Chapter 23

Motions To Suppress Tangible Evidence

Part A. Introduction: Tools and Techniques for Litigating Search and Seizure Claims

§ 23.01 OVERVIEW OF THE CHAPTER AND BIBLIOGRAPHICAL NOTE

The Fourth Amendment to the Constitution of the United States, forbidding "unreasonable searches and seizures," is the subject of an extensive jurisprudence. Issues raised by the numerous Fourth Amendment doctrines are multiple and complex; the law is often uncertain and in flux. The best general treatment of the subject is WAYNE R. LAFAVE, SEARCH AND SEIZURE (5th ed. 2012 & Supp.). *See also* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED – PRETRIAL RIGHTS 175-461 (1972); JOHN WESLEY HALL, JR., SEARCH AND SEIZURE (3d ed. 2000); ARNOLD MARKLE, THE LAW OF ARREST AND SEARCH AND SEIZURE (1974); WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS (2d ed. 2003 & Supp.); JOSEPH A. VARON, SEARCHES, SEIZURES AND IMMUNITIES (2d ed. 1974). There are voluminous law review articles of good quality on specific subtopics.

Rather than attempt still another doctrinal discourse here, this chapter approaches the law of search and seizure from a different angle. After a brief description of the major constitutional guarantees that defense counsel may invoke to challenge the legality of police searches and seizures and thereby the admissibility of prosecution evidence produced by those activities (§ 23.02 *infra*), the text sets out a checklist of questions that counsel can ask and answer (with minimal investigation) about the facts of any particular case s/he is handling (§ 23.03 *infra*). The references following each question will direct counsel to subsequent sections containing functional analyses of the law applicable to the basic factual situation targeted by the question. These analyses should assist counsel in identifying particular aspects of law enforcement activity that may be assailable in each situation, together with the theoretical grounds and supporting authorities for assailing them.

Throughout the sections on search and seizure law, an emphasis will be placed on issues likely to arise in a typical juvenile delinquency practice. Issues such as searches of students in school will receive greater attention than, for example, electronic surveillance (which tends to be used primarily in police investigations of adult perpetrators) or administrative searches (which tend to be searches of the workplace, thereby involving primarily adults). When issues like electronic surveillance or administrative searches do crop up in a delinquency case, counsel should consult the treatises cited in the first paragraph of this section.

Most of the caselaw discussed in this chapter is adult court caselaw, since most of the developments in search-and-seizure law have taken place in adult court prosecutions. However, the Supreme Court has made clear that the Fourth Amendment applies to adults and juveniles alike and that adult court precedents regarding search and seizure are equally applicable to

juvenile prosecutions. *See New Jersey v. T.L.O.,* 469 U.S. 325, 337-38 (1985) (equating the privacy rights of children and adults and demonstrating that prior adult court precedents also define the limits of police intrusiveness in searching or seizing children).

§ 23.02 CONSTITUTIONAL AND STATUTORY RESTRAINTS ON SEARCHES AND SEIZURES

§ 23.02(a) General Principles of Fourth Amendment Law

The Fourth Amendment's proscription of unreasonable searches and seizures governs federal prosecutions by its express terms and state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643 (1961). It regulates the actions of the police, other law enforcement agents, other government officials (see § 23.34 *infra*) and, in limited circumstances, private citizens (*see*, *e.g. State v. Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963); *Milan v. Bolin*, 795 F.3d 726, 729 (7th Cir. 2015) (dictum); *cf. Wilson v. Layne*, 526 U.S. 603, 614 (1999) (dictum) ("We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant")).

Perhaps the simplest way of viewing the vast array of Fourth Amendment caselaw is by breaking it down into six categories of cases:

(i) Caselaw defining the powers of police officers to conduct a search of a person, place, or thing, and to seize items discovered in that search, without the benefit of a search warrant. The Supreme Court has repeatedly declared that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993); *Thompson v. Louisiana,* 469 U.S. 17, 19-20 (1984); *United States v. Karo,* 468 U.S. 705, 714-15, 717 (1984). The "jealously and carefully drawn" exceptions to the warrant requirement (*Jones v. United States,* 357 U.S. 493, 499 (1958)) include searches and seizures made with the valid consent of an authorized person (see § 23.18 *infra*), incident to a valid arrest (see § 23.08 *infra*), under "exigent circumstances" (see § 23.20 *infra*), in an operable motor vehicle that there is probable cause to believe contains criminal objects (see § 23.24 *infra*), and after an officer's observation of contraband or crime-related objects in "plain view" (see § 23.22(b) *infra*). In addition to these specific exceptions to the warrant requirement, the courts also will excuse the absence of a warrant and will test a search or seizure under the standard of "general reasonableness" in situations in which the "intrusion on the individual's Fourth Amendment interests" is minimal (*United States v. Place,* 462 U.S. 696, 703 (1983); *see, e.g.*, *Samson v. California*, 547 U.S. 843 (2005); *United States v. Sczubelek*, 402 F.3d 175, 184-87 (3d Cir. 2005)), or the police conduct at

issue is of a type that "historically has not been, and as a practical matter could not be, subjected to the warrant procedure," *Terry v. Ohio,* 392 U.S. 1, 20 (1968); *see, e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 330-37 (2001); *Delaware v. Prouse,* 440 U.S. 648, 653-55 (1979); *Michigan v. Summers,* 452 U.S. 692, 699-701 (1981), or "'in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant . . . requirement impracticable,'" *O'Connor v. Ortega,* 480 U.S. 709, 720 (1987) (plurality opinion), "and where the 'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control,'" *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015); *see, e.g.*, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Griffin v. Wisconsin,* 483 U.S. 868 (1987); *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

(ii) Caselaw concerning warrantless seizures of the person, either in the form of an "arrest" or in the form of the less extensive restraint first differentiated in *Terry v. Ohio*, 392 U.S. 1 (1968), and commonly called a *"Terry* stop." See §§ 23.04-23.14 *infra.*

(iii) Caselaw dealing with searches and seizures made pursuant to a search warrant. See § 23.17 *infra.*

(iv) Caselaw pertinent to the procedural issue of when a respondent has a sufficient interest in the area searched or the item seized to mount a challenge to the search or seizure. See §§ 23.15, 23.23 *infra.*

(v) Caselaw addressing the procedural question of whether, if a search or seizure was unconstitutional, the prosecution may nevertheless use particular items of evidence at trial because they are not viewed as "tainted" by the unlawful search or seizure. See §§ 23.37-23.40 *infra.*

(vi) Caselaw defining the extent of Fourth Amendment regulation of searches and seizures by government officials who are not in the field of law enforcement, such as public school teachers (*see Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, *supra*; *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, *supra*) and probation officers (*see Griffin v. Wisconsin, supra*), and searches or seizures by private citizens acting in collaboration with the police. See § 23.33-23.36 *infra.*

§ 23.02(b) State Constitutional Protections Against Searches and Seizures

As explained in § 7.09 *supra,* some state courts in recent years have begun to construe state constitutional provisions as providing greater protections than the parallel provisions of the Constitution of the United States as interpreted by the Supreme Court of the United States. This has occurred particularly in the area of searches and seizures. *See, e.g.*, *State v. Short*, 851 N.W.2d 474, 486 (Iowa 2014) ("A survey of jurisdictions in 2007 found that a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree."). Quite a few state courts have developed an extensive body of

state constitutional law on searches and seizures, rejecting major doctrines that limit Fourth Amendment rights. Although the state constitutional decisions are too numerous to survey systematically, some of the most significant ones will be noted in the relevant subsections of this chapter. As § 7.09 advises, defense counsel should always invoke state constitutional provisions in addition to the federal Fourth Amendment, even when there are no state constitutional precedents on the issue. This is a cost-free practice, and the advantages of winning a search-and-seizure claim on state-law grounds always make that possibility worth pursuing. See the concluding paragraph of § 7.09.

§ 23.02(c) State Statutory Provisions Relating to Searches and Seizures

In many jurisdictions there are statutes (i) delineating the circumstances under which a police officer or a private citizen may make an arrest for a felony or misdemeanor (see § 23.07 *infra*), (ii) limiting the degree of force that may be employed in the course of an arrest (*cf.* § 23.07 concluding paragraph); and (iii) enacting "knock-and-announce" requirements under which a police officer must give adequate warning of the officer's identity and intention to enter a dwelling before entering forcibly (see § 23.21 *infra*). Other statutory regulations of searches and seizures are found in some States but these are less common or less frequently involved in juvenile cases.

In addition to statutes applicable to both adult and juvenile cases, many jurisdictions have special statutory provisions governing police conduct in arresting and booking juveniles. See § 3.06 *supra;* § 24.14 *infra.* Violations of these procedures may, in an appropriate case, result in the suppression of tangible evidence.

Finally, there is a federal statute (18 U.S.C. §§ 2510-2520 (2016)) and, in several jurisdictions, state statutes, governing police use of electronic surveillance.

§ 23.03 ANALYZING SEARCH AND SEIZURE ISSUES: THE QUESTIONS TO ASK

In examining a case for possible search and seizure issues, counsel should begin by breaking down the series of governmental actions into their component parts, since each specific act by a government agent may give rise to a separate claim for relief. For example, in a case in which the police stop a person, pat the person down, arrest the person, and seize objects from the person's possession, counsel should consider all of the following issues: Did the police have a sufficient basis for making the initial *Terry* stop? Even if the police had the requisite basis for a *Terry* stop, did they have the additional "specific and articulable facts" necessary for a *Terry* frisk? If there was an adequate basis for the *Terry* frisk, did the manner in which the frisk was conducted exceed constitutional limits for a pat-down? Did the police thereafter have an adequate basis for an arrest? Did the subsequent search incident to arrest exceed constitutional limits? If not, was the seizure of each particular object that the search uncovered constitutionally justified? Any of the distinct police actions identified in these questions could generate a basis for suppressing evidence.

The following questions should be asked in analyzing search and seizure claims:

(1) Was the respondent stopped, accosted, arrested, or taken into custody by government agents at any time?

(a) If so, is it in the interest of the defense to characterize the agents' action as an arrest or as a *Terry* stop? See § 23.05 *infra.* Do the facts support the preferred characterization? See § 23.06 *infra.*

(b) If the agents' action is characterized as an arrest:

(i) Did the agents have the requisite probable cause to make the arrest? See §§ 23.07, 23.11 *infra.*

(ii) Did the agents search the respondent incident to the arrest? If so, did the search comply with the requirements for searches incident to arrest? See § 23.08 *infra.*

(iii) Did the post-arrest custodial treatment of the respondent comport with constitutional and statutory requirements? See §§ 23.08(c), 23.14 *infra.*

(c) If the agents' action is characterized as a *Terry* stop:

(i) Did the agents have the requisite factual basis for a *Terry* stop? See §§ 23.09, 23.11 *infra.*

(ii) Did the agents conduct a *Terry* frisk? If so, did they have the requisite facts to support a *Terry* frisk? See §§ 23.10-23.11 *infra.*

(iii) Was the period of the stop unduly extended or the post-stop investigation conducted in a manner that exceeded the justifications for search activities incidental to the stop? See §§ 23.06(a), 23.27, 23.28 *infra.*

(d) Did the agents search any closed containers that the respondent had in his or her possession? See §§ 23.08(b), 23.12 *infra.*

(e) Was the respondent's body or clothing inspected? Was any physical examination of the respondent made? Were any tests conducted on the respondent's body or on any object or fluid, hair, or like substance taken from the respondent's body? See § 23.14 *infra.*

(f) Did the incident occur in a school setting? See §§ 23.33-34, 23.36 *infra.*

(2) Did government agents enter or search the respondent's home, any premises with which s/he had more than transitory connections, or any premises in which the respondent was legitimately present at the time of the agents' entry or search?

(a) If so, does the respondent have a constitutionally protected interest that permits him or her to challenge the agents' entry into the premises, the agents' search of areas within the premises, or both? See § 23.15 *infra.*

(b) If the respondent does have the requisite interest:

(i) Was the agents' entry and was the search authorized by a search warrant? If so, was the warrant validly issued, and was it validly executed? See § 23.17 *infra.*

(ii) Was the agents' entry and was the search authorized by an arrest warrant? If so, did the agents limit their activities to arresting the subject of the warrant or use the arrest entry to conduct an impermissible search? See §§ 23.19, 23.22(d) *infra.*

(iii) Was the agents' entry and was the search authorized by exigent circumstances? If so, did the agents confine their activities to a range within the scope of this justification? See §§ 23.20, 23.22(d) *infra.*

(iv) Was the agents' entry and was the search authorized by the consent of the respondent? If so, was the respondent's consent voluntary? See § 23.18(a) *infra.*

(v) Was the agents' entry and was the search authorized by the consent of some individual other than the respondent? If so, did that individual have the authority to consent to the search of the area? Was the consent voluntary? See § 23.18(b) *infra.*

(c) Did the agents at any time after they entered the premises detain or search the person of the respondent? If so:

(i) Did the agents have the requisite basis for detaining the respondent? See § 23.22(c) *infra.*

(ii) Did the agents have the requisite basis for searching the person of the respondent? See § 23.22(c) *infra.*

(d) Did the agents seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 23.22(b) *infra.*

(e) Did the agents comply with the rules requiring them to announce their identity and intention to enter before effecting a forcible entry of a dwelling? See § 23.21 *infra.*

(3) Did the agents stop, search, or seize any motor vehicle?

(a) If so, does the respondent have a constitutionally protected interest that permits him or her to challenge the agents' conduct in stopping, searching or seizing the vehicle? See § 23.23 *infra.*

(b) If the respondent does have the requisite interest:

(i) Did the agents stop the vehicle while it was moving? If so, did the agents have the requisite factual basis for a *Terry* stop? See § 23.27 *infra.*

(ii) Did the agents order the respondent out of the vehicle? If so, did they have the requisite basis to issue that order? See § 23.28 *infra.*

(iii) Did the agents conduct a search of the vehicle incident to an arrest of the respondent? If so, was the arrest valid? Was the search properly limited in scope? See § 23.26 *infra.*

(iv) Did the agents conduct an evidentiary search of the vehicle? If so, did they have the requisite probable cause for that search? See § 23.24 *infra.*

(v) During the stop or search of the vehicle, did the agents seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 23.22(b) *infra.*

(vi) Was the asserted basis for the stop of the vehicle a traffic infraction? See § 23.28 *infra.*

(vii) Was the vehicle impounded and thereafter searched in an "inventory search"? If so, was the search conducted pursuant to standardized procedures? Was the alleged inventory a mere pretext for an otherwise impermissible evidentiary search? See § 23.25

infra.

(viii) Did the agents open any closed containers that were in the vehicle? See § 23.24 *infra.*

(4) Was the respondent or were his or her possessions searched while at school?

(a) If so, was the search conducted by a school official without the involvement of the police? Was it:

(i) A search of the respondent's person? See §§ 23.33-23.34 *infra.*

(ii) A search of the respondent's locker or desk? See § 23.35 *infra.*

(b) Was the search conducted by a police officer or by a school official acting under the direction of, or in conjunction, with a police officer? See § 23.36 *infra.*

(5) Did government agents act on the basis of information obtained from informants, whether those informants were "special agents," police spies, or private citizens? See § 23.32 *infra.*

When law enforcement activity that may give rise to search and seizure issues has occurred, it is important to think comprehensively about all the items that could be suppressed as a result of a ruling that the search or seizure was unconstitutional. For example, if an arrest is found to be unlawful, the suppressible fruits of that arrest may include any physical object or substance seized at or after the time of the arrest, any show-up or lineup observations made at or after the time of the arrest, identifications of the respondent's photograph in a photographic array that was made possible because the respondent was photographed upon arrest, confessions or statements of the respondent made in custody after the arrest or otherwise induced by pressures flowing from the arrest, any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent given while the respondent was in custody after the arrest or upon consent otherwise induced by pressures flowing from the arrest, testimony of witnesses whose identity was learned by interrogation of the respondent following the arrest, and fingerprint identification evidence based upon exemplars taken at the time of the arrest. See § 23.37 *infra.* While some of these potential fruits of the arrest may be found eventually to be too far removed from the illegality to require suppression, see *id.,* counsel cannot afford to overlook any conceivably viable suppression arguments.

In analyzing the validity of a search or seizure, it is crucial to isolate the facts and circumstances known to the police at the time of the search or seizure from those facts later learned by the police. The constitutionality of police officers' conduct "must [be] judge[d] . . . in light of the information available to them at the time they acted." *Maryland v. Garrison,* 480

U.S. 79, 85 (1987). *See also Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *United States v. Jacobsen,* 466 U.S. 109, 115 (1984) ("[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred"). It is not always easy to determine what facts were known by the police at the time of a search or seizure. For example, police officers often amend the complaint report, supposedly containing the facts learned from the victim on the scene (see § 8.19(a)(1) *supra*), to add a detailed description of the respondent based upon the officers' observations of the respondent after arrest. Counsel should not accept these reports at face value but must cross-examine the police officer to ascertain what precise facts were known to him or her when s/he undertook the search or seizure.

