was seen talking to victim outside victim's apartment wherein murder occurred at least two hours before the victim was found dead. However, there was no evidence that defendant was seen either entering or leaving victim's apartment, that victim and defendant were arguing, or that there was some hostility between the two. The police had attempted on numerous occasions to talk with defendant but were never able to make contact. The police officer discovered that the defendant had an outstanding bench warrant for failure to pay his fine on a ticket for driving without his licenses so he sent the fugitive team to arrest defendant. After defendant was placed into custody and brought back to police headquarters, he confessed to killing the victim after being Mirandized and told he did not have to answer their questions. The Court held that the action of police in arresting murder suspect under the outstanding misdemeanor arrest warrant, intending to question suspect solely about murder, did not render confession to murder inadmissible nor the arrest illegal as the conduct of police was objectively reasonable.

V.

OTHER FOURTH AMENDMENT INTRUSIONS (SEARCH & ENTRIES)

A. SEARCH INCIDENT TO ARREST ("SITA")

(1) In General

A SITA is a "policy justified" search in the sense that it does not require its own justification in terms of probable cause or reasonable suspicion. All that is required is a lawful custodial arrest and a SITA can occur.

In *Illinois v. LaFayette*, 462 U.S. 640, 103 S. Ct. 2605 (1983), the U.S. Supreme Court said, "The authority to search the person incident to a lawful custodial arrest, while based on the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found on the person of the suspect ... the arrest being lawful means the SITA requires no additional justification." *Id.* at 645.

In LaFayette, *supra*, the defendant was arrested for disturbing the peace and was taken to the police station. The police department had a routine booking procedure that required officers to inventory "everything" in the possession of an arrested person. *Id.* at 648. Pursuant to that procedure, an officer emptied the contents of the defendant's shoulder bag and discovered illegal drugs. In defending the resulting drug possession charges, the defendant argued that the search of his shoulder bag violated his Fourth Amendment rights. Ultimately, the Supreme Court rejected that argument, holding that it is reasonable for the police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at the police station incident to booking and jailing the suspect.

In *U.S. v. Robinson*, 414 U.S. 218, 94 S. Ct. 467 (1973) the Supreme Court said all custodial arrests from murder to traffic violations are equal in justifying SITA.

However, the *Robinson* "bright-line rule" does not apply to an encounter similar to a routine traffic stop in which a police officer issues only a citation or summons. Because the nature and duration of such an encounter are significantly different and less threatening than in the case of an officer affecting a custodial arrest, the rationales justifying a full field-type search are not sufficient to authorize such a search incident to the issuance of a citation.

SITA requires a lawful "custodial" arrest and does not apply to citation situations. *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484 (1998). The rationale for the "search incident to arrest" exception (the need to discover and preserve evidence) does not apply when officer, having probable cause to make custodial arrest for speeding, issues a citation instead. *Id*.

SITA requires a "lawful" arrest which means lawful under the Constitution (ie. supported by probable cause), but not that it has to be lawful under state law. *Virginia v. Moore*, 128 S.Ct. 1598 (2008). Restrictions on arrests for minor offenses are purely a matter of state law because the Fourth Amendment only requires probable cause without regard to the severity of the offense. *Id.* So, if officers do in fact make a probable cause arrest for a minor traffic offense (even in violation of state statute or policy), it is "lawful" under the Constitution and a SITA is permissible. *Id.* However, states are free to provide greater protection than the Federal Constitution and a violation of a state law or policy will have its own consequences beyond suppression of evidence.

In *State v. Bayard*, 119 Nev. 241, 71 P.3d 498 (2003), the Nevada Supreme Court held that an officer could not arrest and search a person incident to minor traffic violations (ie. illegal left turn and lane change). Although NRS 484.795 gives an officer discretion to arrest, it is an abuse of that discretion unless there are "special circumstances" that demonstrate that a citation will not satisfy society's interests. This is to spare the driver the humiliation of arrest.

In *Morgan v. State*, the Nevada Supreme Court explained that "special circumstances" include probable cause that criminal activity is afoot and arrest is mandatory if the person does not furnish proper identification or the officer has reasonable and probable grounds to believe the person will disregard the citation." *Morgan v. State*, 120 Nev. 219, 220, 88 P.3d 837, 838-39 (2004). Thus, the Court upheld Morgan's arrest for suspended driver's license per department policy and a history of FTA's even though Morgan cooperated with the police officer, identified himself, and never engaged in conduct indicating that he would fail to honor a traffic summons. In light of Morgan's prior conduct of failing to pay fines or appear in court, the police officer's decision to arrest Morgan was not arbitrary or unreasonable.

(2) Scope of SITA

Since the SITA is automatic with a lawful custodial arrest, the legal issues in this area involve the scope of SITA. How soon must it occur? How far can it go in terms of area and intrusion? The following cases provide some guidelines but officers should realize that the more time goes by and the further

away from the exact place of the arrest -- the harder it would be for the arrestee to get into the area searched and the less likely it will be a valid SITA.

(a) Time

The general rule is that the SITA must be "contemporaneous" with the arrest. It is axiomatic that a SITA cannot precede an arrest in providing the justification for the arrest, but if the justification exists already (i.e. - police had P/C before the SITA) then the fact that the formal arrest immediately followed the SITA made no difference. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556 (1980); *Rose v. State*, 86 Nev. 923, 478 P.2d 573 (1970) (Seizure of stolen items without warrant from defendant's automobile was proper where seized items were in plain view, identified by burglary victim as fruits of alleged burglary and seizure was incidental to and contemporaneous with defendant's arrest).

Although the search must be contemporaneous, courts provide police a brief cushion of time until they have gained complete control of the situation. *U.S. v.* \$639,558 in *U.S. Currency*, 955 F.2d 712 (D.C. Cir. 1992). There is no prohibition against a reasonable delay between the elimination of danger and the search. *U.S. v. Han*, 74 F.3d 537 (4th Cir. 1996). A search incident to arrest must be contemporaneous but not necessarily immediate. See *U.S. v. Willis*, 37 F.3d 313 (7th Cir. 1994) (Officer's search of defendant's car incident to arrest was permissible notwithstanding defendant's confinement to police car; at time of his arrest, both defendant and his vehicle were near school building, one car door stood wide open, and there were many individuals who were congregated in schoolyard near vehicle and thus, it was reasonable for police to have believed that defendant or others could possibly gain access to weapon or destroy evidence in vehicle at time of defendant's arrest).

In *U.S. v. Johnson*, 114 F.3d 435 (4th Cir. 1997), the Fourth Circuit applied Han to the facts in that case stating that (1) the car was within Johnson's immediate control at the beginning of his encounter with the officers; (2) the search was conducted at the scene of the arrest, (3) that the officers moved the car to the front of the shopping center mall into a better lighted area; and found that the delay between the elimination of the danger--Johnson-- and the search was not unreasonable.

(b) Place searched

In *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034 (1969), the U.S. Supreme Court held that police could not search areas inside a house outside the "immediate control" of the suspect at the time of the lawful arrest. Further,

police are not allowed to simulate circumstances justifying a SITA merely by bringing the item they wish to search into the area near the person arrested or vice versa. See *U.S. v. Perea*, 986 F.2d 633 (2nd Cir. 1993). However, if the suspect voluntarily asks to move about his premises (to get a coat or other clothes, etc.), the officer can monitor the arrestee's movements and SITA may be valid at another location. See *Washington v. Chrisman*, 455 U.S. 1, 102 S. Ct. 812 (1982) (holding that an officer may accompany an arrested person into the arrested person's residence for the purpose of ensuring officer safety).

Items "immediately associated with the person" can be searched incident to the arrest of the person including a woman's shoulder bag regardless of whether on her shoulder or on the ground a few feet away. See *U.S. v. Nelson*, 102 F.3d 1344 (4th Cir. 1996) In *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981), the Supreme Court admitted cocaine found in the zipped pocket of a jacket on the back seat of a car, even though the officer removed the occupants from the car and separated them from one another before he searched the car.

However, the Nevada Supreme Court in *Camacho v. Nevada*, 119 Nev. 395, 75 P.3d 370 (2003), declined to follow *Belton* and held that under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest. The Court followed the reasoning of *State v. Harnisch*, 113 Nev. 214, 931 P.2d 1359 (1997) (*Harnisch I*) (stating that search incident to arrest exception evolves from need to disarm and prevent destruction of evidence and, thus, does not apply where person in custody and removed from vehicle); and *Greenwald v. Nevada*, 109 Nev. 808, 858 P.2d 36 (1993) (The authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed.)

In *Camacho*, police, through an informant, arranged to purchase one pound of methamphetamine from Camacho at a Wal-Mart parking lot in Reno. Police planned to arrest Camacho as soon as he entered the parking lot, to search and seize his vehicle, and institute forfeiture proceedings against the vehicle. Police did not seek or obtain a search warrant for the vehicle. Camacho then entered the parking lot in his vehicle, alone, and two marked police units had Camacho's vehicle pull into a marked parking space for Wal-Mart customers. Police removed him from his vehicle, handcuffed him, and escorted him away from the car. A few moments later, a detective briefly searched the "immediate area" of Camacho's vehicle without Camacho's consent. The detective recovered a white plastic grocery bag beneath the driver's seat containing three smaller plastic bags filled with an off-white, rocky, powdery substance. Camacho argued that because police removed him from his vehicle several minutes before the search and he was handcuffed and disarmed, he could neither destroy nor

conceal evidence and police could not rely on the search incident to arrest exception. The Nevada Supreme Court agreed.

In *Greenwald v. Nevada*, 109 Nev. 808, 858 P.2d 36 (1993), the Nevada Supreme Court held that the search of Greenwald's motorcycle after Greenwald was safely locked away in a police car was not a valid search incident to arrest because there was no conceivable need to disarm him or to prevent him from concealing or destroying evidence. See also *Rice v. State*, 113 Nev. 425, 936 P.2d 319 (1997) (Defendant's backpack was not validly searched incident to defendant's arrest for operating bicycle without headlight and carrying concealed weapon, where defendant was placed in patrol car before officer searched backpack).

However, other district courts appear to disagree with the Nevada Supreme Court interpretation. In *U.S. v. Cotnam*, 88 F.3d 487 (7th Cir. 1996), the Seventh Circuit found it OK to search arrestee's jacket laying a few feet away at arrest. Similarly, in *U.S. v. Ortiz*, 84 F.3d 977 (7th Cir. 1996), the Seventh Circuit found it OK to push button on pager found on defendant at time of arrest revealing numeric messages.

Some courts allow a SITA of a locked area or container. See *U.S. v. Gonzales*, 71 F.3d 819 (11th Cir.1996) (holding that an automobile glove compartment and leather bag found inside were "containers" that could be searched incident to lawful arrest of driver).

However, if the arrestee is handcuffed, in police custody and has no chance of unlocking and opening the container, it seems that searches of locked containers require a search warrant or other exception (such as inventory search or consent).

In *U.S. v. Tarazon*, 989 F.2d 1045 (9th Cir. 1993), the Ninth Circuit held that police could search a desk drawer where defendant was sitting at time of arrest even though he was handcuffed. In *U.S. v. Hudson*, 100 F.3d 1409 (9th Cir. 1996), the Ninth Circuit found it OK to search a rifle case at the feet of person arrested even though he was removed from the room 3 minutes earlier. In *U.S. v. Horne*, 4 F.3d 597 (8th Cir. 1993), the Eighth Circuit held valid a search of a seat where defendant was arrested even though he was handcuffed.

(c) Arrestee Handcuffed

Every case decided in SITA law says that it makes no difference whether the person was in handcuffs at the time of the SITA as long as the other

SITA requirements were met. *Chimel v. California*, 395 U.S. 752 (1969); *U.S. v. Helmsetter*, 56 F. 3d 21 (5th Cir.1995); See also cases cited above.

(d) Automobiles:

See section on automobile stops and searches in this manual.

B. INVENTORY SEARCH

(1) In General

This section deals with generic and basic rules for inventory search cases. The impound-inventory of vehicles is located in the section of this manual concerning automobile stops and searches.

An inventory search is also a "policy justified" search in the sense that it requires no probable cause or reasonable suspicion in any given case, but is lawful if triggered by a lawful impoundment of property.

In South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976) the court held that after the defendant's car was lawfully towed for a traffic offense, the discovery of drugs in that car, which occurred during a routine inventory search, was admissible. The Court said this was a reasonable search because (1) it protected both the police (from damage claims) and (2) the citizen (from loss of property) and it was not a pretext search for evidence. Other cases say (3) guarding the police from danger is an additional policy consideration. U.S. v. Lomeli, 76 F.3d 146, 148 (7th Cir. 1996). This would probably include potential safety hazards (i.e., gasoline containers, flares, etc).

In *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605 (1983), the suspect was arrested, and during a station house search drugs were found in a bag he was carrying at the time of arrest. The court ruled the search was permissible. Even though the police could use less intrusive means - i.e. - put the whole bag in inventory without checking contents, police do not have to do so and have legitimate reasons to do thorough inventory search.

In *U.S. v. Jenkins*, 876 F.2d 1085, 1088-89 (2nd Cir. 1989), the court addressed an inevitable discovery claim by the government, and held

It is true, assuming that the government could have taken custody of Jenkins' suitcase and transported it to FBI headquarters, that an inventory search, conducted by government agents pursuant to FBI policy, may have been permissible....However, it is also true that, before an inventory search is

permissible, the government must have legitimate custody of the property to be inventoried, either as a result of lawful arrest, or by some other method. Here the government has not yet shown any legitimate custody. (citations omitted)

A lawful inventory search can be made of any items in the possession of the arrestee whether they are locked, unlocked or even wallets and other such items.

In *U.S. v. McCroy*, 102 F.3d 239, 240-41 (6th Cir. 1996), the court held that:

Although defendant's wallet was originally examined...[when the suspect was arrested], the pawn shop tickets that led to the stolen rifle were uncovered during an inventory search at the police station....[T]he rationale justifying an inventory search differs somewhat from that of a search incident to arrest, although it, too, falls outside the warrant requirement:

At the stationhouse, it is entirely proper for the police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house.... Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure."

Even though he was never "jailed" but was issued a citation and released, at the time of the search had been placed in a holding cell while he was checked for outstanding warrants, and therefore "[i]t was by no means certain that defendant would be released with a citation

(2) Standard Police Policy Required

In *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738 (1987), police arrested suspect for DUI and impounded car. Police searched car for inventory including closed backpack where they found drugs. The court held that the opening of a closed container was allowed as part of an automobile inventory search. This decision presupposed the existence of an established police standard procedure, and the absence of bad faith on the part of the police (inventory was not a pretext to an investigatory search).

In *Florida v. Wells*, 495 U.S. 1,110 S.Ct. 1632 (1990), a Florida State Trooper stopped person for speeding then arrested the defendant for DUI, and the defendant's car was impounded. A locked suitcase in the trunk was forced open and found to contain a large amount of marijuana. The Court held that the evidence was to be suppressed. The police department must have a standard policy regarding the opening of containers and conducting an inventory search. This is because an inventory search must not be a ruse for general search for evidence. If the police agency does not have a standard policy (the Florida Highway Patrol did not), then the search is insufficiently regulated and the officer has too much discretion, thereby violating the 4th Amendment. *See also Weintraub v. State*, 110 Nev. 287, 871 P.2d 339 (1994) ("The inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster.") *Id.* at 288.

In *State v. Filkin*, 494 N.W.2d 544, 546 (Neb. 1993) Filkin was lawfully arrested by police. She had her purse with her when transported to the jail. "[T]he standard operating procedure at the...jail was to inventory property 'to see that there are no contraband objects, and, also, for an accurate record for when that prisoner is released, so that the prisoner gets everything back that they brought in with them." The drugs found in her purse were admissible at trial. The same ruling was reached in *U.S. v. Akins*, 995 F. Supp. 797, 811 (M.D. Tenn. 1998)("The admission of the wallet and the \$3,000 cash can be justified as an inventory search subsequent to arrest.").

The inventory search must produce an actual inventory. *Weintraub v. State*, 110 Nev. 287, 289, 871 P.2d 339 (1994)

Based on the above case law, it is clear that an inventory search is allowed when the police have legitimate custody of property, but the search must be conducted pursuant to established routine or standardized policies, and that a written policy is the best means to have a standardized policy to survive the scrutiny of a reviewing court.

C. CONSENT SEARCH

(1) In General

A legal consent search occurs when a person who has or shares an expectation of privacy in a place, vehicle, container or other location freely and voluntarily allows someone else (police) to intrude into that place. Police do not need probable cause or reasonable suspicion to initiate a request for consent, but the person consenting does have to be told what the object of the search is. The

consent does not have to be in writing. Since a consent search is warrantless, the burden is on the police and the District Attorney to show that it is valid

See section in this manual "Search Warrants" for cases on consent to search computers.

(2) Freely and Voluntarily Given

Although in most Fourth Amendment situations, an "objective" test is used to determine the legality of police actions, in consent searches the test has both "objective" and "subjective" factors. The U.S. Supreme Court has said that whether consent is voluntary depends on the "totality of the circumstances" of the police-citizen encounter in which consent is given. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973). The "totality" involves things the police do (objective factors) and things about the person consenting (subjective factors).

Very few cases list all of the possible factors because the case decisions are tied to the facts involved in the specific case being decided. It is important to remember that all of the cases on this subject state that no single factor is controlling as to whether the search was voluntary. The following cases are some examples:

In *U.S. v. Torrez-Sanchez*, 83 F.3d 1123, 1129 (9th Cir. 1996) the court held that the factors to be considered are (1) whether he was in custody, (2) whether the officer had his gun drawn, (3) whether *Miranda* warnings were given, (4) whether he was told he had a right not to consent and (5) whether he was told a search warrant could be obtained. The court also noted that that "the fact that some factors are not established does not automatically mean that the defendant's consent to search was not voluntary." *Id.* at 1130. These five factors are used in the Ninth Circuit for evaluating consent. See *U.S. v. Cormier*, 220 F.3d 1103, 1112 (9th Cir. 2000)(" This Court considers the following five factors in determining whether a person has freely consented to a search: (1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was told he had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained.").

In *U.S. v. Tompkins*, 130 F.3d 117 (5th Cir. 1997), the court held that voluntariness of consent to search is determined from the totality of circumstances surrounding the search; relevant, though not dispositive, factors include (1) the voluntariness of the defendant's custodial status, (2) presence of coercive police procedures,(3) extent and level of cooperation with police,(4)

awareness of his right to refuse to consent, (5) education and intelligence, and (6) defendant's belief that no incriminating evidence will be found. *Id.* at 121.

In *U.S. v. Crowder*, 62 F.3d 782 (6th Cir. 1995), the court noted that the totality of the circumstances include (1) evidence of minimal schooling, (2) low intelligence, (3) whether he was warned of his rights, (4) his age, (5) length of detention, (6) whether there was repeated and prolonged questioning and the use of physical punishment such as depriving the defendant of food or sleep, and (7) knowledge of his right to refuse to consent. The defendant's knowledge to refuse consent is only one factor and is not dispositive. *Id.* at 787. The same ruling was found in *U.S. v. Navarro*, 90 F.3d 1245 (7th Cir. 1996).

While it is true that immaturity, lack of sophistication and mental or emotional state are factors in a consent search, these factors must be clear to police and strong and convincing in order to suppress otherwise valid consent.

In *U.S. v. Dukes*, 139 F.3d 469 (5th Cir. 1998), the court held that a witness was able to consent to having his conversation recorded, but said that "[i]n order to give valid consent, the person consenting to the recording of his conversations must be mentally competent to understand the nature of his act....Further, the act of consent must be the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions." *Id.* at 472 (quotations and citations omitted). The same ruling was had in *U.S. v. Gipp*, 147 F.3d 680, 686 (8th Cir. 1998)(use of drugs not enough to invalidate consent where there was undisputed evidence that the defendant appeared rational in almost all respects and was attempting to cooperate with police).

In *U.S. v. McIntyre*, 997 F.2d 687, 696 (10th Cir. 1993) the court found that the defendant's consent to search airplane carry-on bag was voluntary, despite fact that (1) he was not told that he need not consent to search and (2) that he claimed to have below average intelligence; not being told that he need not consent was only one factor, and it was not clear that police knew or should have known about alleged mental deficiencies and circumstances indicated to the contrary since he was capable of giving and traveling under assumed name and was capable of running large drug operation.

(3) Specific Factors Concerning Voluntariness

(a) Police do not need probable cause or reasonable suspicion to initiate a consent request, as the Nevada Supreme Court held in *State v. Burkholder*, 112 Nev. 535, 538, 915 P.2d 886 (1996)("The police may randomly-- without probable cause or a reasonable suspicion--approach people in public places and

ask for leave to search."); *McIntosh v. State*, 753 S.W. 2d 273, 275 (Ark. 1988)(initial stop was legal, and consent to search was valid), *State v. Allen*, 603 A.2d 71, 73 (1992)(reasonable or articulable suspicion of presence of contraband not required to request consent to search), *State v. Everson*, 474 N.W. 2d 695, 703 (N.D. 1991)(officer did not need reasonable suspicion that defendant was engaged in drug trafficking in order to request consent to search vehicle for drugs), *State v. Abreau*, 608 A.2d 986, 989 (N.J. 1992)(no constitutional requirement of reasonable suspicion as a prerequisite to seeking consent to search), *State v. Dreps*, 558 N.W.2d 339, 341 (South Dak. 1996)(voluntary consent makes probable cause unnecessary).

(b) Police do not have to tell person he can refuse consent

This was the direct holding of the United State Supreme Court in *Schneckloth*, *supra*, and was also the holding of the Nevada Supreme Court in *State v. Burkholder*, *supra*.

(c) Mention of "search warrant" may weigh slightly against consent but is not fatal unless there is no probable cause to justify the possibility of search warrant

In *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968) the U.S. Supreme Court held that where police told an elderly woman that "we have a warrant" when they did not made her consent invalid because she was merely acquiescing to a show of police authority.

- (1) If police don't have or are unsure of probable cause, police should never mention search warrant to the consent giver. If the consent giver brings up the search warrant question and there is no probable cause (or the police are unsure of probable cause) the police should not say that if the person does not consent, the police will get a search warrant. If there is not previously documented probable cause the consent will be held invalid. Police can, however, say that they may "ask," "seek" or "request a judge" for a search warrant. State v. Cuellar, 96 Nev. 68, 605 P.2d 207 (1980), U.S. v. White, 979 F.2d 539, 542 (7th Cir. 1992)("Baseless threats to obtain a search warrant may render consent involuntary....When the expressed intention to obtain a warrant is genuine, however, and not merely a pretext to induce submission, it does not vitiate consent."), and U.S. v. Iglesias, 881 F.2d 1519 (9th Cir. 1989).
- (2) If there actually was independent probable cause which would have supported a search warrant, the vast majority of courts hold that police telling the consent giver that a search warrant can be obtained does not negate consent (as long as the other police conduct and statements are non-coercive

The following cases clearly show the difference between (1) & (2) above.

In *U.S. v. Scheets*, 188 F.3d 829 (7th Cir. 1999), the defendant consented to a search of his motel room after being told the agent would obtain a search warrant and search the room anyway. The court held "[a]s we made clear...[previously] when the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission, it does not vitiate consent. In the present case, Agent Brown not only expressed a genuine intent to obtain a warrant to Scheets, he actually made the necessary arrangements and had to cancel these arrangements after Scheets consented to the search." *Id.* at 840 (quotations and citations omitted).

In *U.S. v. Talkington*, 843 F.2d 1041 (7th Cir.1988), the court held that "[w]hile the threat to obtain a search warrant, by itself, does not vitiate a voluntary consent, it should at least be addressed as one factor under the "totality of all the circumstances" test enunciated by the Supreme Court in Schneckloth, 412 U.S. at 227, 93 S.Ct. at 2047." *Id.* at 1049. The agent notifying a person that a warrant can be obtained does not render consent involuntary unless the threat to obtain a warrant is baseless. *See also U.S. v. Dennis*, 625 F.2d 782, 793 (8th Cir. 1980); *U.S. v. Vasquez*, 638 F.2d 507, 524 (2nd Cir.1980)("Freedom of choice is deemed non-existent, however, if the officers have claimed official authority to conduct the search....And if the individual has merely acquiesced in a show of authority, he should not be found to have consented.").

In *U.S. v. Kaplan*, 895 F.2d 618 (9th Cir.1990) the court drew the distinction between the scenarios above. The court noted that "[c]ourts have drawn distinctions where, on one hand, an officer merely says that he will attempt to obtain a search warrant or whether, on the other hand, he says he can obtain the search warrant, as if it were a foregone conclusion. However, consent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue." *Id.* at 622.

In *U.S. v. Evans*, 27 F.3d 1219 (7th Cir. 1994), the court found that "[t]he consent is not tainted because the agents informed Glenn that they would obtain a search warrant if Glenn would not consent to a search. Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but when the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission, it does not vitiate consent." *Id.* at 1231. When the agents informed Glenn that they could get a search warrant, they had sufficient facts to obtain the warrant. "There was a reasonable probability that evidence of the car theft operation would be found on Glenn's

premises. The agents could have obtained a search warrant, thus expressing their intention to do so to Glenn did not vitiate Glenn's consent." *Id. See also U.S. v. Salvo*, 133 F.3d 943, 954-955 (6th Cir. 1998) (" There is no evidence on the record that the agents' statements that they would secure a search warrant if Salvo did not consent were baseless or a pretext to coerce Salvo, and, therefore, the statements do not render Salvo's consent involuntary."),

In *McMorran v. State*, 118 Nev. 379, 46 P.3d 81 (2002), the Nevada Supreme Court held where officers had no evidence of criminal activity other than an anonymous telephone tip, a police officer's threat that two officers would remain in a motel room while a third officer obtained a search warrant for the room rendered the consent to search the room involuntary. "Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but when the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission, it does not vitiate consent. However, intimating that a search warrant will automatically issue is inherently coercive." 46 P.3d at 84 (citations and quotations omitted). The Court did make it clear, however, that "[i]f officers have probable cause to believe that a crime has occurred or is about to occur, they may lawfully secure relevant premises and seek a search warrant, and if they threaten to do so and as a result obtain consent to search, such a threat does not render the consent involuntary." 46 P.3d at 87.

(d) Mere submission to police does not equal consent

This is a difficult concept because the cases decided by numerous courts indicate that very small facts sometimes make the difference between "voluntary" action by the consenting party and "submission" to police authority.

In *U.S. v. Gonzales*, 71 F.3d 819 (11th Cir.1996) the court ruled that "[f]or consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice. Thus, consent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into her privacy is contemplated if she does a certain thing, and then (b) proceeds to do that thing. In recognition of this fact, we believe, as a matter of law, it cannot be said that failure to object to a search equals consent to the search." *Id.* at 829-830 (quotations and citations omitted). Courts are hesitant to find implied consent by silence especially in entry into the home. *Id. See also U.S. v. Jaras*, 86 F.3d 383 (5th Cir. 1996)("We do not think that consent may reasonably be implied from Jaras's silence or failure to object because Officer Mitchell did not expressly or impliedly ask for his consent to search.")..

In *U.S. v. Shaibu*, 920 F.2d 1423 (9th Cir. 1990), the police went to the defendant's apartment to look for another suspect. The defendant had opened the

apartment door and initially walked towards the officers in the hallway. One of the officers identified himself and asked if the other suspect was in the apartment. The defendant went back into the apartment, but did not close the door. The officers followed him inside without asking permission to enter, and the defendant did not ask them to leave, wait outside the apartment, or produce a search warrant. The court noted that in limited circumstances it is possible to infer consent from a cooperative attitude from a defendant, but they were unwilling to do so in this case. "Even if there was not implicit coercion in fact here, the government may not show consent to enter from the defendant's failure to object to the entry....We hold that in the absence of a specific request by police for permission to enter a home, a defendant's failure to object to such entry is not sufficient to establish free and voluntary consent. We will not infer both the request and the consent." *Id.* at 1427-1428.

In *Howe v. State*, 112 Nev. 458, 916 P.2d 153 (1996), police suspected Howe of possession of marijuana and knocked on his door. Howe opened the door and was very nervous when officers identified themselves and told him why they were there. He told the police that was not a dope dealer and that he did not do dope himself. Police asked for permission to enter and the defendant told them "no, no, no." Police smelled burning marijuana and entered the residence. There was evidence that the defendant stepped aside. The Nevada Supreme Court said there was no consent to enter, stating that even if Howe had not said "no," stepping away from the doorway, without more, does not demonstrate consent. *Id.* at 464. "The law does not require that the occupant of a home physically block the officers' entry in order to indicate lack of consent to their entrance." *Id.* (Note: see the *Howe* case in the Emergency section. No emergency entry here.).

(e) Custody alone is not enough to demonstrate coerced consent to search

When a person giving consent is not in custody (*Terry* Stop or consensual contact) giving *Miranda* warnings has little or no significance as to consent.

A person who is in custody can give valid consent, and although no single factor is dispositive, *Miranda* warnings have some significance in determining voluntariness in a custodial setting. Although *Miranda* warnings to a person in arrest level custody are not required to make the arrestee's consent valid, it is a factor to be considered. *See U.S. v. Oguns*, 921 F.2d 442, 448 (2nd Cir. 1990), *U.S. v. Blakeney*, 942 F.2d 1001, 1016 (6th Cir. 1991), *U.S. v. Jones*, 846 F.2d 358, 360-361 (1988); *U.S. v. Valencia*, 913 F.2d 378, 381 (7th Cir. 1990), *U.S. v. Knight*, 58 F.3d 393, 397 (8th Cir. 1995).

Also, if a person has been arrested and given Miranda warnings and asked for a lawyer (or chose to remain silent) this does not preclude the police from asking the arrestee for consent to search. Although some jurisdictions have reached a different view which misunderstands the difference between interrogation and asking for consent to search, most courts agree that police asking for consent to search is not interrogation.

In U.S. v. Henley, 984 F.2d 1040 (9th Cir. 1993), the court held that while the defendant was not advised of his rights before consenting to the search, a valid consent to search need not be preceded by Miranda warnings. "The mere act of consenting to a search--"Yes, you may search my car"-- does not incriminate a defendant, even though the derivative evidence uncovered may itself be highly incriminating. Therefore, we have held that a consent to a search is not the type of incriminating statement toward which the Fifth Amendment is directed. It is not in itself evidence of a testimonial or communicative nature." Id. at 1042-1043 (quotations and citations omitted). However, the court also held that a statement of ownership of property is subject to Miranda warnings when it is in response to police questioning. "The police may--and should--continue establishing ownership or authority before conducting consent searches. We hold only that such statements of ownership may not be admitted into evidence where police should have known that the response was likely to incriminate the defendant, unless, of course, Miranda warnings were first given." Id. at 1043-1044.

U.S. v. Shlater, 85 F.3d 1251 (7th Cir. 1996) The defendant was arrested, given Miranda warnings, and requested a lawyer. Police then asked him for, and received, consent to search his residence. The Court ruled "we have held that a consent to search is not a self-incriminating statement, and therefore, a request to search does not amount to interrogation. This view comports with the view taken by every court of appeals to have addressed the issue....Thus we hold that the consent to search was not a custodial interrogation triggering the previously invoked *Miranda* right to counsel." *Id.* at 1256 (quotations and citations omitted). See also *U.S. v. LaGrone*, 43 F.3d 332, 336 (7th Cir.1994) ("[t]he Supreme Court has held that a defendant's invocation of his right to counsel for one purpose is not automatically an invocation of his right to counsel for other purposes.") (*citing McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)).

(f) Use of tricks or deceit

In looking at this concept, we have to distinguish between "deceit as to identity" and "deceit as to purpose."

Deceit as to identity usually has no effect on the validity of consent. This was the specific holding of the U.S. Supreme Court in *Lewis v. U.S.*, 385 U.S. 206, 87 S.Ct. 424 (1966) where the defendant invited an undercover police officer into his residence to sell the officer drugs. The Court stressed that the defendant voluntarily admitted the officer and the officer acted within the scope of the invitation.

In U.S. v. Bramble, 103 F.3d 1475 (9th Cir. 1996), the court rejected defendant's claim that in inviting strangers into his home to engage in illegal activity, he may condition his consent to entry on them not being law enforcement officers. Adoption of such a rule would mean the end of undercover work. The agents did not misrepresent the scope, nature or purpose of the investigation, or conduct a search that went beyond the scope of the consent to entry. They stayed in the area where Bramble had invited them. After identifying themselves, they did not leave that area or conduct any search until Bramble had given his consent for them to do so. Additionally, the warrantless entry of the uniformed officers did not invalidate his later consent to search. Where an undercover agent is invited into a home, establishes the existence of probable cause to arrest or search, and immediately summons help from other officers, entry of the other officers does not violate the 4th Amendment. However, "when [officers are] entering pursuant to the suspect's 'consent once removed,' [meaning that the undercover officer can allow police to enter to assist] the additional backup officers are restricted to the scope of the consent originally given. Our holding does not authorize police to go beyond those areas consented to or to conduct general searches without first satisfying the ordinary requirements of consent, a warrant, or exigent circumstances which excuse the failure to obtain a warrant." Id. 1478-1479 (citations omitted). See also U.S. v. Akinsanya, 53 F.3d 852 (7th Cir. 1995)("The doctrine of 'consent once removed' is applicable where the undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers.").

Deceit as to purpose almost always eliminates consent. For example:

The court ruled that there was no consent where undercover police entered and were escorted around a fraternity house falsely claiming an interest in joining and saw contraband in plain view. *State v. Pi Kappa Alpha Fraternity*, 491 N.E.2d 1129 (Ohio 1986).

Where an undercover officer used a ruse of car trouble and requested to use a phone and then was invited in and saw drugs in plain view, the court held no consent. The court focused on the fact that there was no reason to suspect

criminal activity. "It is our conclusion that consent given to a warrantless entry to a private home is invalid if the police, absent a show of cause, obtain entry by ruse. As noted previously, this cause may be based on the officer's participation with the consentor in an illegal transaction or it may be grounded on a reasonable belief that criminal activity is afoot. The consent is clearly invalid, however, when there is no reason shown for selecting a particular home to enter. We hold that a search is patently unreasonable as an arbitrary intrusion when it is based upon consent obtained by deception unless there is a justifiable and reasonable basis for the deception." *State v. Ahart*, 324 N.W.2d 317, 319 (Iowa, 1982). There is a split in courts on this issue, however. See *People v. Catania*, 398 N.W.2d 343, 346 (Mich.,1986)(We believe that in cases of this sort, where entry by an undercover agent is effected solely by the invitation of the defendant, albeit under a misconception as to the agent's identity and purpose, there is no Fourth Amendment...activity so long as the agent does not exceed the scope of the invitation.").

The Ninth Circuit reached a similar ruling in *U.S. v. Bosse*, 898 F.2d 113 (9th Cir. 1990). In *Bosse*, the defendant was licensed to sell semi-automatic firearms, and has a license application pending to sell automatic firearms. A state licensing agent inspected the defendant's home with the defendant's consent as part of the application process. The licensing agent was accompanied by an agent of the ATF who did not identify himself to the defendant as an ATF agent. The federal agent later sought and obtained a search warrant for the defendant's home. The court held that "[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent." *Id.* at 115.

Same result occurred when police got consent to search for guns but really wanted to search for drugs in *State v. Schweich*, 414 N.W.2d 227 (Minn. 1987), and *State v. Hickson*, 590 N.E.2d 779 (Ohio 1990), where the police misrepresented to occupant why they wanted to enter his residence to look out a window.

(g) Consent following previous illegal search

In *U.S. v. Furrow*, 229 F.3d 805 (9th Cir. 2000)(overruled on other grounds by *U.S. v. Johnson*, 256 F.3d 895 (9th Cir. 2001), the court examined a consent search following what was later determined to be an initial illegal entry by police. The court found the consent was voluntary, but held that such a finding was only a threshold requirement and it still had to decide if the evidence was to be suppressed as fruit of the prior unconstitutional entry. "Dissipation of the taint resulting from an illegal entry ordinarily involves

showing that there was some significant intervening time, space, or event." *Id.* at 813-814 (quotation and citation omitted). The court went on to note that "[t]he principle that an illegal entry taints a subsequent consent search is limited, however, to cases where the evidence shows that the illegality is so connected to the subsequent consent so as to render the consent ineffective." *Id.* at 814. The court remanded the case for the lower court to determine if the person giving consent knew of the earlier illegal search at the time he gave his consent.

(4) Quick Checklist for Consent

No one factor is determinative, but the more factors in favor of consent, the more likely that consent will be upheld by a reviewing court.

THINGS THAT HELP CONSENT WORK

- 1. Telling person they do not have to allow search.
- 2. Telling person what you are searching for
- 3. Fewer officers
- 4. Plain clothes
- 5. No weapons displayed
- 6. No trickery such as hinting "no prosecution."
- 7. Relatively short contact before consent given
- 8. Friendly tone of voice, not threatening or commanding.
- 9. Giving *Miranda* warnings (especially if person in custody)
- 10. All factors about person giving consent such as: age, experience with the police, physical and mental condition, fluency in English.