In a few categories of cases, the Supreme Court has held that an unlawful police search or seizure may not require suppression if the actions of the police were so obviously in "good faith" and objectively reasonable that suppression would not further the exclusionary rule's rationale of deterring police misconduct. The context in which this principle is most often invoked – a police officer's good faith reliance on a search warrant issued by a magistrate which turns out to have been defective because the magistrate was mistaken in finding probable cause – is discussed in § 23.17 *infra*. The other situations in which the Court has recognized a "good faith" exception to the exclusionary rule are (1) when the police, in making an arrest, reasonably relied on a computer record of a warrant which a court clerk erroneously failed to update to reflect the later quashing of the warrant (*Arizona v. Evans*, 514 U.S. 1, 14-16 (1995)); (2) when an arresting officer's reasonable but erroneous belief in the existence of "an outstanding arrest warrant" stemmed from "a negligent bookkeeping error by another police employee" who failed to update the police computers when the warrant was recalled (*Herring v. United States*, 555 U.S. 135, 137 (2009)), although this version of the "good faith" rule would be inapplicable and "exclusion [of the fruits of the arrest] would certainly be justified" "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests" or if "systemic errors" in a warrant system were so "routine or widespread" as to make it "reckless for officers to rely on . . . [the] unreliable warrant system" (*id*. at 146-47); and (3) "when the police conduct a search in compliance with binding precedent that is later overruled" (*Davis v. United States*, 564 U.S. 229, 232 (2011)). The Supreme Court also has held that a police officer's "mistake of law can . . . give rise to the reasonable suspicion necessary to uphold . . . [a] seizure under the Fourth Amendment" as long as the mistake was "*objectively* reasonable." *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (upholding the validity of a police officer's stop of a car "because one of its two brake lights was out" and "[i]t was . . . objectively reasonable for an officer . . . to think that [the] . . . faulty right brake light was a violation of North Carolina law" even though "a [North Carolina appellate] court later determined that a single working brake light was all the law required" (*id*. at 539-40)). See also § 23.28 *infra*. Finally, as discussed, in § 23.21 *infra*, the Supreme Court has withdrawn the exclusionary rule as a remedy for violations of the Fourth Amendment's "knock and announce" requirement. *See Hudson v. Michigan*, 547 U.S. 586, 588, 594 (2006). In some States, one or more of the foregoing limitations on the availability of suppression have been rejected by the

state courts as a matter of state constitutional law. See, *e.g.*, § 23.17 *infra* (citing state caselaw that relies on the state constitution to reject the Supreme Court's good faith rule for search warrants issued without probable cause). See generally § 7.09 *supra*.

Part B. On-the-Street Encounters with the Police: Arrests, Searches Incident to Arrest, Terry *Stops,* Terry *Frisks, and Other Encounters*

§ 23.04 THE SPECTRUM OF ON-THE-STREET ENCOUNTERS BETWEEN CITIZENS AND THE POLICE: CONTACTS, *TERRY* STOPS AND ARRESTS

As the Supreme Court has observed, "[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Terry v. Ohio,* 392 U.S. 1, 13 (1968). The Court thus far has identified three categories of encounters, which have differing ramifications for police prerogatives and citizens' rights: contacts, *Terry* stops, and arrests.

§ 23.04(a) Contacts

The Fourth Amendment is not called into play by "law enforcement officers . . . merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . . [even if] the officer identifies himself as a police officer. . . . The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without [triggering Fourth Amendment protections that require] reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer,* 460 U.S. 491, 497-98 (1983) (plurality opinion). *Compare Kolender v. Lawson,* 461 U.S. 352 (1983), *with Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), discussed in § 23.11(b) *infra*.

§ 23.04(b) The Dividing Line Between Contacts and "Seizures" Within the Meaning of the Fourth Amendment

If a police officer, going beyond this kind of detention-free contact, "accosts [the] individual and restrains his freedom to walk away, he has 'seized' that person" within the meaning of the Fourth Amendment's restrictions upon "seizures." *Terry v. Ohio,* 392 U.S. 1, 16 (1968); *Brown v. Texas,* 443 U.S. 47, 50 (1979); *Brendlin v. California*, 551 U.S. 249, 254-55 (2007). The restraint may be physical, *Sibron v. New York,* 392 U.S. 40, 67 (1968), or it may take the form of a command to "stand still" or to "come along" or any other gesture or expression indicating that the person is not free to go as s/he pleases. *Dunaway v. New York,* 442 U.S. 200, 203, 207 n.6 (1979); *see Florida v. Royer,* 460 U.S. 491, 501-03 & n.9 (1983) (plurality opinion); *id.* at 511-12 (concurring opinion of Justice Brennan); *Brendlin v. California*, 551 U.S. at 254-

55. “What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, ‘if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’” *Immigration and Naturalization Service v. Delgado,* 466 U.S. 210, 215 (1984). The touchstone of a Fourth Amendment seizure of a person is whether the police behavior “would . . . have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (per curiam); *see also Brendlin v. California*, 551 U.S. at 254-55, 262 (“A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. . . . When the actions of the police do not show an unambiguous intent to restrain or when an individual’s submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall,* 446 U.S. 544 (1980), who wrote that a seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,’ *id*., at 554 (principal opinion). Later on, the Court adopted Justice Stewart’s touchstone . . . but added that when a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter’ . . . . [W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.”). *See, e.g.*, *United States v. Smith*, 794 F.3d 681, 682, 684-88 (7th Cir. 2015); *United States v. Black*, 707 F.3d 531, 537-39 (4th Cir. 2013); *Clark v. State*, 994 N.E.2d 252, 263 (Ind. 2013). *Cf. United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (police questioning of passengers on a bus did not amount to a “seizure” for Fourth Amendment purposes when “[t]he officers gave the passengers no reason to believe that they were required to answer the officers’ questions,” “left the aisle free so that [passengers] could exit,” and did “[n]othing . . . that would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter”); *California v. Hodari D.*, 499 U.S. 621 (1991) (there was no “seizure” for purposes of the Fourth Amendment when police officers chased a suspect who failed to comply with their directive to halt; therefore, the officers’ lack of a basis for the directive and the pursuit provided no Fourth Amendment ground for suppression of contraband the suspect discarded during the chase; the Court says that “the so-called *Mendenhall* test, formulated by Justice Stewart’s opinion in *United States v. Mendenhall,* 446 U.S. 544, 554 (1980), and adopted by the Court in later cases . . . [citing *Chesternut* and *Delgado*] states a *necessary,* but not a *sufficient,* condition for seizure – or, more precisely, for seizure effected through a ‘show of authority.’ *Mendenhall* establishes that the test for existence of a ‘show of authority’ is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person,” *id*. at 627-28; if, after such a show of authority, the citizen does not attempt to flee or resist but rather “yield[s],” s/he is

deemed to have been seized, *id*. at 626; *see also id*. at 629; but if, instead of complying with the show of authority, the citizen flees, no "seizure" is effected until s/he is thereafter physically restrained or submits to restraint, *id*. at 628-29).

"When assessing whether a juvenile was seized for purposes of the fourth amendment, [it is appropriate to] . . . modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." *People v. Lopez*, 229 Ill. 2d 322, 346, 353-54, 892 N.E.2d 1047, 1061, 1065-66, 323 Ill. Dec. 55, 69, 73-74 (2008). The precedents for considering the particular susceptibility of young people to be overawed by an aura of police authority when a court is determining whether a juvenile is in "custody" for *Miranda* purposes are discussed in § 24.08(a) *infra* and should be persuasive in the present context as well. *See J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 271-72 (2011) ("a child's age properly informs the *Miranda* custody analysis" because the relevant inquiry is "'how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave,'" and "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave").

As a doctrinal matter, these rules involve a strictly objective inquiry; they do not turn either on the suspect's subjective belief that s/he is or is not free to leave (*Brendlin v. California*, 551 U.S. at 258 n.4) or on the officer's unmanifested intentions to restrain the suspect if the suspect attempts to leave (*id*. at 259-62) (the passenger in a stopped automobile was "seized" within the meaning of the Fourth Amendment even though the record did not establish that the officer "'was even aware [the passenger] was in the car prior to the vehicle stop'" and thus the officer may not have intended to stop the passenger: "the objective *Mendenhall* test of what a reasonable passenger would understand . . . leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority"). *See also Kaupp v. Texas*, 538 U.S. at 632 (handcuffing of a suspect was a significant factor in the classification of police conduct as a seizure tantamount to an arrest notwithstanding evidence that the sheriff's department "'routinely'" used handcuffs for safety reasons when transporting individuals: "the officers' motivation of self-protection does not speak to how their actions would reasonably be understood" by the suspect); *United States v. Mendenhall*, 446 U.S. at 554 n.6 (opinion of Justice Stewart, announcing the judgment of the Court); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *United States v. Hensley*, 469 U.S. 221, 234-35 (1985). However, as a practical matter, judges conducting a suppression hearing in the first instance often tend to be moved in the direction of finding a "seizure" when the officers can be gotten to concede that they would not have permitted the suspect to leave if the suspect had attempted to do so. Therefore, counsel may be well advised to ask the officer or officers a question like: "If [the client] had simply ignored you, turned [his] [her] back on you and walked away, are we to understand that you would have done nothing to prevent [him] [her] from taking off?" Officers with an ego will commonly be unwilling to say that they would have done nothing in this insulting situation; and, if they do say so, the question and answer will have done the defense no harm under the ultimate "objective *Mendenhall* test" (*Brendlin v. California*, 551 U.S. at 260). Prosecutorial objections to the question can be met by the observation that U.S. Supreme Court opinions attach significance to

the information that the question seeks to elicit, *see*, *e.g.*, *Florida v. Royer*, 460 U.S. at 503 (plurality opinion) ("the State conceded in the Florida courts that Royer would not have been free to leave the interrogation room had he asked to do so. Furthermore, the state's brief in this Court interprets the testimony of the officers at the suppression hearing as indicating that had Royer refused to consent to a search of his luggage, the officers would have held the luggage and sought a warrant to authorize the search."); *Dunaway v. New York*, 442 U.S. at 203, 212 ("although . . . [Dunaway] was not told he was under arrest, he would have been physically restrained if he had attempted to leave"); *id*. at 212 (Dunaway "was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody") – perhaps because an officer's subjective intentions will frequently manifest themselves in subtle, visible appearances or "actions . . . [that] show an unambiguous intent to restrain" (*Brendlin v. California*, 551 U.S. at 255).

Some states courts extend their state constitutional guarantees against unreasonable searches and seizures to police conduct that would not be characterized as a "seizure" under the federal Fourth Amendment caselaw. There are, for example, decisions requiring that the police have a degree of justification for conduct that the United States Supreme Court put beyond the bounds of Fourth Amendment regulation in *United States v. Drayton*, 536 U.S. at 203-04 (*see*, *e.g.*, *People v. McIntosh*, 96 N.Y.2d 521, 755 N.E.2d 329, 730 N.Y.S.2d 265 (2001)), and in *Hodari D.*, 499 U.S. at 629 (*see*, *e.g.*, *People v. Holmes*, 81 N.Y.2d 1056, 1057-58, 619 N.E.2d 396, 397-98, 601 N.Y.S.2d 459, 460-61 (1993)).

§ 23.04(c) *Terry* Stops

There is a "general rule that seizures of the person require probable cause to arrest" (*Florida v. Royer,* 460 U.S. 491, 499 (1983) (plurality opinion)), but the Court in *Terry v. Ohio* "created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime" (*Florida v. Royer,* 460 U.S. at 498 (plurality opinion)). "The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* at 500. For further discussion of the circumstances justifying a *Terry* stop, see § 23.09 *infra*; for discussion of the rules governing *Terry* frisks, see § 23.10 *infra.*

§ 23.04(d) Arrests

The line on the spectrum that separates *Terry* stops from arrests can be described as the "point [at which] . . . police procedures [are] . . . qualitatively and quantitatively . . . so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full

protection of the Fourth and Fourteenth Amendments." *Hayes v. Florida,* 470 U.S. 811, 815-16 (1985). Obviously, that line is not always easy to pinpoint. As the Court itself has observed, its decisions in "*Terry* [*v. Ohio, supra*], *Dunaway* [*v. New York, supra*], [*Florida v.*] *Royer*[*, supra*] and [*United States v.*] *Place,* [462 U.S. 696 (1983)] considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest." *United States v. Sharpe,* 470 U.S. 675, 685 (1985). Certainly, any time the police "forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes," the police have "crossed" the line between *Terry* stops and arrests and have effected a "seizure[ ] . . . sufficiently like [an] arrest[ ] to invoke the traditional rule that arrests may constitutionally be made only on probable cause." *Hayes v. Florida,* 470 U.S. at 816. *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 631-32 (2003) (per curiam) (seizure requiring probable cause occurred when "a group of police officers rous[ted] . . . [the 17-year-old defendant] out of bed in the middle of the night," handcuffed him and took him to the police station in his underwear, and then questioned him in an interrogation room, even though the officers said "'we need to go and talk,'" the defendant verbally acquiesced, and the sheriff's department routinely used handcuffs for transporting individuals); *Dunaway v. New York,* 442 U.S. at 212 (when police removed defendant from his home, transported him to the police station against his will and interrogated him, the defendant's "detention . . . was in important respects indistinguishable from a traditional arrest"). With respect to lesser intrusions upon an individual's freedom, the point of arrest is flexible, determined on a case-by-case basis by whether the circumstances of the detention were "more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases," *Florida v. Royer,* 460 U.S. at 504 (plurality opinion); *United States v. Bailey*, 743 F.3d 322, 340-41 (2d Cir. 2014) (the police "exceeded the reasonable bounds of a *Terry* stop when they handcuffed Bailey": although "not every use of handcuffs automatically renders a stop an arrest requiring probable cause," the "government failed to make . . . [the requisite] showing" that the police had "a reasonable basis to think that the person detained pose[d] a present physical threat and that handcuffing [was] the least intrusive means to protect against that threat"); *Reid v. State*, 428 Md. 289, 293, 51 A.3d 597, 599 (2012) (police officer's "use of a Taser to fire two metal darts into Reid's back converted what otherwise may have been a *Terry* stop into a *de facto* arrest for Fourth Amendment purposes"). *Accord, Michigan v. Summers,* 452 U.S. 692, 696-97 (1981) (to escape "the general rule that an official seizure of the person must be supported by probable cause, even if no formal arrest is made," the detention must be "significantly less intrusive than an arrest"). The criteria normally considered in making that assessment are described in § 23.06 *infra.* For further discussion of the standards for making an arrest, see § 23.07 *infra.*

§ 23.04(e) "Custody" for Purposes of the *Miranda* Doctrine

It should be noted that there is one other constitutionally significant point on the spectrum of intrusiveness of police contacts with citizens. The protections established in *Miranda v. Arizona,* 384 U.S. 436 (1966), and its progeny, are triggered by the police placing a criminal defendant or juvenile respondent in "custody." See § 24.08(a) *infra.* In *Berkemer v. McCarty,*

468 U.S. 420 (1984), the Court made clear that the *Miranda* concept of custody envisions a greater degree of intrusiveness than a *Terry* stop. *See id.* at 439-40. It is uncertain, however, whether the *Miranda* concept of "custody" is synonymous with the Fourth Amendment concept of "arrests" that require probable cause. For detailed discussion of what constitutes "custody" under *Miranda*, see § 24.08(a) *infra.*

§ 23.05 TACTICAL REASONS FOR SEEKING A CATEGORIZATION OF POLICE CONDUCT AS AN ARREST OR AS A *TERRY* STOP

Because there is no "litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop," *Florida v. Royer,* 460 U.S. 491, 506 (1983) (plurality opinion), the classification of the police action in each case will depend substantially upon the facts that defense counsel elicits from the witnesses and on the quality of counsel's arguments.

Obviously, it is always in the interest of the defense to characterize a police action as a seizure of the person rather than a "consensual encounter," because only seizures trigger the protections of the Fourth Amendment. The determination whether the defense stands to gain by characterizing the seizure as a *Terry* stop or as an arrest is not quite so clear-cut. Before the criteria for classifying seizures are discussed, it is useful to examine the strategic considerations that may make one or the other of the two classifications more beneficial to the respondent.

Ordinarily, defense counsel will wish to establish that a particular restraint was an arrest rather than a *Terry* stop (or, in cases in which the degree of police restraint escalated over a period of time, that the arrest occurred earlier, rather than later, in the sequence of events). The arrest categorization usually favors the defense because the preconditions for a valid arrest are more demanding than those for a *Terry* stop, see §§ 23.07, 23.09 *infra,* making it more difficult for the prosecution to justify the seizure. Moreover, in certain cases, the classification of the seizure as an "arrest" will provide additional grounds for suppression apart from the central claim that the invalidity of the seizure tainted all evidence derived from it. (For discussion of the concept of "derivative evidence," see § 23.37 *infra*.) For example, in cases involving confessions or other statements of the respondent, the greater level of custody involved in an arrest will ordinarily guarantee *Miranda* protection. See § 24.08(a) *infra; Orozco v. Texas,* 394 U.S. 324, 327 (1969); *compare Berkemer v. McCarty,* 468 U.S. 420, 434 (1984) ("there can be no question that respondent was 'in custody' at least as of the moment he was formally placed under arrest and instructed to get into the police car"), *with id*. at 439-42; *cf*. § 23.04(e) *supra*. And the greater degree of coerciveness inherent in an arrest will be a factor for consideration in determining the voluntariness both of incriminating statements (see § 24.04 *infra; cf*. *Payne v. Arkansas,* 356 U.S. 560, 567 (1958)) and of consents to search or seizure (see § 23.18 *infra*; *cf*. *Schneckloth v. Bustamonte,* 412 U.S. 218, 240 n.29 (1973) (dictum) ("courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody").

In certain cases, however, it may be in the interest of the defense to characterize a restraint as a *Terry* stop rather than an arrest. One of the most important examples of this is when the classification of the restraint as a *Terry* stop can be used to invalidate a subsequent search of the respondent. If the restraint were characterized as an arrest and the arrest was lawful because the police had probable cause to arrest, then any postarrest search would be valid as a search incident to arrest. See § 23.08 *infra.* On the other hand, if the restraint were classified as a *Terry* stop and if the police lacked the requisite basis for a *Terry* frisk – specific and articulable facts warranting a reasonable conclusion that the respondent was armed and dangerous, see § 23.10 *infra* – then the frisk would be invalid and the fruits of the frisk would have to be suppressed. (Before deciding to attempt to bring a case within the latter principle, however, counsel should consider whether s/he can also bring it within the general rule that "a search incident to a lawful arrest may not precede the arrest," *Sibron v. New York,* 392 U.S. 40, 67 (1968), and can avoid the narrow exception permitting a search incident to arrest to be made immediately preceding the arrest as a part of a single course of action. See § 23.08(d) *infra*.)

§ 23.06 CRITERIA FOR CATEGORIZING A RESTRAINT (THAT IS, ANY SEIZURE OF THE PERSON) AS A *TERRY* STOP ON THE ONE HAND OR AN ARREST ON THE OTHER

As already explained, the defense will always want to classify a police action as a "seizure of the person," in order to bring the Fourth Amendment's protections into play. This initial step of showing that a "seizure" occurred is ordinarily achieved by establishing that the police made some "show of official authority," *Florida v. Royer,* 460 U.S. 491, 502 (1983) (plurality opinion), that would cause a "'reasonable person'" to believe "'that he was not free to leave,'" *id.* See § 23.04(b) *supra.* Thus, in *Royer,* the plurality concluded that a Fourth Amendment "seizure" had occurred when officers approached a suspect in an airport concourse, identified themselves as narcotics agents, told the defendant that he was suspected of transporting drugs, asked him to accompany them to the police room while retaining his airplane ticket and driver's license, and in no way indicated that he was free to leave. *Id.* at 502-03. *See also Reid v. Georgia,* 448 U.S. 438 (1980) (per curiam).

The next step is to categorize the seizure as either a *Terry* stop or, conversely, an arrest. Counsel should consider developing the facts on each of the following subjects that bear upon the stop-*versus*-arrest classification.

§ 23.06(a) The Length of the Restraint

On numerous occasions the Court has said that one of the factors that distinguishes *Terry* stops from arrests is the relative brevity of a *Terry* stop. *See, e.g., United States v. Place,* 462 U.S. 696, 709 (1983) (explaining that "[a]lthough we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," and then

invalidating a 90-minute detention of an air traveler's luggage on reasonable suspicion: "[A]lthough we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case"); *Florida v. Royer,* 460 U.S. at 500 (plurality opinion) ("This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); *Dunaway v. New York,* 442 U.S. 200, 212 (1979) (stops are limited to "brief and narrowly circumscribed intrusions"); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 880-82 (1975); *Terry v. Ohio,* 392 U.S. at 10. *See also, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (dictum) ("brief investigatory stops"). *Cf. United States v. Sokolow,* 490 U.S. 1, 10-11 (1989) (dictum).

In *United States v. Sharpe,* 470 U.S. 675 (1985), the Court retreated somewhat from an iron-clad rule that a *Terry* stop must be no longer than momentary. While continuing to recognize that "'brevity . . . is an important factor'" (*id.* at 685, quoting *United States v. Place, supra*), the Court in *Sharpe* stressed that "our cases impose no rigid time limitations on *Terry* stops" (*Sharpe,* 470 U.S. at 685) and stated:

> "[W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. . . . A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation . . . ." *Id.* at 685-86.

Applying this standard in *Sharpe*, the Court concluded that the 20-minute investigative detention there was a *Terry* stop, not an arrest because: (i) the police officer "pursued his investigation in a diligent and reasonable manner" and "proceeded expeditiously," and there was no indication "that the officers were dilatory in their investigation"; (ii) to perform the investigation it was necessary to detain the suspect during the 20-minute period; (iii) the police were acting in a swiftly developing situation; and (iv) "[t]he delay in this case was attributable almost entirely to the evasive actions" of one of the suspects and, in the absence of that suspect's "maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place," *id.* at 687-88.

In the wake of the *Sharpe* decision, the relevant question is whether the detention exceeded the "time reasonably needed to effectuate" the "law enforcement purposes to be served by the stop," *id.* at 685; *accord*, *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) ("We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (dictum) ("A seizure . . . can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" justifying the seizure); *Illinois v. McArthur*,

531 U.S. 326, 332 (2001) (dictum) ("this time period was no longer than reasonably necessary for the police, acting with diligence, to [complete the activity that justified the suspect's restraint]"); *and see, e.g.*, *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006); *State v. Coles*, 218 N.J. 322, 344-47, 95 A.3d 136, 148-50 (2014). (The predicate for this question – and thus another necessary element for characterizing a police action as a stop rather than as an arrest – is that the purposes served by the officer's actions are consistent with the function of a *Terry* stop, to confirm or dispel an officer's suspicions by nonintrusive methods of investigation. *See, e.g.*, *People v. Ryan*, 12 N.Y.3d 28, 30-31, 904 N.E.2d 808, 809-10, 876 N.Y.S.2d 672, 673-74 (2009) (even assuming that the police had reasonable suspicion to stop the defendant, the detention exceeded the permissible bounds of a *Terry* stop and became a seizure requiring probable cause when the police held the defendant at the location for 13 minutes while they conducted a photo identification procedure, apparently "to make it convenient for the police to arrest defendant if a positive identification subsequently occurred")). When, as in *United States v. Place,* the police seized a suspect's luggage for 90 minutes in order to arrange for a narcotics-sniffing dog and when the police had forewarning of the suspect's arrival which would have permitted them to make advance preparations and thereby shorten the detention period, a reviewing court could properly conclude that the police failed to act diligently. *See United States v. Sharpe,* 470 U.S. at 684-85 (explaining the holding in *Place*). But diligence is not the only issue. The most diligent of police officers is not permitted to extend a *Terry* stop indefinitely simply because the purpose of the stop cannot be achieved in a finite period of time. As the Court acknowledged in elaborating its new standard in *Sharpe,* "[o]bviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." 470 U.S. at 685. And the Court in *Sharpe,* when describing the need for allowing the police to pursue their investigations, specified that it was contemplating investigations that were to be conducted "quickly." *Id.* at 686. *See also United States v. Foreste*, 780 F.3d 518, 525 & n.4 (2d Cir. 2015) (if police officers conduct successive stops of the same individual based on the "same reasonable suspicion," and if "the officer conducting the subsequent investigation is aware of the prior investigation and the suspicion that supported it, the investigations' duration and scope must be both individually and collectively reasonable under the Fourth Amendment"; "The same would be true were the suspicion justifying the second investigation generated from the first investigation rather than if it were identical to it. In either case, the second stop can be viewed as an extension of the first stop, justifying the stops' joint evaluation for reasonableness under the Fourth Amendment.").

§ 23.06(b) Whether the Police Transported the Respondent from the Location of the Stop

The police frequently transport a suspect from the place of initial accosting to another location, either to conduct questioning in a more private setting, or to display the suspect to an eyewitness in a show-up identification procedure, or for some other investigative purpose. In *Hayes v. Florida,* 470 U.S. 811 (1985); *Dunaway v. New York*, 442 U.S. 200 (1979); *Florida v. Royer*, 460 U.S. 491 (1983); and *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam), the ambulatory nature of the detention was a significant factor in the Court's classification of the

detention as an arrest rather than a *Terry* stop.

In *Hayes v. Florida,* the Court concluded that the forcible removal of a suspect from his home and the non-consensual transportation of the suspect to the police station constituted such an "intrusi[on] with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments." 470 U.S. at 816. Similarly, in *Dunaway v. New York,* two of "[t]he pertinent facts relied on by the Court" in finding that the detention was an arrest "were that (1) the defendant was taken from a private dwelling; [and] (2) he was transported unwillingly to the police station." *United States v. Sharpe,* 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*).

In *Royer,* one of the factors that transformed "[w]hat had begun as a consensual inquiry in a public place" (460 U.S. at 503) into a full arrest was the transportation of the defendant some 40 feet to a small airport room for questioning. In condemning this movement of the suspect, the plurality in *Royer* stressed that "[t]he record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officer's attempt to gain his consent to a search of his luggage." 460 U.S. at 505. *See also United States v. Sharpe,* 470 U.S. at 684 (discounting the portion of the *Royer* opinion that seemed to rely on the length of the detention, and defining the opinion as being concerned primarily with "the fact that the police confined the defendant in a small airport room for questioning").

In the *per curiam* opinion in *Kaupp v. Texas*, the Court relied on the reasoning in *Hayes v. Florida* and *Dunaway v. New York* to hold that the police conducted a seizure that was "'in important respects indistinguishable from a traditional arrest' and therefore required probable cause or judicial authorization" when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs, "placed [him] in a patrol car, dr[o]ve[ ] [him] to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned." *Kaupp v. Texas*, 538 U.S. at 631. "[W]e have never 'sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.'" *Id*. at 630 (quoting *Hayes v. Florida*, 470 U.S. at 815). The Court in *Kaupp* reiterated that "[s]uch involuntary transport to a police station for questioning is 'sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.'" *Kaupp v. Texas*, 538 U.S. at 630 (quoting *Hayes v. Florida*, 470 U.S. at 816).

§ 23.06(c) The Nature of the Setting in Which the Detention Takes Place

In *Berkemer v. McCarty,* 468 U.S. 420 (1984), in the course of holding *Miranda* inapplicable to roadside questioning of motorists detained pursuant to traffic stops, the Court made some general observations concerning the distinction between *Terry* stops and arrests. Explaining that typical traffic stops differ from the usual *Miranda* custodial setting in that the "exposure to public view . . . diminishes the motorist's fear that, if he does not cooperate, he will

be subjected to abuse," the Court then commented that in this respect, "the usual traffic stop is more analogous to a so-called *'Terry* stop' . . . than to a formal arrest." *Id.* at 438-39. The Court noted that *Terry* stops are normally characterized by "[t]he comparatively non-threatening character of [the] detentions." *Id.* at 440.

Non-public setting played an important part in the decision in *Florida v. Royer, supra.* In condemning the transportation of the suspect, the plurality stressed that the effect of the move was to shift the suspect from a "public place" to "a small room – a large closet . . . [where] [h]e was alone with two police officers," 460 U.S. at 502. Although the *Royer* plurality did not expressly characterize the change in location as designed to increase the pressure on the suspect, that conclusion is implicit in the plurality's strong criticism of the lack of any "legitimate law enforcement purposes" in "removing Royer to the police room prior to the officers' attempt to gain his consent to a search of his luggage." *Id.* at 505.

Significantly, the progenitors of the "stop" doctrine, *Terry v. Ohio* and *Sibron v. New York,* originally recognized the "stop" power in the context of stops made on the street or in a public place. In extending that power to cases in which police officers board a bus and question passengers, the Court in *United States v. Drayton*, 536 U.S. 194 (2002), and *Florida v. Bostick*, 501 U.S. 429 (1991), said that "[t]he fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure." *Drayton*, 536 U.S. at 204; *Bostick*, 501 U.S. at 439-40. Acknowledging that "[w]here the encounter takes place is one factor" in assessing whether a "seizure" has taken place, *Bostick*, 501 U.S. at 437, the Court explained that "an encounter [that] takes place on a bus" may be no more intrusive than one that "occurred on the street" "because many fellow passengers are present to witness [the] officers' conduct, [and thus] a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances," *Drayton*, 536 U.S. at 195.

Except for a pair of scenarios – one of which the Supreme Court has addressed in several decisions – all of the Court's rulings upholding stops have involved "on-the-street" situations, *Dunaway v. New York*, 442 U.S. at 210-11, or encounters in similarly public places, such as buses or airport concourses (*United States v. Mendenhall*, 446 U.S. 544, 560-66 (1980) (plurality opinion on this point)). The first exception is a situation in which officers who are executing a valid search warrant for contraband in a home detain an occupant of the premises during the search – a scenario the Court addressed in *Michigan v. Summers*, 452 U.S. 692 (1981), and again in *Muehler v. Mena*, 544 U.S. 93 (2005). See § 23.22(c) *infra*. In *Summers*, the Court held that in this situation, officers executing a valid search warrant have "the limited authority to detain the occupants of the premises while a proper search is conducted," 452 U.S. at 705. *Accord*, *Los Angeles County v. Rettele*, 550 U.S. 609, 613-14 (2007) (per curiam). *Cf. Bailey v. United States*, 133 S. Ct. 1031, 1038 (2013) (*Summers* doctrine is strictly limited to "cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant"); *United States v. Watson*, 703 F.3d 684, 691-92 (4th Cir. 2013). In *Muehler*, the Court added that the police also may engage in the additional intrusion of handcuffing an occupant during the search if this measure is necessitated by

"inherently dangerous" circumstances such as those that existed in the *Muehler* case, where the "warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises" and there was a "need to detain multiple occupants." 544 U.S. at 100. But, as the Court emphasized in establishing the general rule in *Summers*, the police officers' possession of a search warrant in these cases precludes any possibility that the police have arranged for detention in a non-public place for the sake of exploiting the coercive atmosphere to gain information or consent to a search or seizure. The *Summers* Court made a point of explaining that "the type of detention imposed here is not likely to be exploited by the officer" to extract information from the suspect since "the information the officers seek normally will be obtained through the search and not through the detention." *Summers*, 452 U.S. at 701. *See also Muehler*, 544 U.S. at 101-02 (explaining that, although the police questioned the handcuffed suspect about her immigration status, the case did not require that the Court consider the constitutionality of "questioning that extended the time [the detainee] . . . was detained" or that otherwise "constitute[d] an independent Fourth Amendment violation"). Moreover, in this scenario, extraction of a consent to search or seize would be superfluous since the officers already have a warrant.

The second exceptional scenario is *Illinois v. McArthur*, 531 U.S. 326 (2001), where the Court upheld the conduct of police who, after discussions with a homeowner on his front porch, refused to permit him to enter his home unaccompanied by a police escort during a two-hour period while they were seeking a search warrant for the home, based on probable cause to believe there was marijuana inside. The Court justified the restraint of the homeowner's freedom because "the police had good reason to fear that, unless restrained, . . . [he] would destroy the drugs before they could return with a warrant, *id*. at 332, and it noted that, on the two or three occasions when a police officer accompanied the homeowner into the house during the two-hour wait, the homeowner had "reentered simply for his own convenience, to make phone calls and to obtain cigarettes" and had given his consent to the officer's escorting him inside for these purposes, *id*. at 335.

Accordingly, in situations other than the *Summers-Muehler* and *McArthur* scenarios, counsel can argue that any detention of a suspect in a "'police dominated'" setting (*Berkemer v. McCarty*, 468 U.S. at 439), where no or few other members of the public are "present to witness officers' conduct" (*United States v. Drayton*, 536 U.S. at 204) and to reinforce "[t]he comparatively nonthreatening character of [the] detention[ ]" (*Berkemer v. McCarty*, 468 U.S. at 440), transforms what might otherwise be merely a *Terry* stop into an arrest requiring probable cause. The argument has particular force when the police have moved the suspect from a public location to a setting of that sort – a particularly intimidating action. See the discussion of *Florida v. Royer* in the second paragraph of this section.

§ 23.06(d) Whether the Detention Was for the Purpose of Interrogation

If the purpose of police detention of a suspect is interrogation, the courts are particularly likely to view the interrogation as an arrest requiring probable cause rather than a *Terry* stop. In *Dunaway v. New York,* the Court concluded that when the police transported the suspect to the

police station for the purpose of interrogation, the "detention . . . was in important respects indistinguishable from a traditional arrest." 442 U.S. at 212; *see also United States v. Sharpe,* 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*). In *Kaupp v. Texas*, *supra*, the Court applied the reasoning of *Dunaway* to hold that the police had conducted a seizure that was "'in important respects indistinguishable from a traditional arrest' and therefore required probable cause or judicial authorization" when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs and drove him "to the sheriff's offices, where he was taken into an interrogation room and questioned." 538 U.S. at 631 (quoting *Dunaway v. New York*, 442 U.S. at 212). Such "involuntary transport to a police station *for questioning*," the Court explained, is "'sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.'" *Kaupp v. Texas*, 538 U.S. at 630 (emphasis added)). Similarly, in *Florida v. Royer,* it was deemed significant that the police transported the defendant to the police room for the purpose of interrogation rather than legitimate "reasons of safety and security." 460 U.S. at 504-05 (plurality opinion). By contrast, in *Michigan v. Summers,* 452 U.S. at 701-02 & n.15, the Court emphasized that the detention of the suspect, which the Court classified as a *Terry* stop, was not designed to extract information from the suspect.