THINGS THAT HURT CONSENT

- 1. Display of weapons
- 2. Large number of police, especially uniformed.
- Deceit or trickery about either purpose or results (prosecution) of search
- 4. Officer's threatening demeanor, tone of voice.
- A claim that police have authority to do the search anyway such as false claim that police have a warrant.
- 6. Negatives about person giving consent (young, stupid, drunk, poor English)

(5) "Third Party" Consent

(a) In General

The basic rule, that consent to search may be given by a third party who actually (or reasonably appears to police to) shares access, control, use and authority over the area or item to be searched.was set forth in U.S. v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). In that case, a woman who jointly occupied a bedroom with the defendant gave police consent to search. The Court looked at other cases to find that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." 415 U.S. at 170, 94 S.Ct. at 993. The court held that "[t]hese cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 171, 94 S.Ct. at 993. It is crucial to understand that "legal property rights" such as ownership in most cases have little or nothing to do with whether a third party can give consent. See, Stoner v. California., 376 U.S. 483, 84 S.Ct. 889 (1964), where police got consent from hotel management to search a guest's room (ruled invalid) and in *Chapman v. U.S.*, 365 U.S. 610, 81 S.Ct. 776 (1961), involving a landlord's consent to search a tenant's room. The third party giving consent must share the expectation of privacy on which police want to intrude.

In *U.S. v. Brown*, 961 F.2d 1039 (2nd Cir. 1992), the "officer concluded that because [the landlord] Davis was authorized to enter Brown's apartment when necessary to turn off electrical appliances or lights, she could consent to a search of his apartment." *Id.* at 1041. Although the facts presented to the officer were true, there was a misapprehension of the applicable rule of law. The court held that it was not "aware of any legal basis for the district court's conclusion that Davis could authorize 'a limited entry for the purpose of retrieving a firearm,' although not 'a thorough search.' We accordingly conclude that the motion to suppress the evidentiary use of the Uzi should have been granted." *Id.*

Remember, the third party giving consent must have equal right to access the area and all of the items searched. In *U.S. v. Salinas-Cano*, 959 F.2d 861 (10th Cir. 1992), police arrested a drug dealer, and then went to his girlfriend's apartment where she gave consent to enter. The arrested suspect had a suitcase there which officers knew was the suspect's and the girlfriend neither used or had access to it. The girlfriend could not give police either actual or apparent permission to search it.

In *U.S. v. Welch*, 4 F.3d 761 (9th Cir. 1993), the court held that a third party could lawfully consent to the search of a rental car where he and defendant had joint access to and mutual use of it, and his voluntary consent was sufficient to waive defendant's Fourth Amendment interest in car, but valid consent did not extend to defendant's purse absent showing of shared control with respect to the purse

In *U.S. v. Fultz*, 146 F.3d 1102 (9th Cir. 1998), the court held that: (1) defendant, who had been allowed to move in to residence of friend after being evicted from his own apartment, had reasonable expectation of privacy in cardboard boxes in garage of residence in which he kept his belongings, and (2) friend had neither actual nor apparent authority to consent to search of boxes by police.

(b) Factors used to determine ability of third party to give consent

The person giving consent must have a sufficient relationship to the property searched which means mutual use of the property by virtue of joint access to it or control for most purposes over it. *U.S. v. Iribe*, 11 F.3d 1553, 1556 (10th Cir. 1993).

In addressing whether a parent can consent to the search of a child's room, the Court of Appeals of Washington held "that where the State has shown that a third party with the status of a custodial parent has consented to the search of a child's room within the house, it has carried its burden of establishing the lawfulness of the search. However, where it can be shown that the third party's status is more like that of a landlord than a custodial parent, he or she has no authority to consent to a search of the child's room." *State v. Summers*, 764 P.2d 250, 253-254 (Wash. App. 1988).

Contrary to common mythology, a child (of sufficient age) can give consent to enter the parent's house, but police will be held to higher standard (see "Things that help consent" in this outline.) *See Pesterfield v. Comm.*, 399 N.W.2d 605 (Minn. App. 1987) and *U.S. v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990)("Under the circumstances of this case, where children twelve and fourteen years of age routinely were left in exclusive control of the house, and defendants' possession of large quantities of marijuana was so open and patently non-exclusive that its odor pervaded the house, the government satisfied its burden of demonstrating the initial warrantless search of the bedroom was by consent, since the boys enjoyed that degree of access and control over the house that afforded them the right to permit inspection of any room in the house, and defendants assumed that risk.").

In *U.S. v. Guiterrez-Hermosillo*, 142 F.3d 1225 (10th Cir. 1998), the court held that a 14 year old minor who shared expectation of privacy in a motel room could consent to a police search. The same result was found in *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir.1995), which held that minors do have the capacity to give consent.

In *U.S. v. Kim*, 105 F.3d 1579 (9th Cir. 1997), by instructing his associate to rent storage units in the associate's own name, the defendant assumed the risk that his associate would allow a search of the units, giving him common authority to consent to a search, where associate could exercise his rights as lessee to have storage company open unit, and the defendant allowed him to keep possession of leases, supervise unloading of goods, and retain keys on occasion.

In State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998), the Court ruled that actual authority occurs "(1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property" and does not require an ownership interest in the property by a third party nor does it require the owner's presence at the time of the consent search. Id. at 1079 (citations omitted). The defendant's traveling companion had actual authority to consent to the police search of his suitcase even though she told police the suitcase belonged to him (although her name was on the luggage claim ticket). He entrusted the suitcase to her under circumstances where he understood a high risk that police might ask her for consent to search, "not for the purpose of safekeeping but to transport a controlled substance and to avoid detection himself." Id. The court also held that "[w]hether an individual has apparent authority to consent to a search must be judged against an objective standard, namely, would the facts available to the officer at that moment warrant a person of reasonable caution to believe that the consenting party had authority over the property." Id. at 1080.

(c) What if one person having joint use and control says "Yes" and the other "No?"

In *Georgia v. Randolph*, the Supreme Court examined whether the search of a marital residence, on the basis of consent given to police by defendant's wife, was valid as to defendant, who was physically present and expressly refused to consent. *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515 (2006). The Court held that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to police by another resident.

However, police may proceed on the consent of one occupant where there is no objection by any resident present at the time of a search of a residence. *Casteel v. State*, 122 Nev. 356, 131 P.3d 1 (2006). In *Casteel*, a search of a residence for child porn related to defendant's sexual misconduct with his step-daughter was valid based on the consent of the defendant's live-in girlfriend even though she was not present. The defendant was initially present but did not object to police entry and then voluntarily accompanied officers to the police station to give a statement and police never sought his consent.

(d) "Apparent authority"

If police get authority to search a place or item from a person who the police reasonably believe has authority to give consent, and it later turns out that the person did not have actual authority to consent, items found and seized will not be suppressed. This was the ruling by the U.S. Supreme Court in *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793 (1990) and the Nevada Supreme Court in *Snyder v. State*, 103 Nev. 275, 738 P.2d 1303 (1987).

"The existence of apparent authority has a three-part analysis. (1) did the officer believe some untrue fact that was used to assess the extent of the consent giver's use, access and control over the area searched, (2) was it objectively reasonable for the officer to believe that the fact was true under the circumstances and (3) if it was true would the consent giver have had actual authority." *U.S. v. Dearing*, 9 F.3d 1428, 1429-1430 (9th Cir. 1993). See also *U.S. v. Fiorillo*, 186 F.3d 1136, 1144 (9th Cir. 1999)

An essential part of any "apparent authority" case is that the police officers ask enough questions prior to obtaining consent so that they have enough information to support their "reasonable belief." If officers rely on assumptions instead of asking questions, a court is unlikely to find "apparent authority." See U.S. v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991)("It is the government's burden to establish that a third party had authority to consent to a search. The burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry.")(citations omitted), U.S. v. Rosario, 962 F.2d 733 (7th Cir. 1992)("[I]n the absence of sufficient facts, officers have a duty to seek further information in order to determine whether they may reasonably infer that the inviter has the necessary authority to consent to an entry or search of the premises."), and U.S. v. Reid, 226 F.3d 1020, 1026 (9th Cir. 2000)("In light of Deputy Kitts's knowledge about the residents of the apartment and the surrounding circumstances, it was not objectively reasonable to believe that Grant resided in the apartment simply because he opened the door and appeared to be alone. We are mindful that "mere access" to a residence, without more, is insufficient to establish apparent authority. Here, other than access, the officers had no reason to believe that Grant lived in the apartment.")(citation omitted).

The more information the officers have, the better. The search in Reid above was not upheld because the information that the officers had would lead a reasonable person to question the authority of the person who answered the door to consent to a search (police knew that he was not a resident, the person did not know whose car was consistently parked in the apartment's assigned parking space, and the name of the person who answered the door was not listed on the lease). The officers therefore should have conducted a further inquiry before relying on the consent of that person. See *U.S. v. Enslin*, 327 F.3d 788, 794 (9th Cir. 2003)

(6) Scope of the Consent

In *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801 (1991), the Court held that if the nature of the items searched for is disclosed by police and the consenting party does not expressly limit the area of the search, then the officers can search any part of the premises, car or place consented to which a reasonable person would think could contain the object of the search. *See also U.S. v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994)("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness- -what would the typical reasonable person have understood by the exchange between the officer and the suspect?")(quoting *Jimeno*, 500 U.S. at 249-52, 111 S.Ct. at 1803-04.).

Consent is not an "all or nothing" concept. The consent giver can limit the consent in terms of area or extent of intrusion and can withdraw consent.

One key ingredient in this concept is that police must tell the consent giver what police are looking for because this is always a factor in determining the scope of the search. This was the holding in *U.S. v. Maldonado*,(below) and *Canada v. State*, 104 Nev. 288, 756 P.2d 552 (1988). This makes sense because in order for consent to be voluntary, the consenting party has to know how intrusive the search will be. A law abiding citizen may allow police to search his home for a fugitive or stolen microwave, but not for drugs, even if he has no drugs, because police searching for drugs (small item) can look anywhere and everywhere.

In *U.S. v. Maldonado*, 38 F.3d 936 (7th Cir. 1994), Drug Enforcement Administration agents did a consensual contact with defendant at a train station and told him they were looking for narcotics. He consented to a search of his luggage. Inside the luggage the agents found some boxes closed with tape which

they opened and found drugs inside. The court upheld the consent search. "[T]he consent to search luggage validates the search both of the luggage and of containers within the luggage." *Id.* at 941 (quotation and citation omitted). The court noted that its finding was "supported by the decisions of other circuits which have since addressed this issue in light of [*Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801 (1991)]. *See, e.g., U.S. v. Kim*, 27 F.3d 947, 956 (3rd Cir.1994) (holding that suspect's general consent to search his luggage covered the search of sealed can of vegetable protein found inside his luggage); *U.S. v. Springs*, 936 F.2d 1330, 1334 (D.C.Cir.1991) (holding that suspect's consent to the search of her tote bag extended to the search of a closed baby powder container found within the bag)." *Id.*

In *U.S. v. Gordon*, 173 F.3d 761 (10th Cir. 1999), the defendant was consensually contacted by police at a train station and gave unlimited consent to search his bags. The officer came across a smaller padlocked bag inside the larger bag. The agent asked Gordon if Gordon could open it, and Gordon without objection handed her the key to open it. She reasonably construed his response as consent to search the locked bag. "We consistently and repeatedly have held a defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent." *Id.* at 766.

If an individual consents to provide or voluntarily provides DNA sample in an unrelated case, there is no Fourth Amendment violation. *Herman v. State*, 122 Nev. 199, 128 P.3d 469 (2006). No plain error was committed by allowing defendant's DNA information, which defendant voluntarily submitted to a public facility to absolve defendant of robbery, into evidence in unrelated murder prosecution; defendant provided his DNA sample for use in a public forum without limitation on the use or storage of the sample, and reasonable person would have understood that the resulting DNA profile, like fingerprints, could be available for general investigative purposes, and legitimately obtained DNA sample could be used in a subsequent murder investigation without implicating Fourth Amendment concerns.

In *State v. Johnson*, 116 Nev. 78, 993 P.2d 44 (2000), a majority of the court concluded that "dismantling" a vehicle glove box by removing three nonfactory screws on a panel to reveal hidden narcotics, exceeded the scope of general consent to search and was therefore unreasonable. However, in *State v. Ruscetta*, 123 Nev. ____, 163 P.3d 451, 451 (2007), the court rejected any suggestion that all "dismantling" was per se unreasonable and clarified that the proper test in cases involving consensual vehicular searches is one that examines the totality of the circumstances for objective reasonableness. Therefore, the

Ruscetta case was remanded for an evidentiary hearing on whether an officer's discovery of drugs and a handgun underneath an unsecured center console of a vehicle which "shifted" when the officer placed his hand on it, was within the scope of defendant's consent to search.

(7) Burden of Proof

"The burden of proving consent rests with the state. Clear and persuasive evidence is required....[A] court must distinguish between the peaceful submission by the arrested suspect to the authority of a law enforcement officer, from an intelligent and intentional waiver of a constitutional right." *Alejandre v. State*, 111 Nev. 1235, 1242, 903 P.2d 794 (1995)(quotation and citations omitted)(overruled on other grounds by *Gama v. State*, 112 Nev. 833, 920 P.2d 1010 (1996)). "The state bears the burden of proving consent by clear and persuasive evidence." *Howe v. State*, 112 Nev. 458, 463, 916 P.2d 153 (1996)(quotation and citations omitted).

D. PLAIN VIEW

The Fourth Amendment permits warrantless seizure of evidence of crime in "plain view." The "plain view" exception to the warrant requirement does not authorize warrantless searches, only warrantless seizures.

To justify a warrantless seizure of an item in plain view an officer must be lawfully located in the place from which the object can be plainly seen and the item's incriminating character must be immediately apparent.

It is important to remember that the 4th Amendment prohibits general curiosity satisfying ("let's see what we have here") types of searches. The three requirements for plain view seizure are:

- 1) The officer is in a position where he/she has legal right to be;
- 2) It is immediately apparent to the officer that the items are "probably" subject to seizure because it is contraband or evidence; and,
- 3) The seizure can be made without substantial additional intrusion on privacy, also called a "lawful right of access

- Special Note on "Inadvertent Discovery" Requirement

Nevada continues to follow the U.S. Supreme Court's plain view test as announced in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971), which allows the seizure of objects not specified in a search warrant so long as (1) the initial intrusion of the police is lawful, (2) *the police "inadvertently" discover the incriminating evidence*, and (3) it is "immediately apparent" to the

police that the items they observe may be evidence of a crime. *Ford v.State*, 122 Nev. 796, 138 P.3d 500 (2006); *Luster v. State*, 115 Nev. 341, 991 P.2d 466 (1999). However, in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990), the U.S. Supreme Court repudiated the inadvertent discovery requirement as mere dictum. Since, then, Nevada has continued to cite to the *Coolidge v. New Hampshire* requirement for inadvertent discovery even while recognizing that the U.S. Supreme Court has abandoned it. *Luster*, supra. Apparently, the continued viability of the inadvertent discovery requirement has not been squarely at issue in Nevada and so there has been no need for the Nevada Supreme Court to address it. *Id*.

(1) Officer Legally Positioned

This means that the officer is already legally correct in being where the officer stands. This can occur where officer is executing search warrant for specified objects and in the course of the search comes across other articles of incriminating nature. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969), or where initial police intrusion is supported by exception to warrant requirement such as hot pursuit or entering in an emergency, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), protective sweep, *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990) (*see* section on Frisks), or having consent to enter (See section on Consent), *Woerner v. State*, 85 Nev. 281, 453 P.2d 1004 (1969).

Remember that the constitution protects people in their 'persons, houses, papers and effects.' This rule is not extended to open fields. Officers' intrusion upon open fields is not an unreasonable search prohibited by the Fourth Amendment. *U.S. v. Barajas-Avalos*, 359 F.3d 1204, as amended, 377 F.3d 1040 (9th Cir. 2004), *citing Hester v. U.S.*, 265 U.S. 57, 44 S.Ct. 445 (1924). Even if trespassing, officers may enter open fields and evidence of criminality in plain view is not subject to a search warrant. (In that case, officers looked in from an open field through the window of a non-residential travel trailer with a flashlight, and saw methamphetamine manufacturing equipment, for which they then obtained a search warrant.)

(2) Immediately Apparent

For a plain view seizure to be lawful, the officers must have probable cause to believe that the seized item is incriminating. However, probable cause "does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983).

The U.S. Supreme Court took a narrow view of this requirement in the case of Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987). A bullet was fired through the floor of an apartment, hitting a person in the apartment below. Police arrived and lawfully entered the suspect's apartment without a warrant due to the emergency. Police were looking for the shooter, weapons and other victims. Police found and seized some firearms. While there, police noticed two sets of very expensive stereo components which seemed out of place in the squalid slum apartment. The officers lifted, turned and examined the stereo items and obtained the serial numbers. Police then called in the serial numbers and learned the components were stolen. Court held that the distinction between "looking" at a suspicious object and "moving it even a few inches" to examine it constituted an additional and unlawful "search" under the 4th Amendment because this action was not related to the scope of the initial "lawful" search. A plain view seizure required that probable cause, not just reasonable suspicion, and must appear immediately. "Immediately" means "not involving an additional search."

"It is obvious that a plain view seizure involves an item actually in plain view. A person still retains privacy in an item which is lawfully seen by officers but whose nature (or contents) is not immediately apparent. If the intended (plain view) seizure requires further investigation (a search) to determine P/C as to what the object is (or contains) there can be no plain view seizure because plain view does not authorize warrantless searches, only seizures." *U.S. v. Brown*, 79 F.3d 1499 (7th Cir. 1996).

U.S. v. Beal, 810 F.2d 574 (6th Cir.1987). Police authorized to search a dresser and saw what they first thought were pens, but turned out to be "penguns" and it was not until they were taken apart that police could see that they were contraband. The Sixth Circuit held this was not a plain view seizure because P/C was lacking at the time of the seizure. P/C must be immediate and apparent.

In *Luster v. State*, 115 Nev. 431, 991 P.2d 466 (1999), LVMPD police were executing a S/W at the defendant's residence in a case of murder and other crimes. The search warrant authorized police to search for fairly small items (handgun, shorts, black cap) and police also seized a shotgun, several roles of duct tape and ammunition. The Court upheld the seizure of items not listed in the search warrant on the basis of plain view, ruling that "immediately apparent" standard is that the police seizure is "presumptively reasonable that there is probable cause to associate the item with criminal activity." The Court noted that the police who executed the search warrant had information from a different victim who was kidnapped and described the interior of the house to police. Upon entering Luster's house, police realized that it matched the other victim's

description. The other victim was kidnapped at gunpoint and bound by duct tape.

In *Simmons v. State*, 112 Nev. 91, 102, 912 P.2d 217, 223 (1996), the Nevada Supreme Court upheld the seizure, under the plain view doctrine, of a book entitled *Witchcraft* during the execution of a search warrant which did not list the book as an item to be searched for. The Court stated that the book's contents were related to the crime under investigation. The Court did not explain how officers satisfied the "immediately apparent" prong of the test.

There is a legal doctrine called "the single purpose container." If the container is recognized by the officer as having a unique purpose, like a gun case or a bindle or small balloon used to hold drugs, the officer can open the container if the officer has lawful access to it. It is not enough that a container "might" contain contraband. In *Harris v. Comm.*, 241 Va. 146, 400 S.E.2d 191 (Va. 1991) a film canister recovered from the pocket of a defendant in a lawful stop and frisk could not be opened under the plain view theory. However, where an officer saw a small paper bindle in a person's wallet while the person was showing the officer ID, the officer could seize and open the container in *State v. Courcy*, 48 Wash.App. 326, 739 P.2d 98 (1987).

U.S. v. Del Vizo, 918 F.2d 821 (9th Cir.1990) ("plastic bags with packages inside" were sufficient to suspect cocaine); *U.S. v. Oswald*, 441 F.2d 44(9th Cir.1971) ("a package wrapped in red and blue paper" was sufficient to suspect a kilo brick of marijuana); *U.S. v. Yoon*, 751 F.Supp. 161 (D.Haw.1989) (folded and taped white business envelope sufficient to suspect PCP).

In *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983), the police lawfully stopped a car and in plain view saw small balloons wrapped around something about the size of a small marble. The Court validated the search of the balloons stating, "The fact that Officer Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents--particularly to the trained eye of the officer."

In *U.S. v. Williams*, 41 F.3d 192 (4th Cir. 1994), the court ruled that the cellophane wrapped packages found in Williams' suitcase "spoke volumes as to their contents--particularly to the trained eye of the officer." (*Citing Texas v. Brown*) For instance, from the appearance and size of the packages, heavily wrapped in cellophane with a brown opaque material inside, it was reasonable to assume each package weighed approximately one kilogram. A detective testified at Williams' suppression hearing that similarly wrapped packages, in his experience, "always " contained narcotics.

In *U.S. v. Corral*, 970 F.2d 719 (10th Cir.1992), to protect the privacy interest of the contents of a container, courts will allow a warrantless search of a container in plain view only "where the contents of a seized container are a foregone conclusion." When a container is not closed, or is transparent, or when its distinctive configuration proclaims its contents, the container has no reasonable expectation of privacy. In determining whether the contents of a container are a foregone conclusion, the circumstances under which an officer finds the container may add to the apparent nature of its contents.

(3) No Substantial Additional Intrusion on Privacy

Note that in cases where open view discloses contraband, a search warrant is still required to seize the items, unless there is consent, emergency or a search that does not require a warrant such as automobile searches.

"The final requirement is that the officer have a lawful right of access to the object. For instance, this factor is implicated in situations where an officer on the street sees an object through a window of a house or when officers make observations through aerial or long range surveillance. In those cases officers cannot use plain view to justify a warrantless seizure because to do so would require a warrantless entry upon private premises." *U.S. v. Naugle*, 997 F.2d 819 (10th Cir.1993).

For example, if a search warrant allows a search for stolen video equipment, plain view does not apply if an officer opens a small jewelry box and finds drugs. The same ruling would apply to a consent to search -- the search is limited by the size of the object(s) for which consent has been given.

In the case of *Horton v. California, supra*,, police got a search warrant to search Horton's home for proceeds of an armed robbery. Although the warrant affidavit talked about the weapons and other instruments of the crime, the warrant did not authorize seizure of those items. While executing the search warrant, police saw and seized an Uzi, a .38 revolver, handcuff key, stun gun and clothing matching that worn by one of the suspects. The U.S. Supreme Court said that this seizure was lawful under plain view. The major holding of this case was that a valid plain view seizure does not need to be inadvertent.

The Court went on to say that a search warrant that specifically describes the place to be searched and items to be seized adequately limits the area and duration of the intrusion by police. In the *Horton* case, the scope of the search (looking for jewelry and other small items) was not enlarged by police (i.e. they could look anywhere in the house for these items); therefore, no

additional intrusion on privacy occurred when the instrumentalities were observed and seized.

"It no longer matters after *Horton* that the invited-along officer seized items of criminality that were not mentioned in search warrant. What matters is whether officers looked in places or ways not permitted by the warrant and that the officer invited along has special expertise which makes it immediately apparent to him that objects in plain view are evidence of a crime." *U.S. v. Ewain*, 88 F. 3d 689 (9th Cir. 1996).

(4) Related Matters

Generally, courts hold that use of electronic gear to enhance hearing is not a "plain hearing" situation.(*See* section on open view) Use of X-rays or scanners has been considered a search..*U.S. v. Henry*, 615 F.2d 1223, 9th Cir. 1980).

Attaching an electronic monitoring device to someone's vehicle and tracking a suspect's movements is not an unreasonable search and does not require a warrant. *Osburn v. State*, 118 Nev. 323, 44 P.3d 523 (2002). The use of drug-sniffing dog at a valid stop does not constitute a search. *U.S. v. Ibarra*, 345 F.3d 711 (9th Cir. 2003).

(5) Nevada Cases

In *Ford v. State*, 122 Nev. 796, 138 P.3d 500 (2006), seizure of blood-stained stocking cap and sweatshirt that defendant was wearing was justified under plain-view exception to warrant requirement; defendant was lawfully detained at time of seizure, detectives' observation of blood stains was inadvertent, and it was immediately apparent that stocking cap and sweatshirt were evidence of a crime.

In *Koza v. State*, 100 Nev. 245, 681 P.2d 44 (1984), police entered a motel room under emergency circumstances having probable cause to believe that two or more armed robbers/murderers were inside. After arresting the occupants, one detective saw a piece of chrome metal sticking out between the mattress and bed. He was aware that the arrested persons had been armed and that no guns were found in the search incident to arrest. The chrome he could see looked like part of a gun. The court said that the plain view seizure was appropriate, The officer did not have to know for sure that it was a gun, however, all the facts in this case established probable cause and the officer was permitted to seize the item.

In *Bennett v. State*, 106 Nev. 1015 (1990), police were searching a murder suspect's house authorized by consent of a co-occupant and also by a search warrant. Police were looking for clothing and in the suspect's bedroom

they saw papers containing poetry dealing with death and killing. The Court upheld the seizure of the writings under the plain view doctrine.

E. ADMINISTRATIVE SEARCHES

Inspections which are carried out by governmental agencies for purposes other than investigation of crimes can be called "administrative searches" and sometimes do not require a search warrant. The general rule is that such searches require a warrant, but the probable cause requirement is less than in criminal cases. Also, courts will not allow administrative searches, either with or without a warrant, to be police instigated or controlled searches in order to sidestep the general search and seizure rules.

(1) Warrantless searches

Warrantless administrative searches are allowed only for "pervasively regulated businesses and then only if certain criteria are met:

In *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636 (1987), the Court upheld a warrantless search of an auto junkyard as authorized by a state statute. The court looked at these factors- (1) business had reduced expectation of privacy because it was closely regulated (2) important government interest involved (3) unannounced inspections necessary to control receipt of stolen property (4) statute informs businesses that they will be inspected (5) statutory power to inspect is limited in time, place and scope.

Such searches were upheld in cases involving mining (*Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534 (1981), liquor laws (*Collonade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S.Ct. 774 (1970) and firearms (*U.S. v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593 (1972)).

(2) Searches with warrant

"For purposes of an administrative search, probable cause in the criminal law sense is not required...probable cause for an administrative search may be based not only on a showing of an existing violation but also on a showing that reasonable legislative or administrative standards justify the search." *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816 (1978).

"A regulatory search does not require probable cause as traditionally defined by the courts. It is satisfied if a state's interest in ensuring that a class of regulated persons is obeying the law outweighs the intrusiveness of a program of searches and seizures." *U.S. v. Seslar*, 996 F.2d 1058 (10th Cir. 1993).

(3) Mixed administrative-criminal searches

Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984)Whether a warrantless post-fire search of a location is OK depends on several factors: (1) Whether there are legitimate privacy interests in the damaged property (type of property, amount of damage); (2) whether exigent circumstances exist - i.e.- if fire is out and search is made later; (3) whether object of search is to gather evidence of crime or to determine cause of fire. The U.S. Supreme Court said:

"If the primary purpose is to determine cause and origin of a recent fire, an administrative warrant will suffice. If the primary object is to obtain evidence of criminal activity, a criminal search warrant may be obtained by showing probable cause that evidence will be found in the place to be searched. If evidence of criminal activity is uncovered during a valid administrative search, it may be seized under the plain view doctrine." Same ruling in *U.S. v. Mitchell*, 85 F.3d 800 (1st Cir. 1996).

In Winters v. Board of County Comm., 4 F.3d 848 (10th Cir. 1993) the court held, "When a law enforcement officer intends to seize a piece of criminal evidence from the premises of a pawnshop, the seizure cannot be justified by relying on the pretense of an administrative search and plain view. In such a situation the officer must obtain a warrant."

In Alexander v. City and County of San Fransisco, 29 F.3d 1355 (9th Cir.1994) the court held, "criminal investigatory motives cannot color administrative searches (in a case where a private airport security company looking for weapons was co-opted by police looking for money or drugs associated with drug couriers) ... an administrative search cannot be converted into an instrument which serves the very different needs of police officers..."

(4) Searches of government employees by employers

In *O'Conner v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987) search and seizure of a government employee by employer, in parts of office wide open to fellow employees, has no expectation of privacy. Search & seizure of places where there is an expectation of privacy (desks and file cabinets) depends on the context in which the search takes place and must balance an employee's need for privacy against the employer's need for supervision, control and efficient operation. The search is OK if done without P/C if it is done for work related purposes (not criminal prosecution). Both the inception and the scope of the search must be reasonable. Same ruling in *Gossmeyer v. McDonald*, 128 F.3d 481 (7th Cir.1997), *Camacho v. Rivera*, 699 F. Supp. 1020 (D Puerto Rico 1988), *U.S. v. Taketa*, 923 F.2d 665 (9th Cir. 1991) (although, part of the

evidence was suppressed when the administrative search proceeded into a criminal investigation.

F. BORDER SEARCH

"Border searches ... from before the adoption of the Fourth Amendment, have been considered to be reasonable by the single fact that the person or item in question entered into our country from the outside.... This long-standing recognition that searches at our borders without probable cause and without a warrant are nonetheless reasonable has a history as old as the 4th Amendment itself." *U.S. v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972 (1977).

"Routine (border) searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause or warrant." Detention of a person beyond scope of routine searches is valid if reasonable suspicion indicates internal smuggling of dope. *U.S. v. Montoya de Hernandez*, 473 U.S. 531,105 S.Ct. 3304 (1985).

Note that border searches are only valid when carried out by officers whose duties include the enforcement of customs or immigration laws. See, Title 19, U.S. Code, Section 482; *U.S. v. Soto-Soto*, 598 F.2d 545, (9th Cir. 1979).

1. Search of Person.

"Congress has conferred broad authority on customs officers to search all persons coming into the U.S. from foreign countries ... A traveler crossing an international boundary may reasonably be required to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." U.S. v. Gonzalez-Rincon, 36 F.3d 859 (9th Cir. 1994). Escorting an individual to a security office and searching person for weapons and contraband is not an arrest. U.S. v. Bravo, 295 F.3d 1002 (9th Cir. 2002), cert denied, 123 S.Ct. 1775 (2003). See also, U.S. v. Nava, 363 F.3d 942 (9th Cir. 2004), cert. denied, Nava v. U.S., 125 S.Ct. 439. (Temporarily putting individual in handcuffs for safety while escorting individual to security office is not arrest).

2. Search of Property.

The authority to search entitles government agents to stop persons and search property without probable cause or suspicion. This includes the authority to remove, disassemble, and reassemble property of another. *U.S. v. Flores-Montano*, 541 U.S. 149, 124 S.Ct. 1582 (2004).

In *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074 (1976) the U.S. Supreme Court said that brief questioning of vehicle occupants at a fixed checkpoint on a road coming from the border with another country, but some distance from the border is permissible even without any R/S and that the vehicle could be referred to a secondary location if necessary to check documents.

In *U.S. v. Taghizadeh*, 41 F.3d 1263 (9th Cir. 1994) custom officials can search mail packages at the border without P/C or R/S, but search of mail letters requires R/S.

In *U.S. v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972 (1977) the Court ruled that letter search of international mail could be done without a search warrant.

3. Searches Requiring More From the Government.

In *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 935 S.Ct. 2535 (1973) the U.S. Supreme Court said that when border patrol agents wanted to use roving patrols to stop vehicles away from the border they needed reasonable suspicion to stop and inquire briefly as to residential status and probable cause to search.

G. PROBATION OFFICER

When a person is convicted of a felony or gross misdemeanor and placed on probation, the court usually imposes a "search clause" as a condition of probation allowing a probation officer to search the person, residence, car, and any property under control of the probationer any hour of the day or night without a warrant.

Previously, the U.S. Supreme Court utilized a "special needs" or administrative search rationale to uphold the warrantless search of a probationer's house upon a reduced standard of "reasonable suspicion" instead of requiring probable cause. *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987). As an administrative search, police officers could assist probation authorities, but not use the search as a subterfuge for a criminal investigation or in circumvention of 4th Amendment requirements for probable cause and a warrant. See *U.S. v. Richardson*, 849 F.2d 439 (9th Cir. 1988).

Likewise, Nevada has upheld a warrantless search of a probationer's storage shed based on reasonable grounds that a probation violation had occurred, even though the search was conducted by a police officer who was accompanied by a probation officer who was not the probationer's regularly assigned agent. *Seim v. State*, 95 Nev. 89, 590 P.2d 1152 (1979). The Court

noted that the search clause expressly authorized searches by a "peace officer," the probation officer was the one to initiate the search, and the predominant purpose was probationary, not for general police investigation. *Id*.

Nor does Nevada perceive any material distinction between parolees and probationers in terms of 4th Amendment rights. *Id.* In the parole context, Nevada has upheld the warrantless search of a parolee's home by his parole officer joined by a detective and two police officers based on reasonable grounds to believe a parole violation had occurred. *Allan v. State*, 103 Nev. 512, 746 P.2d 138 (1987).

The requirement that the decision to search must be that of the probation officer and not of the police is important and is closely watched by courts.

"A probation officer may search a probationer's home without a warrant and with less than probable cause ... It is equally well established that a probation officer cannot act as a stalking horse on behalf of police to assist police in evading the Fourth Amendment's warrant requirement. *U.S. v. McCarty*, 82 F.3d 943 (10th Cir. 1996).

"A probation search may not be used as a subterfuge for a criminal investigation.... A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers.... However, collaboration between a probation officer and the police does not render the search unlawful... The inquiry is whether the probation officer helped the police evade the warrant requirement or enlisted the police to assist his own legitimate objectives." *U.S.. v. Watts*, 67 F.3d 790 (9th Cir.1995) (overruled on other grounds *U.S. v. Putra*, 78 F.3d 1386 (9th Cir. 1996).

In 2001, the U.S. Supreme Court eschewed the "special needs" approach of *Griffin* in favor of a general 4th Amendment "reasonableness" analysis of the circumstances and balancing of interests. *U.S. v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001). In *Knights*, a police officer with knowledge of a suspect's probation status and search clause, conducted a warrantless search of the suspect's home based upon reasonable suspicion and for a general criminal investigatory purpose without knowledge or involvement of probation authorities. *Id.* The Court held the search was reasonable under the 4th Amendment where 1) nothing in the search clause itself limited searches to those with a strictly "probationary" purpose, 2) the specific search clause at issue expressly authorized the search to be conducted by any probation or "law enforcement" officer, and 3) California precedent had upheld such searches regardless of the purpose served. *Id.*

In 2006, the U.S. Supreme Court went even further and upheld a warrantless search of a parolee's person by a police officer without any reasonable suspicion at all reasoning that parolees have fewer expectations of privacy than probationers because parole is more akin to prison. Samson v. California, 547 U.S. 843, 126 S.Ct. 2193 (2006). The search of the parolee in Samson was by a police officer without any prior involvement of parole officials, and was grounded in nothing more than the fact that the officer saw a person he recognized as being a parolee walking down the street. Id. Notably, a California law mandated that parolees submit to suspicionless searches by any parole officer or any "police officer." Id.

However, Nevada is not bound by U.S. Supreme Court precedent in interpreting and applying Nevada law and it is unknown whether the Nevada Supreme Court would be persuaded by the new reasoning of the U.S. Supreme Court. Unlike the situations in *Knights* and *Samson, supra*, Nevada has precedent distinguishing between probationary and investigatory purposes in conducting probation searches and Nevada has specifically declared there to be no 4th Amendment distinction between probationers and parolees. *Seim v. State, supra.* Nor does Nevada have a law authorizing "suspicionless" searches of parolees as in *Samson.* Accordingly, Nevada precedent at this time requires the same standard of "reasonable grounds" for a search of either a probationer or parolee. Furthermore, the prohibition against a general investigatory purpose still applies and police may assist but not initiate the search.

H. HOT PURSUIT AND EMERGENCY

(1) Hot Pursuit

"Hot pursuit" is a sub-category or particular type of emergency.

In *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), the court upheld a warrantless entry and search where police knew that an armed robbery had just taken place and civilian witnesses had followed the suspect to his house about 5 minutes before police got there. Continuous "eyeball" contact by police was not necessary - a serious crime had been committed.

In *U.S. v. Santana*, 427 U.S. 38, 96 S.Ct. 2406 (1976), Santana had just made a heroin sale to an undercover agent and was in possession of marked money. Police went to her house and saw her standing in the doorway holding a bag. As officers approached, she retreated into the house. Officers pursued and arrested her in the home. Bag contained heroin. The Court held that hot pursuit justified entry.

In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984), police entered a home after finding a car in a ditch. A citizen told officers the driver appeared drunk. Officers arrived at defendant's home about 10 minutes later and had probable cause that he was inside. Court held entry could not be justified by hot pursuit. The court's decision did not really discuss the "time lapse" issue, but focused on minor nature of the crime (misdemeanor DUI) stating that it would be hard to ever justify warrantless police entry into home unless a serious crime was involved.

(2) Emergency in General

There is no precise definition of an "emergency" which would allow police to enter a residence without a warrant. However, courts have defined a number of factors about emergencies which officers should use as guidelines. The first major factor is that an emergency requires probable cause according to the U.S. Supreme Court. "In the absence of hot pursuit there must be at least probable cause to believe that factors justifying the entry were present." *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990) (No emergency existed - warrant should be used).

Fortunately, the Nevada Supreme Court has rendered a number of decisions helping to define "emergency" and the appropriate police conduct. Generally speaking, the Nevada decisions mirror the majority of modern day opinions of state and federal courts. The most thorough Nevada case is *Howe v. State*, 112 Nev. 458, 916 P.2d 153 (1996) where the court held that a warrantless entry and search by police who smelled marijuana coming from inside the house while they spoke to the occupant at the door violated the 4th Amendment. The Court provided ground rules for two types of emergency home entries. It is not necessary that all of the factors listed be present in any particular case. The number and/or strength of the factors present are critical.

(a) Entry to prevent destruction of evidence

The Nevada Supreme Court uses the test approved in *U.S. v. Rubin*, 474 F.2d 262 (3d Cir.1973) The test balances the following factors:

- 1. The degree of urgency involved and amount of time necessary to get a warrant;
- 2. Reasonable belief the contraband is about to be removed;
- The possibility of danger to police guarding the site while a warrant is obtained:
- 4. Information that the possessors of the contraband are aware the police are on their trail; and

5. The ready destructibility of the contraband.

In *U.S. v. Tarazon*, 989 F.2d 1045 (9th Cir. 1993) police arrested a person who told police he got cocaine from *Tarazon*. He called Tarazon and went to his place to get cocaine. He went in and saw cocaine and came outside and told police that *Tarazon* would be suspicious if he didn't come up with the money right away. He told the police that he usually operated with his supplier on a "cash in hand" basis and that they would become suspicious if he did not return soon to make his purchase. This court has held several times that irregularities in drug transactions which could cause a supplier to suspect police action and destroy evidence or prepare to defend a residence are sufficient to constitute exigent circumstances.

In *U.S. v. Wihbey*, 75 F.3d 761 (1st Cir. 1996) the need for quick action arose upon the agents' determination that arrestees Rohan, Britt, and Weiner had provided reliable information about Wihbey and that he would be suspicious because of any further delay in getting back to him. Exigent circumstances justified warrantless entry of marijuana supplier's home to arrest him after intermediaries for controlled buy were arrested and disclosed supplier's name and address; DEA agents were not obligated to prepare warrant application in advance merely because it might have been foreseeable that contemplated arrest of intermediaries would lead agents to source of marijuana, and agents had no choice but to respond promptly once they learned that supplier was at his condominium, undoubtedly growing suspicious as he awaited overdue proceeds from transaction.

(b) Entry to make a warrantless arrest

The leading case in this area is *Dorman v. U.S.*, 435 F.2d 385 (D.C. Cir.1970) which was cited with approval by the Nevada Supreme Court in *Howe v. State*, 112 Nev. 458, 916 P.2d 153 (1996). This test is more rigid than entry to make a warrantless search. The test balances the following factors:

- 1. A grave offense is involved, particularly a crime of violence;
- 2. "The suspect is reasonably believed to be armed;"
- 3. The probable cause for believing the suspect committed the crime is clear, even more than required to obtain a warrant;
- 4. There is a strong reason for believing the suspect is in the premises;
- 5. There is a "likelihood that the suspect will escape if not quickly apprehended;" and
- 6. Entry is made peaceably if possible

In Nevada, a "grave" offense includes Armed Rape. <u>Murray v. State</u>, 105 Nev. 579, 781 P.2d 288 (1989). Other jurisdictions have held the following to be sufficiently "grave": kidnapping, assault, threat w/rifle, armed robbery, threat to kill, rape, bank robbery, murder, aggravated robbery, residential burglary into occupied home, discharge firearm, sexual assault, etc.

Crimes that are not "grave" offenses for purposes of entry to make a warrantless arrest include Marijuana Use or Possession, *Howe v. State*, 112 Nev. 458, 916 P.2d 153 (1996), Indecent Exposure, *Edwards v. State*, 107 Nev 150, 808 P.2d 528 (1991), and DUI, *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984).

(3) An emergency entry is limited in time

In *Mincey v. Arizona*, 98 S.Ct. 2408 (Ariz.1978), police officers entered an apartment where a narcotics sale had been set up. The suspect shot and killed one of the officers and was wounded by the other officers. About ten minutes later, homicide detectives arrived and searched the apartment for four days. The court held that this warrantless search was illegal and not based on an emergency. Probably a short immediate investigation would have been OK but after that police had time to get a warrant.

In *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409 (1984) police were summoned to a residence by the daughter of a woman who had just shot and killed her husband then took an overdose of drugs. The police entered the house to confirm the status of the male victim and render assistance to the female suspect, but then stayed for several hours searching the house and finding a gun and a suicide note. The U.S. Supreme Court held that the original entry was valid as an emergency and that any items seen in plain view at that time could have been lawfully seized. However, once the police had secured the premises and gotten medical help, the emergency ended and items found in a search which was not related to and defined by the nature of the emergency were suppressed.

Subsequent cases make it clear that police can make a warrantless entry into premises where they reasonably think a dead body will be found *State v. Siqueiros*, 591 P.2d 557 (Ariz. 1978), or to render aid to a person in need of medical assistance *Ortega v. State*, 669 P.2d 935 (Wyo.1983), *overruled on other grounds Jones v. State*, 902 P.2d 686 (Wyo. 1995). Items in plain view can be seized if they have an incriminating character that is immediately apparent, *People v. Koehn, 178 P.3d 536* (Colo. 2008) and a prompt warrantless search can be made limited to looking for other victims or the presence of the killer

People v. Roark, 643 P.2d 756 (Colo. 1982). Tamborino v. Superior Court, 719 P.2d 242 (Cal. 1986).

Also, in *U.S.*. *v. Whitten*, 706 F.2d 1000 (9th Cir. 1983) the Court held that where there was P/C that an active methamphetamine lab was inside a premises, police could make an immediate entry based on emergency. However, in *U.S. v. Impink*, 728 F.2d 1228 (9th Cir. 1984) the Court ruled that there was no justification for emergency entrance into suspected drug manufacturing residence because there was no P/C.

In *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165 (9th Cir. 2003), the court held that exigent circumstances justified a warrantless entry even after a three hour wait by the police. The police located Defendant's truck outside a residence at 12:40 a.m., approximately an hour and forty minutes after he shot and killed the victim. For about two hours police conducted several stops in the neighborhood to investigate who resided in the home where Defendant's truck was parked. Police learned that someone fitting Defendant's description lived at the residence. Without a warrant, the police entered the home at approximately 3:40 a.m. and arrested Defendant. The court found the entry was justified because of the seriousness of the murder charges and to avoid danger to the officers and others in the public.

(4) Other Nevada Cases Defining Emergency

Three factors stand out in all the Nevada cases. First, the crime must be serious. Second, the entry is not a disguise for a search. Third, the police didn't act or investigate in such a way as to "create" the emergency.

State v. Hardin, 90 Nev. 10, 518 P.2d 151 (1974), police went to a hotel and found a blood drenched corpse and signs of a violent struggle. Police knocked on door of Hardin's room which was next to victim's room and although a witness told police Hardin had recently entered the room he didn't respond. Police entered with pass-key and found a key to victim's room and saw defendant with bloodstained clothing. Held: officers can enter without warrant if they have reasonable grounds to believe there is an urgent need to:

- (1) preserve life or property;
- (2) render assistance;
- (3) inquire into unsolved crime involving substantial threat of imminent danger; or
- (4) entry made without intent to conduct a "planned warrantless search."

Banks v. State, 94 Nev. 90, 575 P.2d 592 (1975), involved a warrantless entry into a motel room shortly after an armed robbery. Some suspects exited

room and police had no way of knowing if others were inside and had reason to believe a gun was in the room. Police entered, searched the room for weapons and found a gun, a knife and some of the victim's property. Held: even though the entry was made with intent to search for weapons, speed was essential. Police needed to be sure that there were no other suspects or weapons that could be used against them.

Murray v. State, 105 Nev. 579, 781 P.2d 288 (1989), a woman reported to police that she had just been raped at Murray's home and that he had guns there. Police entered immediately to arrest but did not search until hours later with a warrant. Held: exigent circumstances did exist - there was an urgent need to launch a criminal investigation involving substantial threat of imminent danger. Murray's arrest was not accompanied by planned warrantless search.

Edwards v. State, 107 Nev. 150, 808 P.2d 528 (1991), suppressed evidence found in defendant's motel room when police entered without a warrant to arrest defendant for indecent exposure even though there was strong probable cause. Court said no emergency because no serious crime occurring, citing, Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984).

(5) Police Can't Create Emergency

"In determining whether police manufactured the emergency we first examine the reasonableness and propriety of the investigative tactics that generated the urgent situation.... Employing this standard, we found that the heightened danger that the evidence would be destroyed was the probable result of the officers' removal and replacement strategy....(putting beeper in package containing drugs which went off when package was opened). Because the danger of destruction was created by the officers' investigative strategy, it could not justify a warrantless entry." *U.S. v. Johnson*, 12 F.3d 760 (8th Cir. 1993).

In *Nelson v. State*, 96 Nev. 363, 609 P.2d 717 (1980), police arrested suspect outside her home for "suspicion of burglary" after she refused consent to enter and then entered home "believing that her three year old child was unattended." Evidence from home suppressed because police action "created" the necessity to enter to check the welfare of the child.

In *Phillips v. State*, 106 Nev. 763, 801 P.2d 1363 (1990), police saw persons leave a "wet t-shirt" contest at a bar and go to a motel room. Police went to the room to interview the persons about the contest. When the door was opened, one suspect inside the room had his hands concealed and refused police order to put hands in view. Police heard "metallic sound" like slide on pistol and entered fearing for safety. (Turned out to be crushing of soda can.) Drugs seen in

plain view. Held: drugs suppressed -no emergency or indication persons in room were dangerous or suspected of a crime.

(6) "Check the Welfare" and Domestic Violence Cases

Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury, without violating the Fourth Amendment. *Brigham City, Utah v. Stuart*, 547 US. 398, 126 S.Ct. 1943 (2006). Regardless of their subjective motives, police officers were justified in entering a home without a warrant, under exigent circumstances exception to warrant requirement, as they had an objectively reasonable basis for believing that an occupant was seriously injured or imminently threatened with injury; officers responded to complaints about loud party at the home at three o'clock in the morning, they heard fighting and yelling from within the home as they approached, and from the backyard of the home through windows, they observed a juvenile being held back by several adults, and the juvenile struck one of the adults, sending the adult to the sink spitting blood. *Id.*

In *Hannon v. State*, 125 Nev.Adv.Op. 15 (May 21, 2009) the Nevada Supreme Court brought Nevada's standard for emergency home entry into conformity with the *Brigham City* standard under which a law enforcement officer's subjective motivation is irrelevant. Rather, the reasonableness of an emergency home entry depends on whether law enforcement had an objectively reasonable basis to believe that there was an immediate need to protect the lives and safety of themselves or others. Under the facts of this particular case, there was no objectively reasonable basis to believe that the two occupants or any undisclosed third party may have been in danger inside the house where in response to a domestic violence call officers spoke with two occupants at the door who were flushed and breathing heavily but who denied any physical altercation and where there were no observable signs of injury or evidence of any third occupant and it appeared the domestic dispute had dissipated by the time officers arrived.

Officer's initial warrantless entry into apartment was justified by exigent circumstance of 911 domestic violence call where officers reasonably feared that defendant's ex-girlfriend could have been inside the apartment badly injured and in need of medical attention. *United States v. Black*, 482 F.3d 1035 (9th Cir. 2007). Police were dispatched to defendant's apartment upon report from ex-girlfriend that defendant had beat her up that morning, that he had a gun, and that she intended to return to the apartment to retrieve her property. However, upon arrival of police, ex-girlfriend was not present, no one answered knock on apartment door, and defendant (who was located outside) denied living in the apartment even though he had a key to it in his pocket.

"We do not think that police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams. The less intrusive a search, the less justification is required. The question is whether the search was reasonable." *U.S. v. Brown*, 64 F.3d 1083 (7th Cir. 1995).

"Only a mild exigency need be shown where entry can be accomplished without destruction of property.... The facts known to police officers indicated that a resident was not responding when the circumstances inside the house strongly suggested that a resident should have been present. The officers had reason to enter immediately without a warrant. A passerby reported to police that a person was seen running from a dark house. Police responded and found the rear sliding door open and lights and TV on but no one answered phone or police shouts. Citizens in the community would have viewed it as poor police work if they had left the scene or failed to investigate further at once." *Murdock v. Stout*, 54 F.3d 1437 (9th Cir. 1995). *See also*, *People v. Ray*, 75 Cal. Rptr.2d 565 (1998) (Police only required to have a reasonable suspicion of exigency to make warrantless entry to perform a welfare check).

People v. Higgins, 31 Cal. Rptr.2d 516 (1994) officers went to a residence on a call of domestic violence and were met at the door by a woman who was very frightened and had marks on her face. She claimed she had fallen down the stairs and that her boyfriend was not home and tried to edge the police away from the door. Police entered without her consent and found drugs in plain view. In upholding the entry, the Court held, "The officers had reason to believe her statements were false. Domestic violence calls commonly involve dangerous situations in which the possibility for physical harm escalates rapidly."

In *State v. Greene*, 784 P.2d 257 (Ariz. 1989) the Court said that when an officer is responding to a domestic violence call and has probable cause that the perpetrator is inside "this is sufficient indication that an exigency exists unless there are other circumstances indicating that entry is unnecessary." Same ruling in *State v. Raines*, 778 P.2d 538 (Wash. 1989).

Other cases upholding police entries into premises without a warrant due to emergency (P/C...information from neighbors and/or prior history of domestic violence) that a domestic violence situation has or is occurring despite claim from female that no man is there. *U.S. v. Bartelho*, 71 F.3d 436 (1st Cir. 1995) and *Tierney v. Davidson*, 133 F.3d 189 (2nd Cir. 1998).

(7) Emergency Seizures of Blood

In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966) the court held that taking blood or urine samples can be done if there is probable cause that it contains evidence - no time for warrant because evidence would tend to disappear but reasonable and humane methods must be used. (Note: Nevada statutes on vehicular offenses give more specific rules).

Almond v. State, 105 Nev. 904, 785 P.2d 217 (1989), overruled, other grounds, Long v. State, 109 Nev 523, 853 P.2d 112 (1993). Police had probable cause to arrest the suspect where he admitted to drinking seven or eight beers and was obviously intoxicated and his passenger had fallen off the hood of the truck which the suspect was driving sustaining serious injuries. Warrantless blood draw justified given the rapid, inevitable destruction of the evidence sought (blood alcohol percentage).

State v. Jones, 111 Nev. 774, 895 P.2d 643 (1995) Court held that police could not take a blood draw without a search warrant where persons were arrested for Under the Influence of Controlled Substance ("UICS.") Unlike alcohol cases where the specific level is critical, UICS cases don't require a certain level and most drugs stay in the system in a detectible form for many hours. The Court said that a positive test for drugs combined with the officers' testimony about the suspect's actions can establish the elements of the offense. Note: the Court strongly suggested that police could take a warrantless blood draw of a person when probable cause that driving UICS was present because of the "implied consent" law.

I. AUTOMOBILE STOPS AND SEARCHES

(1) INTRODUCTION

Traffic stops are seizures within the Fourth Amendment. A court will evaluate the validity of a vehicle stop on a step by step basis. What was the first thing the officer did? (Followed the car, stopped the car, etc). Did the officer's actions need justification? If so, what facts supported the justification? Were the officer's actions appropriate based on the court rulings on the justification needed? If the officer made a valid stop but conducted activity normally unrelated to (or in addition to) the basis for the stop, what was that action and was it justified

Police officers and automobiles are constantly coming in contact with each other and it is important that officers understand the different types of automobile searches. This is because each type of search has a separate and different justification which defines the scope, intensity and duration of a lawful search in a given situation.

Virtually all cases approve police requesting a drivers' license and registration during a valid traffic offense stop. *U.S. v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568 (1985) and *Berkemer v. McCarthy*, 468 U.S. 420, 104 S.Ct. 3138 (1984); "An officer on a routine traffic stop may request license and registration, do a computer check and issue a citation." *U.S. v. McRae*, 81 F.3d 1528, 1534 (10th Cir.1996); U.S. v. Sullivan, 138 F.3d 126 (4th Cir. 1998).

See NRS 484.800(1) which provides:

Except for a citation issued pursuant to NRS 484.810, whenever a **police** officer makes an arrest or issues a citation to a person for any violation of this chapter, **he shall record the name as given by that person, the number of his driver's license** and a brief description of his physical appearance. This information must be maintained in a record for offenses kept at the **traffic** enforcement agency which employs that officer. (emphasis added).

(2) SLOW DRIVING

In *Taylor v. State*, 111 Nev. 1253, 903 P.2d 805 (1995), the Court held there was reasonable suspicion to justify a traffic stop where the vehicle was driving slowly, the driver appeared nervous, and the officer observed a safety hazard, specifically a nonfunctioning brake light.

However, in *State v. Rincon*, 122 Nev. 1170, 147 P.3d 233 (2006), the Court clarified that slow driving alone, without any other indicia of erratic driving or unusual behavior, would not satisfy the reasonable suspicion standard for a traffic stop.

Absent reasonable suspicion, and <u>under very limited and narrow circumstances</u>, an inquiry stop of a slow driver may be permissible pursuant to the "community caretaking" exception to the Fourth Amendment. *Rincon*, supra, citing *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973). The community caretaking doctrine recognizes that police officers have a duty to aid drivers who are in distress. *Id.* An objectively reasonable belief that emergency assistance is needed may arise if a police officer observes circumstances indicative of a medical emergency or automotive malfunction.

(3) STOPS ("PRETEXT")

The dictionary defines "pretext" as an "ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." Blacks Law Dictionary 1187 (6th ed. 1990). In the context of Search & Seizure Law, the "Pretext" claim is raised by the defense when an officer stops a person for a reason "A" when reason "B" is the real or primary basis for the stop.

Before 1996, there used to be two tests for determining whether a stop was "pretextual." The majority rule in the U.S., the "could you" rule was that there was no such thing as a pretext stop as long as the officer who made the stop did actually and truthfully observe the occurrence of the minor offense which was the basis for the stop. The other rule used in a minority of courts was the "would you" rule. Under this test the court tried to determine whether a police officer would ordinarily stop a person or vehicle for the minor offense, absent the officer's desire to investigate the more serious offense.

Currently, the U.S. Supreme Court and the Nevada Supreme Court have clearly adopted the "could you" test.

The U.S. Supreme Court's decision was in the case of *Whren v. U.S.*, 517 U.S. 806, 116 S.Ct.1769 (1996). The Court ruled that the internal thoughts of the officer were irrelevant for a Fourth Amendment inquiry as long as the officer had a truthful objective reason for making the stop. The U.S. Supreme Court did note that the selective enforcement of traffic laws based solely on race or ethnicity would violate the Equal Protection Clause of the Fourteenth Amendment.

Additionally, the U.S. Supreme Court has held that an officer's subjective intention not to issue defendant a speeding ticket does not make continued detention illegal so long as detention is justified by the circumstances, viewed objectively *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417 (1996).

In *U.S. v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000), a police officer pulled over Lopez-Soto's vehicle, which displayed a license plate of a foreign country, under the erroneous belief that the registration was not displayed in compliance with the with the laws of its home jurisdiction as required by local law. During a subsequent search for the registration sticker the officer detected a strong odor of marijuana and discovered 400 kilograms of marijuana. Lopez-Soto sought suppression of the marijuana.

The Ninth Circuit rejected Lopez-Soto's claim that a traffic stop required probable cause and reaffirmed the principle that the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops. *Id.* at 1104-1105. However, the Court did find that the officer's actions were not objectively reasonable. The Court, citing *U.S. v. Miller*, 146 F.3d 274 (5th Cir. 1998), held:

The rule articulated by the Supreme Court in Whren provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions. But the flip side of that leeway is that the legal justification must be objectively grounded. *Id.*

In *Gama v. State*, 112 Nev. 833, 920 P. 2d 1010 (1996), police involved in drug interdiction suspected that Gama's car might contain illegal drugs although they had neither P/C nor R/S to support that belief. A trooper saw Gama's car and began to follow in order to "try to gain probable cause for stop." He saw Gama's vehicle drive through a 45 mph zone at 56 mph and, although numerous vehicles traveling at the same speed were neither stopped nor cited, he stopped Gama's vehicle. After the stop, the trooper was joined by other officers with a narcotics trained dog which walked around the outside of Gama's car and alerted. The car was then searched. A bag with drugs and paperwork was seized.

The Court held that as long as the trooper had a valid basis to stop the car, it made no difference what the trooper's subjective motive was. The court also held that a dog sniff was probable cause to justify the warrantless search of the car.

In *Doyle v. State*, 116 Nev. 148, 995 P.2d 465 (2000), the Nevada Supreme Court reaffirmed the "could you" test of *Whren* and *Gama* and also noted that although *Whren* involved a traffic detention, its conclusion that subjective intentions play no role in ordinary probable cause Fourth Amendment analysis is equally applicable to arrests.

In *State v. Johnson*, 116 Nev. 78, 993 P.2d 44 (2000), Johnson's vehicle was pulled over for failing to stop at a stop sign. The trooper asked the purpose of Johnson's trip. He replied that he was going to Montana to do carpentry work with some of his relatives and stated that he had his tools in the trunk and that the trooper could go ahead and look in the trunk to see the tools. The trooper asked Johnson if he had any drugs in the car. Johnson averted his gaze, looked back to the car, dropped his head, and said, "No, you can go ahead

and look." The trooper also testified that he asked Johnson if he could search the vehicle and Johnson replied, "Yes."

Russell Owens, a trooper with twenty-one years experience as an officer and who had conducted thousands of vehicle searches, arrived to conduct the search of the vehicle. Owens searched the front seat and the dashboard areas. On the dashboard area just below the glove box, Owens noted that the screws on a panel were not the type of black screws that are normally used in automobiles, but were shiny, non-factory screws. He removed three screws directly below the hinge of the glove box, a panel dropped and Owens recovered three bindles of narcotics.

Upon holding that the bindles of narcotics should be suppressed, the Nevada Supreme Court stated "Innocent citizens must not be stopped on the pretext of a traffic violation and have their automobiles dismantled when a police officer has nothing more than a "hunch" that contraband may be present. *Id* at 81, 993 P.2d at 46.

Although the U.S. Supreme Court and the Nevada Supreme Court have eliminated the concept of a "pretext" stop, officers should be aware that just because the stop can now lawfully be made for any violation no matter how minor, this does not mean that the stop can be extended for an indefinite period of time (unless R/S appears), nor can the vehicle be searched without either probable cause or valid consent.

The *Whren* rule was followed in *Kearse v. State*, 986 S.W.2d 423 (Ark. 1999), *People v. Woods*, 981 P.2d 1019 (Calif. 1999) and in cases from the Supreme Court in the states of Florida, Indiana, Illinois, Iowa, Maryland, New York, Tennessee, Washington and West Virginia.

(4) PASSENGERS IN A VEHICLE

In *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330 (1977), the court held that police could order the driver of a car stopped on a routine traffic offense to get out of the car even without a particular suspicion that the person posed a danger, due to the inherent danger of these stops.

In *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882 (1997), the Court held that the same legal authority on routine stops extends to the passengers of an automobile. The Court said that because the passengers are already stopped with the driver and the car, the additional intrusion by ordering them out was minimal when compared to officers' safety. Note: Although police can require a license from the driver, unless there is R/S or P/C police cannot require

passengers to provide identification. See also *U.S. v. Diaz-Castaneda*, 494 F.3d 1146 (9th Cir. 2007) (Police officer's *request* for passenger's identification during vehicle stop was valid where officer wanted to learn identity of passenger and whether passenger could drive truck once driver was arrested for driving on suspended licence).

In *Brendlin v. California*, 127 S.Ct. 2400, 2403 (2007), the Court held that "a passenger is seized [when a traffic stop occurs] and so may challenge the constitutionality of the stop." A passenger may challenge a stop of a vehicle on Fourth Amendment grounds even if they have no possessory or ownership interest in the vehicle. *U.S. v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000).

Some courts require an articulable basis for ordering passengers out of vehicles. See *Washington v. Reynolds*, 27 P.3d 200 (Wash. 2001) where it was held that upon stopping a vehicle for a traffic violation, a police officer may order passengers into or out of the vehicle only if the officer is able to articulate an objective rationale predicated specifically on safety concerns. In weighing those circumstances, the officer may consider several nonexclusive factors, none of which, standing alone, would automatically meet the objective rationale standard: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants.

Officers may frisk a lawfully stopped passenger the same as a driver, upon reasonable suspicion that the person subject to the frisk is armed and dangerous. In *Arizona v. Johnson*, 129 S.Ct. 781 (2009), an officer's patdown of a vehicle passenger, whom she suspected was armed, was lawful where officers patrolling a neighborhood associated with gang membership had pulled over the vehicle when a licence plate check revealed that its registration had been suspended for an insurance-related violation, and officer, wanting to question the passenger on his possible gang affiliation, had asked the passenger to get out of the car, See also *U.S. v. Wiga*, 662 F.2d 1325 (9th Cir. 1981) (Occupants of a lawfully detained motor vehicle may be routinely ordered out of the vehicle, and with reasonable suspicion that the occupants are carrying weapons, arresting officers may lawfully subject such occupants to a pat-down search.)

(5) DURATION OF THE STOP

In *U.S. v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568 (1985) the Supreme Court held that a *Terry* stop required the police to diligently pursue a means of investigation that would quickly confirm or dispel their suspicion.

In *U.S. v. Salzano*, 158 F.3d 1107 (10th Cir. 1998) the Court stated a rule that applies to all traffic stops by federal or state police. "When police stop a car for traffic violation the officer cannot take more time than is necessary to review license, registration, insurance, run a computer check (or call dispatch) to check outstanding warrants(and other relevant factors) and issue a citation unless the officer develops R/S or P/C." Same ruling in many other cases such as *U.S. v. Mesa*, 62 F.3d 159 (6th Cir. 1995)(dog sniff delayed-evidence suppressed).

There must be legally learned R/S to detain the vehicle longer. (Note: Defense attorneys can subpoen police records on traffic stops and establish an approximate time for routine traffic stops.)

In *U.S. v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 2001), a California Highway Patrol officer pulled over Valenzuela's vehicle for following another vehicle too closely. The officer questioned Valenzula during a seven minute interval while a dispatcher checked his license and registration. The officer asked a series of questions about his starting point, destination, whom he was visiting and where he worked. During the conversation, the officer noticed that Valenzuela was trembling and would not make eye contact. Upon learning that the license and registration were valid the officer returned those items to Valenzuela. The officer then asked whether there were any drugs in the car and asked for consent to search the vehicle and Valenzuela agreed. Valenzuela signed a consent to search card. Upon a search of the trunk a large amount of narcotics were discovered.

The court found sufficient justification for the vehicle stop but concluded that the subsequent search exceeded the scope of the initial traffic stop. The Court concluded that extreme shaking and avoidance of eye contact were insufficient to justify the extended detention and inquiry into other criminal activity. The Court noted that even though Valenzuela's license and registration were returned a reasonable motorist, under these circumstances, would not believe he could disregard the officer's inquiry and end the conversation. The officer lacked the requisite reasonable suspicion when he continued to detain Valenzuela after completing the traffic stop and asked him if he was carrying drugs. Lastly, Valenzuela's consent to search was subsequent to an illegal investigation and was therefore tainted by the illegality and inadmissible.

In *U.S. v. Garcia-Rivera*, 353 F.3d 788 (9th Cir. 2003) Garcia-Rivera was pulled over for driving a motor vehicle with a cracked windshield. The officers observed Garcia-Rivera make a furtive movement as if reaching for something. Upon request, Garcia-Rivera was unable to produce a driver's

license, vehicle registration or proof of insurance. Garcia-Rivera informed officers that he had been convicted of armed robbery. The officers conducted a pat down search and requested consent to search. Thereafter, the officers discovered a .25 caliber shell casing on the floor and a .25 caliber handgun in the seat.

Garcia-Rivera subsequently claimed that the officers impermissibly expanded the scope of his stop. The Court rejected this argument, holding that given the furtive movements and inability to provide documentation the officers properly expanded the scope of the stop beyond the cracked windshield violation.

It is important to note that although routine traffic stops are based on probable cause seen by police, while *Terry* stops are based on reasonable suspicion which may come from various sources, the courts view a traffic stop (whether probable cause for traffic violation or reasonable suspicion for other crimes) as basically a *Terry* stop because in most cases, the person is not going to be custodially arrested on the traffic stop. This was the ruling in *Berkemer v. McCarthy* and *U.S. v. Toledo*, 139 F.3d 913 (10th Cir. 1998). Of course a traffic stop for a felony where there is probable cause before the stop, is a different situation. Remember that a reasonable suspicion stop can last longer (up to 60 minutes, see NRS 171.123(4)) whereas a traffic stop usually takes 10-15 minutes at most.

If the officer, after the stop, develops reasonable suspicion to believe that criminal activity is afoot, as long as the officer diligently pursues the investigation, the questioning and time of detention can extend beyond matters related to the initial traffic stop. *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir.1994). This can also occur if the driver voluntarily consents to the officer's questions. *U.S. v. Sandoval*, 29 F.3d 910 (8th Cir.1994).

An officer's inquiries into matters unrelated to the justification for the traffic stop, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. *Arizona v. Johnson*, ____ U.S. ____, 129 S.Ct. 781 (2009). During a vehicle stop for suspended registration due to an insurance-related violation, passenger's incidental temporary detention was lawful and officer's unrelated inquires to him about possible gang affiliation did not prolong the stop.

See also, Gama v. State, 112 Nev. 833, 920 P. 2d 1010 (1996), where subsequent to a valid traffic stop a narcotics unit, including the drug dog, Cleo, arrived on the scene prior to the time that the citation was completed. The drug dog sniffed the vehicle and altered the officers to the possible presence of

narcotics. The vehicle was searched and narcotics were found. The Supreme Court held that because the sniff was conducted while Gama was lawfully detained for the traffic violations, there was no improper seizure. That is, the officers did not exceed the scope of the initial traffic stop. Also, the Court held that a sniff was not a "search" for Fourth Amendment purposes. Once the dog alerted to the presence of drugs the officers had an independent legal justification for searching the vehicle.

(6) CITATION OR CUSTODIAL ARREST

In *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536 (2001), the U.S. Supreme Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. The Supreme Court recognized, however, the state's power to legislatively restrict arrests for such minor offenses.

The cases decided by federal circuit courts all hold that whether the officer has discretion to arrest or give a citation on a traffic offense depends on the laws established by the state legislature. For example,

In *U.S. v. Ramos*, 39 F.3d 219 (9th Cir. 1994) the defendant was arrested for a traffic offense. The Circuit Court held that the State Legislature has lodged discretion in the arresting officer in every case of a misdemeanor to either take the person arrested to jail or before a magistrate or release him upon his written promise to appear. The language is explicit in the use of the words "in any case" and "at any time". Hence the arresting officer is not compelled to, but may, for example, take a person charged with driving while under the influence of intoxicating liquor before a magistrate. We hold that this statute (discretion) is valid. (Note: Inventory recovered drugs and weapons.)

In Nevada, there is a statute and Supreme Court decision which deal with when a custodial arrest can be made on a traffic stop.

NRS 484.795 states:

Whenever any person is halted by a peace officer for any violation of this chapter and is not required to be taken before a magistrate, the person may, in the discretion of the peace officer, either be given a traffic citation, or be taken without unnecessary delay before the proper magistrate. He must be taken before the magistrate in any of the following cases:

1. When the person does not furnish satisfactory evidence of identity or when the peace officer has reasonable and probable grounds to

- believe the person will disregard a written promise to appear in court:
- 2. When the person is charged with a violation of NRS 484.701, relating to the refusal of a driver to submit the vehicle to an inspection and test;
- 3. When the person is charged with a violation of NRS 484.755, relating to the failure of a driver to submit the vehicle and load to a weighing or to remove excess weight therefrom; or
- 4. 4. When the person is charged with a violation of NRS 484.379 or 484.379778 (driving under influence of alcohol or drugs), unless he is incapacitated and is being treated for injuries at the time the peace officer would otherwise be taking him before the magistrate.

In *Morgan v. State*, the Nevada Supreme Court upheld Morgan's arrest for suspended driver's license per department policy and a history of FTA's even though Morgan cooperated with the police officer, identified himself, and never engaged in conduct indicating that he would fail to honor a traffic summons. *Morgan v. State*, 120 Nev. 219, 220, 88 P.3d 837, 838-39 (2004). In light of Morgan's prior conduct of failing to pay fines or appear in court, the police officer's decision to arrest Morgan was not arbitrary or unreasonable.

However, in *State v. Bayard*, 119 Nev. 241, 71 P.3d 498 (2003), a police officer observed Bayard commit two minor traffic violations – 1) Bayard turned left onto a 2 lane thoroughfare and drove immediately to the outside lane and 2) Bayard changed lanes abruptly. The officer pulled Bayard over for these traffic infractions. The officer's contact with Bayard was unremarkable as Bayard produced identification and was cooperative. The officer arrested Bayard for violating the traffic ordinances and during a subsequent booking procedure Bayard was strip searched revealing bindles of cocaine and marijuana inside Bayard's underwear.

Bayard filed a motion to suppress based on an illegal arrest. The district court granted Bayard's motion and on appeal the Nevada Supreme Court affirmed. Noting that Bayard was cooperative and that there was no indication that Bayard would not respond to the traffic summons, the Court ruled that the mandatory provisions of NRS 484.795 did not apply. The Supreme Court stated that although the Legislature has given officers discretion in determining when to issue a citation or make an arrest for a traffic code violation, that discretion is not unfettered.

The Court ruled that to make a valid arrest based on state constitutional grounds an officer's exercise of discretion must be reasonable. Reasonableness requires probable cause that a traffic offense has been committed and

circumstances that required immediate arrest. Absent "special circumstances requiring immediate arrest", individuals should not be made to endure the humiliation of arrest and detention when a citation will satisfy the state's interest.

It should be noted that the Nevada Supreme Court specifically stated that the facts of *Bayard* were distinguishable from those in *Collins v. State*, 113 Nev. 1177, 946 P.2d 1055 (1997).

In *Collins v. State*, 113 Nev. 1177, 946 S.Ct. 1055 (1997) the defendant was custodially arrested for an unstated misdemeanor traffic offense. The Court held that the arrest was valid under NRS 484.795 (1) because Collins acted with hostility toward the trooper, initially refused to provide his license, registration and proof of insurance, and crumpled the citation that the trooper gave him, thereby making it reasonable and probable for the trooper to believe that he would disregard a written promise to appear in court.

Despite the rulings on custodial arrests rather than citations on traffic stops, officers should note that Federal Courts have held that it is unconstitutional to arrest a person because they refuse consent to search or to make an "out of the ordinary" arrest to justify a search or impound.

(7) THE "FRISK" OF A VEHICLE

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983), police saw a car swerve into a ditch late at night in a remote area. Suspect got out of car and met police. When asked for license and registration, he started back towards the car - police saw a large hunting knife on the floor. Suspect was frisked and police entered the car to make a quick search for weapons and found marijuana in a pouch under the armrest. Holding: This was a lawful search. Protective search (*Terry* v. Ohio) is justified when there is reasonable belief that suspect poses a danger to police - can briefly search the car limited to places where suspect might retrieve a weapon if he broke away from police or area that suspect would return to if cited and released.

In *U.S. v. Wiga* 662 F.2d 1325 (9th Cir. 1981) agents had not been keeping a motor home under surveillance very long when they pulled it over and, after the stop, the driver lied to agents when he told them that no one else was present in motor home, and vehicle was licensed to handicapped person but agent knew that driver was not handicapped. The Ninth Circuit held that the agent was justified, under the protective sweep doctrine, in making a quick and

cursory inspection incident to lawful arrest of the driver, and weapons discovered in plain view were lawfully seized.

In *U.S. v. Stanfield*, 109 F.3d 976 (4th Cir. 1997) a car was illegally parked in an area of high crime and drug activity. The driver's window was down, but the passenger window was raised, tinted so dark that the officer on that side couldn't see into the car. Police on the driver's side could see little of the car's interior so an officer opened the passenger side door to see if the occupant was armed or had access to weapons and he saw from the outside a clear plastic bag of cocaine.

The Court upheld the police action stating: Even if the interiors of cars are fully visible, "roadside encounters between police and suspects are especially hazardous," with as many as "30% of police shootings occurring when a police officer approaches a suspect seated in an automobile," The Supreme Court noted recently in *Maryland v. Wilson* that in 1994, 5,762 assaults on police occurred during the course of traffic pursuits or stops. Thus, "it is too plain for argument that the governmental interest in officer safety during traffic stops is substantial."

When, during already dangerous traffic stops, officers must approach vehicles whose occupants and interiors are blocked from view by tinted windows, the potential harm to which the officers are exposed increases to the point of unconscionability. We can conceive of almost nothing more dangerous to an officer in the context of a traffic stop than approaching an automobile whose passenger compartment is entirely hidden from the officer's view by darkly tinted windows and someone inside might be aiming a gun at the officer.

In *U.S. v. Christian*, 187 F.3d 663 (DC Cir. 1999) officers were in an area of Washington, D.C., "notorious for drug selling and stolen property." From the squad car they observed a man holding two objects in his hand standing next to an empty car with a woman who was holding a white plastic bag. Upon seeing the police, he threw the two objects through the car's front window.

The officers approached to investigate. Through the car's partially open window, an officer noticed a dagger with a six-inch blade wedged next to the driver's seat. The man said the car was his and gave police the keys. Then, without his consent to search, the officer entered the car to secure the dagger.

While retrieving the dagger, the officer noticed a bag lying on the front passenger's seat next to the dagger. He picked up the bag, felt what he thought was a weapon inside, and opened it to find a loaded, .45 caliber handgun. Court upheld Christian's conviction as an ex felon in possession of a firearm.

In *State v. Wilkins*, 692 A.2d 1233 (Conn. 1997) the Court approved police conduct when an officer observed a car careen around a truck in the oncoming lane, cross a double yellow line and nearly hit his cruiser head-on. He made a U- turn and followed the vehicle into a parking lot behind an apartment building.