§ 23.07 CIRCUMSTANCES JUSTIFYING AN ARREST

§ 23.07(a) Authorization by Statute or Common Law

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Michigan v. DeFillipo,* 443 U.S. 31, 36 (1979). In virtually all jurisdictions the conditions for a valid arrest are specified by either statute or caselaw.

State law may require the suppression of evidence obtained as a consequence of a legally unauthorized arrest, *see*, *e.g.*, *Commonwealth v. Le Blanc*, 407 Mass. 70, 75, 551 N.E.2d 906, 909 (1990) ("The police officer in this case acted without statutory or common law authority both when he stopped the defendant and when he arrested him. Our case law supports exclusion of evidence when such conduct prejudices the defendant. . . . The requirement that a police officer have lawful authority when he deprives individuals of their liberty is closely associated with the constitutional right to be free from unreasonable searches and seizures."), but such an arrest does not *eo ipso* violate the Fourth Amendment or require suppression as a matter of federal constitutional law (*Virginia v. Moore*, 553 U.S. 164, 176-77 (2008)). The state-law validity of an arrest may also have other consequences unaffected by federal law: In many States, for example, a defendant or respondent can be convicted of the crime of resisting arrest only if the arrest is lawful. *E.g.*, *State v. Robinson*, 6 Ariz. App. 424, 433 P.2d 75 (1967); *People v. Peacock*, 68 N.Y.2d 675, 496 N.E.2d 683, 505 N.Y.S.2d 594 (1986); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954).

In several jurisdictions the juvenile court statutes establish additional requirements for arrests of juveniles. See §§ 3.03-3.09 *supra.*

§ 23.07(b) Arrest Warrants

In cases in which a juvenile respondent is arrested on an arrest warrant (in some jurisdictions called a "custody order"), the defense can challenge the validity of the warrant, and thereby the validity of the arrest, by arguing that the warrant was issued without a showing of probable cause to believe that the respondent committed an offense. *See Giordenello v. United States,* 357 U.S. 480 (1958), as explained in *Aguilar v. Texas,* 378 U.S. 108, 112 n.3 (1964); *Steagald v. United States,* 451 U.S. 204, 213 (1981) (dictum). In determining whether such an argument is viable, counsel will need to obtain the affidavit or sworn complaint submitted by the police or prosecutor in support of the request for the arrest warrant and examine the sufficiency of the facts presented to the magistrate or judge who issued the warrant. In cases in which an arrest warrant does not correctly name the respondent and instead is issued on the basis of an alias, a nickname, or a description of the person sought, counsel also may be able to challenge the validity of the warrant on the grounds that it does not identify the respondent with the requisite particularity. *See, e.g., United States v. Doe,* 703 F.2d 745 (3d Cir. 1983).

The practical value of challenging arrest warrants has been drastically curtailed by the holdings in *United States v. Leon,* 468 U.S. 897 (1984), and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), that the exclusionary rule does not apply to evidence obtained through police actions taken in "good faith" reliance upon an apparently valid warrant issued as a consequence of a magistrate's erroneous finding of probable cause. For discussion of this complicated subject, see § 23.17 *infra.*

§ 23.07(c) Arrests Without a Warrant: The Basic Authorizations for Warrantless Arrest in Felony and Misdemeanor Cases Respectively

In most jurisdictions the requirements for a warrantless arrest depend upon whether the underlying crime is a felony or a misdemeanor:

(i) If the underlying crime is a felony, a warrantless arrest can be made whenever the arresting officer (or the officer who ordered or requested the arrest) was in possession of facts providing probable cause to believe that the crime was committed and that the person to be arrested had committed it. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *United States v. Watson,* 423 U.S. 411 (1976); *United States v. Santana,* 427 U.S. 38 (1976); *Michigan v. DeFillippo,* 443 U.S. 31, 36 (1979). This is the ubiquitous state-law rule and is also the rule of the Fourth Amendment.

(ii) If the underlying crime is a misdemeanor, the rule in most jurisdictions is that a warrantless arrest can be made only when the offense was committed in the presence of the arresting officer. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 355-60 (2001) ("Appendix to Opinion of the Court," listing and quoting state statutes). The Supreme Court has explicitly reserved the question "whether the Fourth Amendment [also] entails an 'in the presence' requirement for purposes of misdemeanor arrests." *See id.* at 341 n. 11, citing, with a "*cf.*" signal,

Justice White's statement in a dissent in *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984), that the "'requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment.'" The answer to that question is important because "violations of state arrest law" are not necessarily "also violations of the Fourth Amendment" (*Virginia v. Moore*, 553 U.S. 164, 173 (2008)). See § 23.07(a) *supra*.

(A) Counsel contending that the Fourth Amendment does embody the majority state-law rule limiting misdemeanor arrests to offenses committed in the presence of the arresting officer can point to passages in a number of Supreme Court opinions which treat that proposition as axiomatic. *See id*. at 171 ("In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, . . . [t]he arrest is constitutionally reasonable."); *id*. at 178 ("When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest"); *Maryland v. Pringle*, 540 U.S. 366, 370 (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. City of Lago Vista*, 532 U.S. at 354 ("[i]f 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.").

(B) The argument for a "presence" requirement also has strong historical support. Most of the common-law authorities extensively canvassed in the *Atwater* opinion, 532 U.S. at 326-43, condition an officer's arrest power in misdemeanor cases upon the circumstance that the misdemeanor was "committed in the presence of the arresting officer" (JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT – A STUDY IN CONSTITUTIONAL INTERPRETATION 45 (Johns Hopkins University Studies in Historical and Political Science, Ser. 84, No. 1, 1966), quoted in *Atwater*, 532 U.S. at 336; *and see* the earlier American commentaries cited in *id*. at 343) or "committed in his view" (see the English treatises quoted in *Atwater*, 532 U.S. at 330-31), or that the offender was found or "taken in the very act" (*Money v. Leach*, 3 Burr. 1742, 1766, 97 Eng. Rep. 1075, 1088 (K.B.1765), quoted in *Atwater*, 532 U.S. at 332 n.6).

(C) Pre-*Atwater* decisions of the federal courts of appeals in several Circuits had rejected the "presence" requirement as a Fourth Amendment precondition for valid arrest upon probable cause, and it is unclear to what extent *Atwater* will spark a reconsideration of those precedents. *See*, *e.g.*, *United States v. Laville*, 480 F.3d 187, 191-94 (3d Cir. 2007)*; United States v. Dawson*, 305 Fed. Appx. 149, 160 n.9 (4th Cir. 2008); *United States v. McNeill*, 484 F.3d 301, 311 (4th Cir. 2007); *Rockwell v. Brown*, 664 F.3d 985, 996 (5th Cir. 2011); *Alford v. Haner*, 446 F.3d 935, 937 n.2 (9th Cir. 2006); *Hall v. Hughes*, 232 Fed.Appx. 683, 684-85 (9th Cir. 2007). Pending Supreme Court resolution of the issue, counsel should press the claim, when relevant, that the Fourth Amendment does prohibit misdemeanor arrests for offenses of which the arresting officer has no personal, observational knowledge, so that s/he is relying solely on third parties for the information necessary to establish probable cause.

§ 23.07(d) The Probable Cause Requirement for Arrest

As indicated in the preceding two sections, a showing of "probable cause" is the minimum precondition for a valid arrest, with or without a warrant.

Much of the law of the Fourth Amendment is concerned with the concept of "probable cause." Not only arrest warrants but also search warrants are issued upon a magistrate's or a judge's finding of probable cause; not only warrantless arrests but also many types of warrantless searches depend upon the officer's possession of probable cause. Whether the issue is the validity of an arrest or a search, the constitutional phrase *probable cause* means "'a reasonable ground for belief,'" *Brinegar v. United States,* 338 U.S. 160, 175 (1949): "Probable cause exists where 'the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the [requisite] belief . . .,'" *id.* at 175-76; *accord*, *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) ("A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present. . . . The test for probable cause is not reducible to 'precise definition or quantification.' . . . All we have required is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'"); *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 371 (2009) ("a 'fair probability' . . . or a 'substantial chance'"); *Maryland v. Pringle*, 540 U.S. at 370-71; *Wong Sun v. United States,* 371 U.S. 471, 479 (1963). Specifically, probable cause to *arrest* is established when there are reasonable grounds to believe that the particular person sought to be arrested has committed a crime; probable cause for a *search* is established when there are reasonable grounds to believe that objects connected to criminal activity or otherwise subject to seizure are presently located in the particular place to be searched. *Zurcher v. Stanford Daily,* 436 U.S. 547, 556-57 n.6 (1978); *Steagald v. United States,* 451 U.S. 204, 213 (1981); *Safford Unified School District # 1 v. Redding*, 554 U.S. at 370. There are elaborate definitions of the concept of probable cause, *e.g., Gerstein v. Pugh,* 420 U.S. 103, 111-12 (1975); *Dunaway v. New York,* 442 U.S. 200, 208 n.9 (1979), and innumerable constructions of it in individual factual situations.

The topic of probable cause for the issuance of warrants will be taken up in discussing search warrants. See § 23.17 *infra.* With respect to warrantless arrests, the probable cause requirement must be "strictly enforced" (*Henry v. United States,* 361 U.S. 98, 102 (1959)) because "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others . . . while acting under the excitement that attends the capture of persons accused of crime" (*United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the

> officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (*Johnson v. United States*, 333 U.S. 10, 13-14 (1948).)

A*ccord*, *United States v. Watson,* 423 U.S. 411, 432 n.6 (1976) (Powell, J., concurring) (emphasizing the Court's "longstanding position that . . . [such a warrantless arrest] should receive careful judicial scrutiny").

In determining whether the police had probable cause to arrest, the central question is what facts the police knew before the arrest. "[A]n arrest is not justified by what the subsequent search discloses." *Henry v. United States,* 361 U.S. at 104. *See also Maryland v. Pringle*, 540 U.S. at 371 ("To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause"); *Florida v. Harris*, 133 S. Ct. 1050, 1059 (2013) ("we do not evaluate probable cause in hindsight, based on what a search does or does not turn up"); and see § 23.03 penultimate paragraph *supra*. For discussion of some of the factors commonly considered by the courts in assessing whether there was probable cause, see § 23.11 *infra.*

When an arrest is made, with or without a warrant, upon probable cause to believe that a particular individual has committed an offense but the police arrest the wrong individual, their arrest is nonetheless legal if (i) they honestly believe that the person arrested is the individual sought and (ii) they have probable cause for this belief. *Hill v. California,* 401 U.S. 797 (1971).

Fourth Amendment restrictions on the amount of physical force that can be used to effect an arrest or other seizure are the subject of a body of case law emanating from *Tennessee v. Garner*, 471 U.S. 1 (1985). *See, e.g.*, *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and cases discussed; *Tolan v. Cotton*, 134 S. Ct. 1861 (2014); *Mullenix v. Luna*, 136 S. Ct. 305, 308-10 (2015) (per curiam); *State v. White*, 142 Ohio St. 3d 277, 280-85, 29 N.E.3d 939, 944-47 (2015). In some circumstances, violations of these restrictions may require the exclusion of evidence produced by the excessive force. *See Rochin v. California,* 342 U.S. 165 (1952)*; cf.* § 23.14 i*nfra*, discussing *Winston v. Lee*, 470 U.S. 753 (1985), and cognate cases.

§ 23.08 SEARCHES INCIDENT TO ARREST

§ 23.08(a) The "Search Incident to Arrest" Doctrine

Warrantless searches of an arrested person's clothing and body surfaces are routinely permitted incident to a valid arrest. *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v.*

Florida, 414 U.S. 260 (1973); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174-76, 2182-83 (2016); *United States v. Chadwick,* 433 U.S. 1, 14 (1977) (dictum). "[A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *New York v. Belton,* 453 U.S. 454, 457 (1981). The rationale for this exception to the warrant requirement is that "[w]hen a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless 'search of the arrestee's person and the area "within his immediate control" construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" *United States v. Chadwick,* 433 U.S. at 14. This rationale has crucial implications for the *scope* of the search permitted incident to arrest (as explained in the following paragraphs) but does not require any case-by-case factual showing of a likelihood that any particular arrestee possesses a weapon or destructible evidence. Rather, what has evolved – in the interest of a bright-line rule – is the treatment of a valid arrest as *generically* posing the requisite likelihoods and *categorically* authorizing a search calculated to address them. "The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested [actually] possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo,* 443 U.S. 31, 35 (1979). *See also Birchfield v. North Dakota*, 136 S. Ct. at 2183 (under "the search-incident-to-arrest exception, . . . [the arresting officer's] authority [to search the arrestee's person] is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case."); *Illinois v. LaFayette,* 462 U.S. 640, 644-45 (1983) (dictum); *Michigan v. Long,* 463 U.S. 1032, 1048, 1049 & n.14 (1983) (dictum). *But see State v. Conn*, 278 Kan. 387, 391-94, 99 P.3d 1108, 1112-13 (2003) ("In Kansas, the permissible circumstances, purposes, and scope of a search incident to arrest are controlled by statute." Because the statute authorizing search incident to arrest states the permissible "purpose" of such a search as being "'(a) Protecting the officer from attack'"; "'(b) Preventing the person from escaping'"; or "'(c) Discovering the fruits, instrumentalities, or evidence of the crime'" . . . this court rejected the view that case law applying the Fourth Amendment . . . meant that a search of an automobile could automatically be conducted when an occupant was arrested." Because "the trooper in this case did not indicate any concern for safety," "the search cannot be justified as a search incident to arrest."). A search incident to arrest may be made either at the site of the arrest, *United States v. Robinson*, 414 U.S. at 224-26, 236, or at the stationhouse to which the arrested person is taken, *United States v. Edwards,* 415 U.S. 800 (1974).

The rule's rationales do circumscribe it in two principal ways. First, they preclude the extension of the authority for warrantless search to generic situations that are *not* conceived to be akin to arrests from the standpoint of inciting probable armed resistance or evidence destruction. *See*, *e.g.*, *Knowles v. Iowa*, 525 U.S. 113, 116-19 (1998) (the rationales of the "search incident to arrest" doctrine do not justify a full search of a vehicle when the police stop a motorist for speeding and issue a citation rather than arresting him); *Virginia v. Moore*, 553 U.S. 164, 176-77 (2008) (reaffirming *Knowles*) (dictum); *Sibron v. New York,* 392 U.S. 40, 67 (1968) ("a search

incident to a lawful arrest may not precede the arrest"). Second, searches that are innately too intrusive or too expansive to be justified by concerns about armed resistance or evidence destruction cannot be sustained under the search-incident-to-arrest exception to the warrant requirement. *See*, *e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2493 (2014), discussed further in § 23.08(b) *infra* ("when a cell phone is seized incident to arrest," a search "warrant is generally required before . . . a search" may be made of digital information on the phone); *Commonwealth v. Morales*, 462 Mass. 334, 335, 344, 968 N.E.2d 403, 405, 411-12 (2012) (a search incident to arrest that resulted in exposure of the defendant's buttocks to public view on a public street constituted a "strip search" that violated both the federal and state constitutions). *Cf. Birchfield v. North Dakota*, 136 S. Ct. at 2177-78, 2184-85 (holding that a motorist who has been arrested for drunk driving can be compelled to submit to a warrantless breath test to determine his or her intoxication level but cannot be compelled to submit to a blood draw because "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test" (*id*. at 2184)).

"[T]he search-incident-to-arrest rule actually comprises 'two distinct propositions': 'The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.'" *Id*. at 2175-76. The limits of the latter proposition have been established by a series of Supreme Court decisions whose upshot is that searches incident to arrest are restricted to "the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon [to attack the arresting officer] or destructible evidence." *Chimel v. California,* 395 U.S. 752, 763 (1969). *See also United States v. Chadwick,* 433 U.S. 1, 14 (1977); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 326 (1979). "That limitation, which . . . define[s] the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. . . . If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Arizona v. Gant*, 556 U.S. 332, 339 (2009). Police officers could not, for example, predicate their entry and search of a house on the arrest of a respondent outside the house. *See, e.g., Vale v. Louisiana,* 399 U.S. 30 (1970); *Shipley v. California,* 395 U.S. 818 (1969). *See also Arizona v. Gant*, 556 U.S. at 343-44 (narrowing previous rulings in *New York v. Belton* and *Thornton v. United States*, 541 U.S. 615, 617 (2004), to "hold that the *Chimel* rationale authorizes police to 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," but announcing an additional rule, which "does not follow from *Chimel*," to permit a search incident to arrest in certain "circumstances unique to the vehicle context," see § 23.26 *infra*).