As the officer approached the vehicle, he saw its two occupants "scrunching down" in the front seat of the car, as if trying to avoid detection. Concerned for his safety, he drew his weapon as he approached shouted to the occupants to sit up and raise their hands into his line of sight. Both occupants sat up, but the defendant disobeyed the repeated instructions to keep his hands in sight, twice dropping them down out of the officer's line of vision.

The officer believed the defendant may have been reaching down for a weapon. He ordered both persons out of the car and called for backup which arrived within a few minutes. Then the officer checked the front passenger section and found a loaded pistol under the seat

Numerous cases follow *Long* where the officer has R/S that the vehicle's passenger compartment contains a weapon. *U.S. v. Gleason*, 25 F.3d 605 (8th Cir. 1994), *U.S. v. Burrows*, 48 F.3d 1011 (7th Cir. 1995) The "frisk" can include accessible closed containers, *U.S. v. Cervantes*, 19 F.3d 1151 (7th Cir. 1994). Applied in *State v. Herbert Wright*, 104 Nev. 521, 763 P.2d 49 (1988). See *U.S. v. Baker*, 47 F.3d 691(5th Cir.1995), *U.S. v. Mancillas*, 183 F.3d 682(7th Cir. 1999).

See, *U.S. v. Holifield*, 956 F.2d 665 (7th Cir. 1992). In which the court held that police officers' protective search for weapons in locked glove compartment in vehicle defendant was driving was reasonable. Officers had anticipated allowing vehicle's occupants to reenter vehicle while officers wrote traffic citation and once occupants reentered vehicle, it would have taken only a few seconds to obtain gun from glove compartment. However, the Court did note that protective searches are only limited in the sense that officer conducting protective search must first have reasonable suspicion that suspect is dangerous and protective search must be directed only to locations which may contain weapon and to which suspect may have access.

In *Colorado v. Litchfield* 918 P.2d 1099 (Colo. 1996), police improperly extended their warrantless search of properly stopped vehicle for weapons, when they searched trunk of vehicle; search was not supported by safety concerns, as there was no way detainees could reach any weapons stored in trunk while vehicle was enroute to police station.

(8) AUTOMOBILE SEARCH INCIDENT TO ARREST

(a) Federal Law

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981), a policeman stopped suspect and others in a car for traffic violation. The officer smelled marijuana and saw some marijuana in the car. The officer arrested all occupants for possession. Got occupants out of car and separated them. Searched interior of car - found jacket - opened pocket and found cocaine. Court: When police made custodial arrest of occupant of a car, police may, incident to that arrest, search the passenger compartment of the car, and any unlocked container (clothing and glove compartment) inside the car.

The long established practice of applying *Belton* as a "bright-line rule" to every vehicle wherein an occupant was arrested was recently disavowed by the U.S. Supreme Court. In *Arizona v. Gant*, ____ S.Ct. ____, 2009 WL 1045962 (Decided April 21, 2009), the Court held that police may search a vehicle incident to a recent occupant's arrest *only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search*. Alternatively, the Court also concluded that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." <u>Id</u>. The latter might occur for drug arrests, but not traffic offenses.

(b) Nevada Rule

In *State v. Greenwald*, 109 Nev. 808, 858 P.2d 36 (1993), the court declined to follow the *Belton* rule. An NHP trooper lawfully arrested Greenwald for reckless driving, handcuffed him, searched his person and then locked him in the police car. Then the trooper went back to the motorcycle and searched the entire bike, including looking inside the gas and oil tanks and taking apart a flashlight. In a saddlebag, the trooper found a gun and some LSD.

The court held: dope suppressed. Search incident to arrest is based on the policy that allows an officer, even without individualized cause or suspicion in any given case, to search to disarm and prevent possible destruction of evidence. No need to do this with Greenwald handcuffed and locked in police car.

All five Justices in Greenwald agreed that, in theory, the search could be justified on another legal basis, if one existed, even though the officer was not thinking of that legal basis when he searched. (The Court recognized the "objective test" for police conduct). In *Greenwald*, "inventory" was a possible alternative basis, but the Court also rejected that theory on the case's facts.

In *Rice v. State*, 113 Nev. 425, 936 P.2d 319 (1997) Rice was lawfully stopped for a traffic violation while riding a bicycle and was arrested for carrying a concealed weapon after an officer saw a pocket bulge during a patdown search. His knapsack was removed from him and placed on the ground, then he was handcuffed and put in a police car. A search of the knapsack minutes later was unlawful under the *Greenwald* rule. Court noted that the police officers did not perform and record an inventory of the knapsack.

In *Camacho v. State* 119 Nev. 395, 75 P.3d 370 (2003), police conducted three undercover methamphetamine purchases from Camacho. Another purchase was arranged in order to lure Camacho to police for arrest. Camacho drove his vehicle to the prearranged meeting location where he was removed from the vehicle, handcuffed and escorted away from the vehicle. A police officer searched the immediate area of the vehicle and recovered a bag beneath the driver's seat containing narcotics. The next day, pursuant to department policy, police conducted an inventory search. No contraband was recovered during this search, but all items found in the vehicle were included on the inventory search form. Camacho moved to suppress the narcotics discovered in his vehicle. In response, the State argued that several justifications existed for the search of the vehicle, including that the search was conducted incident to lawful arrest.

Addressing the validity of a search incident to arrest under these circumstances, the Nevada Supreme Court reaffirmed earlier case law rejecting the reasoning of *Belton*. The Court held that under the Nevada Constitution there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful arrest.

(9) INVENTORY SEARCHES

(a) The Impoundment Must Be Valid

Please note that the LVMPD manual provides that the SOP of that department is to pursue the "park and lock" option or allowing a non arrested adult passenger to drive the car away when the driver of a motor vehicle is arrested. Park and lock does not have to be followed in every case depending on such factors as remote area, high crime area, hazard to traffic and other factors. Also, a vehicle which is used in a felony crime is subject to impound and forfeiture and a vehicle (in an accident, for example) may be impounded as evidence. The key is that the reason to impound must be a legitimate one. If the

Court thinks that it was done simply to allow a general rummaging under the automatic inventory rule, any evidence or contraband will be suppressed.

An Inventory Search is not treated as an investigative search because they serve three administrative purposes: "the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger." See *South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S.Ct. 3092 (1976).

In *Florida v. White*, 526 U.S. 559, 119 S.Ct. 1555 (1999) the Court held that the Fourth Amendment does not require a warrant to seize a car for forfeiture from a public place where there is P/C to justify the forfeiture.

In *U.S. v. Duguay*, 93 F.3d 346 (7th Cir. 1996) the court held that rationales for impoundment are distinct from permissible reasons for conducting routine inventory of contents of impounded vehicle, which are to protect owner's property while it is in custody of police, to insure against claims of lost, stolen, or vandalized property, and to guard police from danger.

Impoundments by police may be in furtherance of public safety or community caretaking functions, such as removing disabled or damaged vehicles, and removing automobiles that violate parking ordinances and thereby jeopardize both public safety and efficient movement of vehicular traffic.

Impoundment of defendant's vehicle following his arrest was unreasonable, and violated the Fourth Amendment, when defendant's girlfriend, who had driven car and had possession of keys, was prepared to remove car from street. Among criteria regulating inventory searches of vehicles that must be standardized, for Fourth Amendment purposes, are circumstances in which car may be impounded.

Numerous cases uphold impounds even where it wasn't "absolutely necessary." U.S. v. Martin, 982 F.2d 1236 (8th Cir.1993), Sammons v. Taylor, 967 F.2d 1533 (11th Cir. 1992), U.S. v. Rodriguez-Morales, 929 F.2d 780 (1st Cir.1991), U.S. v. Kornegay, 885 F.2d 713 (10th Cir. 1989), U.S. v. Hood, 183 F.3d 744 (8th Cir. 1999) and Smyth v. City of Lakewood, 83 F.3d 433 (10th Cir. 1996).

(b) A Standard Inventory Policy is Required

In *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632 (1990), The U.S. Supreme Court set forth the rule that an inventory search must not be a ruse for

general rummaging in order to discover incriminating evidence; policy or practice governing inventory searches should be designed to produce an inventory, and individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.

NOTE: Since May 1990, LVMPD has a standard written policy requiring inventory of all vehicles and containers inside them upon impounding the vehicle.

In *U.S. v. Como*, 53 F.3d 87 (5th Cir. 1995) the court held that the police department's policy requiring inventory of vehicles and any containers therein was deemed to cover an inventory of locked trunks.

(c) An Investigative Purpose Does Not Invalidate an Otherwise Valid Search

The starting point is that an inventory search can't be a ruse for a "general rummaging"; otherwise any court will find it unlawful. But, if police are conducting an otherwise valid impound/inventory search, there is no rule that says the police must have "no idea at all" that contraband may be found. U.S. v. Lomeli, 76 F.3d 146 (7th Cir.1996) and U.S. v. Lewis, 3 F.3d 252 (8th Cir. 1993). The key requirement here is a clear showing that the police would have done the inventory anyway.

In *U.S. v. Wallace*, 102 F.3d 346 (8th Cir. 1996) police policy is that if a driver is arrested an officer might release a vehicle to a passenger, if the passenger was a licensed driver and was not arrested. In this case, the car crashed at over 100 mph in a police chase and was totally wrecked. Wallace was arrested. His wife was a passenger and was licensed. The court held that the car was subject to impoundment pursuant to the police policy because not only was it a traffic hazard, but was also the primary physical evidence of the crime of reckless driving.

Police are not precluded from conducting inventory searches when they lawfully impound vehicle of individual that they also happen to suspect is involved in illegal activity; as long as impoundment pursuant to community caretaking or public safety function is not mere subterfuge for investigation, coexistence of investigatory and caretaking or public safety motives will not invalidate search.

Inventory search of locked trunk of impounded automobile was reasonable, despite fact that written police policy did not expressly provide that

officers should inventory locked trunks, where officer testified that officer would have had to open trunk to make sure that car was safe to transport, and police department policy requiring inventory of contents of vehicle and any containers therein covered inventory of locked trunks.

(d) Nevada Cases

In *Greenwald* (see SITA cases) the Nevada Supreme Court upheld the majority rule that an inventory search cannot be a pretext or ruse for "general rummaging." Some of the factors include places searched (in *Greenwald* the officer searched the gas tank and took apart a flashlight) and whether the officer made an actual inventory listing all valuable items. The Court reasoned, "without an inventory, we can have no inventory search."

In *Weintraub v. State*, 110 Nev. 287, 871 P.2d 339 (1994) police lawfully impounded the defendant's car but listed only 8 out of 100 items, many of which were valuable, and the court held that there was no actual inventory and suppressed drugs found in the search.

In *Collins v. State*, 113 Nev. 1177, 946 P.2d 1055 (1997) the defendant was arrested and his car was in an unsecured parking lot and no evidence existed that the car or its valuables would remain safe and the car was in an aisle way, not a parking space. The Court held that the impound was valid because it was reasonable and did not turn on the existence of alternative means. The car was taken to a more secure location before the inventory search.

The Court ruled that police have a duty to inventory the contents of a car to protect against claims of theft. As the trooper conducted the inventory he found items that he suspected were indicative of criminal activity and requested an officer from another department to examine the items to see if they were incriminating. The Court held that this did not violate the Fourth Amendment. The Court also held that the police did not exceed the scope of a proper inventory when they read the contents of a spiral notebook and listened to an unmarked tape which was proper so that the tape could be documented on the inventory sheet.

There is no requirement that police contact the registered owner of vehicle prior to conducting an inventory search when the rightful possession by the driver is in doubt or when the vehicle is abandoned and obstructing traffic. *Diomampo v. State*, 124 Nev. ____, 185 P.3d 1031 (2008). LVMPD policy provides cause to impound a vehicle "[w]hen ownership and rightful possession by the driver is in doubt" or "[w]hen an abandoned vehicle causes an immediate threat to other motorists by its location or cargo, immediately after citing the

vehicle." In *Diomampo*, the inventory search was justified because neither Diomampo nor Olsen were the registered owner of the vehicle or had a valid driver's license. Second, the impound and subsequent inventory search were reasonable because the vehicle was parked in an unsecured location, obstructing traffic. Contrary to Diomampo's claims, there is no requirement that police contact the registered owner of the vehicle prior to conducting an inventory search under either of these policies.

In *Camacho v. State* 119 Nev. 395, 75 P.3d 370 (2003), as related in the previous SITA section, the Court held a search of a vehicle invalid based on a search incident to arrest. Nonetheless, the Court upheld the admissibility of the contraband discovered during the search, reasoning that the police would have recovered the contraband during a subsequent inventory search and, therefore, the inevitable discovery doctrine applied.

(10) ROADBLOCK CASES

These are also "policy justified" searches in the sense that no individualized reasonable suspicion or probable cause is required to initiate such a stop. However, the intrusion in such cases must be brief and slight, and the determination of which cars to stop must be made according to some articulable, non-arbitrary standard.

(a) The roadblock must be established according to some non-arbitrary standard

Courts, including the U.S. Supreme Court, have dealt with roadblock cases in a manner consistent with their other "seizure of the persons" cases. The basic legal concept is that the courts want to avoid "unfettered discretion" by police in contacts with citizens. In the area of "stop" and "arrest" the courts do this by requiring reasonable suspicion or probable cause . In roadblock cases it is done by (a) limiting the time and extent of the police intrusion and (b) taking away discretion by requiring a pre-set plan and (c) requiring a valid reason for the roadblock.

Generally, the roadblock, according to numerous federal cases, should (1) be at a location selected for its safety and visibility, (2) have adequate signs (lighted at night) to inform motorists of the police roadblock, (3) uniformed officers and marked vehicles and (4) a predetermination by the administrative officers of the location, time and neutral procedures to be followed.

The following cases are illustrative of the courts' approach to roadblock cases.

In *Delaware v. Prouse*, 440 U.S. 648 (1979) the U.S. Supreme Court struck down a practice by Delaware police whereby officers on roving patrol randomly stopped cars to check for license and registration without either P/C or R/S, since such stops and searches were essentially standardless and arbitrary. See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000) (Drug interdiction checkpoint unconstitutional because its primary purpose was general crime control).

In *Michigan v. Sitz*, 496 U.S. 444 (1990) the U.S. Supreme Court upheld "DUI checkpoints" at fixed locations without reasonable suspicion as long as (1) the intrusion is slight, (2) the program limited officers' discretion by imposing clear criteria for determining which cars to stop (i.e.: stop all cars or stop every other car, etc) and (3) the program was aimed at "the very serious drunken driving problem."

(b) Once stopped at a roadblock, can a car be searched for other criminal activity unrelated to the purpose of the roadblock?

Courts are somewhat divided regarding whether police can search a car for evidence of other criminal activity (such as narcotics) while it happens to be stopped at a roadblock that is set up for another purpose (such as checking for DUI's). Some courts have held that, where the checkpoint is otherwise constitutionally valid, officers may conduct dog sniffs while the driver is stopped. Decision upheld in *U.S. v. Ramirez-Gonzales*, 87 F.3d 712 (5th Cir. 1996) and *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995). In *Merrett*, the court specifically stated that a dog sniff at a roadblock was valid even if the roadblock had a "mixed motive" which was both administrative (such as checking for DUI's) as well as to target criminal activity (narcotics activity).

However, other courts have disagreed and held that, unless some reasonable suspicion or probable cause exists, police may not randomly search for narcotics at checkpoints if the "primary purpose" of the checkpoint is not administrative but is instead a "mere pretext" for a general criminal search. *U.S. v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992), *U.S. v. Huguenin*, 154 F.3d 547 (6th Cir. 1998), *Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999).

Regardless of the purpose for a roadblock, courts have upheld vehicle searches where officers independently developed probable cause based upon their observations of suspicious behavior at the roadblock. In both *U.S. v. Trevino*, 60 F.3d 333 (7th Cir. 1995), *U.S. v. Lopez*, 777 F.2d 543 (10th Cir. 1985), courts upheld searches where drivers reacted in a very suspicious manner when approaching a roadblock and could not adequately answer questions regarding where they had come from or where they were going.

One additional consideration regarding whether such searches are valid is that courts have held that Fourth Amendment concerns are lessened where a roadblock is placed on a road that is not commonly used by the public and has only one destination, such as a road that leads only to a prison, since such searches serve a special security need of the prison. *Spear v. Sowders*, 71 F.3d 626 (6th Cir. 1995), *Romo v. Champion*, 46 F.3d 1013 (10th Cir. 1995).

(c) The standards for roadblocks may be relaxed where the roadblock is established in response to specific, recent or ongoing criminal activity

One major exception to these requirements exists in cases involving the apprehension of persons who have just committed a serious crime where a roadblock has to be established quickly.

In *Maxwell v. City of New York*, 102 F.3d 664 (2d Cir. 1996) the Court dealt with a situation where within an approximate 6 block area there had been numerous drive by shootings within a few weeks. The police set up roadblocks two or three days a week and stopped every car entering the area and requested proof from the driver that he or she lived in the area and if not, police told the driver to park the car and walk into the area or else turn around and leave. The police did not search the car. The Court ruled that this roadblock was valid.

In *Scott v. State*, 629 So. 2d 238 (Fla. 1993) two perpetrators fled into a nearby housing complex and police established a perimeter and temporarily stopped all persons leaving the area. This was upheld as reasonable by the court.

In *U.S. v. Harper*, 617 F.2d 35 (4th Cir. 1980) authorities intercepted a ship on the high seas, searched and found it to be loaded with drugs. With police aboard, it proceeded to its intended destination. Agents moved in but learned that several people awaiting narcotics delivery had fled and established a roadblock on the only paved road leading from that area. All cars were stopped and occupants briefly questioned which resulted in Harper's arrest. The court upheld the roadblock stating that it was OK to discover suspects for a known serious crime and the route roadblocked was reasonably expected to be used for their escape.

In *U.S. v. O'Mara*, 963 F.2d 1288 (9th Cir. 1992) a roadblock at the only exit from a campground where shots were reported was valid because police had reason to believe that one of the cars exiting the park contained occupants who committed the crime.

In *State v. Gascon*, 812 P.2d 239 (Idaho, 1991) a roadblock at "the quickest route to the interstate highway" was reasonable because the police reasonably believed that the robber would try to flee the community after a bank robbery.

(11) PROBABLE CAUSE SEARCH

This is a search which has the greatest scope and level of intrusion. It should be emphasized that automobile searches are one area where the rule established in Nevada is significantly narrower than the rule followed in other states and in the federal courts.

The rule established by the U.S. Supreme Court is broader than that currently in effect in Nevada in that it permits searches to be performed without a warrant under circumstances in which the Nevada Supreme Court requires a warrant. The U.S. Supreme Courts state that, if police have probable cause to believe that an automobile has contraband or evidence inside it, police can, without a search warrant, search anywhere in that car where the object of the search might be found. The scope and intensity of the search is only limited by the size of the item sought. Police can force open locked containers within the vehicle and it makes no difference whether the P/C runs to the car as a whole or to specific containers within the car.

A brief legal history of the U.S. Supreme Court's rulings is as follows:

In Carrol v. U.S., 267 U.S. 132, 45 S.Ct. 280 (1925) the Court for the first time said police could search a car with probable cause but without a warrant. The original reason for "no warrant" was that a car was a "fleeting target" easily mobile and that caused a sort of "exigent circumstance." In U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982) the Court upheld two warrantless P/C searches of the car, one at the location of arrest and another some time later after police had removed the car to a police station. In Michigan v. Thomas, 458 U.S. 259, 102 S.Ct. 3079 (1982) the Court said that when police have probable cause they can conduct a warrantless search of the car even after it has been impounded and is in police custody. Accord, Florida v. Meyers, 466 U.S. 380, 104 S.Ct. 1852 (1984). In California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985) a warrantless probable cause search of a motor home located in a public parking lot, and a second search at the police station were upheld. In this case the Court explained that "mobility exigency" wasn't the only legal basis for a warrantless probable cause search and that the diminished expectation of privacy in a motor vehicle was a separate legal basis. In California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982 (1991) the Court said that it made no difference whether the probable cause ran to the car as a whole or to specific containers n the car.

In *U.S. v. Ornelas*, 517 U.S. 690, 116 S.Ct. 1657 (1996) (See section on reasonable suspicion for basic facts about stop and consent to search), the Court upheld probable cause for the search: An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable. He noticed that a panel above the right rear passenger armrest felt somewhat loose and a screw in the door jam adjacent to the loose panel was rusty, which to him meant that the screw had been removed at some time. To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedk with years of experience, it suggested that drugs may be secreted inside the panel.

All federal courts in the U.S. now follow this rule, which essentially states that vehicle plus probable cause equals search without warrant. Surprisingly, there are a few decisions issued by state Supreme Courts that misinterpret this rule and do not state it correctly and should not be relied upon as authority. For example, in *Pennsylvania v. Labron*, 518 U.S. 938, 116 S.Ct. 2485 (1996) the Supreme Court of Pennsylvania said that a warrantless auto search needed probable cause and exigent circumstances. The U.S. Supreme Court noted that that was incorrect. Accord, *Maryland v. Dyson*, 527 U.S. 465, 119 S.Ct. 2013 (1999).

However, as stated above, the rule applied in Nevada is somewhat narrower than that established by the U.S. Supreme Court. In Nevada, warrants are required to search automobiles that are parked, immobile and unoccupied, unless "exigent circumstances" exist.

In *State v. Harnisch (Harnisch I)*, 113 Nev. 214, 931 P.2d 1359 (1997), police had a search warrant for Harnisch's apartment and were searching it when Harnisch showed up and was arrested. Police found his car in an apartment parking space and searched it and found evidence which proved he committed felony theft crimes. The trial court suppressed the items from the car and the Supreme Court upheld it, stating "police need P/C and a search warrant unless there are "exigent circumstances."

The State filed a motion for reconsideration and in *State v. Harnisch (Harnisch II)*, 114 Nev. 225, 954 P.2d 1180 (1998) the Court modified its prior decision. The Court held that unless there are exigent circumstances, police need a warrant to search a car where the vehicle is "parked, immobile and unoccupied when police first encounter the vehicle in connection with the investigation of a crime." What does "mobile" mean? In *Chambers v. Maroney*,

399 U.S. 42, 90 S.Ct. 1975 (1970), cited with approval by the Nevada Supreme Court in *Harnisch I* and *II* was a case where police stopped, on probable cause, a car that was occupied by persons involved in a robbery. The persons were arrested and the car was taken to the police station and searched. The U.S. Supreme Court upheld the search.

Therefore, in Nevada, if the car is occupied and mobile, ie: driveable, when first encountered, it can be searched without a warrant if there is probable cause that the car contains contraband or evidence even if the occupants are lawfully arrested before the search.

To satisfy this requirement, a car need only appear to be mobile. In *U.S. v. Hatley*, 15 F.3d 856 (9th Cir. 1994), the court stated that apparent mobility is sufficient to conduct a search without a warrant based on probable cause . "It would be unduly burdensome to require the police to establish that every car that appeared to be mobile was indeed mobile before making the search."

Moreover, this rule applies only when the car is parked, immobile and unoccupied "when first encountered by police." If the car is mobile or occupied when first encountered and probable cause exists, then no warrant is required even if the car subsequently becomes immobile before the search is conducted. In *Fletcher v. State*,115 Nev. 425, 990 P.2d 192 (1999), the Court upheld the warrantless probable cause search of a car that had been pulled over after a pursuit and the driver arrested, and the car parked on a roadside awaiting an inventory search and impoundment. The Court held that a warrantless search while the car sat on the roadside was valid since it would be unreasonable to require the police to remain at the scene of the arrest pending the arrival of a warrant or assign an officer to accompany the tow truck to an impound yard pending the arrival of a warrant. In *Hughes v. State*, 116 Nev. 975, 12 P.3d 948 (2000), the Court extended this rule to allow warrantless probable cause searches conducted after a car had been stopped in a pursuit, but before the driver actually placed under arrest.

(12) SEARCHES FOR WEAPONS IN ABANDONED OR EMPTY CARS

Courts have allowed empty or abandoned vehicles to be searched without a warrant where officers had "reasonable suspicion" to believe that a weapon might be in the vehicle, since such weapons might endanger public safety if stolen.

In *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973), police arrested an out of state police officer for DUI. Police believed that Chicago officers were required to carry a gun when off duty, and no gun was found on the arrested officer. Police had already lawfully impounded the car. The owner was not present but the officer had "reasonable suspicion" that a weapon was in the car. The U.S. Supreme Court ruled that it was proper to search the car to obtain the weapon because of safety of the general public if an intruder entered the car and stole the gun. This is not an inventory search.

- In *U.S. v. Prescott*, 599 F.2d 103 (5th Cir. 1979) the court held that police could search an unoccupied car on R/S that a weapon was in the car because of public safety (not an impound search).
- In *U.S. v. Feldman*, 788 F.2d 544 (9th Cir. 1986) the court held that "In *Prescott*, the Fifth Circuit considered irrelevant the local police inventory procedure and whether the officer acted in conformity with that procedure, given the potential existence of a gun in the vehicle. As *Prescott* sensibly concluded, swift and effective action by an officer to secure a gun which he or she reasonably believes to be in an empty impounded car should be recognized as "standard police procedure."
- In *U.S. v. Wilson*, 2 F.3d 226 (7th Cir. 1993), an officer approached Wilson's car in the alley immediately after Wilson fled because a passenger remained in it. At this point he saw the weapons in plain view through the open door and took possession of them. The firearms could have been properly removed from the car, as a public safety measure, to prevent intruders from making off with them if the car were to be secured and left in the alley. (Citing *Cady v. Dombrowski*).

(13) CONSENT CAR SEARCH

Please refer to this manuals section on "Consent."

Remember that the consent-giver can limit the scope of the search and can withdraw consent. Any factors or items discovered during a consent search can be used for P/C if consent is withdrawn after search starts.

(a) If an officer does not have independent reasonable suspicion or probable cause, a consent to search may only be validly obtained if the initial contact was also consensual. If the driver of the vehicle was illegally detained without reasonable suspicion or probable cause, then the consent is also invalid since it is considered the "fruit of a poisonous tree."

For example, in *U.S.*. *v. Chan-Jimenez*, 125 F.3d 1324 (9th Cir.1997), a police officer saw a truck which was stopped lawfully by the roadside. The officer pulled over behind the truck and got license and registration from the driver, and then, after not returning these items to the driver and with his hand on his pistol, the officer asked for consent. The driver consented and the officer found a large bag of marijuana. Held: the officer's actions illegally raised the level of the stop to an investigative stop without sufficient R/S, so the search was the fruit of an illegal detention. Therefore, the consent was not voluntary.

On the other hand, if the initial stop is valid, an officer may subsequently obtain consent for a broader search than permitted by the initial stop, if the circumstances indicate that the consent was voluntarily given. However, if the person indicates that he wishes to terminate the initial encounter, consent can no longer be obtained. In *Ohio v. Robinette*, 519 U.S. 33,117 S.Ct.417 (1996) the Court held that after a "stop" of a person for a traffic citation, the officer did not have to specifically tell the person that, "you are free to go" in order to lower the level to a consensual encounter but an officer has to be low key in objective words and actions in order to make this valid and acceptable in court.

Similarly, in *U.S. v. Erwin*, 155 F.3d 818 (6th Cir. 1998), police made a routine traffic stop, then asked for consent to to broader search. The court held that a law enforcement officer does not violate the 4th Amendment merely by approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking whether he is willing to answer some questions including a request for consent to search the individual's vehicle. However, absent any reasonable suspicion of criminal activity, the individual is constitutionally free to leave (after the time routinely used for a traffic stop), and (although the officer doesn't have to say "you can leave") if the officer rejects the individual's indication that he would like to leave, valid consent can no longer be obtained. Same ruling in *U.S. v. Little*, 178 F.3d 1297 (8th Cir. 1999)

After consent is given, an individual may change his mind and withdraw it. If consent is withdrawn, the search must stop. In *U.S. v. Lattimore*, 87 F.3d 647, 650 (4th Cir.1996), an officer stopped a car for a traffic violation and then obtained oral consent from the driver who then refused written consent, and the officer (after the refusal) said he would get a drug sniffing dog. Court ruled: Consent to search is not irrevocable, and if a person effectively revokes consent prior to the time the search is completed, the police may not thereafter search based upon the earlier consent. Once consent is withdrawn or its limits exceeded, continued search by the officials is violative of the 4th Amendment. However, in this case, the Court held that the refusal to execute a written consent form after a voluntary oral consent does not act as an

effective withdrawal of the prior oral consent, and upheld the search. Same ruling in *U.S. v. Castillo*, 866 F.2d 1071 (9th Cir.1988).

(b) The Scope of the Search

In general, the scope of the search must be limited to the scope of the consent.

The U.S. Supreme Court has stated that a general consent to search, without any limitation, authorizes an officer to search the entire vehicle and any containers within the vehicle. In *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801 (1991), a "suspect had given the police officer a general consent to search the car, and had placed no explicit limitation on the scope of the search. Where a suspect does not limit the scope of a search, nor objects when search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle."

Alternatively, officers may ask for permission to search for particular items. In that case, the scope of the search is defined to include areas where those objects might reasonably be found. As stated in *U.S. v. Orrego-Fernandez*, 78 F.3d 1497 (10th Cir.1996), "The scope of a search is generally defined by its expressed object." There, the court held that the search of the vehicle did not exceed the scope of consent where the officer had informed the person that he wanted to search for guns and drugs, and the search encompassed areas where those items could reasonably be hidden. See also *Florida v. Jimeno, supra*, (objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs).

One issue that frequently arises (especially in narcotics cases) is the extent to which officers can disassemble sealed containers or compartments within a vehicle during a search. The general rule seems to be that, if the scope of the consent reasonably includes compartments within the vehicle, then officers can use reasonable efforts to open those compartments, such as unscrewing screws or pulling back trim, so long as such efforts are within the contemplated scope of consent based on the totality of circumstances.

In *State v. Johnson*, 116 Nev. 78, 993 P2.d 44 (2000) (rehearing denied), Highway Patrol officers stopped a car for a traffic offense. They requested and received consent to search for drugs. One officer unscrewed and then removed the rear seat. He then pulled up the carpet in the back seat area, finding nothing. Looking in the front, he then noticed three screws near the dashboard which appeared different from regular and ordinary screws in a

passenger compartment. The officer removed the screws and found drugs inside. The Supreme Court ruled 4-3 that removing the screws "disabled" the car and exceeded the scope of the consent search. The Court's opinion reveals that it was concerned with the scope of the destruction that officers had inflicted on the car during their search:

"Would [the defendant] have consented to the dismantling of his automobile? Innocent citizens must not be stopped on the pretext of a traffic violation and have their automobiles dismantled when a police officer has nothing more than a "hunch" that contraband may be present.... no reasonable police officer could expect that by being told that he can "go ahead and look" for drugs and by hearing "yes" in response to the officer's request for permission to search, the officer is entitled to take apart the vehicle. Nor would any reasonable person expect such a search when giving that consent."

However, in *State v. Ruscetta*, 123 Nev. ____, 163 P.3d 451, 451 (2007), the court rejected any suggestion that all "dismantling" was per se unreasonable and clarified that the proper test in cases involving consensual vehicular searches is one that examines the totality of the circumstances for objective reasonableness. Therefore, the *Ruscetta* case was remanded for an evidentiary hearing on whether an officer's discovery of drugs and a handgun underneath an unsecured center console of a vehicle which "shifted" when the officer placed his hand on it, was within the scope of defendant's consent to search.

Where the scope of the search does not result in a "dismantling" of the vehicle, courts have frequently upheld police efforts to open compartments even where some damage is done. One example is U.S. v. Torres, 32 F.3d 225 (7th Cir. 1994), where police stopped a truck and trailer for speeding and got written consent from the owner to search "a truck and trailer, including any part, compartment, or trunk of the vehicle and the contents of any object or container found therein." In the trailer the officer saw a wooden box-like compartment near the front of the trailer sealed with six shiny new screws. After releasing the screws and removing the compartment's cover, he discovered approximately 450 pounds of marijuana. The Court held that a reasonable person would have understood that scope of the Defendant's consent included allowing the police to search the wooden container in which the marijuana was discovered. Further, the consent allowed the police to unscrew the compartment in order to gain access to its contents. Although general permission to search does not include permission to inflict intentional damage to the places or things to be searched, in this case, the container or the trailer were not damaged by the act of removing the six screws.

Similarly, in *U.S. v. Santurio*, 29 F.3d 550 (10th Cir. 1994), an officer stopped a van for speeding and received consent to search for drugs. He also found signs of a false compartment in the van and removed a few screws from the strip holding down the carpet which covered the metal compartment containing the packages of cocaine. The Court held that the search was not so invasive and destructive as to exceed the scope of defendant's consent to the search.

In *U.S. v. Zapata*, 180 F.3d 1237 (11th Cir. 1999), police stopped a van for a traffic offense, talked to the driver, got license and other papers and gave a warning after returning papers to driver. After bidding Zapata a good night, Officer Phillips asked him if he could search the minivan for drugs. Zapata said yes. As the officer began searching, he noticed that the plastic trim around the interior door handle of the sliding door was not fitted properly to the handle and that the interior panel was not fitted properly to the sheet metal portion of the door. The minivan was relatively new and he found the misfitting parts unusual and pried back the panel with his fingers. Two of the plastic snaps holding the panel to the door popped loose. Between the interior panel and the sheet metal portion of the door, Phillips discovered packages appearing to contain cocaine.

The Court upheld the search, stating: "We must consider what the parties knew to be the object of the search. A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items. The search was within the scope of his consent as long as the area behind the interior door panel might reasonably have contained drugs or money."

Other cases in which courts have upheld searches in which police officers used a screwdriver to open interior portions of a car include *U.S. v. Flores*, 63 F.3d 1342 (5th Cir.1995) (large sum of cash behind vents in interior panels of car), and *U.S. v. Pena*, 920 F.2d 1509 (10th Cir.1990) (cocaine in area between interior door panel and exterior door panel).

(14) VIN SEARCH (Vehicle Identification Number)

This is a very limited search. In *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960 (1986), police lawfully stopped a car for traffic violations. One officer opened the car door to look for the VIN. When he didn't see it he reached into the car to remove some items from the dashboard where the VIN is also sometimes found. In doing so, the officer saw the handle of a gun protruding from under the seat and seized it. The U.S. Supreme Court said that there is a valid federal law which requires that the VIN be visible from outside the car and the officer was justified in making a minimal intrusion just to locate the VIN and

in doing so, the gun was in plain view and subject to seizure. The Court also noted that police could not enter a car under this theory when the VIN was visible from the outside.

Likewise, there is no violation of any reasonable expectation of privacy when an officer conducts a licence plate check on a vehicle. *U.S. v. Diaz*-Castaneda, 494 F.3d 1146 (9th Cir. 2007). Nor does an officer's check of a subject's driver's license or ID card with radio dispatch constitute a search where ID was properly obtained during a valid stop. *Id*.

VI.

SEARCH WARRANT PREPARATION AND EXECUTION

INTRODUCTION

The 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 on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The following materials examine the area of search warrants (S/W) from both a practical and technical viewpoint.

The starting point is a discussion of the *Gates* and *Leon* cases decided by the U.S. Supreme Court in the 1980's. These cases revolutionized the way all courts are instructed to evaluate search warrants under the Fourth Amendment.

Next, we examine the investigatory phase and the sources of probable cause (P/C). An understanding of the ingredients of P/C is essential to the proper formation of a S/W.

Following this, we turn to the actual preparation of a S/W. We examine the paperwork and format involved. The importance of clear, well-organized and literal expression of facts which show P/C is demonstrated. A S/W preparation checklist is included.

After the S/W is obtained, it must be properly executed. The next section deals with all aspects of the execution, including knock and announce, plain view, detention of persons and scope of search. This section also has a S/W execution checklist and directions on how to file and complete all necessary paperwork.

After getting a search warrant, suppression of the items seized is rare because the U.S. Supreme Court has repeatedly stated:

1. When police seize evidence without a warrant, the police action is presumed to be illegal under the Fourth Amendment and the burden is on the police and the DA to show that a valid exception existed and that the scope of the exception was not exceeded.

2. Conversely, when police seize evidence with a search warrant, the police action is presumed to be legal, and the burden is on the defendant to prove the existence of a major flaw in the warrant.

In addition to the normal S/W procedure, there are two types of special circumstances situations involving anticipatory S/W and a "premises freeze." These situations are examined in detail.

A sample search warrant and affidavit are included with these materials so that you can relate the legal principles to a practical application.

A. MODERN SEARCH WARRANT LAW

Two cases decided by the U.S. Supreme Court in the mid 1980's created a highly favorable legal climate for the use of search warrants. These cases are:

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983) which:

- (1) Abandoned the "two-pronged" test of reliability/veracity and basis of knowledge, and substituted the "totality of the circumstances" test.
- (2) Defined probable cause as only a "fair probability."
- (3) Reminded reviewing judges that search warrants are supposed to be entitled to great deference.
- (4) Demonstrated that even "innocent" actions can, in some cases, form a basis for probable cause.

In *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424 (1984) the U.S. Supreme Court upheld evidence seized by police pursuant to a search warrant that had sufficient P/C, but which was defective on its face. The affidavit justified a search for a gun used in a murder, but the S/W on its face authorized only a search for drugs. The court held that the affidavit overcame the error in the S/W.

- *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3430 (1984) held that once an issuing judge had signed a warrant, there should be no suppression of evidence unless:
 - (1) The issuing judge was not impartial.

- (2) The items to be seized or place to be searched are not adequately described.
- (3) There are material intentional misrepresentations of fact in the affidavit.
- (4) The affidavit is so lacking in probable cause that no reasonable police officer (or judge) could think that there was probable cause.
- In *U.S. v. McKneely*, 6 F.3d 1447 (10th Cir. 1993) the Court stated "However, when reviewing an officer's reliance upon a warrant, we must determine whether the underlying documents are devoid of factual support, not merely whether the facts they contain are legally sufficient." Thus, "it is only when an officer's reliance was wholly unwarranted that good faith is absent." Same ruling, *U.S. v. Rowland*, 145 F.3d 1194 (10th Cir.1998) and *U.S. v. Wood*, 6 F.Supp.2d 1213 (D. Kan. 1998).

Although not specifically mentioned in *Leon*, there are two other ways that a search warrant can still fail:

- (5) The probable cause was illegally obtained (fruit of the poisoned tree). *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407 (1963).
- (6) Some other aspect of State law was violated (day/night). *King v. State*, 116 Nev. 349, 998 P.2d 1172 (2000) (citing *Sanchez v. State*, 103 Nev. 166, 169, 734 P.2d 726, 728 (1987) (decision by magistrate to approve a nighttime clause entitled to deference where facts are presented in the affidavit to show that the drugs and/or money would be gone if the officers waited until morning to execute the warrant).

Under U.S. Supreme Court Authority, a violation of the "Knock and Announce" rule should no longer result in suppression as it is too attenuated. In *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006), police violated the knock and announce rule upon executing a valid search warrant. The Court noted that attenuation can occur when the causal connection is remote. But the Court held that attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. Therefore, the exclusionary rule did not apply where the purposes of the knock and announce rule (protection of life, property, and privacy) had nothing to do with the seizure of the evidence.

MORE ABOUT THE GATES CASE

This is a truly remarkable case. Anyone who is going to be heavily involved in search warrant preparation should read this case because here, the U.S. Supreme Court lays out all of the "do's and don'ts" of this field. There are numerous citations to other cases showing approved methods of establishing the reliability of informants, using literal instead of conclusory terms and other matters. Despite the fact that the P/C picture was fairly slender and that the anonymous informant was incorrect about the prediction of whether Susan Gates would fly or drive back with her husband Lance, the Court still found probable cause to exist.

FACTS: On May 3, 1978, the Bloomingdale Police Department received an anonymous letter which stated:

"You have a couple in your town who make their living selling drugs. They are Sue and Lance Gates who live on Greenway in the condominiums. Most of their buys are done in Florida. Sue drives the car to Florida where she leaves it to be loaded with drugs. Sue flies back after she drops off the car. Then Lance flies down and drives it back. May 3 she is driving down there and Lance will be flying down in a few days to drive it back. At the time he drives it back he has the trunk loaded with drugs. Presently they have over \$100,000 in drugs in their basement. They are friends with some big drug dealers who visit their house often."

A police detective confirmed through DMV that Lance Gates had a driver's license at a certain address. A check with O'Hare airport disclosed that "L. Gates" had made an airline reservation from Chicago to West Palm Beach on May 5, 1978. The Drug Enforcement Administration (DEA) observed Lance Gates as he boarded the flight in Chicago and got off in Florida. Lance went to a motel room registered to Susan Gates. The next morning, Lance Gates and a woman got into the Mercury. The Mercury had Illinois plates registered to a Hornet, owned by Gates. The Mercury headed northbound on an interstate toward Illinois.

All of this information was put into an affidavit supporting a search warrant. When the Gates got home, the police searched the car and home and found large quantities of drugs in both places.

The Illinois Supreme Court ruled that the search warrant was no good because there was no showing of the reliability or basis of knowledge of the informant. (Police couldn't have done this because the letter was anonymous.)

LEGAL ISSUE: Was the S/W supported by P/C?

RULING: Yes.

RATIONALE:

1. An affidavit which is wholly conclusory cannot support probable cause. An example of an inadequate affidavit can be found in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964) (overruled by *Illinois v. Gates* 462 U.S. 213, 103 S.Ct. 2317 (1983)). The Aguilar affidavit was inadequate because it merely stated that the officer "has received reliable information from a credible person and does believe that heroin is stored in a certain home."

The reason for this is that the action of the issuing judge can't be a mere ratification of the bare conclusions of the police. The affidavit must contain enough facts so that the issuing judge can make up his own mind.

- 2. Reliability and basis of knowledge are still highly important factors in showing P/C. (When an officer is able to demonstrate these things in the affidavit, the officer should always do so.) However, if either or both of these things cannot be shown, the totality of the circumstances can still show P/C.
- 3. The detail of a tip can allow the issuing judge to infer that the tipster had a strong basis of knowledge. Quote from *Gates*: "Because an informant is right about some things, he is more probably right about other facts." In this case, the letter had a range of details relating not just to easily obtained facts, but also as to future actions of third parties not ordinarily easy to predict.
- 4. The police corroboration of the information in the letter, along with all the other circumstances (Florida known as source area for narcotics; the brevity of Lance Gates' trip) was enough to establish probable cause even though only innocent activity was observed. (See also *Draper v. U.S.*, 358 U.S. 307, 79 S.Ct. 329 (1959).

The upshot of the decisions in *Gates* and *Leon* is that the use of search warrants by police is encouraged because an everyday common sense approach is used to determine probable cause and once a judge has issued a search warrant it is much harder for the defendant to get the evidence suppressed. However, suppression can still result if there is significant non-compliance with the procedures set forth in this S/W preparation and execution manual.

B. BURDEN OF PROOF

(1) The defendant has the burden of proving by a preponderance of evidence that a search warrant is invalid. *U.S. v. Richardson*, 943 F.2d 547 (5th Cir. 1991) and *U.S. v. Wapnick*, 60 F.3d 948 (2d Cir. 1995).

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1970), the U.S. Supreme Court stated, "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit [more than mere conclusion and desire to cross examine the affiant], and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a [Franks] hearing be held at the defendant's request.

A defendant is not entitled to an evidentiary hearing under *Franks v*. *Delaware* to examine the validity of a search warrant unless he or she can make a preliminary showing and an offer of proof that there were intentional or reckless material falsehoods in the affidavit. *Weber v. State*, 121 Nev. 554, 119 P.3d 107 (2005).

In *Lyons v. State*, 106 Nev. 438, 796 P.2d 210 (1990) (abrogated on other grounds) the defendant claimed that police lied about one of the facts alleged. The Court ruled: "A Franks hearing is not required if the alleged falsehood in an affidavit supporting a search warrant is not necessary to the finding of probable cause." *See* 2 LAFAVE SEARCH AND SEIZURE, *supra*, S 4.4(c). "We conclude that the surveillance observations prior to the arrest were sufficient to establish probable cause, independent of the alleged smell coming from the truck." *Id.*

In *U.S. v. Owens*, 167 F.3d 739 (1st Cir. 1999) the defendant claimed that there were falsehoods in the police affidavit. The Court ruled that Owens' claims failed because he could not establish that these misstatements were either knowingly false or reckless. Errors resulting from negligence or innocent mistake are insufficient. Additionally, in order to suppress, the misstatements must be material to showing P/C.

In *Simmons v. Poe*, 47 F.3d 1370 (4th Cir. 1995) the Court ruled that unless the tainted information is so important that "probable cause did not exist without it," the warrant will be deemed valid.

(2) A misrepresentation can be by omission as well as commission if the fact was known, or reasonably should have been known to the affiant officer and the omitted fact would make P/C less likely, the S/W may be successfully attacked.

In *U.S. v. Hall*, 113 F.3d 157 (9th Cir. 1997) Court found that the officer "either intentionally or recklessly" withheld information bearing on a confidential informant's (C/I) credibility, several of his criminal convictions and "most significantly, matters that went to the heart of credibility; a probation violation involving death threats to a wounded police officer, and the 1990 conviction for the offense of falsely reporting a crime." Evidence was suppressed due to withholding information of the C/I's credibility which was "absolutely critical,"(main source of P/C). The judge would probably not have issued a search warrant had he known the truth. Same ruling in *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991) where police omitted fact that eyewitnesses had given seriously different descriptions of the suspect, one picked out another person from a photo lineup and fingerprints that police believed belonged to the perpetrator did not match Golino's.

The majority of courts hold that minor omissions do not always defeat probable cause. *U.S. v. Strifler*, 851 F.2d 1197 (9th Cir. 1988), *State v. Bergin*, 574 A.2d 164 (Conn. 1990), *Mays v. City of Dayton*, 134 F.3d 809 (6th Cir. 1998) (omitted facts regarding the identity of the perpetrator OK because affidavit has sufficient P/C as to the items sought and place to be searched), *U.S. v. McNeesse*, 901 F.2d 585 (7th Cir. 1990) (overruled on other grounds), and *U.S. v. Rumney*, 867 F.2d 714 (1st Cir. 1989)(part of the P/C was a statement by an accomplice who initially claimed no knowledge of crime but was made before he was confronted with evidence linking him to the robbery. The Court ruled that the omission of his initial claims of no knowledge did not delete the finding of P/C.)

In *U.S. v. Colkley/Johnson*, 899 F.2d 297 (4th Cir. 1990) the FBI agent who applied for the warrants intentionally omitted the information in the warrant application that none of the six eye witnesses identified Johnson. Neither the omitted information nor the allegedly skewed composite height description was material to the probable cause determination. A Franks hearing was not required because the omitted material would not have defeated P/C and there was not showing that the affiant intended to mislead the magistrate.

The district court believed that the affiant's omission was material because it "may have affected the outcome" of the probable cause determination. However, to be material under Franks, an omission must do more than potentially affect the probable cause determination: it must be "necessary to the finding of probable cause." For an omission to serve as the basis for a hearing under Franks, it must be such that its inclusion in the affidavit would defeat P/C.

The Ninth Circuit has held that in order to prevail on a Franks challenge to a search warrant and, therefore, suppress evidence, the defendant must show (1) "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and (2) "that after setting aside any such misstatements and omissions, there would not be probable cause for the search warrant." *U.S. v. Jordan*, 291 F.3d 1091 (9th Cir. 2002).

Officers should not fail to include and explain facts that tend to substantially reduce P/C. See the sample search warrant attached to this outline by Officer Todd Fasulo. The suspect was on probation with a search clause meaning that, in theory, his probation officer (P/O) could drop by his home at any time and search for drugs. Ask yourself: Does this fact make it more or less likely that he would have drugs in his house? Note how Officer Fasulo includes this fact, but then gives additional information to explain why the existence of the search clause, as applied to this particular suspect, does not make it less likely that drugs are at his house.

C. THE INVESTIGATION PHASE AND SOURCES OF PROBABLE CAUSE

(1) Investigation

Most successful search warrants are the result of patient and careful police investigation. As the Court pointed out in *Gates*, P/C is really nothing more than common sense. In some cases, P/C can be shown by a single piece of direct evidence such as an observation by an undercover police officer that drugs are in a certain house at a certain time.

However, in many cases, the P/C picture derives from circumstantial evidence which the law says is just as valid as direct evidence. In cases of circumstantial evidence, the investigation should be directed at showing how and why the occurrence of different facts and events are related to one another and why they constitute proof (of P/C) as opposed to mere coincidence, i.e.,: why these bits and pieces of fact all point to the same place.

There are so many variables in the P/C equation that, as the Court noted in *Gates*, one determination will seldom be useful precedent for another. Paul Simon sang, "There must be fifty ways to leave your lover." There are countless ways to make a showing of probable cause.

(2) Linkage or nexus

You have to show what the courts call "linkage" or "nexus" between the evidence you want to seize with the warrant and the place you want to search. Like most things in S/W preparation, this can be done by direct proof (C/I saw the item there), circumstantial proof (drug dealer stops at certain house every time before selling drugs) or by inference (supplies & ingredients for "home made bomb" are likely to be at "home").

In the Ninth Circuit, "only a reasonable nexus between the activities supporting probable cause and the locations to be searched" is required. *United States v. Ocampo*, 937 F.2d 485, 490 (9th Cir.1991). A "reasonable nexus" does not require direct evidence that the items listed as the objects of the search are on the premises to be searched. *Id.* A judge must only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit. *U.S. v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993).

In *U.S. v. Feliz*, 182 F.3d 82 (1st Cir. 1999) "The nexus between the objects to be seized and the premises searched need not rest on direct observation, but rather can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide evidence of a crime."

It is extremely important to remember the rule that search warrants are directed at places and not per se at people (suspects). In other words, even though you develop P/C to show that X and Y are engaged in criminal activity, except in certain cases (drugs and a few others), this is not enough all by itself to get a search warrant for a place (house, storage vault, deposit box, office, etc.) which is controlled by X or Y. In *U.S. v. Pitts*, 6 F.3d 1366 (9th Cir.1993) the Court ruled "We have previously recognized that magistrates may infer that in the case of drug dealers, evidence is likely to be found where the dealers live."

(3) Staleness

In assessing P/C, be aware of staleness problems as well. You have to show that the items will probably be there at the time you execute the S/W. Common sense prevails. For example, if the informant saw growing marijuana plants in X's house 30 days ago there is a reasonable inference that they will still be there. Sometimes specialized police knowledge (that pedophiles keep child pornography at their homes for a long time) can overcome a staleness issue.

Two Nevada cases have a good discussion of staleness and upheld a search warrant despite the defendant's claim, Wright v. State, 112 Nev. 391, 916

P.2d 146 (1996) (overruled on other grounds) ("Information is stale and proable cause does not exist when it is no longer reasonable to presume that a search will turnup evidence of a crime") and *Garrettson v. State*, 114 Nev. 1064, 967 P.2d 428 (1998) ("in the context of an ongoing illicit [marijuana grow operation], the passage of time is less significant in determining whether information is stale").

See also *U.S. v. Spikes*, 158 F.3d 913 (6th Cir. 1998). Instead of measuring staleness solely by counting the days on a calendar, courts must also concern themselves with the following variables: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?), etc."

In *U.S. v. Formaro*, 152 F.3d 768 (8th Cir. 1998) "Time factors must be examined in the context of a specific case and the nature of the crime under investigation." In addition, "where continuing criminal activity is suspected, the passage of time is less significant." In this case, given that "continuing criminal activity was suspected, "the two and one-half week lapse did not negate the existence of probable cause. Indeed, "in investigations of ongoing narcotics operations, intervals of weeks or months between the last described act and the application for a warrant did not necessarily make the information stale." *U.S. v. Ortiz*, 143 F.3d 728 (2d Cir.1998).

In *U.S. v. Feliz*, 182 F.3d 82 (1st Cir. 1999) the drug transactions described in the affidavit took place approximately three months prior to issuance of the warrant. But courts have upheld determinations of probable cause in trafficking cases involving similar or even longer periods. *U.S. v. Greany*, 929 F.2d 523 (9th Cir.1991) (2 year-old information relating to marijuana operation not stale). Based upon C/I's two controlled purchases of cocaine month(s) before, and C/I's statement that he had been purchasing drugs from Feliz for approximately twelve years, the agents could reasonably have believed that his drug trafficking was of a continuous and ongoing nature.

In *State v. Gogg*, 561 N.W.2d 360 (Iowa 1997) the court ruled, "But where the information presented to the issuing judge shows ongoing drug-related activities, the passage of time is less problematic because it is more likely that these activities will continue for some time into the future."

(4) Ingredients (Sources) of Probable Cause

- 1. The observations of the affiant (officer). What you see, smell, feel and hear. All police officers are presumed reliable. *People v. Hill*, 528 P.2d 1 (Cal. 1974) (overruled on other grounds). It is possible to get enough P/C entirely from the direct observations of the affiant officer. *U.S. v. Mueller*, 902 F.2d 336 (5th Cir. 1990). The officer's years of experience, training and knowledge of the smell of methamphetamine was enough for the magistrate to conclude P/C.
- 2. Similar information received from a "fellow officer." It is the collective knowledge of all officers who are joined together in an investigation which is considered in determining P/C. This was the holding in *Doleman v. State*, 107 Nev. 409, 812 P.2d 1287 (1991). In addition, the U.S. Supreme Court has held that one officer can rely solely and entirely on the input of another officer (if the "source officer" knows facts for P/C or R/S) to justify actions under the Fourth Amendment. *U.S. v. Hensley*, 469 U.S. 221, 105 S.Ct. 675 (1975) (*Terry* stop okay because defendant matched description in a flyer put out by another officer).
- 3. A suspect's reputation (arrests or convictions) for a certain type of criminal activity. The U.S. Supreme Court said in *U.S. v. Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971) that although a person's prior conduct is not usually admissible at trial, nevertheless, a policeman's knowledge of a suspect's reputation is a practical consideration of everyday life that can add to P/C.
- 4. A police officer's knowledge of modus operandi. The Court said in *Gates* that the information showing P/C should be weighed not in terms of library analysis but as understood by those versed in the field of law enforcement. The Court also noted that police knowledge of patterns of criminal activity are a factor in assessing P/C. *U.S. v. Cortez*, 449 U.S. 411, 101 S.Ct 690 (1981).
- 5. Information received from informants. In writing a S/W, you must distinguish between and among three classes of informants (citizen informants, anonymous informants and "confidential informants"). The term "confidential informant" (C/I) is really a term of art in that essentially refers to a person who is someone other than a typical honest citizen.

Gates says that you do not have to show the informant's reliability and/or basis of knowledge, but points out that whenever you can show one or both it is highly important to do so because these things boost the strength of P/C.

- (a) An anonymous informant cannot be shown to be reliable by usual means. Therefore you must use the *Gates* approach to show reliability by corroboration of detail, especially predictions of future conduct of the suspect.
- (b) A "citizen informant" is presumed to be reliable. (*Gates* p. 2329) But you must state that the person is a citizen who is giving information to the police for good citizen reasons under circumstances where a false report would subject the honest citizen to criminal liability (false information to a police officer).
- (c) A C/I can be shown to be reliable by a number of means. If you have more than one of these means, use every one.
- (1) Previous reliability. (*Gates* p. 2329) *U.S. v. Reddrick*, 90 F.3d 1276 (7th Cir. 1996) ("officer's statement that the informant provided reliable information in the past...is unsupportable and does not provide P/C" because informant provided little detail regarding drugs allegedly present in house except for their quantity, there was no corroboration of informant's information, informant did not testify at probable cause hearing or provide sworn affidavit). Same ruling in numerous state cases. Instead, give the judge some specific facts and times in generalized (but not minute) detail. For example:

During the past six months, this same C/I has provided information to me concerning the identity of persons involved in selling cocaine. This information has been proven to be accurate through independent police investigation. During this same time period, accurate information from this C/I has been included in three search warrants for premises here in Las Vegas. In all three cases, quantities of cocaine were found at the places stated by the C/I. In addition, I have spoken to Detective Joe Forti of the North Las Vegas Police Department (NLVPD) who told me that the same C/I has given accurate information about the whereabouts of narcotics on several occasions in the past two years.

- (2) Statements against penal interest. (*Gates* p. 2329) and *Jones v. U.S.*, 362 U.S. 257, 80 S.Ct. 725 (1960) (overruled on other grounds). If the C/I admits to a police officer that the C/I has committed crimes, this helps make for reliability.
- (3) Self verifying detail, especially predictions of future conduct. Even details (another term for "corroboration") of "innocent" factors are important. The importance and power of these factors was recognized by the Nevada Supreme Court in the case of *Keesee v. State*, 110 Nev. 997, 879 P.2d 63 (1994).

(4) Demonstration of the informant's motive. The case of *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085 (1985) says that this can help to show reliability. Sometimes, promises or inducements made to an arrestee or accomplice can help to make that person reliable (this should be after Miranda warnings and voluntary waiver of *Miranda*). *U.S. v. Davis*, 617 F. 2d 677 (D.C. Cir. 1979) and *U.S. v. Reivich*, 793 F. 2d 957 (8th Cir. 1986).

For example, in a case involving a confidential informant:

"This informant had admitted breaking into the above described residence for the purpose of stealing. The informant is cooperating with this department in an effort to demonstrate his good faith in gaining a recommendation of leniency in pending criminal charges, conditional upon his giving truthful information. The informant understands that no recommendation of leniency will be made unless the information is accurate and truthful."

(5) Cases approving the use of informants.

Reliability: *U.S. v. Schaefer*, 87 F.3d 562 (1st Cir. 1996) (apprehension of another drug felon); *Commonwealth v. Jones*, 668 A.2d 114 (Pa. 1995) (information led to 3 prior arrests); *State v. Gogg*, 561 N.W.2d 360 (Iowa 1997) (C/I had supplied information in the past on eight occasions and had not given false information on these occasions).

Statements against penal interest: *U.S. v. Leidner*, 99 F.3d 1423 (7th Cir. 1996)(P/C helped where officer knew informant who made statements against his penal interest) Same ruling in *Commonwealth v. Alvarez*, 661 N.E.2d 1293 (Mass. 1996) and many other cases.

Informant's reporting of details: *Houser v. State*, 678 N.E.2d 95 (Ind. 1997) (open door at murder scene); *U.S. v. Lightbourne*, 104 F.3d 1172 (9th Cir. 1997) (controlled buy); *Jackson v. State*, 689 So.2d 760 (Miss. 1997) (police observed as C/I predicted event that three cars would travel in tandem on a certain highway at a certain time and place where C/I said the third car contained drugs).

Motive: *U.S. v. LaMorie*, 100 F.3d 547 (8th Cir. 1996) "statements by a person involved in a crime about her colleagues could have helped her obtain more lenient treatment from prosecutors."

(5) Will the Informant's Identity be Disclosed in Court?

In *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056 (1967), under the U.S. Constitution, the identity of the C/I does not have to be disclosed if the C/I only gives information which is used for P/C. The Nevada Supreme Court has made the same ruling in construing the NRS on informant disclosure that the C/I's identity must be disclosed if the C/I is a percipient (eyeball) witness to the crime charged (*Routhier v. Sheriff*, 93 Nev. 149, 560 P.2d 1371 (1977) and *Sheriff v. Vasile*, 96 Nev. 5, 604 P.2d 809 (1980)) but does not need to be disclosed if the C/I gives P/C information only (*Twigg v. Sheriff*, 95 Nev. 112, 590 P.2d 630 (1979); *State v. Stiglitz*, 94 Nev. 158, 576 P.2d 746 (1978); *Miller v. State*, 86 Nev. 503, 471 P.2d 213 (1970)).

In *U.S. v. Valerio*, 48 F.3d 58 (1st Cir. 1995) Court ruled: It is settled that "a district court need not conduct an in camera hearing whenever the identity of an informant is requested. It is entirely within the discretion of the judge presented with the request to decide whether the disclosure is necessary in order to determine the believability of the testifying officer. There is a presumption of validity with respect to the affidavit supporting the search warrant. Here, we can perceive no abuse of discretion in the trial judge's refusal to hold the requested in camera hearing. At the conclusion of the Franks hearing, the judge credited the testimony of the officer and discredited that of Baez and that there was no basis for concluding that the affidavits were false."

In *U.S. v. Fairchild*, 122 F.3d 605 (8th Cir. 1997) "The defendant bears the burden of demonstrating the need for disclosure, ... the court must weigh the right to information against the government's privilege to withhold the identity of its confidential informants." This privilege may be superseded, however, if disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, ..." Mere speculation fails to meet this burden.

After an in-camera hearing, concluding that, despite slight discrepancies between statements of some informants, the government did not need to disclose their identities, the court noted "there is significant risk to the health and safety of the informants if their identity is disclosed. Also, their testimony would not be particularly significant on the issue of suppression." The government and representatives of the district court were the only parties present at the hearing.

Appellants argue that because the informants were participants or percipient witnesses to the crime charged (rather than mere tipsters) that disclosure is almost always required. The district court considered this factor, however, and determined that the concern for the informants' safety was more compelling. Indeed, the district court correctly weighed the crime charged, potential defenses, the possible significance of the informers' testimony, and other relevant factors.

In *Wade vs. State*, 115 Nev. 290, 986 P.2d 438 (1999), the Nevada Supreme Court reviewed a case involving a defendant charged with conspiracy to traffick methamphetamine and trafficking methamphetamine large, claiming the State violated *Brady* by not disclosing the entire confidential informant file. The Nevada Supreme Court found that the State was not required to disclose the file. *Id.* That Court further found that "although defense counsels' presentation of the theory of defense [procuring agent] may have been enhanced by more complete access to the requested information, we discern no basis for concluding that there is a reasonable possibility that the outcome of [defendant's] trial would have been affected if [defendant] had received all the information requested." *Id.*

See also confidential informant cases in this manual section on Sources of Probable Cause

(6) In order for a fact to be used for probable cause, the item does not have to be admissible in evidence.

So held in *Brinegar v. U.S.*, 338 U.S. 160, 69 S.Ct. 1302 (1949) other things such as the results of a polygraph exam can be used in a search warrant affidavit according to *State v. Coffey*, 788 P.2d 424 (Oregon 1990) and *Bennett v. City of Grand Prarie*, 883 F.2d 400 (5th Cir. 1989).

D. PREPARATION OF THE SEARCH WARRANT

Try to organize a written draft of your S/W affidavit by putting pieces of information together with like pieces of information. Group your facts by the type of source they come from (police, citizen, records etc.)

Think of the preceding section on ingredients of P/C as "source of information lines" which point to a certain time and place. A well organized affidavit is easier for the issuing judge to understand and easier to defend in court. The "source lines" are support for the S/W. You want to make these lines as thick (rich with different facts) as you can. The map is the State of Nevada and the circle is the place you want to search.

1. The S/W must be supported by as much P/C as you can possibly put together. Take time to check out and corroborate information to show that it is reliable.

- 2. Things that you know that point to P/C at the time of writing the S/W but don't put down in writing in the affidavit cannot be added later to show P/C or explain ambiguities in the affidavit even in sworn testimony in court. This was the rule set down in *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031 (1971). Also, oral statements made to the issuing magistrate to support P/C cannot be shown later. If the judge has questions, write the answers down in the affidavit and have the judge initial them.
- 3. Things you know that point away from P/C and are left out of the affidavit can be proven in court later by the defense to support their claim of material misrepresentation by omission. (See section on S/W "Burden of Proof")
- 4. In showing probable cause, it is perfectly OK to use hearsay (the affiant officer heard fact A from the C/I, facts B and C from fellow narcotics detective Stoner and facts D and E from the power and phone companies). However, be sure to indicate how, when and from whom you learned the facts. *Jones v. U.S.*, 362 U.S. 257, 80 S.Ct. 725 (1960) (overruled on other grounds).
- 5. You must be literal when you choose how to phrase your affidavit. Literal means that when someone reads what you have written, there will only be one possible interpretation of what you mean. In other words every fact in your affidavit must show:

WHAT DO I KNOW?
WHEN DID IT HAPPEN?
HOW DID I LEARN THAT IT HAPPENED?
IF SOMEONE ELSE TOLD ME, HOW DID THEY LEARN IT?
WHY DO I BELIEVE THAT IT IS TRUE? (INFORMANTS)
WHAT DOES IT MEAN? (specialized knowledge as a police officer.)

For example, a poorly written S/W affidavit might say

"Police investigation disclosed that early Sunday morning the suspect, Eddie Coyle, was seen approaching the gas station on East Bonanza."

A well written S/W affidavit would read:

"Yesterday, December 15, 1994, Samuel Connors, the manager of the McDonald's fast food restaurant on the corner of Eastern and East Bonanza, told me that on December 2, 1994 Connors looked out

the window of his restaurant at the Rebel gas station across the street at about 3:30 AM and saw a white male adult about 50 years old with a patch over his left eye approach the Rebel gas station where the murder occurred. Today, Detective Brown, who is working on this case with me, saw Connors pick Eddie Coyle's photo from a mug book and say to Detective Brown that Coyle was the man he had seen approaching the Rebel station on December 2, 1994, just prior to the murder."

6. Use the technique of "incorporation by reference" to save time in an affidavit. This is legally valid, *U.S. v. Berisford*, 750 F.2d 57 (10th Cir. 1984). If you want to include information from other lists, documents, charts, photos or the like, do it this way:

"Attached to this affidavit is a six page police report authored by LVMPD Officer Smith under event # 950215-1234 which is designated Exhibit #1 and is incorporated by this reference as though fully set forth herein."

However, in Nevada, there has been some developments about when the warrant needs to state P/C on its face and when incorporation by reference to the affidavit is adequate.

If the warrant is telephonic, the warrant "need not contain a statement of probable cause on the face of the warrant or physically attached to the warrant, and instead, the warrant may incorporate by reference an affidavit or oral statement of probable cause." *State v. Gameros-Perez*, 78 P.3d 511 (2003) (citing *State v. Allen*, 118 Nev. 842, 60 P.3d 475 (2002); *State v. Allen*, 119 Nev. 537, 69 P.3d 232, 235 (2003)); NRS 179.045(2).

If the warrant in unsealed and supported by a written affidavit, the warrant must "either state the probable cause for issuance and the names of persons whose affidavits support the application for the warrant on the face thereof, or the affidavit must be incorporated into the warrant by reference, physically attached to the warrant and left at the premises where the warrant is served." *State v. Gameros-Perez*, 78 P.3d 511 (2003) (citing *State v. Allen*, 118 Nev. 842, 60 P.3d 475 (2002); *State v. Allen*, 119 Nev. 537, 69 P.3d 232, 235 (2003)); NRS 179.045(5).

If the warrant is sealed and supported by a written affidavit, "it is unnecessary for police authorities and judicial officers to recite a statement of probable cause on the face of search warrants issued pursuant to NRS 179.045(3), upon sealed affidavits and warrants issued pursuant to NRS

179.045(2). Under subsection 3, statements of probable cause in sealed affidavits must be incorporated by reference without being attached to the warrant, but remain sealed until some future time." *State v. Gameros-Perez*, 78 P.3d 511 (2003) (citing *State v. Allen*, 118 Nev. 842, 60 P.3d 475 (2002); *State v. Allen*, 119 Nev. 537, 69 P.3d 232, 235 (2003)); NRS 179.045(3).

E. DESCRIPTION OF ITEMS TO BE SEIZED

- 1. Remember the very words of the Fourth Amendment, ...the affidavit must particularly describe the place to be searched and the person or things to be seized. Be as limited as possible in describing the items to be searched for. One of the basic principles of the Fourth Amendment is that "general warrants" are not allowed. Do not make the mistake of thinking that just because you have P/C to search for one thing, that the suspect's "house is yours."
- 2. The purpose of the specificity rule, according to the U.S. Supreme Court is to prevent general searches where police have too much discretion as to what to seize. *Berger v. State of New York*, 388 U.S. 41, 87 S.Ct. 1873 (1967). To put it another way, "the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty."
- 3. Don't use "boiler plate" lists from a computer because if too many of the items on the list don't apply to your search, the warrant may be invalidated as being a "general" warrant. *People v. Frank*, 700 P.2d 415 (Cal. 1985).
- 4. The U.S. Supreme Court decided a case in this area that encourages police to use a narrow list of items to be seized. The case is *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990) which holds that a discovery of evidence during the execution of a S/W did not have to be inadvertent. Police searched a suspect's home looking for proceeds of a jewelry robbery and also thought that weapons and other instrumentalities used might be there but didn't ask in the S/W to look for such items. The U.S. Supreme Court said that the weapons found in the search would not be suppressed as long as there was P/C in the S/W to look for the items that were named and the scope of the search did not exceed what would be reasonable to find the items named in the S/W.

The *Horton* case also ruled that when police search for specific items, the search must be stopped immediately once the items are found. This, of course, does not apply to drugs and some similar items.

5. Therefore, make your "items to be seized" list skinny and take away a possible means of attack when the case gets to court. Be sure, however, that there is a bona fide basis to look for the items named in your S/W. The Nevada

Supreme Court implied in the case of *Rowbottom v. State*, 105 Nev. 472, 779 P.2d 934 (1989) that a search warrant could be held to be pretextual and could therefore result in suppression of items found but not named.

6. Don't go overboard with "plain view" seizures. If you are executing a valid search warrant for narcotics, and find evidence of child pornography, the safest course is to obtain a "piggyback warrant" to justify seizures of evidence that go far beyond the scope of the original warrant. See *Weber v. State*, 121 Nev. 554, 584 (2005) (While searching for evidence of fraudulent credit cards, fake ID's and internet scams, detective came across depictions of child pornography on a computer. The search was halted while a second warrant was obtained specifically for child pornography and related materials.)

A new warrant (the "piggyback warrant") can be quickly obtained simply by attaching as an exhibit the entire original search warrant and affidavit, incorporating by reference, then doing a short supplemental affidavit to get a new S/W expanding your authority. For example:

"Myself and fellow Officers Brown and Smith were executing a search warrant for a house at X. A copy of the S/W and a six page affidavit supporting the S/W is attached to this (new) affidavit and incorporated by reference herein. While doing so, I saw ...(describe your plain view observations which give you P/C as to the new crime). Therefore, we now want to search for ...(list items to be seized reference the new crime).

Then do a new search warrant listing the same premises and new items. The lesson is that if you take too many items under "plain view" you give the defense an argument that (1) the original S/W was a pretext, or (2) the original S/W was over-broadly executed. (Note: the judge is supposed to tell you fairly specifically what items you can look for and seize.)

- 7. As to each and every item that you want to search for and seize, the affidavit must show why you are entitled to do so (i.e. it is contraband, or it is evidence and why).
- 8. You can attach a photograph or list of certain items sought, as an exhibit to the S/W and incorporate the entire affidavit with exhibits into the warrant by reference.
- 9. If necessary, you can ask permission in the affidavit to use an expert to assist in identifying items during a search (*People v. Moore*, 104 Cal.App.3d

1001 (1st Dist. 1980) and *People v. Noble*, 635 P.2d 203 (Colo. 1981)), or a private person (crime victim) to do the same (*U.S. v. Robertson*, 21 F.3d 1030 (10th Cir. 1994) and *Bills v. Azeltine*, 958 F.2d 697 (6th Cir. 1992)), or a drugtrained dog when searching for dope (*U.S. v. Lambert*, 771 F.2d 83 (6th Cir. 1985)).

10. In *U.S. v. Somers*, 950 F.2d 1279 (7th Cir. 1991) Defendant claimed that the warrant was fatally overbroad in that it authorized police to search for and seize "dangerous drugs and narcotics, evidence of cocaine, materials used for the packaging and distribution of cocaine, and marijuana, such as scales, plastic bags, cutting agents, ledgers of narcotics transactions and ...currency."

"The fourth amendment requires that a search warrant describe the objects of the search with reasonable specificity, but it need not be elaborately detailed. Here, there is little question that the warrant's description of narcotics material was sufficiently detailed to enable the police to distinguish contraband from legitimate items. Nor was it inappropriate that the warrant authorized the seizure of U.S. currency; this court has previously upheld a search warrant authorizing, among other things, the seizure of gems, narcotics and currency." *Id.*

Principles Concerning Specificity

- 1. If police show that they have worked as hard as possible to get all the descriptive facts that a reasonable investigation of the type of crime involved could be expected to uncover, a court will allow more latitude on description. *U.S. v. Storage Spaces*, 777 F.2d 1363 (9th Cir. 1985).
- 2. A more general description is OK where the nature of the object is such that it doesn't have specific characteristics. Warrant for "white string and brown paper" OK. *U.S. v. Davis*, 589 F.2d 904 (5th Cir. 1979) (overruled on other grounds). Also OK "42 sheets of plywood." *State v. Salsman*, 290 A.2d 618 (N.H. 1972), "weapons" *U.S. v. Beck*, 122 F.3d 676 (8th Cir. 1997).
- 3. Less precise description of contraband "controlled substances" held OK because a reasonably well trained officer could recognize different types. (But it's better to specify the type of dope if you can.) *State v. Quintana*, 534 P.2d 1126 (N.M. 1975).
- 4. Commingled goods. Where the S/W gave police a means of ascertaining which cars were stolen, but at the premises search, stolen cars were intermingled with non-stolen cars, it was OK for the S/W to authorize police to

examine (search) all the cars but only to seize the stolen ones. *U.S. v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982).

- 5. An error in the description is not fatal if, from all the circumstances, the officer can determine what item is to be seized. For example, slight error in serial numbers still made numbers approximately right and therefore seizure OK. *U.S. v. Rytman*, 475 F.2d 192 (5th Cir. 1973), *Hagler v. State*, 726 P.2d 1181 (Okla. 1986).
- 6. Greater care is necessary when the type of property sought is generally in lawful use in substantial quantities. Warrants for "stolen jewelry" or "stereo tapes and players" were held to be too broad, *Namen v. State*, 665 P.2d 557 (Alaska 1983), *In Re 1969 Plymouth*, 455 S.W.2d 466 (Mo. 1970) and *U.S. v. Spilotro*, 800 F.2d 959 (9th Cir. 1986).
- 7. Most care is required in the area of books or films because these are protected by the First Amendment. In *Heller v. U.S.*, 413 U.S. 483, 93 S.Ct. 2789 (1973) the Supreme Court upheld seizure of such items when a search warrant provided that an adversary hearing was conducted immediately afterward to determine if the seized materials were obscene.
- 8. If you are going to search a location which has private files not subject to seizure, such as a lawyer's office, a doctor's office or similar place, it is strongly suggested that in the S/W affidavit, you ask the issuing judge to appoint an impartial observer (doctor or lawyer) to go along when the S/W is executed. This not only protects the privacy rights of clients or patients that have nothing to do with your investigation, but it protects the police officers from potential civil or criminal liability. *People v. Blasquez*, 165 Cal.App.3d 408 (5 Dist. 1985).