Within the "wingspan" area defined by *Chimel*, a warrantless search incident to arrest is valid if – but only if – the arrest itself is valid under the doctrines summarized in § 23.07 *supra*. *See*, *e.g.*, *Beck v. Ohio*, 379 U.S. 89 (1964).

§ 23.08(b) Searches of Containers in the Possession of Arrested Persons

An issue that frequently arises in cases of searches incident to arrest or *Terry* frisks is whether these warrantless search powers extend to a closed container that the respondent is carrying, such as a knapsack or gym bag.

In *United States v. Chadwick,* 433 U.S. 1 (1977), the Court implied that large locked receptacles, such as luggage, may be taken from an arrested person as a matter of routine incident to arrest. But the Court also stated explicitly (although in *dictum*) that containers seized in this manner may not thereafter be *opened* without a warrant based upon probable cause. *Id.* at 14-16 & n.10. *See also Horton v. California,* 496 U.S. 128, 142 n.11 (1990) (dictum); *United States v. Place,* 462 U.S. 696, 701 n.3 (1983) (dictum).

In *New York v. Belton,* 453 U.S. 454 (1981), which the Court later circumscribed in *Arizona v. Gant*, 556 U.S. 332 (2009), the Court appeared to take a contrary position. *Belton* upheld an arresting officer's opening of a zippered pocket in a leather jacket found on the seat of a car following arrest of the car's occupants. In *dictum* the Court in *Belton* stated a very broad rule that the scope of search incident to arrest of a motorist extends to "the contents of any containers found within the passenger compartment," *Belton*, 453 U.S. at 460, including "luggage, boxes, [and] bags," *id.* at 460-61 n.4, "whether [the container] . . . is open or closed," *id.* at 461.

The subsequent opinion in *United States v. Ross,* 456 U.S. 798 (1982), further compounds the confusion. First, the Court in *Ross* gratuitously comments that "[a] container carried at the time of arrest *often* may be searched without a warrant and even without any specific suspicion concerning its contents." *Id.* at 823 (emphasis added). Second, the Court asserts (in the different context of a *Carroll* vehicle search, see § 23.24 *infra*), that "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case," *id.* at 822. The latter observation appears to rule out any distinction between "paper bags, locked trunks, lunch buckets, and orange crates," *id.,* so far as the Fourth Amendment privacy interests of the respective possessors of these containers is concerned. Within the framework of the search-incident-to-arrest doctrine, the containers might still be distinguished, allowing search of the paper bag and not the trunk, on the ground that the arrestee's ability to seize weapons or destructible evidence from the former is greater. That distinction is, however, difficult to reconcile with the holding of *United States v. Robinson,* 414 U.S. at 235, that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon 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 upon the person of the suspect." *Belton* not merely quotes this *Robinson* language but draws from it the conclusion that the power of search incident to arrest encompasses "containers [which are] . . . such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." 453 U.S. at 461. Differences in the

accessibility of various containers to the arrestee can hardly be thought decisive of the application of a doctrine that permits search of containers that could not hold a weapon or evidence in the first place. *See Thornton v. United States*, 541 U.S. 615, 623 (2004) (*Belton* rule does not "depend[ ] on differing estimates of what items were or were not within reach of an arrestee at any particular moment"). So *Belton* rests the search-incident-to-arrest power not upon the risk that the arrestee may grab the contents of the container but upon the concept that a "lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have" in containers within his or her reach. *Id.* But if this is so, the question arises why the search-incident-to-arrest power is restricted to the area within the arrestee's reach, as *Belton* concedes that it is (*id.* at 457-58, 460), and as *Gant* declares unequivocally that it is (*see Arizona v. Gant*, 556 U.S. at 335 ("a vehicle search incident to a recent occupant's arrest" is not constitutionally "authorize[d]" "after the arrestee has been secured and cannot access the interior of the vehicle")). *Chadwick* squarely holds that the privacy interests inhering in "property in the possession of a person arrested in public" (433 U.S. at 14) but outside of his or her reach are *not* dissipated by the fact of a lawful custodial arrest. 433 U.S. at 13-16. And it adds that "[u]nlike searches of the person, *United States v. Robinson,* 414 U.S. 218 (1973) . . ., searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." 433 U.S. at 16 n.10.

This area of Fourth Amendment law was muddied still further when the Court in *California v. Acevedo*, 500 U.S. 565 (1991), revised the rules governing a *Carroll* vehicle search (see § 23.24 *infra*) to eliminate the distinction that *Ross*, in explaining the import of *Chadwick* and *Arkansas v. Sanders*, 442 U.S. 753 (1979), drew between what the police may do when they have probable cause to believe that a seizable object is concealed in a vehicle and what they may do when they have probable cause merely to believe that a seizable object may be contained within some particular receptacle carried in the vehicle. The *Acevedo* decision concerned solely a *Carroll* vehicle search and accordingly did not address the nature and scope of the "search incident to arrest" doctrine.

In *Arizona v. Gant* in 2009, the Court disavowed the lower courts' "broad reading of *Belton*" as authorizing "a vehicle search . . . incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search." *Gant*, 556 U.S. at 343. Explaining this curtailment of the lower courts' expansive applications of *Belton*, the *Gant* Court stated:

> "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would . . . untether the rule from the justifications underlying the *Chimel* exception – a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S., at 460, n. 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to 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." (*Id*.)

Although the five-Justice majority in *Gant* characterized its decision as merely a "narrow[ing]" of *Belton* (*Gant*, 556 U.S. at 348 n.9), the four dissenting Justices viewed the *Gant* majority opinion as "effectively overrul[ing]" both *Belton* and *Thornton v. United States* (*id*. at 355 (Justice Alito, dissenting, joined in pertinent part by Chief Justice Roberts and Justices Kennedy and Breyer)). Even by the shoddy standards for clarity and durability that characterize the U.S. Supreme Court's Fourth Amendment jurisprudence generally (see Justice Frankfurter's classic statement that "[t]he course of true law pertaining to searches and seizures . . . has not – to put it mildly – run smooth" (*Chapman v. United States*, 365 U.S. 610, 618 (1961) (concurring opinion)), the *Belton-Gant* caselaw is a disaster area. Its unprincipled and unstable quality gives counsel an especially strong argument for urging state high courts to reject it and adopt more protective state constitutional rules to govern this sector, as suggested in § 7.09 *supra. See, e.g.*, *State v. Gaskins*, 866 N.W.2d 1, 12-13 (Iowa 2015) ("declining to adopt *Gant*'s broad evidence-gathering purpose as a rationale for warrantless searches of automobiles and their contents incident to arrest under article I, section 8 of the Iowa Constitution" and invalidating a warrantless search of a small portable locked safe found in an automobile following the driver's arrest for marijuana possession and removal to a squad car; "We now agree with the approach taken by the courts that have rejected the *Belton* rule that authorized warrantless searches of containers without regard to the *Chimel* considerations of officer safety and protecting evidence. 'When lines need to be drawn in creating rules, they should be drawn thoughtfully along the logical contours of the rationales giving rise to the rules, and not as artificial lines drawn elsewhere that are unrelated to those rationales' . . . . ¶ . . . [W]e decline to adopt *Gant*'s alternative evidence-gathering rationale for warrantless searches incident to arrest under the Iowa Constitution because it would permit the SITA exception to swallow completely the fundamental textual rule in article I, section 8 that searches and seizures should be supported by a warrant. In other words, 'use of a [SITA] rationale to sanction a warrantless search that has nothing to do with its underlying justification – preventing the arrestee from gaining access to weapons or evidence – is an anomaly.'").

Even though *Gant* did not address (and had no reason to address) the preexisting rules governing searches of containers incident to the arrest of an individual outside the automobile context, *Gant* throws into question some of the lower court caselaw on this subject because that caselaw was expressly predicated on *Belton*. *See, e.g.*, *State v. Roach*, 234 Neb. 620, 627-30, 452 N.W.2d 262, 267-69 (1990) (concluding that *Belton* applies outside the automobile context and relying on the court's own and other courts' broad readings of *Belton* to uphold a search of a closed container in the possession of an individual arrested inside a house). Given *Gant*'s repudiation of a broad reading of *Belton*, counsel can argue that the best source of Supreme Court guidance on the proper handling of container searches incident to arrest is *Chadwick*. In States in which the courts relied on *Belton* to authorize container searches even when the container was not physically accessible to the arrestee at and after the time s/he was seized by the arresting officers, counsel can challenge that rule by invoking *Gant*'s explanation that, in the absence of "circumstances unique to the automobile context" (*Arizona v. Gant*, 556 U.S. at 335), the "search-incident-to-arrest . . . rule does not apply" when "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search" (*id*. at 339). *See also, e.g.*,

State v. Lamay, 140 Idaho 835, 839-40, 103 P.3d 448, 452-53 (2004) (pre-*Gant* decision that rejected *Belton* as inapplicable outside the automobile context and held that the customary rules on searches incident to arrest inside a dwelling do not permit the search of an arrestee's knapsack if the arrestee is handcuffed and the knapsack is "nearly fifteen feet away . . . and located in a different room"); *People v. Gokey,* 60 N.Y.2d 309, 311, 313-14, 457 N.E.2d 723, 724, 725, 469 N.Y.S.2d 618, 619, 620 (1983) (state high court, which had previously rejected *Belton* in favor of a state constitutional rule that resembles the rule the Supreme Court eventually adopted in *Gant*, applies its state constitutional rule to hold that a warrantless search of an arrestee's duffel bag was unlawful, even though the bag was "within the immediate control or 'grabbable area'" of the arrestee "at the time of his arrest" because the "defendant's hands were handcuffed behind his back and he was surrounded by five police officers and their dog" and thus the circumstances did not "support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag").

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court addressed the question "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Id*. at 2480. Distinguishing between "physical objects" and "digital content on cell phones," the Court concluded that the two governmental interests underlying "*Robinson*'s categorical rule" for searches of "physical objects" – the risks of "harm to officers and destruction of evidence" – do not have "much force with respect to digital content on cell phones." *Id*. at 2484-85. Moreover, while "*Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself," "[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals," and "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*." *Id*. at 2485. *See also id*. at 2488-89 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."); *id*. at 2489 ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone."); *id*. at 2494-95 ("Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans 'the privacies of life'" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))). Accordingly, the Court "decline[d] to extend *Robinson* to searches of data on cell phones, and h[e]ld instead that officers must generally secure a warrant before conducting such a search." *Riley v. California*, 134 S. Ct. at 2485. *See also id*. at 2494 ("even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone"); *United States v. Camou*, 773 F.3d 932, 939, 940-41, 943 (9th Cir. 2014) (a Border Patrol agent's search of an arrestee's cell phone, which was retrieved from the arrestee's vehicle, "was not roughly contemporaneous with Camou's arrest and, therefore, was not incident to arrest," because "one hour and twenty minutes passed between Camou's arrest and Agent Walla's search of the cell phone" and "a string of intervening acts occurred between Camou's arrest and the search of his cell phone" that "signaled the arrest was over" by the time of the cell phone search; the search also was not justifiable under the exigent

circumstances exception because the search "occurred one hour and twenty minutes after [Camou's] arrest," and, furthermore, "even if we were to assume that the exigencies of the situation permitted a search of Camou's cell phone to prevent the loss of cell data, the search's scope was impermissibly overbroad" in that it "went beyond contacts and call logs to include a search of hundreds of photographs and videos stored on the phone's internal memory"; the search also was not justifiable under the automobile exception because *Riley*'s reasoning requires that cell phones be classified as "*non*-containers for purposes of the vehicle exception to the warrant requirement"); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (discussed in § 23.15(d) concluding paragraph *infra*).

§ 23.08(c) "Inventory" Search Incident to Incarceration

If an arrested person is to be incarcerated, the police may remove, examine, and inventory everything in his or her possession at the lockup. *Illinois v. LaFayette,* 462 U.S. 640, 646-48 (1983). This "inventory search" power permits the opening, without a warrant, of any container carried by the person, whether or not the police have any reason to suspect its contents and whether or not they could practicably secure the container during the period of the person's incarceration without opening it up. *Id.* Presumably the rule of *Riley v. California*, 134 S. Ct. 2473 (2014) – which bars the application of the "search incident to arrest" doctrine to the digital content of a cell phone because "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person," *id*. at 2489; see also § 23.08(b) *supra*, discussing *Riley* – applies as well in the context of "inventory" searches incident to incarceration and requires that such a search be authorized either by a search warrant or by some "case-specific exception" that "justif[ies] a warrantless search of a particular phone" (*id*. at 2494). *See also State v. Granville*, 423 S.W.3d 399, 402 (Tex. Crim. App. 2014) (pre-*Riley* decision holding that a search warrant was needed for the police to examine the contents of a cell phone that was taken from the defendant "during the booking procedure and placed in the jail property room": the arrestee, a "high-school student[,] did not lose his legitimate expectation of privacy in his cell phone simply because it was being stored in the jail property room"; the officer "could have seized appellant's phone and held it while he sought a search warrant, but, even with probable cause, he could not 'activate and search the contents of an inventoried cellular phone' without one").

Inventory searches must be conducted "in accordance with established inventory procedures." *Illinois v. LaFayette,* 462 U.S. at 648. *See id.* at 644 (explaining that the validity of inventory searches is to be determined by the principles of *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), a decision that calls for standardized procedures to control "'the discretion of the official in the field,'" 440 U.S. at 655); *see also Colorado v. Bertine,* 479 U.S. 367, 372-76 (1987) (analogizing inventory searches of automobiles to inventory searches of arrested individuals and reaffirming that inventory searches of automobiles must be conducted in accordance with "standard criteria"); *Florida v. Wells*, 495 U.S. 1, 4 (1990); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000).

Jail personnel may also conduct an intrusive visual search of the body – including body cavities – of an individual who is being admitted into the general population of a holding facility, for the purpose of detecting and confiscating any materials that would compromise the facility's security. *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012).

§ 23.08(d) Search Prior to the Point of Arrest

The general rule is that "a search incident to a lawful arrest may not precede the arrest." *Sibron v. New York,* 392 U.S. 40, 67 (1968). However, the Court has recognized two narrow exceptions to this rule.

If the search and the arrest are parts of a single course of events and "the formal arrest followed quickly on the heels of the challenged search," *Rawlings v. Kentucky,* 448 U.S. 98, 111 (1980), then it is not "particularly important that the search preceded the arrest rather than vice versa." *Id.* However, the police officer must, of course, have "probable cause to place [the respondent] under arrest" at the time of the search, *id.,* and "[t]he fruits of the search of [the respondent's] person . . . [cannot be] necessary to support probable cause to arrest." *Id.* at 111 n.6. *Accord, Sibron v. New York,* 392 U.S. at 63 ("[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification"). *See also People v. Reid*, 24 N.Y.3d 615, 617, 619, 620, 26 N.E.3d 237, 238, 239, 240, 2 N.Y.S.3d 409, 410, 411, 412 (2014) (Although a search can precede an arrest as long as "the two events were substantially contemporaneous," the officer "testified [that], but for the search there would have been no arrest at all," notwithstanding that "probable cause to arrest the driver existed before the search," and "[w]here that is true, to say that the search was incident to the arrest does not make sense."; "[T]he 'search incident to arrest' doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to be applied.").

In cases in which the search and the arrest are not a single course of events, a search prior to arrest nevertheless may be valid if it is restricted to the "very limited search necessary to preserve" some evidence of "ready destructibility" that the suspect would otherwise likely destroy. *Cupp v. Murphy,* 412 U.S. 291, 296 (1973). Thus, in *Cupp,* the Court approved the officers' taking scrapings of what appeared to be dried blood from the fingernails of a suspect, at a point in time when the police already had probable cause to arrest the suspect, even though the formal arrest did not occur until a month later. The Court emphasized that the scope of the search must be strictly limited to the measures needed to "preserve . . . highly evanescent evidence," *id.* at 296, and that "a full *Chimel* search [the type of extensive search permitted incident to arrest upon probable cause] would [not be] . . . justified . . . without a formal arrest and without a warrant." *Id.* See the discussion in *Illinois v. McArthur*, 531 U.S. 326, 331-34 (2001), of police authority to prevent alerted suspects from destroying evidence; and see the cases dealing with a similar issue in the context of building searches, discussed in § 23.22(c) *infra*. Note that this authority depends upon the possession by the police of probable cause to believe that seizable

evidence exists and is within the capacity of the suspect to destroy. *See Illinois v. McArthur*, 531 U.S. at 334 ("We have found no case in which this Court has held unlawful a temporary seizure *that was supported by probable cause* and was designed to prevent the loss of evidence . . . . (emphasis added)); *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (in cases in which *there is probable cause to arrest a suspect*, "the need to preserve evidence for later use at trial" is one of the justifications for allowing a warrantless search incident to arrest). If the police lack probable cause either (i) to search for seizable evidence or (ii) to arrest a suspect, they have no power to seize evidence in the first place, *see*, *e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993), so they cannot justify a "preventive" search on the theory that it is necessary to preserve destructible evidence.