Some Examples of Descriptions

- 1. "Stolen women's clothing" was not specific enough. *U.S. v. Fuccillo*, 808 F.2d 173 (1st Cir. 1987).
- 2. "Videotapes showing children under the age of 18 years engaged in sex" was specific enough. *U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).
- 3. "Articles tending to establish the wealth and financial status" of the suspect was not specific enough. *U.S. v. Washington*, 797 F.2d 1461 (9th Cir. 1986).

- 4. "Articles of personal property tending to establish the identity of persons in control of the premises including, but not limited to utility company receipts, rent receipts, canceled mail, envelopes and keys" was OK. Police are not required to guess in advance what items of ID will be there. *People v. Rogers*, 187 Cal.App.3d 1001 (3 Dist. 1986), *U.S. v. Whitten*, 706 F.2d 1000 (9th Cir. 1983). "Any indicia of ownership and control" held OK in *U.S. v. Crozier*, 777 F.2d 1376 (9th. Cir. 1985).
- 5. "Notes, documents and papers and other (written) evidence of a conspiracy to distribute (drugs)" was OK. *U.S. v. Young*, 745 F.2d 733 (2d Cir. 1984); *U.S. v. Vanichromanee*, 742 F.2d 340 (7th Cir. 1984); *U.S. v. Hargus*, 128 F.3d 1358 (10th Cir. 1997) (holding that "receipts and other records" described in the search warrant would be found at defendant's house and that "there need not be direct evidence or personal knowledge" that the items sought are located at the place to be searched).

Principles Regarding Destruction in Search Warrants

In *Liston v. Riverside*, 120 F.3d 965 (9th Cir.1997) Liston claimed that the officers ransacked their home, dumping out garbage and removing items from drawers and closets, without cleaning up after themselves. They also contended that officers destroyed a backyard fence and dug up the backyard. The Court found that as an initial matter, it was not clear that those actions rise to the level of a constitutional violation, as officers executing a search warrant occasionally "must damage property in order to perform their duty. Although this court has not addressed the matter, other circuits have held that only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment."

In *U.S. v. Weinbender*, 109 F.3d 1327 (8th Cir. 1997), The Court found that the manner in which a warrant is executed is always subject to judicial review to ensure that it does not traverse the general Fourth Amendment proscription against unreasonableness. "In this case, the search warrant authorized officers to search the entirety of Weinbender's home for the specified items. Moreover, the officers had been informed that 'hiding places,' including under the basement stairs, were utilized by Weinbender. The space along the I-beam was sufficiently large to permit any of the listed items to be stored there. Furthermore, the evidence does not support Weinbender's argument that Officer Schmit engaged in the unnecessary destruction of property."

A Very Instructive Case.

In *U.S. v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), the defendant complained that the information in a search warrant was stale (the last act of the defendant noted in the warrant was approximately eleven months before the warrant was sought), and that the description of things sought to be seized was overbroad. In an excellent opinion by Nevada's Judge Proctor Hug, the court noted that the defendant had been part of a "widespread, firmly entrenched and ongoing" criminal enterprise, which caused the "staleness" argument to lose much of its force, and, further, that the records sought were of the sort that were typically maintained over a long period of time. The court indicated that the issuing magistrate was entitled to rely upon the expertise of the affiant, and the affiant's expert opinion, in finding probable cause.

The defendant also objected to language calling for the seizure of records "showing drug transactions" and "reflecting property obtained through proceeds derived from narcotics trafficking" as overbroad. The court held that since the warrant affidavit showed that the defendant was a "kingpin" who used legitimate businesses to launder drug proceeds and as fronts for his trafficking, the language was "reasonably specific." The breadth of the seizure was justified by the breadth of the probable cause. The Court relied on *U.S. v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 474 U.S. 822 (1984), in which the U.S. Supreme Court approved the seizure of virtually every record in a Las Vegas business, because the entire operation of the business was based on fraud. (The court also indicated that if, because of the broad permissible seizure of records, unrelated records were inadvertently seized, such seizure would not support a remedy of invalidating the search, but merely not permitting those particular records into evidence.)

F. DESCRIPTION OF PLACE TO BE SEARCHED

A search warrant may be obtained to search any place where police have probable cause that they will find evidence of a crime. A search warrant may even be obtained to search a place which is controlled by innocent parties in order to recover contraband or evidence of a crime as long as there if probable cause that the item or items will be located at the location. In the case of *Zurcher v. Stanford Daily*, 436 U.S. 547, 554, 98 S. Ct. 1970, 1975 (1978), the Court upheld the search of a campus newspaper office to find photographs of students injuring other students and police officers during a campus riot. The newspaper refused to release the photos voluntarily and even though this was not a crime, the Court held that a search warrant was a proper procedure under the 4th Amendment. *Id.*

1. A search warrant must contain a description of the place to be searched in addition to the address so that it is clear in the warrant which location is included in the warrant. As a practical matter, it is helpful to consider whether an officer who doesn't know where the place is could find it based on the description in the warrant. It is also important to consider whether there are other premises matching the description near by. In *Lucas v. State*, 96 Nev. 428, 610 P.2d 727 (1980), the Nevada Supreme Court upheld the validity of a search warrant that had the incorrect address, because the description was clear enough to ensure that officers searched the correct premises and to preclude them from searching an incorrect premises.

If place is hard to describe, use a map, sketch or photo attached to the search warrant.

2. Courts have ruled that warrants include the entire cartilage of the residence included in the search warrant. In *U.S. v. Vaandering*, 50 F.3d 696, 701 (9th Cir. 1995), the warrant covered the entire curtilage of the residence by giving the street number.

In *Keesee v. State*, 110 Nev. 997, 1003, 879 P.2d 63, 68 (1994), the Nevada Supreme Court held that where deputies had obtained information that drug activity was being conducted at suspects' residence, and in addition, the suspects were in control of out-buildings within the curtilage of the residence, the search warrant which allowed them to search any buildings on the curtilage was not overbroad even if the police only had probable cause to search a portion of the premises. Moreover, the deputies could have searched any building within the curtilage of the residence even if the search warrant did not specify that out buildings would be searched.

Although the photos evidently showed marijuana only in the shed, the search warrant properly permitted search of the residence as well. Wright v. State, 112 Nev. 391, 397, 916 P.2d 146, 150 (1996) overruled on other grounds by Levingston v. Washoe Co., 114 Nev. 306, 956 P.2d 84 (1998). See Garrettson v. State, 114 Nev. 1064, 967 P.2d 428 (1998) (holding that search warrant listing house was not overbroad when probable cause only existed for shed). The words in the search warrant must say "entire premises" as place to be searched.

3. A search warrant designating more than one person or place to be searched must contain sufficient probable cause as to each person or place listed in the search warrant. *People v. Easley*, 671 P.2d 813, 820 (Cal. 1983). Similarly, two or more buildings occupied by the same person, but not located near each other can be searched under a single search warrant as long as there is

probable cause as to both places. *Williams v. State*, 240 P. 2d 1132, 1140 (Okla. 1952).

- 4. According to the U.S. Supreme Court, the description within the search warrant is sufficient if the officer with the search warrant can, "with reasonable effort, ascertain and identify the place to be searched." *Steele v. U.S.*, 267 U.S. 498, 503, 45 S.Ct. 414, 416 (1925). In *State v. McClelland*, the Kansas Supreme Court found that a description containing the street address, city, county and state was sufficiently specific. *State v. McClelland*, 523 P.2d 357 (Kan. 1974). In a rural area, a description of a farm by name of the owner and directions for reaching the farm was sufficient. *Luster v. State*, 433 So.2d 481 (Ala. 1983).
- 5. Errors in the description of the location to be searched will not invalidate the search warrant provided the description of the property to be searched within in the warrant is sufficient to lead a police officer to the correct address. *Robinson v. Comm.*, 248 S.E.2d 786 (Va. 1978). The Supreme Court of Virginia upheld a search warrant which listed the street as "Westover Hills Village" rather than "Westover Village Drive" because the property description was detailed enough to allow officers to locate the correct property. *Id.* See also, *U.S. v. Valentine*, 984 F.2d 906 (8th Cir. 1993)(holding that error in building number was not sufficient to invalidate search warrant); *U.S. v. Garza*, 980 F.2d 546 (9th Cir. 1992)(holding error in street number did not rise to the level of material misrepresentation); *State v. Madsen*, 609 P.2d 1046 (Ariz. 1980)(upholding a search warrant with the incorrect address listed where there were only two trailers in the rural area and the description led officers to the correct trailer). *See, Lucas v. State, supra*.

G. INTRUSIONS INTO THE BODY

1. **Surgical Procedures**: In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952). the Supreme Court ruled that it was a violation of the Due Process Clause to pump a defendant's stomach in order to extract narcotics which the officers saw the defendant swallow. In *Yanez v. Romero*, 619 F.2d 850 (10th Cir. 1980) writ denied 449 U.S. 876, 101 S.Ct. 221, 66 L.Ed.2d 98 (1980), the Tenth Circuit found that police did not violate the defendant's Due Process rights where they obtained a voluntary urine sample after threatening to use a catheter. In distinguishing their ruling from *Rochin*, the court reasoned that in *Yanez*, the police did not ever actually touch the defendant.

In *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611 (1985), the Supreme Court analyzed the circumstances under which a search warrant could be used to order surgery to remove physical evidence from the body. In *Winston*, the state

was seeking to remove a bullet from the defendant's chest which was fired from the victim's firearm. The Supreme Court reasoned that absent exigent circumstances, a search warrant must be obtained to recover evidence by surgical procedures. *Id* at 761. Further, the Court said that the reasonableness of a decision to extract evidence by surgical means should be decided on a case by case basis by balancing the following factors:

- The extent to which the procedure may threaten the health or safety of the individual,
- b) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity,
- c) probability that the procedure will produce evidence, and
- how important or crucial the evidence is considering all the other facts of the case.
- 2. **Blood Draws/Urine Tests**: According to the Supreme Court, a blood withdrawal constitutes a search of a person and is subject to the constraints of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966). In *Schmerber*, the Supreme Court held that, if police can establish probable cause that a person is driving under the influence of alcohol, a blood or urine sample can be taken without a search warrant because an emergency exists. *Id.* In *Schmerber*, the emergency involved the destruction of evidence, percentage of alcohol in the system, which would rapidly change. *Id.* The Supreme Court also cautioned that the sample must be obtained in a humane and medically accepted manner. *Id.* at 771-772.

In contrast, the Nevada Supreme Court held that a search warrant was necessary to obtain a blood sample in a case where there was probable cause to believe that the suspect was under the influence of a controlled substance. *State v. Jones*, 111 Nev. 774, 775, 885 P.2d 643, 664 (1995). The Nevada Supreme Court did not find an exigent circumstance because scientific evidence shows that drugs can be detected in the system for a relatively long time (many hours or days) compared to alcohol. Additionally, the exact percentage of controlled substance in the blood is not an element of the crime therefore, a search warrant must be obtained.

This rule does not apply to DUI cases, where the Nevada Implied Consent Law supersedes the general principle. See NRS 484.383 - NRS 484.389. When an officer has reasonable grounds to believe that a person was driving or in actual physical control of a vehicle while under the influence of liquor or a controlled substance, the officer can request the person to provide a sample of his blood, urine or breath. If the person refuses to submit to such a test reasonable force can be used to extract blood from the defendant.

NRS 484.383(7). If the suspect is dead, unconscious or otherwise in a condition incapable of refusing, blood may be withdrawn without the necessity of advising the suspect of the implied consent law. NRS 484.383(2).

3. **Body Cavity Searches:** Other types of intrusions into the body which potentially could be found to violate Due Process rights include the visual body cavity searches conducted at most detention facilities. Although this procedure has been approved as a standard operating procedure without probable cause there are limits, and probes would generally not be permitted, See *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979).

H. THE FORM OF THE SEARCH WARRANT

A sample search warrant, affidavit supporting the search warrant and return is attached to this outline. The form of these documents will be discussed in more detail, but it is first important to understand some basic principles under Nevada law concerning search warrants. The Nevada Statutes are NRS 179.015 through NRS 179.115.

- 1. Who may apply? There is not an express provision for this. The affiant is usually a police officer, but any credible person could be the affiant.
- 2. Who may issue the search warrant? Any District Court Judge, Justice of the Peace, or Municipal Court Judge. See NRS 179.025.
- 3. Who may execute the search warrant? Per NRS 179.045 (5), the warrant must be directed to a peace officer in the county where the search warrant is to be executed.
 - 4. What items can be searched for? Any property which is:
 - A. Stolen or embezzled: or
 - B. Designed or intended for use or which is or has been used as the means of committing a crime; or
 - C. Constitutes evidence to show a crime has been committed or that a particular person has committed a crime. See NRS 179.035.

The Search Warrant Itself:

This is a single page (sometimes two pages) signed by the Judge which makes it lawful for the police to carry out the search. Note that as required by the 4th Amendment, a search warrant has three basic components: (1) it must be issued upon probable cause and have support for the statement of probable

cause, (2) it must describe the area to be searched, and (3) it must describe what will be seized. *See State v. Allen*, 119 Nev. 537, 69 P.3d 232, 235 (2003).

The search warrant should incorporate the affidavit by reference. This means that legally speaking they are as one document. In the case of *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 1286 (2004), the United States Supreme Court found a search warrant invalid for failing to provide an adequate description of the property to be searched and the items to be found. Although the affidavit provided a better description, the search warrant was found to be invalid because it did not incorporate the affidavit.

The Affidavit:

Usually the first pages mostly repeat the information contained in the actual search warrant, but it also includes the identity and experience of the affiant officer.

The affidavit states why the items are subject to seizure. In drug cases, this may be obvious, but it may need explanation in a homicide, fraud or pandering case. (For example, it is not a crime to have a gun, suitcase and many other items).

The next part of the affidavit describes why there is probable cause to search for the items listed in the search warrant at the particular location listed.

The next part of the affidavit is the "prayer" or request to do the search. In Nevada, all searches must be done between 7 a.m. and 7 p.m. unless the Judge authorizes a night-time search based upon a showing of good cause. NRS 179.045. Absent an abuse of discretion, a magistrate's finding of a reasonable necessity for night-time service should not be disturbed. *Sanchez v. State*, 103 Nev. 166 (1987). See also, *People v. Lopez*, 173 Cal.App.3d 125, 218 Cal.Rptr. 799 (Cal. App. 1985); In *Sanchez*, the Nevada Supreme Court upheld a night-time clause based on the affiant's representations that the buy money and drugs at apartment could dissipate and based on the officer's representations that drugs may be sold both day and night.

The affidavit should be attached to the warrant unless the affidavit describing probable cause is sealed or the warrant is obtained telephonically. See *State v. Gameros-Perez*, 119 Nev. 537, 78 P.3d 511, 513 (2003). Where the warrant is obtained telephonically, the affidavit or recorded oral statement of probable cause by reference. *Id.*

The Return:

Nevada law requires the officer executing the warrant to leave a copy of the warrant and an inventory of items seized at the place searched. The inventory must also be given to the issuing Judge (or Clerk of that Court). NRS 179.075.

The Nevada Supreme Court has also held that, as a matter of state law, when officers serve a (non-telephonic) search warrant which incorporates the affidavit by reference, they must, absent a sealing order, leave a copy of the affidavit with the warrant. *State v. Allen (Allen II)*, 119 Nev. 166, 69 P.3d 232 (2003). Such a warrant must contain a statement of probable cause, and if the probable cause is set forth in the incorporated affidavit, that must be left with the warrant itself.

The Court clarified its *Allen II* holding in *State v. Gameros-Perez*, 119 Nev. 537, 78 P.3d 511 (2003): a search warrant on affidavits for which a sealing order has been issued, or a telephonic search warrant, must be supported by probable cause, but that probable cause need not appear on the face of the warrant nor need it be incorporated by reference in the warrant; a search warrant issued otherwise must state the probable cause on its face, or, if the probable cause is set forth in an unsealed affidavit incorporated by reference, the affidavit must be served with the warrant.

Nevada's holdings in *Allen I* and *Allen II*, supra, are purely a matter of state law. The U.S. Supreme Court has held that the Fourth Amendment's particularity requirement applies only to the place to be searched and the things to be seized. *U.S. v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494 (2006). The Constitution does <u>not</u> require that the warrant set forth the magistrate's basis for finding probable cause or the precise manner in which it is to be executed (ie. conditions precedent in an anticipatory warrant or the manner of covert entry to install a listening device in a warrant authorizing interception of oral communications). *Id.* citing *Dalia v. U.S.*, 441 U.S. 238, 99 S.Ct. 1682 (1979).

Use of a "Sealing Order":

Upon a showing of good cause, the magistrate may order an affidavit or a recording of an oral statement given pursuant to this section to be sealed. NRS 179.045 (3). Upon a showing of good cause, a court may cause the affidavit or recording to be unsealed. NRS 179.045.

Even though a search warrant affidavit can be sealed, the question as to when it will be unsealed is wide open under Nevada law. At some point, the

affidavit has to be unsealed. Otherwise, the affidavit could consist of anything or next to nothing and the defense could argue (probably successfully) that they could not even subject it to a post-*Leon* and *Gates* challenge.

Therefore, until some firm rules are established through statutes and/or Nevada case law, officers should regard the sealing order as a short term protection. If there is a major crime and the suspect is in custody with a speedy preliminary hearing, this could be as short as a few weeks.

In *Certain Individuals v. Pulitzer Pub. Co.*, 895 F.2d 460 (8th Cir. 1990) the Court denied access by media to a sealed affidavit in a wiretap case. According to the court, the privacy interests protected by Title III of the individuals in the case outweighed the media's right to the information especially where there was no indictment of the individuals on the wiretap. The Court reasoned that until case prosecuted "the government's investigation tips the balance in favor of privacy and against disclosure at this time." *See also Times Mirror v. U.S.*, 873 F.2d 1210 (9th Cir. 1989) (holding that media did not have an unqualified right to sealed affidavit during pre-indictment investigation).

In *Matter of Eye Care Physicians*, 100 F.3d 514 (7th Cir. 1996) the Court held that no provision within the Fourth Amendment grants a fundamental right of access to sealed search warrant affidavits. The Court found that, before an indictment, where no person affiliated with the eye care business was arrested or charged with any crime, Eye Care's common law right was outweighed by the government's need for privacy in the search warrant. "The identity of unnamed suspects not yet charged would be revealed and privacy of innocent people would be threatened."

Although most portions of the sealed search warrant can be revealed to the defense, a portion which contains information from the criminal informant may be kept sealed at least in part. In *Lawmaster v. U.S.*, 993 F.2d 773 (10th Cir.1993) (involving plaintiff's appeal of denial of petition to unseal affidavit used to obtain search warrant), the Court upheld the District Court's denial of the defendant's request to unseal the affidavit in order to ascertain the identity of the informant. Further, the Court found that whatever need the defendant had demonstrated for the affidavit was satisfied when he was provided with a redacted version of the affidavit which did not name the informant. *Id.*

Similarly, in *People v. Hobbs*, 873 P.2d 1246 (Cal. 1994), the Court found that all or any part of search warrant affidavit may be sealed if necessary to implement informant's privilege and protect identity of confidential informant. Trial courts are expressly authorized to utilize in camera review and

discovery procedure to effectuate a balance between implementation of the informant privilege and the defendant's discovery rights.

Also note: In 1990, the Nevada State Attorney General issued a written opinion (which does not have the same force as a Nevada Supreme Court decision) in which the Attorney General stated that in cases where the affidavit includes information from a criminal informant whose identity might be learned from reading the affidavit, the affidavit can be sealed under Nevada law (NRS 49.335 et. seq. protecting the identity of an informer).

Thus, if the judge, after an in camera hearing, wants to release some parts of the affidavit, ask the judge to keep sealed the portions of the affidavit that would allow the defendant to deduce the criminal informant's identity such as "when the criminal informant saw or learned of the contraband" or "the relationship between the criminal informant and defendant."

I. SEARCH WARRANT PREPARATION CHECKLIST

"Success has the uncanny knack of favoring those who have paid the price of careful preparation." "Luck is what happens when preparation meets opportunity."

- 1. Give the name of the officer who will be the affiant.
- 2. Describe the place to be searched and items to be seized.
- 3. Name the crime(s) connected to the items to be seized.
- 4. Note whether it is a regular search warrant or anticipatory search warrant.
 - 5. Complete affidavit, warrant and seal (if necessary).
- 6. If using pre-formatted warrant and/or affidavit, be sure that all the standard language (courts call this "boilerplate" language) actually applies to this particular search warrant.
- 7. If a night-time clause is needed, be sure it is requested and justified. If the search warrant is signed at night, ask the issuing judge to put the time as well as the date on the search warrant.
- 8. Have the proposed search warrant and affidavit reviewed by your supervisor.

- 9. Contact dispatch for phone numbers of on-call District Attorneys. Have the search warrant reviewed telephonically by one of the District Attorneys. Insert the District Attorney's name on the last page of the affidavit under "Approved by" or note the District Attorney's name in your report.
- 10. Contact the judge (District Court or Justice of the Peace). Get the judge's phone number from dispatch. You will need several copies of the search warrant and affidavit (one for premises, original to be filed, copy for police records etc.) so you have two choices:
 - A. Since a copy can be served at the premises, take the original search warrant and affidavit to the judge for signature then Xerox copies, or
 - B. Make several copies of the search warrant and affidavit before going to the judge and be sure that the judge signs multiple copies.
 - 11. You must swear to and sign the affidavit in front of the judge.
- 12. Contact dispatch and get a separate event number for execution of the search warrant.
- 13. Ensure that the search warrant kit is fully stocked (Return of Service, evidence bags, gloves, etc.)

J. EXECUTION OF THE SEARCH WARRANT

Two recent U.S. Supreme Court cases have rulings on the execution of a search warrant.

In *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999) the Supreme Court noted that police could use the presence of a third party during the execution of the warrant to do things like identify stolen property. However, the Supreme Court found that police cannot bring media persons into the premises where a search warrant is executed. The request to use a third party should be in writing in the search warrant and the search warrant affidavit.

In *City of West Covina v. Perkins*, 525 U.S. 234, 119 S.Ct. 678 (1999) the Supreme Court ruled that when police lawfully seize property pursuant to a search warrant there is no requirement that police provide the owner with state law remedies to try to get the property returned.

The search warrant can be executed by any Nevada peace officers in the county where the search takes place. The law requires officers to show the search warrant to the person having control over the premises searched. However, in *U.S. v. Davis*, 76 F.3d 311 (9th Cir. 1996), the Court ruled that police do not have to have the search warrant in hand when the search is begun as long as the search warrant was issued before the search began. See *U.S. v. Hepperle*, 810 F.2d 836 (8th Cir. 1987); *U.S. v. Bonner*, 808 F.2d 864 (1st Cir. 1986). The law also requires that you leave a copy of the search warrant and the affidavit at the premises searched unless you have gotten an order sealing the affidavit from the Judge who issued the search warrant.

You are also required to knock and announce before entry. This means to announce that you are the police and that you have a search warrant. If you are "refused entrance" you can break doors or windows and force entry. Refusal doesn't have to be an explicit statement ("You can't come in. Go away.") but you must wait a "reasonable" period of time before silence from inside is considered refusal. See section on Knock and Announce.

You must leave an inventory of the items seized either with the person in control of the premises or at the premises. NRS 179.075. The same information must be reported to the issuing Judge (this is done by filing the paper in the office of the Clerk of Courts for the issuing Judge (District or Justice). In Clark County, this is accomplished by using a multi-layered and colored self-copying paper called "Return." The bottom copy is left at the premises, the white (top) copy is filed with the court clerk and the other copy is used for police records.

1. Scope, Intensity and Duration:

Once entry is made and premises secured, the search can begin. It is permissible to search the entire curtilage (building, other structures) on the same land. *Keesee v. State*, 110 Nev. 997, 879 P.2d 63 (1994), citing *U.S. v. Moore*, 743 F.2d 254 (5th Cir.1984) (search warrant for a house covers garage thirty-five to forty feet from house); *U.S. v. Whitten*, 706 F.2d 1000 (9th Cir.1983) (a warrant may authorize a search of an entire street address while reciting probable cause to only a portion of the premises if the defendant is in control of the whole premises); *U.S. v. Williams*, 687 F.2d 290 (9th Cir.1982) (warrant authorizing search of "premises" in a rural area includes buildings on that land); *Barton v. State*, 161 Ga.App. 591, 288 S.E.2d 914 (1982) (warrant for premises authorized search of shed twenty feet behind house and within curtilage); and, *State v. Trapper*, 48 N.C.App. 481, 269 S.E.2d 680 (1980) (warrant for house trailer authorized search of shed thirty feet away because it is within the curtilage of the house). *See U.S. v. Frazin*, 780 F.2d 1461 (5th Cir. 1986)(

holding that even if garage was not described in warrant to search residence, warrant authorized its search).

If police execute the search warrant and some items listed in the warrant are not seized, police can return to the premises, search for and seize the items if the second search is a continuation of the first. *U.S. v. Kaplan*, 895 F.2d 618 (9th Cir. 1990) (holding that second search was a continuation of the first when officers returned to the scene two hours and ten minutes after first search); *U.S. v. Carter*, 854 F.2d 1102 (8th Cir. 1988)(holding second search was a continuation of first where officers returned several hours after first search).

The scope or intrusiveness of the search is limited only by the size and nature of the items sought. It is appropriate to search anywhere in the premises where the item may be found. *See U.S. v. Buckley*, 4 F.3d 552 (7th Cir. 1993)(finding that search of premises which uncovered illegal items not listed in warrant was valid because those items were located in an area that could have contained the items enumerated in the warrant).

"Once police have discovered everything enumerated in warrant, anything seized thereafter must be suppressed. However, there are no bright line rules governing how and how often officers must communicate with one another while conducting search, or when they must stop and inventory items in view before continuing to look." *U.S. v. Bater*, 830 F. Supp. 28 (D. Mass. 1993)

It is important to use common sense in determining the permissible scope and duration of a search. If officers are looking for a single item, such as a gun, once the gun is located, the search is over. Although most searches do not take more than a few hours, courts have upheld lengthy searches in certain circumstances. *State v. Swain*, 269 N.W. 2d 707 (Minn.1978)(holding that execution of a search warrant for blood stained items which lasted three days was valid where there was a reason for the delay and the probable cause continued).

It is appropriate to search personal effects if they might contain the items searched for. *U.S. v. Williams*, 687 F.2d 290 (9th Cir. 1982)(holding that search of lunch box was proper where is was located on the premise and could have contained items listed in the warrant). If police do not know at the time of search who a container belongs to then it is okay to search inside it. Police can assume they are part of the premises. *Carman v. State*, 602 P.2d 1255 (Alaska, 1979)(holding that a search of a purse located within the premise was proper where no one claimed ownership over it); *People v. McCabe*, 144 Cal.App. 3d 827 (Cal. 1983). Additionally, if a visitor makes his belongings accessible to the occupant of the premises and the occupant had the opportunity to stash the

contraband there, it is permissible to search the visitor's property. *Comm. v. Wheatley*, 402 A.2d 1047 (Penn. 1979).

In *U.S. v. Lucas*, 932 F.2d 1210, 1215-1216 (8th Cir. 1991), the court found that a search warrant for records relating to drug transactions included playing the tape on a telephone answering machine. Similarly, in *U.S. v. Peters*, 92 F.3d 768, 769 (8th Cir. 1996) a warrant for records associated with drug distribution authorized playing unmarked audio cassette tapes located at the residence. Further, in *U.S. v. Gallo*, 659 F.2d 110, 114 (9th Cir. 1981) answering the phone during a search warrant at a bookmaker's residence was valid because phone calls are part of the defendant's booking operation. *See U.S. v. Stiver*, 9 F.3d 298, 302 (3rd Cir. 1993); *U.S. v. Ordonez*, 737 F.2d 793, 810 (9th Cir. 1984).

Automobiles on the premises can be searched as part of the "premises" even though not specifically named as long as they are owned by or under the control of the person in control of the premises. *U.S. v. Asselin*, 775 F.2d 445, 446-447 (1st Cir. 1985)(holding search of a disabled Cadillac not named in warrant was not beyond the scope of the warrant). In *U.S. v. Evans*, 92 F.3d 540, 543 (7th Cir. 1996), the Court found that police can search a car located in the garage of a house listed in a search warrant even if the car is not mentioned in the search warrant because the car is like any other container located at the property. The Court went on to explain that the car could be searched as a "container" even if the car does not belong to the resident of the property as long as it is not apparent that the car belongs to a person wholly unrelated to the criminal activity.

2. Time of Execution:

Pursuant to NRS 179.075 a warrant is to be executed and returned within 10 days. According to the Nevada Supreme Court, service of a warrant within 10 days complies with the statutory requirement that a warrant be served "forthwith". *Smithart v. State*, 86 Nev. 925, 929 (1970). It is important to note that a delay in execution of a search warrant is permissible under the 4th Amendment only where the probable cause in the affidavit continues until the time of the execution. *U.S. v. Nepstead*, 424 F.2d 269, 271 (9th Cir. 1970).

As previously stated, all search warrants must be executed in the daytime between 7 a.m. and 7 p.m. unless the issuing judge authorizes a night-time clause. In *Sanchez v. State*, 103 Nev. 166, 169, 734 P.2d 726, 728 (1987), the Nevada Supreme Court ruled that the fact that narcotics could dissipate, the buy money could be lost and drugs were often sold at night was abundant justification for a night-time search. *See also Gooding v. U.S.*, 416 U.S. 430

(1974)(holding that no special showing needed for night-time search other than a showing that items in the warrant are likely to be present at the property at night).

Other courts have held that where the safety of the officers or occupants of a premises would not be disturbed, a nighttime justification can be found. *State v. Brock*, 653 P.2d 543, 546 (Or. 1982). This would include searches of permanently lit places, airport baggage areas, and closed containers already in police custody. *Id.* Further, a night-time search is appropriate where there is not a citizen located on the premise. *State v. Lacey*, 694 P.2d 795, 799 (Ariz. 1984). In making this assertion, an Arizona court reasoned: "The antipathy to night searches stems from the greater intrusiveness of police suddenly rousing people from their sleep which may be fraught with conflict or violence. Where there is no citizen to confront, these problems disappear." *Id.*

3. Detention and Restraint of Occupants:

In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. (1981), the U.S. Supreme Court held that officers executing a search warrant for contraband may "detain the occupants of the premises while a proper search is conducted." A temporary and limited detention is justified 1) to prevent flight in the event that incriminating evidence is found, 2) to minimize the risk of harm to the officers, and 3) to facilitate the orderly completion of the search. *Id*.

In *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465 (2005), officers executing a search warrant of a house for weapons and evidence of gang membership in the wake of a drive-by shooting acted reasonably in detaining the occupant in handcuffs for two to three hours while the search was in progress. The governmental interest in handcuffing the occupant was at its maximum in view of the nature of materials sought, thus outweighing the occupant's interest in being free from additional intrusion effected by handcuffing, especially since only two officers were available to watch over occupant and three other detainees. *Id.*

Furthermore, in *Muehler v. Mena*, supra, officers needed no independent reasonable suspicion in order to question the occupant concerning her immigration status so long as it did not prolong her detention. *Id.* Mere police questioning does not constitute a Fourth Amendment seizure. *Id.*

In a civil rights lawsuit, *Los Angeles County v. Rettele*, 500 U.S. 609, 127 S.Ct. 1989 (2007), officers acted reasonably for Fourth Amendment purposes while executing a valid search warrant when they ordered innocent

naked residents out of their bed, and held them at gunpoint for one to two minutes, while they verified that no weapons were present and that no other suspects were close by. The valid search warrant authorized a search of the residence for documents and computer files related to a fraud and identity-theft crime ring run by four African-American suspects, one of whom had registered a 9-millimeter handgun. *Id.* Although the criminal suspects had moved three months earlier, based on the warrant the officers reasonably believed at the time that the criminal suspects resided in the home and the presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well, blankets and bedding could have concealed weapons, and officers allowed the residents to retrieve their clothing as soon as officers secured the room. *Id.*

4. Search and Arrest of Occupants:

If a particular person as well as a place is named in the search warrant that person may be searched.

If a person is arrested at the place of search based on probable cause, the probable cause for the arrest must be based on more than mere fact that the person is present at the place searched. *Ybarra v. Illinois*, 444 U.S. 85, 90, 100 S.Ct 338, 342 (1979). According to the Nevada Supreme Court, drugs in plain view are in the "constructive" possession of all occupants and provide probable cause to arrest all occupants. *Maskaly v. State*, 85 Nev. 111, 114, 450 P.2d 790, 792 (1969). In *State v. LeClair*, 304 A.2d 385, 387 (Me. 1973), the Court found probable cause for an arrest where a person who appeared to be under the influence of drugs showed up at the location while police were executing a search warrant. Once a person is arrested based on probable cause, police can search that person "incident to arrest." *See* Section on Search Incident to Arrest.

In a place open to the public the general rule is that police cannot automatically search persons who are present at the time and place of execution of a search warrant. *Ybarra v. Illinois, supra.* In *Ybarra*, the search warrant was executed in a bar open to the public and the Supreme Court found that it was unlawful for police to pat down patrons without individualized suspicion that they were armed. *Id.*

With regard to detention and search of persons, other than occupants, in a private premises when police have a search warrant, if *Terry* type reasonable suspicion exists as to a person present during execution of a search warrant, that person can be detained. *Baker v. Monroe*, 50 F.3d 1186 (3rd Cir. 1995); *U.S. v. Fountain*, 2 F.3d 656, 662 (6th Cir. 1993) cert. denied, 510 U.S. 1014, 114 S.Ct. 608, (1993), and overruled on other grounds, Trepel v. Roadway Express, Inc.,

194 F.3d 708, 717 (6th Cir.1999). In *U.S. v. McEaddy*, 780 F.Supp. 464, 471 (D. Mich. 1991) the Court held that anyone inside the non-public premises was an "occupant." A person who enters house during execution of search warrant cannot be subjected to detention or frisk merely because he came to the house where the search warrant is being executed. *Lippert v. State*, 664 S.W. 2d 712, 721 (Texas, 1984), In *Lippert*, the police did not have a reason to perform a *Terry* frisk of the defendant just because he came to the location during the execution of the search warrant. *Id.* Because the defendant did not flee or make furtive movements, police were not entitled to perform the *Terry* frisk. *Id.* Conversely, the Court in *U.S. v. Moreno*, 891 F.2d 247, 249 (9th Cir. 1989) held that police were proper in conducting a *Terry* stop where a person drove up to the location of the search warrant and then tried to leave upon seeing the police.

Sometimes a search warrant can authorize the search of "any person" present at the place and time of the execution of the search warrant. This is far more likely to be legal when the place searched has limited access such as a residence and when the police have probable cause to believe that criminal activity is openly and notoriously taking place at that location. *U.S. v. Graham*, 563 F. Supp. 149 (N.Y. 1983). In *Graham*, the Court upheld a warrant issued for any persons on the premise where it was shown that the other people present at the location had lied for the defendant and had become associated with the defendant's presence at the location.

NRS 179.055(3) provides that in the execution of a search warrant, police may reasonably detain and search any person in the place at the time in order to protect the police from attack or to prevent destruction, disposal or concealment of any instruments, articles or things particularly described in the warrant. This statute must be interpreted in light of the Supreme Court's decision in *Ybarra* because it is axiomatic that a state statute cannot overrule the Supreme Court's interpretation of the U.S. Constitution.

Based on the statutes and case law above, the general rule seems to be that police can "detain" persons found at the premises named in search warrant if the people are "occupants" and it is a private premises.

5. Knock and Announce:

- Federal Authority

The U.S. Supreme Court has held that the common law "knock and announce" rule is an integral requirement of the 4th Amendment reasonableness inquiry whether force is used upon entry or not. *Wilson v. Arkansas*, 514 U.S.

927, 930, 115 S.Ct. 1914, 1916 (1995). This ruling resolved a dispute among lower courts regarding the necessity of "knock and announce".

The rule requiring an officer to knock and announce serves several fundamental interests, including: (1) protecting law enforcement officers and household occupants from potential violence; (2) preventing the unnecessary destruction of private property; and (3) protecting people from unnecessary intrusion into their private activities. *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006); *U.S. v. Combs*, 394 F.3d 739 (9th Cir. 2005).

According to the Supreme Court, the Fourth Amendment does not permit "blanket exceptions" to the "knock and announce" rule. *Richards v. Wisconsin*, 520 U.S. 385, 395, 117 S.Ct. 1416, 1422 (1997). In *Richards*, the court rejected a blanket state-created exception to the knock and announce rule for all drug cases. *Id.* However, the Supreme Court did reason that police can make a no knock entry if there is reasonable suspicion (not probable cause) that knock and announce would be (1) dangerous, (2) futile, or (3) would inhibit the investigation of the crime by allowing the destruction of evidence. *Id.*

In *Richards*, an officer with a search warrant dressed as a maintenance man and knocked on the door. Richards asked who it was and the reply was maintenance man. He opened the door, and when he saw a police officer standing nearby, slammed the door. After waiting 2 to 3 seconds, police kicked down the door identifying themselves as police, entered, found him trying to leave by a window, then found cocaine. The Supreme Court held that the entry was lawful, even without knocking, because police had reasonable suspicion to believe that the defendant might destroy the drugs. *Id.* at 389.