§ 23.09 CIRCUMSTANCES JUSTIFYING A *TERRY* STOP

In *Terry v. Ohio,* 392 U.S. 1 (1968), the Supreme Court held that a state could constitutionally authorize its law enforcement officers to conduct a "stop" – a brief on-the-street detention for the purpose of inquiry and observation – under circumstances giving rise to a rational suspicion of criminal activity but not amounting to the probable cause necessary for arrest. *Terry* "created an exception to the requirement of probable cause, an exception whose 'narrow scope' . . . [the Supreme] Court 'has been careful to maintain.'" *Ybarra v. Illinois,* 444 U.S. 85, 93 (1979); *see also Dunaway v. New York,* 442 U.S. 200, 207-10 (1979); *Florida v. Royer,* 460 U.S. 491, 499 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). *See also Kaupp v. Texas*, 538 U.S. 626, 630 (2003).

The *Terry* stop must rest upon specific, identifiable facts that, "judged against an objective standard," *Terry v. Ohio,* 392 U.S. at 21; *see Delaware v. Prouse,* 440 U.S. 648, 654 (1979), give rise to "a reasonable and articulable suspicion that the person seized is engaged in criminal activity," *Reid v. Georgia,* 448 U.S. 438, 440 (1980) (per curiam); *see Brown v. Texas,* 443 U.S. 47, 51-53 (1979). Considering "the totality of the circumstances," the "detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez,* 449 U.S. 411, 417-18 (1981); *see also Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989) (dictum); *Kolender v. Lawson,* 461 U.S. 352, 356 n.5 (1983) (dictum). Conduct or circumstances that "describe a very large category of presumably innocent [persons]" is not sufficient, *Reid v. Georgia,* 448 U.S. at 441; *Brown v. Texas,* 443 U.S. at 52; *cf. Ybarra v. Illinois,* 444 U.S. at 91; *compare United States v. Sokolow*, 490 U.S. at 8-11; the "particularized suspicion" must be focused upon "the particular individual being stopped," *United States v. Cortez,* 449 U.S. at 418; *see also, e.g.*, *United States v. Black*, 707 F.3d 531, 540-41 (4th Cir. 2013); *State v. Teamer*, 151 So. 3d 421, 427-28 (Fla. 2014) ("The discrepancy between the vehicle registration and the color the deputy observed does present an ambiguous situation, and the Supreme Court has recognized that an officer can detain an individual to resolve an ambiguity regarding suspicious yet lawful or innocent conduct. . . . However, the suspicion still must be a reasonable one. . . . In this case, there simply are not

enough facts to demonstrate reasonableness. . . . [T]he color discrepancy here is not 'inherently suspicious' or 'unusual' enough or so 'out of the ordinary' as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV. ¶ The law allows officers to draw rational inferences, but to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch. Doing so would be akin to finding reasonable suspicion for an officer to stop an individual for walking in a sparsely occupied area after midnight simply because that officer testified that, in his experience, people who walk in such areas after midnight tend to commit robberies. Without more, this one fact may provide a 'mere suspicion,' but it does not rise to the level of a reasonable suspicion."). Information "completely lacking in indicia of reliability would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams,* 407 U.S. 143, 147 (1972) (dictum). *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (an anonymous tip which lacks "moderate indicia of reliability" will not justify a stop, and this is the rule even where the tip contains an "accurate description of a subject's . . . location and appearance"; "[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"; and the *Terry* requirement of "standard pre-search reliability testing" in terms of reasonable suspicion is not relaxed in the cases where the tip asserts that the subject is in possession of an illegal firearm); *United States v. Freeman*, 735 F.3d 92, 97-103 (2d Cir. 2013); *United States v. Brown*, 448 F.3d 239 (3d Cir. 2006); *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003); *United States v. Mallides,* 473 F.2d 859 (9th Cir. 1973); *Irwin v. Superior Court,* 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969), *modified in In re Tony C.,* 21 Cal. 3d 888, 894, 582 P.2d 957, 960, 148 Cal. Rptr. 366, 369 (1978); *cf. Navarette v. California*, 134 S. Ct. 1683, 1686, 1688-90 (2014); *United States v. Ramsey,* 431 U.S. 606, 612-15 (1977); *Jernigan v. Louisiana,* 446 U.S. 958, 959-60 (1980) (opinion of Justice White, dissenting from denial of *certiorari*).

The power of the police to conduct a *Terry* stop is more limited when the stop is for the purpose of "investigat[ing] past criminal activity . . . rather than . . . to investigate ongoing criminal conduct." *United States v. Hensley,* 469 U.S. 221, 228 (1985). The *Terry* decision itself and almost all of the caselaw establishing standards for *Terry* stops involved situations in which the "police stopped or seized a person because they suspected he was about to commit a crime . . . or was committing a crime at the moment of the stop." 469 U.S. at 227. In such situations the stop is justified by the exigencies of crime prevention and the need to avert an imminent threat to public safety. *Id.* at 228. "A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly . . . [and] officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop." *Id.* at 228-29. To conduct a stop for the purpose of investigating a completed crime, a police officer must "have a reasonable suspicion, grounded in specific and articulable facts, that [the] . . . person . . . was involved in or is wanted in connection with a completed felony." *Id.* at 229. Moreover, in authorizing such investigatory stops in *United States v. Hensley,* the Court strongly indicated that these stops may be conducted only in cases in which

the police previously "have been unable to locate [the] . . . person," 469 U.S. at 229, and therefore need to exercise the "stop" power in order to prevent "a person they encounter" (*id.*) from "flee[ing] in the interim and . . . remain[ing] at large." *Id. See id.* at 234-35 (emphasizing that the defendant was "at large" and that the officers who conducted the stop could reasonably conclude, on the basis of a "wanted flyer," that "a warrant might have been obtained in the period after the flyer was issued"). It is only the inability to find the defendant or respondent in a fixed location – to fully "choose the time and circumstances of the stop" (*id.* at 228-29) – that creates the exigency necessary to conduct a stop for the purpose of investigating a completed crime. *See id.* at 228-29; *see also Brown v. Texas,* 443 U.S. at 51. Thus, at least arguably, when the police have known the respondent's address and failed to avail themselves of the opportunity of conducting a purely voluntary "contact" at the respondent's home (see § 23.04(a) *supra*), they may not use their suspicions about the respondent's involvement in a completed crime to conduct a *Terry* stop.

For discussion of some of the factors commonly considered by the courts in gauging whether there was an adequate basis for a *Terry* stop, see § 23.11 *infra.*

§ 23.10 CIRCUMSTANCES JUSTIFYING A *TERRY* FRISK; THE PLAIN TOUCH DOCTRINE

In *Terry v. Ohio,* 392 U.S. 1 (1968), the Court ruled that a state could constitutionally authorize not only a "stop" but also, under appropriate circumstances, a "frisk": – that is, a pat-down for weapons or a similar "self-protective" search. The frisk must be made incidental to a valid accosting or stop. *See, e.g.*, *State v. Serna*, 235 Ariz. 270, 275, 331 P.3d 405, 410 (2014) (a *Terry* frisk could not be conducted during a consensual encounter between a civilian and a police officer even though the civilian admitted to having a gun because "the initial stop was based on consent, not on any asserted suspicion of criminal activity," and "*Terry* allows a frisk only if two conditions are met: officers must reasonably suspect both that criminal activity is afoot and that the suspect is armed and dangerous").

A *Terry* frisk cannot be conducted for the purpose of seeking evidence; it can only be conducted for the purpose of discovering weapons that might be used against the officer. *See Sibron v. New York,* 392 U.S. 40, 64-65 (1968); *Ybarra v. Illinois,* 444 U.S. 85, 93-94 (1979); *Michigan v. Long,* 463 U.S. 1032, 1049-52 & n.16 (1983); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *Florida v. J.L.*, 529 U.S. 266, 269-70 (2000). To justify a frisk, the officer needs more than the reasonable suspicion of criminal activity that will justify a stop and needs more than merely a hunch that the suspect might be armed. The officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the conclusion that the officer "is dealing with an armed and dangerous individual," *Terry v. Ohio,* 392 U.S. at 21, 27; *see Sibron v. New York,* 392 U.S. at 63-64; *Ybarra v. Illinois,* 444 U.S. at 92-93; *Michigan v. Long,* 463 U.S. at 1049-52 & nn.14, 16; *Minnesota v. Dickerson*, 508 U.S. at 373; *Florida v. J.L.*, 529 U.S. at 269-72; *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Dunaway v. New York*, 442 U.S. 200, 209 n.11 (1979) (dictum); *State v. Serna*,

235 Ariz. at 275, 331 P.3d at 410 ("mere knowledge or suspicion that a person is carrying a firearm" will not suffice because *Terry* requires "that a suspect be 'armed *and* presently dangerous'"). *But cf. Samson v. California*, 547 U.S. 843, 846, 851-52 (2006) (police officer, "who was aware that [Samson] was on parole" and stopped him based on a belief that there was "an outstanding parole warrant" for him but then confirmed that no such warrant had been issued, could nonetheless frisk Samson because Samson's expectation of privacy was diminished by having signed a statutorily-required agreement to a parole condition of being subject to a "'search or seizure by a parole officer or other peace officer . . . with or without cause'"); *compare State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) ("reject[ing] the holding of *Samson* under the Iowa Constitution" and "conclud[ing] that a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search").

In addition to limiting the situations in which an officer can make a frisk, the Fourth Amendment also regulates the manner in which frisks may be conducted. A frisk must be "limited to that which is necessary for the discovery of weapons." *Terry v. Ohio,* 392 U.S. at 26. *See Sibron v. New York,* 392 U.S. at 65-66; *United States v. Brignoni-Ponce,* 422 U.S. 873, 880-82 (1975); *Pennsylvania v. Mimms,* 434 U.S. 106, 111-12 (1977) (per curiam); *Florida v. Royer,* 460 U.S. 491, 500 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. at 373. Emphasizing that the frisk approved in *Terry* consisted of "a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault" and that it was only after the discovery of such objects that "the officer in *Terry* place[d] his hands in the pockets of the men he searched," the Court in *Sibron v. New York* condemned a frisk in which the officer, "with no attempt at an initial limited exploration for arms, . . . thrust his hand into [the defendant's] pocket." 392 U.S. at 65. *See also State v. Privott*, 203 N.J. 16, 31-32, 999 A.2d 415, 424-25 (2010) (police officer exceeded the permissible scope of a *Terry* frisk by "lift[ing] defendant's tee-shirt to expose defendant's stomach, and in doing so, observ[ing] a plastic bag with suspected drugs in the waistband of defendant's pants"). In *Minnesota v. Dickerson,* 508 U.S. at 378-79, the Court held that a "police officer . . . overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*" by "continu[ing] exploration of respondent's pocket after having concluded that it contained no weapon." The frisk must be "limited to those areas in which a weapon may be placed or hidden." *Michigan v. Long*, 463 U.S. at 1049 (during a *Terry* search of the passenger compartment of an automobile, the *Terry* frisk doctrine permits officers to search only those areas that could contain a weapon and were accessible to the suspect). *See also United States v. Askew*, 529 F.3d 1119, 1123, 1127-44 (D.C. Cir. 2008) (*en banc*) (police officers' partial unzipping of the defendant's outer jacket during a show-up to allow the victim to see whether the defendant's sweatshirt matched that of the perpetrator exceeded the lawful bounds of a *Terry* frisk).

If, in the course of a *Terry* frisk, "a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity [as contraband]

immediately apparent," the officer may be able to seize the object pursuant to the "plain touch" (sometimes called the "plain feel") doctrine. *Minnesota v. Dickerson*, 508 U.S. at 373, 375-76. For the "plain touch" doctrine to justify a seizure, "the officer who conducted the search . . . [had to have been] acting within the lawful bounds marked by *Terry*" at the time s/he discovered the contraband (*id*. at 377); the "incriminating character of the object . . . [had to have been] immediately apparent" to the officer without, for example, engaging in "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'" after it was already apparent that the "pocket . . . contained no weapon" (*id*. at 378-79); the officer's recognition of the contraband nature of the object must reach the level of "probable cause" (*id*. at 377); and it must be evident from the circumstances that the officer was not exploiting an authorized *Terry* frisk for weapons to engage in "the sort of evidentiary search that *Terry* expressly refused to authorize . . . and that [the Court has] . . . condemned in subsequent cases" (*id*. at 378). *But cf*. *People v. Diaz*, 81 N.Y.2d 106, 110-12 & n.2, 612 N.E.2d 298, 301-02 & n.2, 595 N.Y.S.2d 940, 943-44 & n.2 (1993) (rejecting the "plain touch" doctrine altogether on state constitutional grounds).

§ 23.11 FACTORS COMMONLY RELIED ON BY THE POLICE TO JUSTIFY AN ARREST OR A *TERRY* STOP OR FRISK

Invariably, the police invoke the same general factors in case after case to justify their decisions to arrest or to conduct a *Terry* stop and frisk. In part, this may be due to police experience that these factors are reliable indicators of criminal conduct. In part, it may be because police officers have learned the proper formulaic responses necessary in order to obtain judicial ratification of their actions. The following subsections discuss some of the more controversial factors.

§ 23.11(a) "High Crime Neighborhood"

Police routinely cite the high crime rate in a neighborhood to justify a stop or an arrest. Although the prevalence of crime in a certain area may be of some relevance in determining probable cause or articulable suspicion, *see Carroll v. United States,* 267 U.S. 132, 159-60 (1925); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), the Supreme Court has indicated that this factor should be given little weight as a predicate for either an arrest or a *Terry* stop. In *Brown v. Texas,* 443 U.S. 47 (1979), the Court invalidated a *Terry* stop that was based in part on the crime-prone character of the neighborhood, saying: "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Id.* at 52. *Accord*, *Illinois v. Wardlow*, 528 U.S. at 124 ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (citing *Brown v. Texas*, *supra*)); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit

assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion."); *People v. Shabaz,* 424 Mich. 42, 60-61, 378 N.W.2d 451, 459 (1985); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect's presence in a "known narcotics location," even when combined with his flight from the police and a "bulge in the pocket of his jacket," did not provide the requisite basis for a *Terry* stop: "Given the unfortunate reality of crime in today's society, many areas of New York City, at one time or another, have probably been described by the police as 'high crime neighborhoods' or 'narcotics-prone locations.'"). Mere presence in a crime-ridden locale also cannot supply the predicate for a *Terry* frisk. *See Ybarra v. Illinois,* 444 U.S. 85, 93-96 (1979) (holding that the defendant's presence in a sparsely occupied one-room bar "at a time when the police had reason to believe that the bartender would have heroin for sale," 444 U.S. at 91, did not justify a reasonable belief that the defendant was armed and dangerous).

§ 23.11(b) Failure To Respond to Police Inquiry; Flight

Frequently the police detain or arrest an individual because the individual refused to answer questions or because s/he walked or ran away when the police attempted to question him or her.

When suspects choose to answer the questions of the police, "the responses they give to [the] officers' questions" can be considered in the calculus of probable cause or articulable suspicion. *United States v. Ortiz*, 422 U.S. 891, 897 (1975). It is not clear, however, whether (and, if so, to what extent) a refusal to answer inquiries may be given weight in justifying a stop or arrest. In a number of cases, a majority or plurality of the Supreme Court or an individual Justice has stated that a suspect's refusal to answer police questions cannot provide a predicate for satisfaction of the Fourth Amendment criteria for a *Terry* stop or an arrest. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business"; an individual has the "right to . . . remain silent in the face of police questioning"); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (a suspect's "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure"); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (a "detainee is not obliged to respond" to a police officer's questions); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Justice Brennan, concurring) (a *Terry* suspect "must be free . . . to decline to answer the questions put to him"); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (a suspect's "refusal to listen [to police questions] or answer does not, without more, furnish . . . grounds" for a *Terry* stop); *Terry v. Ohio*, 392 U.S. at 34 (Justice White, concurring) (a suspect's "refusal to answer furnishes no basis for an arrest"). Similar statements can be found in lower court opinions. *See, e.g.*, *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1985); *People v. Howard*, 50 N.Y.2d 583, 591-92, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 584 (1980). In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), however, the Court rejected a Fourth Amendment challenge to a "stop and identify" statute that allowed an officer to detain a person to "'ascertain his identity'" if the "'circumstances . . . reasonably indicate that the person has committed, is committing or is

about to commit a crime'" and that permitted the suspect's failure to give the officer his or her name under these circumstances to be punished criminally as "'obstruct[ing] and delay[ing] . . . a public officer in attempting to discharge his duty.'" *Id*. at 181-82. In upholding the statute, the Court stated that "[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop," as long as the "statute does not alter the nature of the stop itself . . . [–] does not change its duration . . . or its location" (*id*. at 187-88, 189). The *Hiibel* ruling is expressly limited to situations (and, thus, jurisdictions) in which a statute authorizes an arrest of an individual for refusing to divulge his or her name during a *Terry* stop. *See id*. at 187-88 (explaining that prior Court statements, such as those quoted above, regarding a suspect's right to refuse to answer questions concern the nature and import of Fourth Amendment protections while the *Hiibel* "case concerns a different issue, . . . [in that] the source of the legal obligation arises from Nevada state law, not the Fourth Amendment"). *See also, e.g.*, *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 222, 99 P.3d 1125, 1134 (2004) (rejecting the prosecution's *Hiibel* argument because "[u]nlike the State of Nevada, we have no statute requiring persons to identify themselves . . . [and thus] *Hiibel* is clearly distinguishable from this case"). Moreover, even in jurisdictions possessing a statute such as the one upheld in *Hiibel*, "the statutory obligation does not go beyond answering an officer's request to disclose a name" (*Hiibel,* 542 U.S. at 187), and thus a suspect's failure to answer police questions about other matters presumably cannot be factored into the calculus of probable cause or articulable suspicion. *See id*. at 185 (explaining that "the Nevada Supreme Court . . . [had] interpreted . . . [the applicable statute] to require only that a suspect disclose his name. . . . 'The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists' . . . . As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means – a choice, we assume, that the suspect may make – the statute is satisfied and no violation occurs."); *and see id*. at 187-88 (explaining that a state statutory requirement that "a suspect . . . disclose his name in the course of a valid *Terry* stop is consistent with" "the purpose, rationale, and practical demands of a *Terry* stop" and "does not alter the nature of the stop itself"). Finally, even under a statute such as the one upheld in *Hiibel*, the initial stop that prompts the question about identity must be "based on reasonable suspicion, satisfying the Fourth Amendment requirements" for *Terry* stops (*id*. at 184; *see id*. at 188; *see also, e.g.*, *Commonwealth v. Ickes*, 582 Pa. 561, 873 A.2d 698 (2005) (striking down a "stop and identify" statute that, unlike the one in *Hiibel*, failed to require a valid *Terry* stop as a predicate for the request for identification)); "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" (*Hiibel*, 542 U.S. at 188); and it must be apparent from the circumstances that "[t]he officer's request [for identification] was . . . not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence" (*id*. at 189).

Flight may be relevant to the determination of probable cause or articulable suspicion, *see Illinois v. Wardlow*, 528 U.S. at 124-25; *Sibron v. New York,* 392 U.S. 40, 66-67 (1968), but it is not dispositive and cannot, in and of itself, supply the basis for an arrest or a stop. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. at 124 ("flight," although "suggestive" of "wrongdoing," "is not

necessarily indicative of wrongdoing"); *United States v. Green,* 670 F.2d 1148, 1152 (D.C. Cir. 1981); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect's flight from the police, even when combined with his presence in a "known narcotics location" and a "bulge in the pocket of his jacket," did not provide the requisite basis for a *Terry* stop). Moreover, unless the flight occurs under circumstances in which it is reasonable to infer guilty knowledge, the flight cannot be considered at all. *See, e.g., Wong Sun v. United States,* 371 U.S. 471, 482-83 (1963) ("when an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight . . . must be regarded as ambiguous conduct [and] . . . afford[s] no sure . . . inference of guilty knowledge"); *People v. Shabaz,* 424 Mich. at 64, 378 N.W.2d at 461. *See also Illinois v. Wardlow*, 528 U.S. at 128-29, 131-35 (Justice Stevens, concurring in part and dissenting in part, joined by Justices Souter, Ginsburg, and Breyer) (identifying a variety of "instances in which a person runs for entirely innocent reasons" and scenarios in which "[f]light to escape police detection . . . may have an entirely innocent motivation"). *Cf. id*. at 124 (majority opinion) (*Terry* stop was justified by the totality of circumstances, including the suspect's "unprovoked," "[h]eadlong flight" "upon noticing the police").

§ 23.11(c) Furtive Gestures

Frequently, a "furtive gesture" of the respondent's will be the impetus for a stop or an arrest. Although "deliberately furtive actions" may be considered, *Sibron v. New York,* 392 U.S. at 66, the purported furtiveness of the gestures must be carefully scrutinized to determine whether they could be equally consistent with innocent behavior. *See, e.g., Reid v. Georgia,* 448 U.S. 438, 441 (1980) (per curiam) (invalidating a *Terry* stop because the allegedly furtive "manner in which the petitioner and his companion walked through the airport" was "too slender a reed to support the seizure"); *Brown v. Texas,* 443 U.S. at 52 (striking down a *Terry* stop that was based on the defendant's "'look[ing] suspicious'" and seemingly walking away from a companion upon the arrival of the police, while in a "'high drug problem area'" (*id*. at 49); *compare Florida v*. *Rodriguez,* 469 U.S. 1 (1984) (per curiam). If the officer's assertions about "furtive gestures" are vague, defense counsel should consider pinning the officer down on precisely which gestures s/he viewed as suspicious, in order to be able to argue that these actions are consistent with innocent conduct. However, if counsel knows from interviews with the respondent or witnesses that the respondent's actions really were suspicious, counsel should refrain from giving the officer an opportunity to clarify a vague account.

§ 23.11(d) Arrests and *Terry* Stops Based on Tips from Informants

Frequently, a police officer's decision to make an arrest or a *Terry* stop is based on information obtained from a third party – either an ordinary citizen or a covert police informer. The standards regulating police reliance on such information are the same in these cases as in other contexts, such as automobile searches (see § 23.24 *infra*) and "hot pursuit" or "exigent circumstances" entries into premises (see §§ 23.19-23.20 *infra*) and are discussed in § 23.32 *infra.*

§ 23.12 POLICE SEIZURES OF OBJECTS FROM THE RESPONDENT'S PERSON; POLICE DEMANDS THAT A RESPONDENT HAND OVER AN OBJECT IN HIS OR HER POSSESSION

Any activity by a police officer or other state agent that is "designed to obtain information . . . by physically intruding on a subject's body . . . [is] a Fourth Amendment search." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam). Frequently, in the course of an on-the-street encounter between a juvenile respondent and the police, a police officer will seize an object from the respondent. Such "a seizure of personal property [is] . . . *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant . . . [or is justified by] some . . . recognized exception to the warrant requirement." *United States v. Place,* 462 U.S. 696, 701 (1983). *See, e.g., Beck v. Ohio,* 379 U.S. 89 (1964); *Torres v. Puerto Rico,* 442 U.S. 465 (1979). Objects may be seized from the respondent's person and may be searched without a warrant pursuant to the doctrine of "search incident to arrest" if all of the requirements of that doctrine, including probable cause to arrest, are satisfied. See § 23.08(b) *supra.* And if the respondent is carrying an object that is visibly contraband, in plain view of the officer, then the seizure and search of that object may be justifiable under the "plain view" doctrine. See § 23.22(b) *infra.*

Under certain narrowly defined exigent circumstances, for example, when "the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime," *Arizona v. Hicks,* 480 U.S. 321, 327 (1987), the police may be able to conduct a *"Terry*-type investigative . . . [detention]" of an object. *United States v. Place,* 462 U.S. at 709. However, this limited extension of the *Terry* doctrine has thus far been applied only in cases of "investigative detention of [a] vehicle suspected to be transporting illegal aliens," *Arizona v. Hicks,* 480 U.S. at 327 (citing *United States v. Cortez,* 449 U.S. 411 (1981), and *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975)) and a case involving a "seizure of [a] suspected drug dealer's luggage at [an] airport to permit exposure to [a] specially trained dog," *Arizona v. Hicks,* 480 U.S. at 327 (citing *United States v. Place, supra*). In each of the cited cases, the Court demanded "reasonable suspicion" of the criminal nature of the object seized, in the ordinary sense of the *Terry* doctrine (see § 23.09 *supra*), as a necessary precondition of the seizure.

The police cannot avoid these constitutional restrictions upon seizures by simply ordering the respondent to turn over the object rather than physically taking it from the respondent's possession. *See, e.g., Kelley v. United States,* 298 F.2d 310, 312 (D.C. Cir. 1961) (police officers' demand that "appellant systematically disclose the contents of his clothing, first one pocket, then another, and then another, was no less a search . . . than if the police had themselves reached into the appellant's pockets"); *United States v. Hallman,* 365 F.2d 289, 291-92 (3d Cir. 1966); *In the Matter of Bernard G.*, 247 A.D.2d 91, 94, 679 N.Y.S.2d 104, 105 (N.Y. App. Div., 1st Dep't 1998) (police officers' "ask[ing] . . . [a juvenile] to empty his pockets . . . was the equivalent of searching his pockets themselves"). In cases in which the police officers frame their demand in the form of a request and purportedly obtain the respondent's consent to the officers' taking

control of the object or searching it, the constitutionality of their actions will ordinarily turn on whether there was a valid, voluntary "consent" under the principles set forth in § 23.18(a) *infra. See, e.g., Florida v. Royer,* 460 U.S. 491 (1983); *People v. Gonzalez,* 115 A.D.2d 73, 499 N.Y.S.2d 400 (N.Y. App. Div., 1st Dep't 1986), *aff'd,* 68 N.Y.2d 950, 502 N.E.2d 1001, 510 N.Y.S.2d 86 (1986). But when the sole justification for the encounter is a *Terry*-type investigative detention, a request for consent to conduct a search of the respondent's person or possessions which is unrelated to that justification has been held impermissible, tainting the ensuing consent and a search pursuant to it. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

§ 23.13 THE RESPONDENT'S ALLEGED ABANDONMENT OF CONTRABAND UPON THE ARRIVAL OF THE POLICE: THE "DROPSIE" PROBLEM

Police officers frequently testify that, when approached or accosted, the respondent threw away an incriminating object, which was then picked up by the officer, or that the respondent disclosed the object to their sight in an attempt to hide it somewhere away from his or her person. This testimony is calculated to invoke the doctrines that the observation of objects "placed . . . in plain view" is not a search, *Rawlings v. Kentucky,* 448 U.S. 98, 106 (1980) (dictum); *see, e.g., Rios v. United States,* 364 U.S. 253, 262 (1960), and that it is neither a search nor a seizure to pick up "abandoned" objects thrown on a public road, *California v. Greenwood,* 486 U.S. 35 (1988); *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *see, e.g., Lee v. United States,* 221 F.2d 29 (D.C. Cir. 1954).

In these "dropsie" or "throw-away" cases, the defense can prevail by showing that:

(a) The alleged abandonment of the property was itself the product of unlawful police action. Thus abandonment will not be found if (i) the respondent was illegally arrested or illegally detained prior to the time of the alleged "drop" (*see Reid v. Georgia,* 448 U.S. 438 (1980) (per curiam); *United States v. Beck,* 602 F.2d 726 (5th Cir. 1979); *Commonwealth v. Harris,* 491 Pa. 402, 421 A.2d 199 (1980); *State v. Bennett,* 430 A.2d 424 (R.I. 1981)); (ii) the police were engaged in an unlawful search prior to the time of the alleged "drop" (*see United States v. Newman,* 490 F.2d 993 (10th Cir. 1974); *State v. Dineen,* 296 N.W.2d 421 (Minn. 1980)); or (iii) the police were in the course of unlawfully pursuing the respondent at the time of the alleged "drop." (Prior to the decision in *California v. Hodari D.*, *supra*, there were a number of state high court decisions holding that if police officers initiated visible pursuit of an individual without the requisite justification for an arrest or a *Terry* stop (see §§ 23.07, 23.09 *supra*) and if the individual responded by fleeing and tossing away an incriminating object, an unconstitutional "seizure" of the individual had occurred at the time when the pursuit became manifest (because, for example, the police activated a flasher or a siren or called to the individual to stand still), and the discarded object was tainted by this illegality and therefore subject to suppression. *See*, *e.g.*, *People v. Shabaz,* 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Torres,* 115 A.D.2d 93, 499 N.Y.S.2d 730 (N.Y. App. Div., 1st Dep't 1986); *Commonwealth v. Barnett,* 484 Pa. 211, 398 A.2d 1019 (1979). As a matter of federal constitutional law, those decisions have been cast in doubt by the holding in *Hodari D.* that an individual who flees when

accosted by police is not "seized" for Fourth Amendment purposes until s/he is caught and physically restrained (see § 23.04(b) first paragraph *supra*). However, the pre-*Hodari* caselaw should continue to obtain in jurisdictions where (A) state law requires a justification for the initial accosting, and that justification is lacking (*see, e.g.*, *People v. Holmes*, 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993)) or (B) the state courts have rejected *Hodari* as a matter of state law and continue to hold that a "seizure of the person" occurs at the point of initiation of a manifest police pursuit (*see*, *e.g., State v. Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992); *Commonwealth v. Stoute*, 422 Mass. 782, 665 N.E.2d 93 (1996); *Commonwealth v. Barros*, 435 Mass. 171, 755 N.E.2d 740 (2001)). *See State v. Quino*, 74 Haw. 161, 840 P.2d 358 (1992).

(b) The "dropped" object fell into a constitutionally protected area. *See, e.g., Rios v. United States,* 364 U.S. at 262 n.6 (taxicab "passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it"); *Work v. United States,* 243 F.2d 660, 662-63 (D.C. Cir. 1957) (the trash receptacle into which defendant placed phial of narcotics upon police officers' entry into a house was within the constitutionally protected "curtilage" of the home); *Commonwealth v. Ousley*, 393 S.W.3d 15, 18, 26-29, 33 (Ky. 2013) (police officers' search of "closed trash containers," which were near the defendant's home, was unlawful because "[t]he containers had not been put out on the street for trash collection" and were within the "curtilage" of the home). (Section 23.15(c) *infra* discusses the concept of "curtilage" in detail.)

(c) The police "dropsie" story is a fabrication, as it often is. *See, e.g.*, *People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 198 (N.Y. App. Div. 1st Dep't 1978). In seeking to show that the police officers are fabricating, defense counsel should cross-examine the officers on what they did prior to the "drop" that caused the respondent to disclose to them incriminating matters that were otherwise well-concealed. If plainclothes police are involved, this fact, together with the fact that the respondent had not previously encountered the officers, should be brought out. Even the habitual credulity of judges with regard to police testimony is sometimes shaken by accounts of a respondent's tossing away incriminating (and often highly valuable) objects at the approach of unannounced, unknown, and unidentifiable police.

§ 23.14 POST-ARREST CUSTODIAL TREATMENT OF THE RESPONDENT

The post-arrest treatment of persons in custody is regulated by statute or caselaw in virtually all jurisdictions. The typical post-arrest procedures are described in some detail in §§ 3.03-3.12 *supra.* Counsel should be alert to the possibility that an arresting officer's failure to follow a constitutionally or statutorily required procedure rendered the post-arrest confinement unlawful and supplies a basis for suppressing evidence obtained during the postarrest period. For example, if the police keep the respondent at the stationhouse for an undue length of time instead of bringing him or her to court expeditiously for arraignment, this will almost certainly violate local statutory requirements and may also fall afoul of the constitutional protections in this area (see § 4.28(a) *supra*), thereby tainting evidence such as confessions or lineup identifications

obtained during the period of undue delay. See § 24.15 *infra*; *cf.* § 25.07 *infra*. Similarly, if the police fail to follow local statutory requirements for notifying the respondent's parent and arranging the parent's presence during interrogation, these omissions may render the respondent's confessions suppressible. See § 24.14 i*nfra.* Police brutality during the postarrest period may render any subsequent confessions or consents to searches unlawful, see § 24.04(a) *infra.*

The postarrest period is often the stage at which the police conduct physical examinations, extractions of body fluids, hair, and so forth. An individual's body is protected by the Fourth and Fourteenth Amendments' prohibition of unreasonable searches of the person, including any procedure that is "designed to obtain information" and that involves "physically intruding on a subject's body." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam). *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) ("our cases establish that the taking of a blood sample or the administration of a breath test is a search" for Fourth Amendment purposes). Searches that intrude into the body or breach the body wall – and perhaps other intimate personal examinations – are governed by a set of constitutional principles articulated in *Schmerber v. California,* 384 U.S. 757 (1966), and *Winston v. Lee,* 470 U.S. 753 (1985). The "individual's interests in privacy and security are weighed against society's interests in conducting the [search] procedure . . . [in order to determine] whether the community's need for evidence outweighs the substantial privacy interests at stake." *Winston v. Lee,* 470 U.S. at 760. *Compare, e.g.*, *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1513, 1518, 1521, 1523 (2012) (jail's policy of requiring that "every detainee who will be admitted to the general population . . . undergo a close visual inspection while undressed," notwithstanding the absence of "reasonable suspicion of a concealed weapon or other contraband," did not violate the Fourth Amendment, given the "undoubted security imperatives involved in jail supervision" and the "reasonable balance [that had been struck] between inmate privacy and the needs of the institution[ ]"), *with United States v. Fowlkes*, 804 F.3d 954, 958, 966 (9th Cir. 2015) ("the forcible removal of an unidentified item of unknown size from Fowlkes' rectum [during processing at jail after a strip search] by officers without medical training or a warrant violated his Fourth Amendment rights"; "the record is devoid of any evidence from which the officers reasonably might have inferred that evidence would be destroyed if they took the time to secure a warrant and summon medical personnel. . . . ¶ Similarly, the record contains no evidence that a medical emergency existed. . . . Thus, there was time to take steps – potentially including, *inter alia*, securing medical personnel, a warrant, or both – to mitigate the risk that the seizure would cause physical and emotional trauma."), *and with People v. Hall*, 10 N.Y.3d 303, 312-13, 886 N.E.2d 162, 169, 856 N.Y.S.2d 540, 547 (2008) ("manual body cavity search" of a suspect at the police station to remove contraband observed during a lawfully conducted strip search violated the Fourth Amendment because there were no exigent circumstances preventing the police from obtaining a warrant). In the application of this balancing test, the following factors are central to an assessment of the "reasonableness," and thereby of the constitutionality, of the search:

(a) Whether the police officers obtained a search warrant; or, if they failed to obtain a

warrant, whether their failure to obtain a warrant was justified because the imminence of disappearance of the evidence made it impracticable to obtain a warrant. *Schmerber,* 384 U.S. at 770; *Winston v. Lee,* 470 U.S. at 761. *See, e.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1563, 1568 (2013) ("in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant"; "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically"). *Accord, Birchfield v. North Dakota*, 136 S. Ct. at 2173-74, discussed in subdivision (d) of this section; *State v. Schaufele*, 325 P.3d 1060, 1068 (Colo. 2014) ("the trial court properly adhered to *McNeely* in suppressing evidence of Schaufele's blood draw" because *McNeely* holds "that the Fourth Amendment requires officers in drunk-driving investigations to obtain a warrant before drawing a blood sample when they can do so without significantly undermining the efficacy of the search . . . .").