In *U.S. v. Ramirez*, 523 U.S. 65, 71 118 S.Ct. 992, 997 (1998), the Supreme Court upheld a no knock search warrant because knocking would have been dangerous to the police. In *Ramirez*, officers had information from a reliable informant that the occupant of the premises had drugs and guns. Further, the informant told police that and a person named Shelby with a prior record for violent crimes who had made threats to kill witnesses and police officers and was wanted for escape was residing in Ramirez's house. *Id*.

In *U.S. v. Banks*, 540 U.S. 31, 124 S.Ct. 521 (2003), to execute a search warrant for cocaine, a forced entry resulting in property damage following knock and announce and waiting an interval of 15 to 20 seconds with no response, was reasonably justified given the exigency of possible destruction of evidence. The fact that the occupant was in the shower at the time was irrelevant as only the facts known to police are what count in judging a reasonable waiting time. Furthermore, the crucial fact is not the time it would

take the occupant to answer the door, but the time it would take him to destroy the coaine.

In *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006), the Court held that the exclusionary rule does not apply to a violation of the knock and announce rule because the purposes of the knock and announce rule (protection of life, property, and privacy) had nothing to do with the seizure of the evidence.

- Nevada Authority

Nevada law requires an officer executing a search warrant to give notice of his authority and purpose, also known as "knock and announce". NRS 179.055. The notice requirement means that officers must notify the occupant of the premises that they are the "police" and that they have a "search warrant." Officers must wait a reasonable amount of time before concluding that entry has been refused.

In *King v. State*, 116 Nev. 349, 357, 998 P.2d 1172, 1178 (2000), the Nevada Supreme Court held that officers substantially complied with NRS 179.055 by yelling "Police officer. Search warrant," and properly entered the apartment under exigent circumstances. The residence was secured with bars on the windows and an iron gate or security door and officers had information that persons within were armed and dangerous. Immediately after police entered, shots were fired from the interior of the residence.

In *Zabeti v. State*, 120 Nev. 530, 96 P.3d 773 (2004), police satisfied NRS 179.055 without actually knocking on the door where they announced their presence, "police officer search warrant," in a loud voice and made entry after approximately 10 seconds based on exigent circumstances. The search warrant was classified by the SWAT team as a high-risk warrant due to prior arrests of the occupants for weapons and violence, the residence had two stories enabling occupants to have high ground, and the garage door was open presenting a high risk. See also *U.S. v. Fox*, 790 F.Supp. 1487 (D.Nev. 1992) (noncompliance with NRS 179.055 was justified based on police officers' reasonable basis for believing that complying with knock and announce provisions would have placed them in danger.)

While there is some authority in other jurisdictions for obtaining a no knock warrant from a judge in advance, see e.g., *U.S. v. Spry*, 190 F.3d 829, 833 (7th Cir. 1999) *citing Richards v. Wisconsin*, 520 U.S. 385, 395, 117 S.Ct. 1416, 1422 (1997), there is no such statutory authorization for a no knock search warrant in Nevada. Rather, the authority to dispense with knock and announce requirements arises from exigent circumstances where police officers have a

reasonable suspicion that compliance would endanger the police or occupants or would allow for the destruction of evidence.

- Useless Gesture Exception

When someone inside the premises to be searched indicates that they know the police are present i.e. looks out window and the sound of running is heard or some citizen or accomplice on the outside shouts "police" the waiting time between announcement and forced entry is reduced to seconds.

- Officers' Safety Exception:

Courts have made an exception to the rule requiring knock and announce where officer safety is at issue. There must be more than a generalized belief that the occupant is armed, but, where police have reasonable belief that occupant is armed and may use a weapon against police, entry without notice is okay. See *U.S. v. Manfredi*, 722 F.2d 519 (9th Cir. 1983) (holding no knock and announce was okay where defendant was armed with a gun); *U.S. v. Whitney*, 633 F.2d 902 (9th Cir. 1980); *U.S. v. Meshane*, 462 F.2d 5, 6 (9th Cir. 1972)(holding police were justified in not knocking and announcing where defendant was armed with sawed off shotgun);

However, courts have held that the fact that guns may be present in the premises is not enough. There must actually be a showing that officers believe their safety is in jeopardy. In *U.S. v. Stowe*, 100 F.3d 494, 498 (7th Cir. 1996) the criminal informant observed the defendant at the apartment with a large amount of crack cocaine and loaded firearms. The court ruled that "while the presence of a gun alone is not enough [for no knock] drug dealing [with a gun] is a crime infused with violence." In *U.S. v. Moore*, 91 F.3d 96, 98 (10th Cir. 1996), the Court found that officers were not excused from the knock and announce requirement because there was no evidence that officers were particularly concerned for their safety.

Where police have documented reasonable suspicion that the occupant is actually violent, a no knock is approved: *U.S. v. Murphy*, 69 F.3d 237, 243 (8th Cir. 1995) (holding no knock was reasonable where occupant was on parole for murder and had firearm); *U.S. v. Perez*, 67 F.3d 1371, 1383 (9th Cir. 1995) (holding that no knock was reasonable where police had knowledge that one occupant had shot a criminal informant in the past and that defendant may destroy evidence) *overruled on other grounds*; *U.S. v. Buckley*, 4 F.3d 552, 558 (7th Cir. 1993)(upholding a no knock where suspect had a pit bull and record for violence).

Routine use of motorized battering ram is unreasonable in executing searches or arrests and should only be used after police have satisfied three preliminary requirements: (1) obtaining warrant upon probable cause, (2) receiving prior authorization to use ram from magistrate, and (3) at time of entry determining there were exigent circumstances. *Langford v. Superior Court*, 729 P.2d 822, 830 (Cal. 1987). However, the use of "flashbangs" which temporarily blind and confuse occupants is appropriate where officers' safety reasonably requires it as flashbangs do not pose an unacceptable threat to property and persons. *Id.*

6. Use of Ruse to Gain Entry:

In *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416 (1997), an officer with a search warrant posed as a maintenance man when knocking on the door. The U.S. Supreme Court did not criticize this ruse. *Id*.

The use of a ruse by police with a search warrant to get occupants to open the door has been upheld by numerous courts. See *U.S. v. Vargas*, 621 F.2d 54 (2d Cir. 1980) (DEA dressed as furniture delivery men); *U.S. v. Harris*, 961 F.Supp. 1127 (SD Ohio. 1997) (officers posed as a pizza delivery man); *Adcock v. Kentucky*, 967 S.W. 2d 6 (1998); "Pop Warner" *Comm. v. Goggin*, 587 N.E. 2d 785 (Mass. 1992)(occupant's car was hit); *State v. Moss*, 492 N.W.2d 627 (Wisc. 1992)(dressed as pizza delivery man). The following cases all upheld use of ruse:

In *U.S. v. Stevens*, 38 F.3d 167, 168 (5th Cir. 1994) officers with a search warrant borrowed a flower delivery truck and came to the door carrying poinsettias. When the occupants opened the door, they advised that they were police and then entered.

In *Coleman v. U.S.*, 728 A.2d 1230, 1234 (DC, 1999) uniformed police arrived with a search warrant and through open screen door said they were there in response to a burglary alarm and were allowed to enter.

In *U.S. v. Syler*, 430 F.2d 68, 70 (7th Cir. 1970) police with a search warrant knocked on door and when person inside said "who is it?" police said "gas man."

In *U.S. v. Salter*, 815 F.2d 1150, 1152 (7th Cir. 1987) police with a search warrant for a motel room called occupant on phone and told her to go to the front desk to sign papers and when room door opened police said "police with search warrant."

In *U.S. v. Contreras-Ceballos*, 999 F. 2d 432, 435 (9th Cir. 1993) police with a search warrant knocked on the door. The occupant said, "who is it?" and police said, "Federal Express." The door opened and police identified themselves and said "search warrant."

In *U.S. v. Phillips*, 149 F.3d 1026 (9th Cir. 1998) the Court ruled that the statutory knock rule does not apply to officers with a search warrant who enter through an open door. However, as a practical matter, in light of U.S. Supreme Court's decision in *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914 (1995) holding that the knock and announce requirement is integral to the 4th Amendment protection, even if a ruse is used to get the occupants to open the door, police should announce their presence and that they have a search warrant prior to entering . The great majority of cases decided on this issue have upheld such police action.

Finding Items Not Named in S/W (Plain view):

See section in this manual on Plain View

K. COMPUTER SEARCHES

(1) Introduction

In this era of technological advancement, computers, including hardware, software, computer disks, disk drives, and CD-ROMs are routinely used to store documents, images, videos, and other data. As this stored data may contain evidence of crimes, the law regarding search and seizure of such stored data is evolving. There are a number of federal and state cases on issues relating to the search and seizure of computers and various peripheral equipment, some conflicting. In many cases the decision of the court is based on the specific facts presented.

There are also Federal Statutes which may have some influence on the lawfulness of computer searches: The Electronic Communications Privacy Act (18 U.S.C. §§2510-2711) which includes rules on stored electronic communication and the Privacy Protection Act of 1980 (42 U.S.C. §2000, et seq.)

Due to these factors, an officer seeking a search warrant involving computers, peripheral equipment, internet service providers, or other electronically stored data should contact the District Attorney's Office in your county. The cases in this section provide general guidelines to assist law enforcement in computer searches.

(2) General Information

All cases agree that the Fourth Amendment right against unreasonable searches and seizures applies to computers and peripheral computer equipments. Absent valid consent or emergency (rarely found), government agents must have a warrant to seize and search the contents of a computer.

There may be important and valuable evidence in a computer's hard drive, floppy drives, CD ROMs, or diskettes. Other electronic storage items to consider are personal digital assistants (PDAs) such as Palm Pilots, laptops, and possibly even newer cellular telephones with cameras and storage capability for photographs. Computers or other electronic storage items may contain a variety of evidence to various types of crimes. A few examples are child porn, counterfeit or altered documents, recipes for manufacturing drugs such as methamphetamine, PCP and records such as pay and owe sheets for narcotics sales and illegal bookmaking

Computer searches are somewhat like searches of a residence in the sense that police (with a warrant) are entitled to search for and seize certain items based on P/C. There may be electronic files in the computer that by their file name or file type are more likely to reveal the information sought. Additionally, special software or search techniques may be used to locate files containing key words. Utilizing methods to pinpoint the locations where these items may be found without searching through everything in the computer and related discs is the preferred method. The US Supreme Court has repeatedly held that general searches are unconstitutional, and having a lay person roam through all information stored on a computer is fraught with potential suppression and/or lawsuits.

For this reason, it appears essential that when police seize a computer and related items with a warrant, a computer expert or computer forensic examiner should be used to conduct the actual search of the computer. This may also be important for preserving the evidence for discovery purposes, documenting or tracking the search method to rebut an allegation of contamination of the computer system by the police, and to avoid "booby traps" designed to destroy the contents of the computer when searched by someone other than the owner. Note that in this section, many cases uphold the police seizure and removal of an item such as a computer (with a warrant), when it would be too difficult or too time-consuming to search at the place from which it is seized. See U.S. v. Campos, 221 F.3d 1143 (10th Cir. 2000).

(3) Consent Searches of Computers and Peripheral Computer Equipment

Please review the section in this manual on consent searches.

Note that the consent giver must have access and control over the place to be searched and police must tell the consent giver what they want to search for so that consent will be valid. A good portion of the recent case law focuses on whether the search conducted by the police was within the scope of the consent given. This requires a review of the specific facts from the cases to understand how the courts are ruling on this issue. It is extremely important to note that if the scope of the consent allows for the seizure of a computer, computer disks, or other peripheral equipment, it may NOT allow for the next step of actually searching the contents of the computer or computer disks. Under those circumstances, if probable cause exists to search the contents of the computer or computer disks, a warrant must be obtained.

The following cases have addressed the issue of consent:

U.S. v. Rossby, 81 Fed.Appx. 109 (9th Cir. 2003) (this case is unreported and is not binding precedent, but gives an idea of how the Ninth Circuit would rule on these facts). During the course of an investigation, officers sought consent to search Rossby's office. Rossby provided written consent to a "complete" search of his office and gave officers written permission to take "from my premises any letters, papers, materials, or other property which they may desire." Ultimately, officers seized and searched several laptop computers found in the office. Rossby was present during the computer search and did not object to it. The laptops were not password protected or "locked" in any way. The Court held the contents of the laptop computers found in the office reasonably fell within the scope of the consent to take any "letters, papers, materials or other property." The Court also found there was no reason to believe Rossby intended to exclude the contents of the laptops from his consent.

U.S. v. Carey, 172 F.3d 1268 (10th Cir. 1999). During an investigation for the sale and possession of cocaine, a police officer asked Carey for consent to search his apartment. Carey provided written consent to search, stating, "I do freely and voluntarily consent and agree that any property under my control ... may be removed by the officers ... if said property shall be essential in the proof of the commission of any crime in violation of the Laws of the U.S....." Officers subsequently discovered and seized two computers, which they believed would either be subject to forfeiture or evidence of drug dealing. The Court concluded the scope of the consensual search was confined to the apartment itself. The seizure of the computer was permitted by Carey's consent, but that the

agreement, by its very terms, did not permit the officer to open the files contained in the computer. As such, a subsequent warrant was needed to search the contents of the computer. However, the result in *Carey* has been limited to its facts.

U.S. v. Tucker, 305 F.3d 1193 (10th Cir. 2002). During a parole search of Tucker's home based on reasonable suspicion, officers seized defendant's computer after a detective saw in plain view that the computer had recently visited a newsgroup called "alt.sex.preteen" in violation of his parole. The Court held the search of Tucker's computer was distinguishable from Carey, supra., in that the terms of his parole agreement are much broader. The agreement allowed parole officers to "search my person, residence, vehicle or any other property under my control ... to ensure compliance with the conditions of my parole." The Court found that by its own terms, the parole agreement authorized a search of any of Tucker's property, including the computer. The parole agreement also prohibited Tucker from possessing or viewing "any material exploiting children or depicting unconsensual sex acts or acts involving force or violence." Therefore, the Court held Tucker's parole agreement expressly allowed parole officers to search for any evidence that Tucker violated parole conditions by possessing or viewing child pornography.

In U.S. v. Turner, 169 F.3d 84 (1st Cir. 1999) the defendant's neighbor was the victim of a nighttime assault in her apartment. Believing the intruder may have entered Turner's apartment as well, police officers obtained Turner's verbal consent to "look around." After looking around and seeing blood inside the apartment, police begin to suspect Turner as the assailant. At officer's request, Turner signed a consent form to search the premises, his vehicle and personal property. Before doing so, he was expressly told that the officers would search for "any signs the suspect had been inside [the apartment]," "any signs a suspect had left behind, or anything of that sort," and "evidence of the assault itself." Police searched a computer room which contained several videotapes of explicit sexual material and noticed the computer screen "suddenly turned on" and displayed a picture of a nude woman who appeared "similar" to the victim. An officer then accessed the index and then opened several files of nude women involving sex or bondage. He called the DA's office for advice and then copied the adult porn files onto a floppy disc, searched the hard drive for other incriminating files, found some child pornography, and closed down and seized the computer.

The Court ruled that the consent did not justify a search of the computer.

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is 'objective' reasonableness--what would the typical

reasonable person have understood by the exchange between the officer and the suspect?" The Court stated, "An objectively reasonable person assessing in context the exchange between Turner and the officers would have understood that the police intended to search only in places where an intruder hastily might have disposed of any physical evidence of the assault." *Id.*, at 88.

There are also cases in which courts have analyzed whether an individual, other than the one against whom the police sought to use the fruits of a warrantless search or seizure of a computer or computer equipment, had the authority to consent to the search or seizure.

In *U.S. v. Smith*, 27 F. Supp. 2d 1111 (D. Illinois. 1998), the Court upheld the consent search finding child pornography in that: (1) housemate was not acting as agent of government in giving consent to search home and computer; (2) housemate had actual authority to consent to search of computer; and (3) even if she lacked actual authority, she had apparent authority to consent. Based on the facts and circumstances as they appeared to the officers it is clear that the officers reasonably believed that Ms. Ushman could consent to a search of the computer and area around the computer. She provided explicit directions to the computer. She lived in the house and used the bedroom. The computer was not closed off from the bedroom or locked away. The computer area was easily accessible to family members.

In *U.S. v. Barth*, 26 F. Supp. 2d 929 (W.D. Tex. 1998), the Court concluded that a computer technician's viewing of a defendant's computer for the limited purpose of repairs and discovery of one pornographic file did not implicate the Fourth Amendment because it was a private search. However, the technician was working as a confidential informant for the FBI. As such, his continued viewing of files on the hard drive after contact with the FBI was a governmental search under the Fourth Amendment. The Court found the technician did not have actual nor apparent authority to authorize consent to a police search of the computer.

(4) Search Warrants For Computers and Peripheral Equipment - Validity Based on Particularity of the Warrant

The Fourth Amendment requires that a warrant "particularly" describe "the place to be searched and the person or things to be seized." In determining whether a warrant contains sufficient particularity, the cases address two main issues: First, whether a warrant supplies sufficient information to guide an officer executing the warrant as to what to seize; and second, whether the language of a warrant is overly broad in that it includes items that should not be seized.

The following cases have addressed the issue of whether a warrant contains sufficient particularity in describing the things to be searched/seized:

In *U.S. v. Wong*, 334 F.3d 831 (9th Cir. 2003), the Court ruled on the specificity of a warrant obtained in the course of a murder investigation. The original search warrant specified that the police would be searching for any writings or documents which display the letters 'NWO' and 'ZOG'(these letters were found on Monopoly money by the victim and were associated with white supremacy groups); any maps, receipts, or writings depicting Churchill County Nevada (where the victim was found); and any and all identification and documents belonging to Alice Sin (the victim). The warrant also specifically authorized the search of computers, their components, and disks to "obtain data as it relates to this case." In doing so, the Court stated, "[w]e consider one or more of the following to determine specificity: (1) whether there was probable cause to seize particular items in the warrant, (2) whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure, and (3) whether the government could have described the items more particularly when the warrant was issued. [citation omitted]."

Computers, palm pilots, and laptops were located and seized pursuant to the original warrant. The police obtained a second or "piggyback" warrant to search the contents of each of these items. A computer forensic specialist conducted the search and searched graphic image files believing maps, depictions of Monopoly money, or references to "NWO" or "ZOG" would be located in those types of files. During the search the forensic specialist discovered child pornography. He noted the location of the child pornography, then continued his search for evidence relating to the murder. He did not search for more child pornography.

Using the three factors, above, the Court found the warrant contained sufficient specificity. The court held the specificity of the items listed in the warrant combined with the language regarding the computers to "obtain data as it relates to this case" made it clear to the officers they could search the computers only for those particular items previously listed in the warrant. The Court further held the child pornography was discovered in "plain view" while the forensic specialist was lawfully searching for evidence of murder in the graphic files legitimately accessed.

In *U.S. v. Bridges*, 344 F.3d 1010 (9th Cir. 2003), the Court found the search warrant was overbroad and tantamount to a general warrant. In this case, the warrant failed to state what criminal activity was being investigated or allege the fraudulent activities the defendant was suspected as having committed. The warrant authorized the search of defendant's business. The items the

government sought were listed as: records, documents, electronically stored information, records relating to clients or victims "including but not limited to the ones listed on the warrant," computer hardware, computer software, computer passwords, telephone records, fax machines, typewriter ribbons, cash, notary seals, postal meter, and unopened mail. The Court found this to be a comprehensive laundry list of sundry goods and inventory that one would readily expect to discover in any small or medium sized business in the U.S. As such, the Court found the warrant fundamentally offensive to the underlying principles of the Fourth Amendment.

In *U.S. v. Upham*, 168 F.3d 532 (1st Cir. 1999), cert. denied, 527 U.S. 1011, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999), the Court upheld the search of the defendant's residence and subsequent seizure of child porn finding the warrant authorizing the search was not overly broad. Customs agents monitoring a "chat room" on the Internet, received a number of images depicting child porn that were traced back to a computer used by the defendant. A warrant was obtained, authorizing the search and seizure of "[a]ny and all computer software and hardware, computer disks, disk drives," and "[a]ny and all visual depictions, in any format or media, of minors engaging in sexually explicit conduct [as defined by the statute]."

As a practical matter, reasoned the Court, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images. The Court stated, "A sufficient chance of finding some needles in the computer haystack was established by the probable cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs."

Of course, if the images themselves could have been easily obtained through an on-site inspection, there might have been no justification for allowing the seizure of all computer equipment, potentially including equipment that contained no images and no connection to the crime. But it is no easy task to search a well-laden hard drive by going through all of the information it contains, let alone to search through it and the disks for information that may have been "deleted." The Court concluded the record showed that the mechanics of the search for images later performed off-site could not readily have been done on the spot.

In *U.S. v. Lacy*, 119 F.3d 742 (9th Cir. 1997), Lacy argued the warrant was too general because it authorized the seizure of his entire computer system. He relied upon *U.S. v. Kow*, 58 F.3d 423 (9th Cir.1995), where the Court had

previously invalidated a warrant authorizing seizure of all the computer hardware and software, as well as "essentially all" of its "records ... files, ledgers, and invoices."

The Court held that unlike the affidavit in *Kow*, the affidavit in this case established probable cause to believe Lacy's entire computer system was likely evidence of criminal activity. Furthermore, while the warrant in *Kow* contained no limits on which documents within each category could be seized or suggested how they related to specific criminal activity, the warrant in this case contained objective limits to help officers determine which items they could seize, i.e., only documents linked to BAMSE (a Danish computer bulletin board system).

The Court further held that no more specific description of the computer equipment sought was possible. The government knew Lacy had downloaded computerized visual depictions of child pornography, but did not know whether the images were stored on the hard drive or on one or more of his many computer disks. In the affidavit supporting the search warrant, a Customs agent explained there was no way to specify what hardware and software had to be seized to retrieve the images accurately. As such, the warrant was not overly broad.

In *U.S. v. Kow*, 58 F.3d 423 (9th Cir. 1995), the Court found the search warrant was unconstitutionally overbroad as it did not describe with sufficient particularity the items to be seized, and was therefore invalid "general warrant." The warrant sought essentially all of the corporation's business and financial records and computer hardware and software but did not limit which items within each category could be seized, specify suspected criminal conduct to which items allegedly related, suggest how such items related to criminal conduct, specify the time frame within which criminal conduct allegedly occurred, or notify officers of locations and descriptions of seizable items.

In *Davis v. Gracey*, 111 F.3d 1472 (10th Cir. 1997), police obtained a search warrant which authorized the officers to search for "equipment ... pertaining to the distribution or display of pornographic material in violation of state obscenity laws." The Court upheld the warrant stating (1) the warrant told the officers how to separate the items subject to seizure from irrelevant items and (2) the items seized were all within the category "equipment" described in the warrant and (3) the definition of equipment reasonably included computers. The Court also ruled the computer was more than merely a container for files, it was an instrumentality of crime and could be legally seized.

The Court further stated the warrant was not overly broad. The description in the warrant was sufficient to provide a meaningful limitation on the search, and was far narrower than those we have found lacking sufficient particularity. The Court noted it has invalidated warrants for overbreadth where the language of the warrants authorized the seizure of "virtually every document that one might expect to find in a ... company's office," including those with no connection to the criminal activity providing the probable cause for the search. In this case, the executing officers consulted with an expert to confirm the computer equipment was in fact used to distribute or display illegal pornographic material and that material fell within the scope of the warrant.

(6) Search Warrants For Computers and Peripheral Equipment – Probable Cause

In *Weber v. State*, 121 Nev. 554, 119 P.3d 107 (2005), probable cause supported issuance of search warrant to search capital murder defendant's computer; murder victim's daughter told police that defendant could make fake identification and had at least 12 or 13 credit cards his name, victim's friend told police that defendant and victim had used fraudulent credit cards extensively in the past, that defendant was very computer literate, and that he had made a lot of money with a "scam" over the Internet on his computer, and officer who authored search warrant affidavit stated that persons such as defendant who had computers and fixations on children might access Internet sites that were pornographic in nature.

In U.S. v. Greathouse, 297 F.Supp.2d 1264 (D. Oregon 2003), the defendant challenged the warrant by alleging the information contained in the affidavit was too thin and too stale to support probable cause. Here, based on information that a user name "cyotee" was offering Internet access to files containing child pornography, agents traced the user name "cyotee" by checking Internet Service Provider (ISP) records and confirming the user identity with DMV and utility records. Agents then had probable cause to believe that a computer located within a single family home in Beaverton, Oregon contained child pornography. The defendant argued that further investigation into who was actually using the computer was necessary to establish probable cause. The Court held the fact that the actual user of the computer may not have been known conclusively at the time the warrant was authorized does nothing to diminish probable cause. A location can be searched for evidence of a crime even if there is no probable cause to arrest the person at the location; accordingly, the Court found sufficient probable cause to believe that evidence of child pornography would be found at the residence.

However, while the Court held there were sufficient facts to support probable cause, it also found that the probable cause was too stale. It was

September 2000 when agents first received information regarding the user name "cyotee" offering Internet access to child pornography. From January to October 2001, agents conducted an investigation to determine to owner of the home. It was not until October 2001 that the search warrant was obtained. The Court found no evidence of continuing criminal activity and no more recent activity that might serve to freshen the older information. Additionally, the Court found the lapse in time did not account for frequent upgrades in computer systems. Finally, the Court noted there was no evidence the defendant was a pedophile. As such, the probable cause was too stale to support the warrant.

In *U.S. v. Zimmerman*, 277 F.3d 426 (3d Cir. 2002), the Court held a six month delay between the viewing of a pornographic video file on the defendant's computer and the execution of a search warrant was too stale, absent any evidence the defendant had actually downloaded the video clip and absent evidence of continuous criminal activity.

U.S. v. Roby, 27 Fed. Appx. 779 (9th Cir. 2001). (This case was not selected for publication in the Federal Reporter, and is not binding precedent, but gives an idea of how the Ninth Circuit would view such a lapse in time). A gap of eight and a half months between the date a person with a certain screen name ("pssygtr") downloaded child pornography and the date a search warrant was executed did not render the information relied on by the warrant stale. The Court held, because computer files are often saved on the user's hard drive for periods as long as eight or nine months, as was supported by the affidavit, there was a substantial basis for the magistrate's finding of probable cause.

In *U.S. v. Hay*, 231 F.3d 630 (9th Cir. 2000), the Court held that "boilerplate" language contained in the search warrant affidavit regarding probable practices of individuals involved in possession and transportation of child pornography did not preclude a finding of probable cause for the search of the defendant's computer system for evidence that he possessed images of child pornography, where files containing child pornography were directly transferred to the defendant's computer, the affidavit in support of the search warrant set forth evidence linking the files to the defendant's apartment, and the boilerplate language provided context and relevant information on computers and online trading of pornography. The Court also ruled that the six month laps in time between the transmission of 19 child pornography images from a known trader of such images to an Internet address accessible by the Defendant via File Transfer Protocol (FTP) and the application for warrant was not too stale to support probable cause to believe the files would still be present when the application contained such "boilerplate" language.

In *People v. Ulloa*, 101 Cal.App.4th 1000, 124 Cal.Rptr.2d 799 (4th Dist. 2002), a the California Supreme Court held a search warrant issued for defendant's residence, which authorized the seizure of any computers, was not overbroad, and subsequent search of computers to discover actual or depicted sexual acts was supported by the search warrant affidavit that established probable cause. Ultimately, the Internet messages seized from defendant's computer containing correspondence between defendant and the minor victim were admissible. The Court held seizure of all computers at the defendant's home was likely to reveal incriminating information.

In *U.S. v. Simpson*, 152 F.3d 1241 (10th Cir. 1998), the Court found probable cause to believe that child pornography would be found on the defendant's computer. Here, a detective presented an affidavit to the judge; the affidavit did not contain copies of unlawful material believed to be in Simpson's possession, nor did it describe in detail the content of those materials. The affidavit informed the judge that the material was child pornography and sought search and seizure of "any and all images of child pornography including pictures and computer images." The affidavit further described an Internet encounter between the defendant and an FBI agent (identity unknown to the defendant) in which the defendant agreed to send the FBI agent a computer diskette containing child pornography. The Court held there was probable cause to believe evidence of child pornography would be found on the defendant's computer and that such generalized descriptions as "child pornography" are adequate to convey to the officer executing the search warrant the nature of the material sought

A second issue presented in *U.S. v. Lacy*, 119 F.3d 742 (9th Cir. 1997), was that Lacy claimed the probable cause was stale. The Court stated, "[w]e evaluate staleness in light of the particular facts of the case and the nature of the criminal activity and property sought." The information offered in support of the search warrant is not stale if "there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." The Court found the affidavit in this case provided ample reason to believe the items sought were still in his apartment.

Based on her training and experience as a Customs agent, the affiant explained that collectors and distributors of child pornography value their sexually explicit materials highly, "rarely if ever" dispose of such material, and store it "for long periods" in a secure place, typically in their homes. The Court was unwilling to assume that collectors of child pornography keep their materials indefinitely, but the nature of the crime, as set forth in this affidavit, provided "good reason" to believe the computerized visual depictions

downloaded by Lacy would be present in his apartment when the search was conducted ten months later.

(7) Search Warrants For Computers and Peripheral Equipment – Scope of the Warrant

In *U.S. v. Walser*, 275 F.3d 981 (10th Cir. 2001), the Court held a police officer did not exceed the scope of a warrant authorizing a search for electronic records of drug transactions when he opened a video file on a defendant's computer containing child pornography. The Court found the officer used a clear search methodology by proceeding to a spreadsheet folder on the premise that it would likely contain drug trafficking records, and came across and opened the video file in the process of searching the spreadsheet folder. He viewed the contents of the video file in a thumbnail format, and enlarged the images to confirm his belief that the file consisted of child pornography images. He did not engage is wholesale searching, and he showed restraint by returning to the magistrate for a new warrant authorizing a search for child pornography.

U.S. v. Carey, 172 F.3d 1268 (10th Cir. 1999). During an investigation for the sale and possession of cocaine, a police officer asked Carey for consent to search his apartment. Carey provided written consent to search. Officers seized two computers during the search and the Court ruled such seizure was permitted by the scope of the consent. (See above for Court's ruling on consent issue). At the police station, officers obtained a search warrant to search the contents of the computers for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances."

A detective and computer technician viewed and printed the directories of both computers. Included in the directories were numerous files with sexually suggestive titles and the label "JPG." The detective began searching the files by entering key words such as, "money, accounts, people, so forth" into the computer's explorer to find "text-based" files containing those words. No files relating to drugs were found. While continuing the search of some files he "was not familiar with," the detective opened one of the "JPG" files and discovered it contained child pornography. Without obtaining a subsequent "piggyback" warrant, the detective downloaded approximately 244 images onto 19 disks, viewing approximately five to seven files on each disk. The Court held the scope of the warrant was circumscribed to evidence pertaining to drug trafficking. While the detective had to open the first "JPG" files and examine its contents to determine what the file contained, a subsequent warrant was necessary to continue his search for further child pornography in abandonment of his search for evidence of drug dealing.

(8) Deleted Material

In *U.S. v. Upham*, 168 F.3d 532 (1st Cir. 1999), *cert. denied*, 527 U.S. 1011, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999), the Court discussed issues involving deleted material recovered during the search of the computer. The first issue was whether the recovery of previously deleted information on the hard drive and diskettes was within the scope of the warrant. The second issue was a challenge to the recovery of deleted material. The government recovered images of child pornography on diskettes simply by using the undelete function of the computer. However, the hard disk had been reformatted by Upham, a process that erases some of the indexing code that allows undeleting to be done quickly. But until the deleted information is actually overwritten by new information, the old information can often be recovered by a specialized utility program. The government used such a program in this case.

The Court found the recovery of the unlawful images, after attempted destruction, is no different than decoding a coded message lawfully seized or pasting together scraps of a torn-up ransom note.

In *Commonwealth v. Copenhefer*, 587 A.2d 1353 (Pa. 1991) police obtained and executed a search warrant for a computer believed to have been used in generating various notes and instructions connected with a kidnapping. After using the computer, the defendant employed the "delete" function to remove the incriminating documents. However, this did not actually remove the material from the computer's hard drive unless and until the hard drive storage space was overwritten to store new data from subsequent use of the computer. An FBI computer expert retrieved files from the hard drive that the suspect thought had been destroyed. The defendant claimed the attempted deletion of documents created a different right of privacy which required a second warrant prior to conducting the delete search. The Court rejected that argument, analogizing the search to be like a diary recorded in private code. If police validly seized the diary with S/W there would be no requirement for a second warrant before deciphering the code and reading the diary.

(9) Off-Site Search of Seized Computers and Peripheral Equipment

There are a number of cases which approve of police seizing items which contain large amounts of information, some of which can be searched and seized at the place searched and some of which cannot.

In *U.S. v. Horn*, 187 F.3d 781 (10th Cir. 1999) police with search warrant for child pornography on videotapes seized more than 300 video tapes and took them to a police location where the tapes could be examined for certain

facts based on authorization in the S/W. The Court upheld the removal because the police could not practically view 300 videotapes at the place designated in the S/W.

In *U.S. v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) police had a S/W authorizing search and seizure of materials depicting minors in pornography. Police seized numerous records and every video and audio cassette tape found. The Court held that the police action was not invalid simply because the executing officers chose not to review each video and audio tape at the premises searched.

As a practical matter, police should consider getting specific approval from the issuing magistrate to take a computer to a police location for examination and search by a person (police or civilian) with expertise in computers.

In U.S. v. Campos, 221 F.3d 1143 (10th Cir. 2000), the affidavit presented by an FBI agent in support of the warrant provided an explanation of the ways in which computers facilitate the production, communication, distribution, and storage of child pornography. The FBI agent also provided an explanation as to why it was not usually feasible to search for particular computer files in a person's home: "Computer storage devices ... can store the equivalent of thousands of pages of information. Especially when the user wants to conceal criminal evidence, he often stores it in random order with deceptive file names. This requires searching authorities to examine all the stored data to determine whether it is included in the warrant. This sorting process can take weeks or months, depending on the volume of data stored, and it would be impractical to attempt this kind of data search on site; andSearching computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The wide variety of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert should analyze the system and its data.... Since computer evidence is extremely vulnerable to tampering or destruction (both from external sources or from destructive code embedded into the system as "booby trap"), the controlled environment of a laboratory is essential to its complete analysis."

This affidavit was considered by the Court in determining that the warrant was not overbroad and rather than authorizing an unfocused inspection of all of the defendant's property, the warrant was directed at items relating to child pornography.

Police should also have the search conducted as soon as reasonably possible. If after the search, police believe that certain items (computer, etc.) should be forfeited then present a subsequent warrant affidavit to the issuing judge to allow this.

(10) Private Searches Not Implicating the Fourth Amendment

In *U.S. v. Jarrett*, 338 F.3d 339 (4th Cir. 2003), the Court found where the government did not know of and did not acquiesce in an anonymous computer hacker's illegal search of a defendant's computer, there was no agency relationship and no violation of the Fourth Amendment.

In *U.S. v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000), a search of defendant's computer by technicians at a computer repair shop was found to be nongovernmental and not subject to the Fourth Amendment. This case also found it reasonable for police to temporarily detain the computer by seizing it for a few hours without a warrant when done so only to safeguard the computer until a warrant could be obtained.

In *U.S. v. Hall*, 142 F.3d 988 (7th Cir. 1998), the defendant took his computer processing unit (CPU) to a repair shop, where, while in the process of repairing the computer, the repairmen found child pornography. The Court found a search of the hard drive of defendant's computer was for the sole purpose of testing the defendant's central processing unit (CPU). The Court stressed the Fourth Amendment is wholly inapplicable to a search or seizure effectuated by a private individual not acting as an agent of the government. The Court also found that the warrantless temporary detention of the computer by the computer repair store at the request of police pending a warrant was not unreasonable.

In *U.S. v. Bach*, 310 F.3d 1063 (8th Cir. 2002), the Court found search and seizure by technicians of an internet service provider (ISP) of defendant's email files from the ISP's server did not violate the Fourth Amendment.

In $U.S.\ v.\ Steiger, 318\ F.3d\ 1039$ (11th Cir. 2003), an anonymous computer hacker's nonconsensual search of defendant's computer did not implicate the Fourth Amendment.

L. SPECIAL WARRANT TYPES

(1) ANTICIPATORY (CONDITIONAL) SEARCH WARRANTS

An anticipatory warrant is a search warrant whose execution is conditioned upon the happening of a future event. Sometimes in police investigations, officers will be aware of facts which show that a certain kind of criminal activity is occurring at a particular place. In some instances, these facts may be enough for probable cause, but officers don't want to execute a search warrant unless they know that the items will be there. For example, police would prefer that a drug dealer not be "dry" at the time the search warrant is executed.

In *U.S. v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494 (2006), the Court held that for an anticipatory search warrant which subjects its execution to some condition precedent to be constitutional, the affidavit must establish probable cause for the search, but also probable cause to believe the triggering condition will occur. Thus, an anticipatory warrant was constitutional where it authorized execution upon delivery of a videotape containing child pornography, even though it was possible, although unlikely, that the suspect would refuse delivery of the videotape he had ordered. *Id.*

Other times, officers may have some facts tending to show probable cause but they want more facts to make the probable cause stronger. Police may want an informant to make a "controlled buy" to confirm that drugs are being sold from the premises. (Note: You would never simply state in the affidavit that you were going to do a controlled buy but you would explain what a controlled buy is.).

In still other instances, officers might have information which, without corroboration, does not constitute probable cause (i.e. – information from an informant that a suspect will be transporting drugs in a specific manner). However, they anticipate being able to corroborate that information in the future and, with that corroboration, they will have sufficient probable cause to support a search warrant.

In any of these instances, an anticipatory search warrant can be most helpful. The majority of federal courts and state Supreme Courts deciding this issue have held that a properly and narrowly drawn anticipatory search warrant is valid. *Comm. v. Glass*, 754 A.2d 655, 658 (Pa. 2000). The Nevada Supreme Court approved the use of anticipatory search warrants in *State v. Parent*, 110 Nev. 114, 867 P.2d 1143 (1994); see also, *Barrios-Lomeli v. State*, 113 Nev. 952, 955-956, 944 P.2d 791, 792-793 (1997), rehearing denied, 114 Nev. 779, 961 P.2d 750 (1998)

The Nevada Supreme Court in *Parent* said: "when an anticipatory warrant is used, the magistrate should protect against its premature execution by listing in the warrant conditions governing the execution which are explicit, clear and narrowly drawn so as to avoid misunderstanding or manipulation by government agents." 110 Nev. at 118, 867 P.2d at 1145-1146.

An "anticipatory" search warrant is the same as a "conditional" search warrant because it anticipates the occurrence of a condition which will trigger probable cause. For instance, in *Parent*, the detective received an anonymous phone call informing him that the defendant would be arriving at the Reno Cannon Airport from New Orleans via Continental Airlines on July 3, 1992. The informant stated that the defendant would be accompanied by two women and that he would have cocaine concealed inside a baby powder bottle in his luggage. The informant described the defendant's physical appearance, gave the detective the defendant's social security number, FBI number and birth date. The detective was able to confirm that the defendant was scheduled to arrive on the date, time and airline described by the informant. In that case, the detective applied for an anticipatory search warrant, conditioned upon the defendant arriving in Reno under the described circumstances. The justice of the peace granted the request for a warrant, and the Nevada Supreme Court held that this was a proper use for an anticipatory warrant.

You cannot, however, use an anticipatory search warrant which anticipates the place to be searched. If you have an ongoing investigation which results in probable cause that contraband or evidence will be somewhere, but you don't know where, you will have to follow the investigation through until you find probable cause as to where. If this happens suddenly, and the situation is urgent, see next section.

(2) PREMISES FREEZE

Suppose you are conducting an ongoing narcotics investigation where an undercover police officer (U/C) is buying increasingly large quantities of drugs from Suspect #1. Suspect #1 tells the U/C that his connection is Suspect #2. Police know Suspect #2 and have evidence tending toward, but not equaling, probable cause as to him. Also, police don't know where Suspect #2 is keeping his drugs.

Suspect #1 tells the U/C that his "connect" will bring ten kilos into town the next day and that Suspect #1 will get 5 kilos and sell them to the U/C. The next day, police observed both #1 and #2 and see #2 leave his residence and meet #1 and hand him a package, then #1 is observed to a location where he

meets the U/C and sells him the package which contains 5 kilos. A "buy-bust" occurs.

The purchase price for the 5 kilos is close to \$90,000 and police are concerned that if #1 doesn't return quickly to #2 with the money that #2 will destroy the other contraband. On these facts, a "premises freeze" may be in order. In a premises freeze, the officers enter the premises without a warrant, clear and secure the premises and then, after the area is secure, apply for the needed warrant.

The U.S. Supreme Court approved of the "premises freeze" theory in two cases decided in the 1980's. *Segura v. U.S.*, 468 U.S. 796, 104 S.Ct. 3380 (1984) and *Murray v. U.S.*, 487 U.S. 533,108 S.Ct. 2529 (1988). In both cases, the Court said that even though warrantless entries are presumed to be illegal under the 4th Amendment, in cases where the legal basis for the search and seizure is a search warrant based entirely on facts known to police before the premises entry, the evidence will not be suppressed regardless of whether the entry was lawful or not.

"The two elements that must be satisfied to allow admission in such circumstances are: (1) the warrant must be supported by probable cause derived from sources independent of the illegal entry; and (2) the decision to seek the warrant may not be prompted by information gleaned from the illegal conduct." U.S. v. Johnson, 994 F. 2d 980, 987 (2d Cir. 1993), citing Murray v. U.S., supra.

It is important for police officers to know that this is a rule which may help avoid suppression of evidence, but it will not protect officers from civil or criminal prosecution for illegal warrantless entry (if someone is harmed). Therefore, this type of entry should never be made unless there is strong probable cause and an emergency situation where lives are in danger or important evidence is likely to be destroyed. The benefit of this entry is that if a search warrant is obtained after entry and before search and seizure of items, there is no suppression due to the independent legal source of authority to search and seize.

NOTE DIFFERENCES IN SITUATIONS CONCERNING WARRANTLESS ENTRIES FOLLOWED BY A SEARCH WARRANT

SITUATION #1.

You investigate Don Doper and learn the following facts for probable cause.

- (1) That he lives at a certain address. (2) His scope and NCIC show a prior conviction for possession with intent to sell 4 years ago. (3) A citizen in the neighborhood tells you that for the past month he has seen ten to fifteen people come and go from Don's place almost every night and that they always stay less than ten minutes. (4) A previously reliable informant tells you that he bought dope from Don at that residence 3 days ago. (5) A fellow officer tells you that he has seen Don several times in the past month with known drug dealers. You and other officers start surveillance but Don recognizes you and runs into his house. You immediately force entry and catch Don running for the bathroom with a large bag of rock cocaine. You grab Don and the dope.
 - (a) Should you get a search warrant?
- (b) Should you include in search warrant affidavit the fact that after you entered you saw Don holding the drugs?
- (c) If Don says, "Aw, you got me. You don't need a warrant. I'll give you consent to search," should you get a warrant anyway?

Answers: (a) Yes. (b) No. (c) Yes.

SITUATION #2.

You are called to a house with a reported 417 battery. Upon arrival, a neighbor tells you that he has heard loud voices, crashes and screaming which just stopped 5 minutes before you got there. You knock on the door and a man opens the door and says that everything is OK and there must be a mistake. You hear a woman's voice moaning and sobbing quietly from inside. You push the man aside, enter and move quickly to a back bedroom where the sobs originate. There you find a badly beaten female. While assisting her, you also see a scale with white powder residue and numerous small plastic baggies. The woman is hysterical and is taken from the scene by ambulance. You want to search for drugs.

- (a) Should you get a warrant?
- (b) Should you include in the search warrant affidavit the drug related items you saw inside the bedroom?

Answers: (a) Yes. (b) Yes.

Why the difference?

In Situation #1, you already had probable cause to justify a search warrant before you entered whereas in Situation #2 you did not. In Situation #2, the only way you have probable cause is by including in the affidavit what you saw after entering. Hopefully, a court will conclude that the manner of entry and observation of the probable cause materials was lawful, but whether a court agrees or not, you have no choice because you need the facts learned after entry for probable cause.

In Situation #1, you don't need the facts learned after entry to show probable cause. If you put the "after entry facts" into the search warrant you run this risk: if the judge concludes the entry was illegal, then inclusion of these facts in the search warrant affidavit may "poison the tree." Why take this chance when you don't have to? The same is true of the suspect's consent. If a court concludes that the entry was illegal, the consent might be the "fruit of the poisoned tree" of the entry.

The "premises freeze" is also called the INDEPENDENT SOURCE DOCTRINE by the U.S. Supreme Court, and now you know why. The Court said that a person doesn't have a constitutional right to destroy evidence or escape police. Therefore, if the authority for the seizure is a search warrant based entirely on probable cause learned before the entry, then the evidence won't be suppressed. This is true even if a court later holds the entry violated the Fourth Amendment.

"A search pursuant to warrant is not a 'genuinely independent search,' . . . 'if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.'." U.S. v. Walton, 56 F.3d 551, 554 (4th Cir.1995), quoting Murray v. U.S., supra; see also, U.S. v. Ruhe, 191 F.3d 376 (4th Cir. 1999)("The 'fruit of the poisonous tree' doctrine recognizes an exception . . . when the evidence in question would have been available from an independent source . . .'[citation omitted.]")

In *U.S. v. David*, 943 F. Supp. 1403 (D.Va. 1996), the Court held that where a warrant is based on an affidavit referencing both legally and illegally obtained evidence, suppression is not always the correct remedy. Rather, the Court must disregard all references to the illegally seized evidence. Then, the Court must reconsider whether there is probable cause without that illegally obtained evidence. If there is sufficient probable cause, then the "Independent Source Doctrine" applies and the evidence need not be suppressed.

For example, in *David*, the defendant claimed that persons acting as the agents of the government illegally searched a package addressed to David. He also claimed that: (1) police decided to conduct a follow-up investigation of David based upon the evidence discovered in that illegal search; and (2) that the police used the illegal evidence to obtain a subsequent search warrant. David then moved to suppress the evidence obtained as a result of the search warrant. The Court followed the above steps and found that there was sufficient probable cause to support the warrant, even without considering the alleged illegally obtained evidence. The Court further found that the evidence in question did not prompt the agents to conduct the subsequent investigation of David nor did it prompt them to obtain the search warrant. Thus, the Court held that there was no proper basis to suppress the evidence obtained from the execution of the search warrant.

M. TERMINATION OF THE SEARCH

The search must be terminated when all the listed items have been found or when it is clear that they are not on the premises. When terminating the search, you must:

- 1. Leave a reasonably detailed inventory of items seized.
- 2. Leave a copy of the search warrant and affidavit (unless sealing order was obtained, in which case leave a copy of the search warrant and the sealing order).
- 3. Verify that no police items are accidentally left behind.
- 4. Secure (by locking, etc.) the premises or leave it in care of a responsible person.
- 5. Prepare reports while events still fresh. (Rough sketch or diagram most helpful)
- 6. File warrant and return within statutory time. (10 days from issuance)
- Arrange for scientific analysis (i.e. print comparison, chemical analysis). Don't allow deterioration or contamination.

Remember: Failure to leave an unsealed, written affidavit at the premises (or with the person searched) along with a copy of the warrant will result in suppression of the evidence seized. The good faith exception will not save the evidence. *State v. Allen, supra*.

N. TELEPHONIC SEARCH WARRANTS

NRS 179.045 authorizes telephonic search warrants. In the case of *Sanchez v. State*, 103 Nev. 166, 734 P.2d 726 (1987) our Supreme Court approved the recording being made by the Deputy DA who was in a 3 way conversation with the officer and the judge while all parties knew they were being recorded. See also, *Pellegrini v. State*, 104 Nev. 625, 764 P.2d 484 (1988). There is no reason to believe that the result would be different if the police did the recording of the conversation to obtain the search warrant.

SUGGESTED PROCEDURE FOR PREPARATION AND ISSUANCE OF THE TELEPHONIC SEARCH WARRANT

- 1. The officer should have a copy of a blank duplicate original search warrant and notes as to probable cause in hand. The term "duplicate original" just means the "original" search warrant in a telephonic situation.
- 2. If your department requires DA approval for a search warrant, or if you personally want a DA to give an opinion as to whether the probable cause and other aspects of the warrant are OK, call your department's dispatch and request that they get the on call DA on the phone. Explain the probable cause to the Deputy DA & get approval.

Note: This initial part does not have to be recorded. It is not necessary and there is no legal requirement that the Deputy DA be on the line with you when you call the judge. If, for some reason, the Deputy DA does get on the line in a 3 way conversation, remember that the DA can only answer legal questions by the judge and the DA cannot give factual information to the judge because the DA does not have the same degree of immunity as a police officer.

- 3. Before beginning the recording, contact a judge by phone, advise the judge that you wish to seek a telephonic search warrant, and that the process will take approximately (however many minutes you estimate. Most cases... probable cause in 15 minutes or less) and that if the judge will be available, you will get the recording equipment "on line" and either re-start your conversation when you are ready to record or call the judge back in a few minutes. If the judge is unavailable or otherwise occupied, thank the judge and call until you find a judge who is available.
- 4. Using your department's dispatch recording system, arrange a recorded phone call between the officer and the judge. (Or use alternative recording method such as hand held recorder with suction cup or other attachment).

5. Now that you are "on line" with the recording going, tell the judge
that he or she is being called to make application for a telephonic search warrant
(and that the DA is also on the line, if true, although in most cases it is not
necessary for the DA to be on the line) and the conversation is being recorded
pursuant to NRS 179.045.

"This is Officer	of the (r	name your	police	agenc	y) an	d I a	m
making application for a telephonic	search w	arrant. (If	f appro	priate,	say "	also (on
the line is Deputy DA)]	I am talki	ng to .	Judge _			
(State Judge's name) and the dat	e is	and	the tin	me of	this	call	is
·,, -							

6. Be sure that the Judge places the officer under oath. This can be done at the end or beginning of the process but it is better to do it at the beginning so that no one forgets the oath. A search warrant without an oath is invalid.

Judge: "Officer _____, do you swear that the information you are about to provide to me is the truth to the best of your knowledge, information and belief?"

Officer: "I do."

- 7. Give the Judge the description of the place to be searched. This could be:
 - a) a residence;
 - b) a person's body (in case of a blood draw); and/or
 - c) a vehicle (this should include make, model, color, license and location).

Then designate what you want to search for. This could be:

- a) contraband or evidence of a crime or a person to be arrested;
- b) blood or other evidence from a person; and/or
- c) contraband or items concealed in a car.

Remember: You must be specific as to the items to be seized. See, *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284 (2004)(warrant that did not describe the things to be seized with particularity was invalid and officer executing that warrant potentially subject to civil liability, i.e. - not entitled to qualified immunity, for such actions.)

Then give the Judge the facts showing probable cause including: (1) the basis for the stop (if there was a stop); and (2) the reasons you believe that evidence of a crime can be found where you want to search. In the case where you want to do a blood draw to support a UICS charge, be sure to describe all of the behaviors and symptoms exhibited by the suspect which lead to your belief that the suspect is under the influence.

- 8. If the Judge verbally approves issuance of the search warrant, fill in the blanks on the duplicate original (which should be in the possession of the applicant officer) and read the search warrant to the Judge and request permission to sign the Judge's name on the duplicate original search warrant.
- 9. Since a copy of the search warrant has to be given to the person in possession of the premises, person or vehicle searched (or left at the place searched) you must also ask the Judge for permission to fill in and sign the Judge's name to a second duplicate original search warrant which will eventually (within 10 days) be returned to the court. (Not necessary if you make a copy before you serve the search warrant because a photocopy of the search warrant can be legally left at the search site but the original must be returned to the court).

10. State on the recording:

"For the record, the Judge's name has been placed on the duplicate original search warrant and a witness has also signed the search warrant and the correct date and time has been noted on the warrant. (The witness is not legally required but it is a good idea to have extra proof if the search warrant is attacked in court. The witness does not have to be able to hear the judge as long as the witness hears the affiant officer's voice as the officer applies for the warrant from the judge).

Note: The telephonic search warrant has a place at the bottom for the judge to sign at a later date. This is not filled in the field during the search warrant application by phone. It is signed later by the judge when he or she is given the package described below in "Filing the Electronic Search Warrant."

11. Thank the Judge for his/her time and then get the name and/or ID number of the operator at your police agency who is recording the call. Ask that operator to immediately prepare a cassette copy of the entire search warrant application process and put it in an envelope with the event # on both the cassette and outside of the envelope. Personally pick this up or have it sent to you through normal channels. (You have to get the tape and the type written copy of the tape's conversation to the judge within 10 days of the recording).

12. Serve the search warrant and make an inventory/return.

Note: In serving the search warrant, follow the procedures described above in subsection "M". However, since the affidavit in this instance is oral, you need not attach a copy. *State v. Gameros-Perez, supra._.* However, it is important to remember that this case only refers to <u>telephonic warrants</u>. If you have a written, unsealed affidavit, it still must be attached and left at the premises or the evidence will be suppressed. If you have a sealed affidavit, you must attach the sealing order to the warrant.

FILING THE TELEPHONIC SEARCH WARRANT

- 1. While the law allows 10 days to complete the filing and return process you should complete this ASAP.
- 2. Get a police department secretary to type a transcription of the recorded conversation. The transcript should include the name of the secretary, date and time of the transcription, and a statement that the transcription is true and accurate (signed by the secretary) and a Certification for the Judge to sign to the effect that:

"Hav	ving read the t	ranscription of the	he telephoi	nic search	ı warrant iss	ued
by this Court	on (date) unde	er event # with C	Officer	as af	fiant and hav	/ing
reviewed the	recording of	the application	it appears	that the	transcription	n is
accurate." _		/s/ Judge				

This transcription, once it is typed and signed by the judge becomes the same thing as the affidavit supporting the search warrant in an ordinary, non-telephonic search warrant. (Note: The judge also needs to sign the search warrant itself as well as the affidavit).

- 3. Make a copy of the cassette recording in case the original gets lost or damaged.
- 4. Place the cassette, duplicate search warrant, return and transcription in an envelope and on the outside of the envelope state:
 - Name of defendant.
 - 2. Property (place) searched (including description of vehicle if applicable).
 - 3. Date and time of the authorization of the search warrant.
 - 4. Name of Police Officer (Affiant).
 - 5. Name of Judge

- 6. Law enforcement event number.
- 5. Seal the envelope and cause it to be brought to the judge (or the judge's secretary). Advise the Judge (or Judge's secretary) that the Judge needs to review and sign the duplicate original search warrant and the certificate on the transcription of the affidavit. You may wish to have a Deputy DA assist with this process and if so, deliver the above mentioned package to a Deputy DA who agrees to get the judge to read, listen to and sign the search warrant and affidavit.
- 6. After this has been completed, the package with the cassette should be re-sealed and filed with the clerk of court (Justice or District). The transcribed affidavit and Search Warrant should not be sealed and should be filed with the court clerk. If the judge has authorized a sealing order, prepare such an order to give to the judge along with the other items mentioned and the order will be filed with the other papers (search warrant and affidavit).
- 6. Of course, an officer may (and probably should) make additional copies of any of these items (including cassette) for police purposes at any time after the search warrant has been authorized.

ALTERNATE MEANS OF ELECTRONIC RECORDATION

- 1. Because of your department's policy or due to practical reasons, the dispatch-communications system may not be available in a particular case. If this occurs, you may use a hand held or other type of recording device attached to the phone line by a suction cup or hard wire. This is a less desirable procedure because of the increased chance of "glitches" in the recording process. However, if the alternate means is used, please note the following:
 - 2. Substitute the alternate means for #4 in this procedure.
- 3. The officer will do the impounding designated in #12 of this procedure.
 - 4. Follow all other directions stated in this procedure.

DUPLICATE ORIGINAL SEARCH WARRANT NRS 179.045

STATE OF NEVADA]] ss. COUNTY OF CLARK]
The State of Nevada, to any Peace Officer in the County of Clark. Proof having been made before me by Officer by sworn under oath telephonic statement incorporated by reference herein, that there is probable cause to believe that certain evidence, to wit:
(Describe items to be seized) is presently located at: (Describe place to be searched)
and as I am satisfied that there is probable cause to believe that said evidence is located as set forth above and based upon the sworn telephonic statement of Officer there are sufficient grounds for the issuance of the Search Warrant,
You are hereby commanded to search said location for said property, serving this warrant (At any hour of the day or night) or (between 7 am and 7 pm) and if the property is there to seize it and leave a written inventory and make a return before me within 10 days.
Dated this day of, 19, ato'clockm.
(Write Judge's name)
Signed by Officer acting upon oral authorization of (judge's name.)
Witnessed by Officer
ENDORSED this day of, 19
(Judge) (The endorsement is done after the judge receives the transcript and recording done by police personnel)

VII. ELECTRONIC SURVEILLANCE

A. INTRODUCTION

Technological advances in the past few years have opened new horizons in the area of electronic surveillance, allowing police to search for and seize incriminating conversations and, sometimes, physical items. Phone and radio transmissions can be intercepted. Tiny electronic bugs can be worn on a person, installed in a building or car, or placed inside of containers in order to record conversations or follow people or objects around. The law in this area is fairly complicated but this section will give some general guideline information.

It is important to remember some general principles of search and seizure law and constitutional law in general in studying this area.

First - decisions by courts, including the U.S. Supreme Court, stating what the U.S. Constitution requires concerning police procedures, are meant to impose a floor or minimum standard below which we cannot fall.

Second - higher standards (greater than those required by the U.S. Supreme Court's interpretation of the U.S. Constitution) and limitations are often placed on police conduct by either (1) state or federal legislation or (2) state court decisions based on state law and state constitutions.

An example of this is the 60 minute limit on investigatory detention which is the state law, by statute (see NRS 171.123(4)), in Nevada, even though, as a matter of U.S. Constitution Fourth Amendment law as interpreted by the U.S. Supreme Court, a longer detention might be upheld.

There is extensive federal and Nevada legislation in the area of electronic surveillance in addition to much case law. Before acting in this area it is wise for a police officer, when possible, to seek counsel from a lawyer in the District Attorney's Office who is knowledgeable in this area.

B. RECORDING OR TRANSMITTING BUGS

(1) "Body bugs:" It is lawful for a person, whether a police officer, informant, or anyone, to wear a body bug or wire in order to transmit or record conversations that person has with other persons in each others presence. No warrant or even p/c is required. The U.S. Supreme Court held this procedure to be constitutional under Fourth Amendment principles in *On Lee v. U.S.*, 343 U.S. 747, 72 S.Ct. 967 (1952), and *U.S. v. White*, 401 U.S. 745, 91 S.Ct. 1122

- (1971). The Nevada Supreme Court has likewise upheld the constitutionality of body bugs. See *State v. Bonds*, 92 Nev. 307 (1976), *Summers v. State*, 102 Nev. 195 (1986) and *Williams v. State*, 103 Nev. 106 (1987). This procedure is OK in Nevada as long as the person wearing the "bug" or wire (1) consents that this be done and (2) is physically present during the conversation being electronically observed.
- (2). Bugs or recorders in police cars or station: In most states, leaving a mini-recorder or bug in a police car or police station interview room in order to eavesdrop on suspect's communications would be legal since the suspects have no reasonable and legitimate expectation of privacy. (See *Brown v. Florida*, 349 S.2d 1196 (1977), and *People v. Crowson*, 660 P.2d 389 (Calif. 1983). "A defendant has no reasonable expectation of privacy in a police car." *U.S. v. Clark*, 22 F.3d 799 (8th Cir. 1994).

Two Nevada Statutes apply to these type of recordings:

NRS 179.440 defined "Oral Communication" as:

"Oral communication" means any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation."

NRS 200.650 prohibits the unauthorized, surreptitious intrusion of privacy by listening device and states:

"Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to or monitoring or recording ... by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons ... unless authorized to do so by one of the persons engaging in the conversation."

Relevant cases indicate that neither of these Nevada Statutes prohibit police from placing a hidden tape recorder in a police car containing two or more persons who were lawfully placed in the police car.

In *State v. Morgan*, 929 S.W. 2d 380 (Tenn. 1996) the court ruled that a surreptitious tape recording of arrested persons in a police car was lawful. The Court cited Tenn. Code S 39-14-411 and S 65-21-110 and 18 USC S 2510(2) and S 2511 which provide recording an oral communication without consent "uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying such expectation." The Court cited *U.S. v. McKinnon (infra)* which held that the US Code did not prevent police from lawfully secretly recording a conversation among arrested

persons in a police car. The Court also held that the "expectation of privacy" had to be reasonable and legitimate and that did not apply in a conversation inside a police car. Same rationale and ruling in *People v. Palmer*, 888 P.2d 348 (Colo. 1995) ("while the defendant had a subjective expectation of privacy, such expectation was not objectively justified.")

In *U.S. v. McKinnon*, 985 F.2d 525 (11th Cir. 1993) The Court ruled specifically that a secret recording by police of persons in a police car was valid. The Court ruled that 18 USC S 2510 did not apply because there was no "justifiable or legitimate expectation of privacy." Same rationale and ruling in *U.S. v. Clark*, 22 F.3d 799 (8th Cir. 1994).

Other cases with the same holding include: *People v. Champion*, 891 P.2d 93 (Cal. 1995), *State v. Smith*, 641 So.2d 849 (Fla. 1994), *State v. Hussey*, 469 So. 2d 346 (La. 1985), *People v. Marland*, 355 N.W.2d 378 (1984) "detainees, not under formal arrest, had no reasonable expectation of privacy in the back seat of a police car" and *State v. Timley*, 975 P.2d 264 (Kan. 1999) "we do not find it significant that the appellants were not under arrest at the time of the recorded conversation (citing *McKinnon*)"

C. BEEPERS

(1). Placing "beepers" on cars, etc. to track location: This is also a lawful practice and needs no warrant and probably needs no justification in terms of probable cause. This was the rationale of the case of *U.S. v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983). In *Knotts*, police had reason to believe that the suspect was manufacturing narcotics and arranged with a merchant who sold a container of chemicals to the suspect to put a beeper in the container. The police used the beeper signals to track the car to an isolated mountain area where the suspect had a cabin. After this, police visually looked at the cabin for a few days and ultimately got a search warrant. The U.S. Supreme Court held that this use of a beeper was permissible because a person going in an automobile on public roads has no reasonable expectation of privacy in his movement from one place to another. Even though the police used the beeper instead of visual following, the court said it amounted to the same thing, because visual following could have been used.

The Nevada Supreme Court has also upheld the warrantless attachment of a tracking device to an automobile in the case of *Osburn v. State*, 118 Nev. 323, 44 P.3d 523 (2002). In *Osburn* the vehicle was parked on a public street in front of the home of a suspected serial rapist. In *U.S. v. McIver*, 186 F.3d 1119 (9th Cir. 1999), the Ninth Circuit also held that the warrantless placement of an

electronic tracking device on the undercarriage of a vehicle did not violate the Fourth Amendment.

(2). Using beeper to find an article in a suspect's home: In *U.S. v. Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984), the U.S. Supreme Court decided a case which seems a lot like the Knott case but which came to a different conclusion. Police had information that a suspect was manufacturing illegal drugs and would obtain ether from an informant. With the informant's consent, police put a beeper in one container, knowing the informant would transfer it to the suspect. Using the beeper, police tracked the containers around to several places and finally got beeper signals coming from a certain house.

Using this information along with other facts, the police got a search warrant for the house. The court upheld the search warrant on the basis that there was enough p/c for the warrant, leaving out the information learned from the beeper, but held that use of the beeper to learn what was inside the house was an illegal search under the Fourth Amendment. Even though there was p/c for the monitoring of the beeper in the house, police should have gotten a search warrant to allow this monitoring. In Karo, unlike Knott, the beeper allowed police to gain information they could not have gotten by visual surveillance.

(3). Beepers in "bait" money: In *U.S. v. Bishop*, 530 F.2d 1156 (5th Cir. 1976), the court held use of tracking equipment to locate a beeper in bait money stolen in a bank robbery was legal. In Bishop, the packet with the beeper was in the suspect's car and could be seized immediately. In cases where the tracking equipment leads to an apartment or residence, entry should be made to "freeze" the location and then a prompt application should be made for a search warrant to remove the evidence.

D. PEN REGISTERS AND PHONE TRAP

(1) Use of dialed number recorder ("pen register"): This instrument which is also known as a "pen register" is one which, when connected to a phone line, keeps track of the phone numbers dialed from that phone. It also keeps track of the frequency of incoming calls but does not record the "calling" number. The pen register keeps this running log and also shows the date and time of the call. Since this instrument does not intercept any of the contents of any call, the U.S. Supreme Court held in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577 (1979)that its use does not constitute a "search and seizure" protected by the Fourth Amendment. Therefore, no warrant or probable cause is required to install a pen register under Federal constitutional law. In 1986, however, the Congress passed a law, Title 18, U.S. Code, Section 3121, *et seq.*, requiring that an *ex parte* order be obtained before installing or using either a pen register or a

trap-and-trace (a machine that records the number <u>from</u> which a call is dialed) device. The court has no discretion not to issue such an order if the federal prosecutor certifies that information from such installation and use is likely to be useful in an ongoing criminal investigation. 18 U.S.C. 3123(a). Interestingly enough, a state officer, unless prohibited by state law, may also make an application to the federal court. 18 U.S.C. 3122(a)(2). The use of this instrument does not require a wiretap order since "intercept" is defined in NRS 179.430 as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device or of any sending or receiving equipment and the pen register/tap doesn't acquire the contents."

Nevertheless, under Nevada Law (NRS 179.530) a court order MUST be obtained before connecting a pen register. This order can be obtained upon slight information amounting to reasonable suspicion that recording the numbers will assist a legitimate ongoing police investigation.

(2) NRS 179.530 also provides for use of a "phone trap" which works just the opposite of a pen register (which registers outgoing calls). A phone trap attached to a phone records the phone numbers of the phones calling into the phone being "trapped".

E. WIRETAPS

Both state and federal law regulate the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment."

This regulates both (a) third party interceptions - i.e. - where police "tap" defendant's phone and listen to conversations between defendant and others where neither defendant nor the other party to the call know they are being eavesdropped upon and (b) so called single party consent recordings.

(1). Third party intercepting of phone conversations:

This practice is what we commonly call "wiretapping". The interception of such conversations requires a court order pursuant to NRS 179.410 through 179.525, or in the case of federal agents, pursuant to 18 U.S.C. 2510 to 2520. These orders, unlike search warrants, are extremely complicated, hard to obtain and are expensive to carry out. Among other requirements, the police need to demonstrate to the court that there is no other way to obtain the information sought to be seized than by use of a wiretap (*Lewis v. State*, 100 Nev. 456 (1984)). Also, you can only get a wiretap authorization for those crimes specifically listed in NRS 179.460.

(2.) Single party consent recordings

Nevada is one of 12 states that require the consent of *all* parties to a conversation before it may be recorded. In *Lane v. Allstate*, 114 Nev. 1176, 969 P.2d 938 (1998), the Nevada Supreme Court held that the statute making it unlawful to intercept any wire communication (NRS 200.620) makes it illegal for private parties to tape their own phone conversations without the consent of all of the other parties.

However, note that federal agents, even in Nevada, have the power to do a "single party consent" wiretap, while Nevada State authorities are prohibited from doing this. If federal agents do this and obtain evidence that is helpful to state authorities, the federal authorities can disclose this information to state authorities. However, the "Feds" can't be acting as "agents" of the state in doing this - they must be doing it for their own purposes.

(3.) Exceptions to court-ordered wiretap requirement

- (a) NRS 200.620 sets forth certain exceptions to the requirement for a court order for wire intercepts. The most common of these are (1) if an emergency exists and you have single party consent, you can wiretap as long as you get ratification order from a court within 72 hours and (2) calls made to a police or fire fighting agency can be recorded period and responding calls back to the calling party can be recorded if police notify the other party the call is being recorded.
- (b) Listening on an extension phone In *Reyes v. State*, 107 Nev. 191, 808 P.2d 544 (1991) the police listened on an extension phone in the police department to a conversation initiated by their informant to a drug dealer. The Nevada Supreme Court held that the manner in which the extension telephone was used (since there was no recording, just listening) was lawful, proper and was in the ordinary course of police duties and not an "interception" requiring a warrant.

The court also said that listening in at the earpiece with the caller was permissible under any circumstances since eavesdropping, in the ordinary course of investigating crimes, is an ordinary tool of law enforcement

(c) Telephone answering machines. It can be argued that the person leaving the message to be recorded has consented to the recording and the contents should be admissible. However a different result may occur if the recipient picks up the phone and the ensuing conversation is recorded. Furthermore, officers executing search warrants may wish to include the

telephone answering machine in the list of items to be seized since it may contain evidence of dominion and control and/or criminal activity.

F. OTHER SPECIAL CASES

(1) Cellular phones - these are considered the same as regular phones for purposes of state and federal law

(2) Paging devices

In *Brown v. Waddell*, 50 F.3d 285 (4th Cir. 1995) the Court held that a state court judge had no power to authorize the use of a "clone or duplicate" digital display pager to intercept electronic communications as a pager was not a pen register and state judge was limited to pen registers and phone traps (without the proper justification for a "wiretap") citing Federal Statutes (Electronic Comm. Privacy Act) Same ruling *U.S. v. Barrios*, 994 F.Supp. 1257 (D. Colo. 1998). A contrary result was found in *U.S. v. Tutino*, 883 F.2d 1125 (2nd Cir. 1989) which held them similar to pen registers because they revealed only numbers, not the content of conversations.

However, there is a difference between intercepting (listening while the pager is in use) and searching (incident to arrest) the contents of a pager.. This was the holding in *U.S. v. Reyes*, 922 F.Supp. 818 (SD NY. 1996), *U.S. v. Chan*, 830 F.Supp. 531 (ND Cal. 1993) and *U.S. v. Ortiz*, 84 F.3d 977 (7th Cir. 1996). Also, calling or activating a pager is not an interception and is permissible. *U.S. v. Diaz-Lizaraza*, 981 F.2d 1216 (11th Cir. 1993).

(3) Radio portion of cordless telephones - Before 1994, police were not required to obtain judicial approval to intercept the radio portion of a communication over a hand held cordless phone. This is different from cellular phones. 18 U.S.C. 2510. This was the holding of *In Re Askin*, 47 F.3d 100 (4th Cir. 1995)

However, in 1994 Congress modified the federal statutes to include cordless phones in the (no intercept without wiretap order) and consequently in *McKamey v. Roach*, 55 F.3d 1236 (6th Cir. 1995) the decision in *Askin* was overruled.

(4) New Technologies: Neither the U.S. nor Nevada Supreme Court have yet addressed these issues, although other courts have. A safe rule is: "when in doubt and time permitting, obtain a warrant."

- (a) GPS (Global Positioning System): There is a split of authority among the courts. Some courts have required a search warrant on the theory that the device does not merely augment or enhance a police officer's senses but is a substitute for it. See *State v. Jackson*, 76 P.3d 217 (Wash. 2003). Other courts have found that the GPS is merely an aid to sense enhancement.
- (b) "Lojack": Similar to a tracking device. The <u>LoJack</u> system operates via a small transmitter concealed on an automobile. The transmitter is remotely activated when a car is reported stolen, and it emits a signal that can be picked up by a receiver installed in a police vehicle and lead police to a stolen vehicle. It is anticipated that courts will treat a Lojack transmitter like the beeper cases previously cited. Further, the owner of a Lo-Jack-equipped car has, at least impliedly, autrhorized police to intercept and track the signal, and the thief has no reasonable expectation of privacy in the stolen vehicle.
- (c) Thermal imaging devices: In a closely decided 5 to 4 decision, the U.S. Supreme Court in *Kyllo v. U.S.*, 533 U.S. 27, 121 S.Ct. 2038 (2001) held that the use of thermal imaging devices to gather information about the interior of a home was a search, requiring a warrant because it revealed details that would have been unknowable without a physical intrusion of the home. However, *Kyllo* did not address the use of a thermal scan of premises other than a home where the expectation of privacy is highest. The U.S. Supreme Court in *Oliver v. U.S.*, 466 U.S. 170, 104 S.Ct. 1735 (1984) held that there is no expectation of privacy in open fields. Additionally, in *Garrettson v. State*, 114 Nev. 1064, 967 P.2d 428 (1998), the Nevada Supreme Court has upheld the use of thermal imaging as the basis for obtaining a search warrant.
- (d) Internet websites, "cookies" and emails: This is a highly complex and rapidly evolving area of law and officers must consult their local District Attorney's office. Physically seizing a computer or inspecting the contents is a type of search distinguishable from merely viewing a website, participating in chatroom exchanges, placing electronic cookies to track a websurfer's page views or accessing electronic communications *stored* (not intercepted) by a third party ISP. Access to "stored electronic communications," for example, an internet service provider's records of communications to or from a subscriber is strictly limited under federal law. 18 U.S.C. 2701 *et seq.*
- (e) Visual Aids: The Nevada Supreme Court has upheld the use of binoculars to enhance an officer's view of items in public in *State v. Barr*, 98 Nev. 428, 651 P.2d 649 (1982). The same rule would apply to other forms of visual aids such as flashlights or the use of ultraviolet light. See *State v. Hardawa*, 36 P.3d 900 (Mont. 2001).

(5) Terrorists: The much maligned USA Patriot Act addresses matters involving terrorists. Officers must consult their local District Attorney's office if their case involves suspected terrorist activity and you wish to use the provisions of this Act.

G. USE OF VIDEO EQUIPMENT

- (1) Permissible without court order in area where person has no reasonable expectation of privacy also permissible where one person who is (and remains) present consents to the videotaping same as wearing a body bug.
- (2) This section refers to video surveillance without capturing (recording) sound, but in an area where an expectation of privacy exists. If sound is recorded, Federal and State wiretap laws must be complied with. The U.S. Supreme Court has not specifically decided what kind of authorization police need for "video only" eavesdropping but most Federal courts have held that a "hybrid" search warrant/wiretap is required (more than a regular search warrant, but less than full wiretap order.) (See *U.S. v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992). A video surveillance order requires:
 - (a) probable cause;
 - (b) showing that other traditional means would probably fail or be too dangerous;
 - (c) particular description of activity to be videotaped;
 - (d) a time frame no longer than necessary; and
 - (e) attempt at minimization (not tape lawful activities).
- (3) Private Video Surveillance tapes: Video surveillance by private parties, rather than by government agents, does not implicate the Federal Constitution's Fourth Amendment or other provisions of the Federal or state constitution, unless the private party is acting at the request of the police. *State v. Diaz*, 706 A.2d 264 (NJ. 1998).

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