(b) Whether the search was justified by a "clear indication" that incriminating evidence would be found. *Schmerber,* 384 U.S. at 770; *see Winston v. Lee,* 470 U.S. at 762 (quoting the *Schmerber* "clear indication" standard). The Court in *United States v. Montoya de Hernandez,* 473 U.S. 531, 540 (1985), subsequently glossed the "clear indication" standard as requiring nothing more than probable cause, but there remains room to argue that a particularly exacting judicial review of the probable-cause determination is appropriate in this context because the degree of justification required for a search always depends upon the extent of "the invasion which the search entails" (*Camara v. Municipal Court,* 387 U.S. 523, 536-37 (1967); *see, e.g., Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Tennessee v. Garner,* 471 U.S. 1, 7-9 (1985)), and "'intrusions into the human body' . . . perhaps implicate[ ] . . . [the] most personal and deep-rooted expectations of privacy" (*Winston v. Lee,* 470 U.S. at 760).

(c) "[T]he extent to which the procedure may threaten the safety or health of the individual." *Winston v. Lee,* 470 U.S. at 761. With respect to this factor it is particularly relevant to consider whether: "all reasonable medical precautions were taken"; any "unusual or untested procedures were employed"; and "the procedure was performed 'by a physician in a hospital environment according to accepted medical practices.'" *Id.; Schmerber v. California,* 384 U.S. at 771-72.

(d) "[T]he extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Winston v. Lee,* 470 U.S. at 761. With regard to this consideration, it is relevant to examine whether the procedure involved any "'trauma, or pain'" or violated "the individual's interest in 'human dignity.'" *Id.* at 762 n.5. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1969, 1980 (2013) ("DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure . . . [w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody"; the Court observes that "[a] buccal swab [to obtain a DNA sample] is a far more gentle process than a venipuncture to draw blood . . .[; it] involves but a light touch on the inside of the cheek . . . [and] no 'surgical intrusions beneath the skin'"; and there are "significant

state interests in identifying . . . [the arrestee] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody"); *compare Birchfield v. North Dakota*, *supra* (upholding state implied-consent laws requiring that drunk-driving arrestees submit to breath tests without a warrant because "breath tests do not 'implicat[e] significant privacy concerns . . .'"; "the physical intrusion is almost negligible," in that "[b]reath tests 'do not require piercing the skin' and entail 'a minimum of inconvenience. . .'"; the "effort is no more demanding than blowing up a party balloon"; "there is nothing painful or strange about . . . [the procedure of taking a tube into one's mouth, which is akin to] use of a straw to drink beverages"; "the process [does not] put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained"; it "results in a BAC [blood alcohol concentration] reading on a machine, nothing more"; and "participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest" (136 S. Ct. at 2176-77), *with id*. ("[b]lood tests are a different matter" (*id*. at 2178) and cannot be compelled without a warrant under "the search incident to arrest doctrine" (*id*. at 2185) because "[t]hey 'require piercing the skin' and extract a part of the subject's body"; "for many [people], the process [of having blood drawn, even for medical diagnostic purposes] is not one they relish"; and "a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.") (*id*. at 2178)). A prime example of a deprivation of dignity sufficient to violate the Due Process Clause occurred in *Rochin v. California,* 342 U.S. 165 (1952), when "police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting." *Winston v. Lee,* 470 U.S. at 762 n.5. *See also United States v. Booker*, 728 F.3d 535, 537 (6th Cir. 2013) (applying the Fourth Amendment to suppress contraband that was removed from the defendant's rectum by an emergency-room doctor to whom the police brought the defendant, "reasonably suspecting that Booker had contraband hidden in his rectum" and who "intubated Booker for about an hour, rendered him unconscious for twenty to thirty minutes, and paralyzed him for seven to eight minutes"; "Even though the doctor may have acted for entirely medical reasons, the unconsented procedure while Booker was under the control of the police officers must, in the circumstances of this case, be attributed to the state for Fourth Amendment purposes. The unconsented procedure, moreover, shocks the conscience at least as much as the stomach pumping that the Supreme Court long ago held to violate due process.")."[D]ue process concerns could be involved if the police initiate[ ] physical violence while administering the [blood alcohol] test, refuse[ ] to respect a reasonable request to undergo a different form of testing, or respond[ ] to resistance with inappropriate force." *South Dakota v. Neville,* 459 U.S. 553, 559 n.9 (1983) (dictum); *see also id.* at 563. *Cf. Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (recognizing that the use of "excessive force" against a pretrial detainee violates Due Process).

(e) Whether there is a "compelling need" (*Winston v. Lee,* 470 U.S. at 766) for the

intrusion or examination because it represents the most accurate and effective method for detecting facts critical to the issue of guilt or innocence. Thus a blood test was approved in *Schmerber* because the test is "'a highly effective means of determining the degree to which a person is under the influence of alcohol'" and "the difficulty of proving drunkenness by other means . . . [rendered the] results of the blood test . . . of vital importance if the State were to enforce its drunken driving laws" (*Winston v. Lee,* 470 U.S. at 762-63 (explaining the holding in *Schmerber*)). Conversely, the Court concluded in *Winston v. Lee* that the state had not shown a "compelling need" for the surgical removal of a bullet from the defendant's body, since the state possessed "substantial" alternative evidence of guilt (*see id.* at 765-66).

Certain types of physical examinations conducted by law enforcement investigators or consultants may run afoul of other constitutional prohibitions. Tests and examinations that involve the eliciting of "communications" from the accused (such as polygraph tests or the use of "truth serums") – and perhaps others that require his or her willed cooperation – are impermissible in the absence of a valid waiver of the Privilege Against Self-Incrimination. *See Estelle v. Smith,* 451 U.S. 454 (1981) (psychiatric examination); *Schmerber v. California,* 384 U.S. at 764 (dictum) ("lie detector tests"); *South Dakota v. Neville,* 459 U.S. at 561 n.12 (dictum) (same); see § 12.15(a) *supra.* A physical examination that is extremely abusive, degrading, or unfair may violate the Due Process Clause of the Fourteenth Amendment. *See Rochin v. California*, 342 U.S. 165 (1952); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961) (alternative ground); *United States v. Townsend,* 151 F. Supp. 378 (D. D.C. 1957). *See also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015) (clarifying that when "an individual detained in a jail prior to trial" brings a claim under 42 U.S.C. § 1983 against "jail officers, alleging that they used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause," the detainee needs not show that "the officers were *subjectively* aware that their use of force was unreasonable," and instead needs show "only that the officers' use of that force was *objectively* unreasonable"). Finally, to an extent that is not yet clear, tests and examinations whose reliability depends upon careful administration are impermissible if conducted in the absence of counsel and without a valid waiver of the right to counsel, following the initiation of adversary judicial proceedings. *See Winston v. Lee,* 470 U.S. at 763 n.6 (reserving the question). *Compare United States v. Wade,* 388 U.S. 218 (1967), and *Moore v. Illinois,* 434 U.S. 220 (1977), *with Gilbert v. California,* 388 U.S. 263, 267 (1967); and see §§ 24.13, 25.06 *infra.*

Part C. Police Entry and Search of Dwellings or Other Premises

§ 23.15 THE THRESHOLD ISSUE: RESPONDENT'S EXPECTATION OF PRIVACY

§ 23.15(a) Introduction to the Concept of Constitutionally Protected Interests and "Standing" To Raise Fourth Amendment Claims

In the preceding discussion of arrests and *Terry* stops, it was unnecessary to deal with the question whether the police conduct adversely affected any constitutionally protected interest of

the respondent. A respondent always has a sufficient interest in the privacy and security of his or her own body to provide a basis for challenging a seizure of the person in the form of an arrest or a *Terry* stop or to challenge a search of the person incident to an arrest or stop. *See, e.g.*, *People v. Burton*, 6 N.Y.3d 584, 588, 848 N.E.2d 454, 457, 815 N.Y.S.2d 7, 10 (2006). When addressing issues raised by searches of dwellings or other premises, however, it becomes necessary to inquire whether the respondent has the kind of relationship to the premises that permits him or her to complain if the Constitution is violated in searching them.

Prior to *Rakas v. Illinois,* 439 U.S. 128 (1978), this inquiry was framed in terms of whether a criminal defendant or juvenile respondent had "standing" to challenge the violation. *Rakas* changed the terminology to "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* at 140. *See also United States v. Payner,* 447 U.S. 727, 731-32 (1980); *United States v. Salvucci,* 448 U.S. 83, 95 (1980); *Rawlings v. Kentucky,* 448 U.S. 98, 104-06 (1980). But *Rakas* also recognized that this terminological change would seldom affect either the nature of the traditional inquiry or its result, 439 U.S. at 138-39; and the term "standing" continues to be used in some jurisdictions as a convenient label for the *Rakas* determination that a particular respondent "is entitled to contest the legality of [the law enforcement conduct which s/he challenges as the basis for invoking the exclusionary rule]," *Rakas,* 439 U.S. at 140. *See United States v. Payner,* 447 U.S. at 731.

§ 23.15(b) Expectation of Privacy; Areas in Which a Respondent Will Ordinarily Be Deemed To Have the Requisite Expectation

In the context of searches of premises, a juvenile respondent's "standing" will almost always depend upon showing that s/he had a legitimate expectation of privacy in the premises. This is so because the two principal kinds of constitutionally protected interests that anyone can have in real property are privacy interests and possessory interests; and a juvenile will seldom be the legal possessor of real property. Thus, as a practical matter, the test of a respondent's right to base a suppression claim upon an unconstitutional search of premises is whether the respondent "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his or her part] of freedom from governmental intrusion' upon those premises." *Combs v. United States,* 408 U.S. 224, 227 (1972). An individual may have "a legitimate expectation of privacy in the premises he was using and therefore . . . claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his 'interest' in those premises might not have been a recognized property interest at common law." *Rakas v. Illinois,* 439 U.S. at 143 (dictum). When the respondent's relationship to searched premises is such that s/he "could legitimately expect privacy in the areas which were the subject of the search and seizure [that s/he seeks] . . . to contest," s/he is entitled to challenge the legality of the search and seizure. *Id.* at 149 (dictum).

All of the following are examples of premises for which the respondent can claim the requisite expectation of privacy:

(i) The respondent's home. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.'"); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home"); *United States v. Karo,* 468 U.S. 705, 714 (1984) ("[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); *United States v. Johnson,* 457 U.S. 537, 552 n.13 (1982) ("the Fourth Amendment accords special protection to the home"); *Payton v. New York,* 445 U.S. 573, 589-90 (1980); *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring) ("it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people"); *Commonwealth v. Porter P.*, 456 Mass. 254, 260-61 & n.5, 923 N.E.2d 36, 44-45 & n.5 (2010) (juvenile had a reasonable expectation of privacy in, and standing to challenge a search of, the "room that the juvenile and his mother shared at the shelter," which was "their home" even though it was "a transitional living space," and even though "he did not own the room," "he was limited in his use of the room," and "shelter staff members had a master key and could enter the room for 'professional business purposes'"). *See also State v. Brown*, 216 N.J. 508, 517, 529, 535-36, 83 A.3d 45, 50, 57, 61 (2014) ("in determining whether a defendant has a possessory or proprietary interest in a building or residence and therefore standing to object to a warrantless search" under the New Jersey Constitution when the state asserts that "the building was abandoned or, alternatively, . . . [that the defendant was a] trespasser[ ]," "the focus must be whether, in light of the totality of the circumstances, a police officer had an objectively reasonable basis to conclude that a building was abandoned or a defendant was a trespasser before the officer entered or searched the home"; "the record supports the trial court's finding that the State did not meet its burden of . . . establish[ing] that the property ["a dilapidated row house in the City of Camden"], although in decrepit condition ["with one or more windows broken, the interior in disarray, the front door padlocked, and the back door off its hinges but propped closed"], was abandoned or that defendants were trespassers"; "The constitutional protections afforded to the home make no distinction between a manor estate in an affluent town and a ramshackle hovel in an impoverished city."). *Compare United States v. Knights*, 534 U.S. 112, 114, 119-20, 121 (2001) (an individual who was placed on probation pursuant to a California statute that establishes a probation condition that the probationer will "'[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer,'" and who signed a probation order agreeing to abide by this condition, had a "significantly diminished . . . reasonable expectation of privacy" in his home and was subject to a search of the home based on "reasonable suspicion that [the] probationer . . . is engaged in criminal activity"), *with Jones v. State*, 282 Ga. 784, 787-88, 653 S.E.2d 456, 459 (2007) (*Knights* rule is inapplicable because the State has not identified any "valid law, legally authorized regulation, or sentencing order" that limited the defendant's "right not to have his home searched without a warrant" as a result of his probationary status and that provided him with adequate "notice of that deprivation of rights"), *and with State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (relying on the state constitution to

hold that a parolee had an undiminished privacy right to challenge a police search of his motel room).

(ii) An unleased room that is occupied from time to time by the respondent, in rental property owned by the respondent's parents. *Murray v. United States,* 380 U.S. 527 (1965) (per curiam), *vacating* 333 F.2d 409 (10th Cir. 1964). *See also United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008), *superseded on another issue by Fernandez v. California*, 134 S. Ct. 1126 (2014) (the rent-paying lessor of various storage units "testified that he allowed Murphy to stay in the storage units [rent-free] . . . and gave him a key that opened all of the units"; "Murphy's living situation was unconventional, but the record shows that the storage units were the closest thing that he had to a residence. He was sleeping in unit 14 and storing his belongings in unit 17. For the purposes of the Fourth Amendment, this is sufficient to create an expectation of privacy and thus the authority to refuse a search.").

(iii) A home that the respondent is visiting as a social guest at the invitation of the homeowner or another resident. *See Minnesota v. Carter*, 525 U.S. at 109 n.2 (Justice Ginsburg, dissenting) (explaining that although the Court majority ruled that there was no reasonable expectation of privacy under the facts of the case, it is "noteworthy that five Members of the Court [one of whom joined the majority opinion and also issued a concurring opinion, one of whom concurred in the judgment, and three of whom dissented] would place under the Fourth Amendment's shield, at least, 'almost all social guests'" (quoting *id*. at 99 (Justice Kennedy, concurring))); *In the Matter of Welfare of B.R.K.*, 658 N.W.2d 565, 572-78 (Minn. 2003) (a juvenile who was one of fourteen participants in a post-graduation evening drinking party at the home of a friend was "was a short-term social guest" entitled to Fourth Amendment protection even though he "does not contend that he was an overnight guest" and although the party was not authorized by the friend's parents); *State v. Talkington*, 301 Kan. 453, 483, 345 P.3d 258, 278-79 (2015) (defendant had "a reasonable expectation of privacy as a social guest in his host's residence," which extended to "standing to assert a reasonable, subjective expectation of privacy in the backyard, *i.e.*, curtilage, of his host's residence"). *See also Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (accused had a reasonable expectation of privacy in a friend's duplex in which he was "[s]taying overnight" as a "houseguest"); *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, 439 U.S. at 141, and *Minnesota v. Carter*, 525 U.S. at 89-90 (majority opinion). *Cf. id*. at 102 (Justice Kennedy, concurring) (although, "as a general rule, social guests will have an expectation of privacy in their host's home," "[t]hat is not the case before us" in that "respondents have established nothing more than a fleeting and insubstantial connection with . . . [the] home," they were using the "house simply as a convenient processing station" for packaging cocaine, they had never "engaged in confidential communications with [the homeowner] . . . about their transaction," they "had not been to . . . [the] apartment before, and [they]. . . left it even before their arrest").

(iv) A hotel room in which the respondent is staying, however temporarily or sporadically. *Stoner v. California,* 376 U.S. 483 (1964); *United States v. Jeffers,* 342 U.S. 48 (1951) (hotel room rented by defendant's aunts, who had given defendant a key and permission

to use the room at will; he "often entered the room for various purposes" (*id.* at 50)).

(v) In the case of respondents who are employed, their office or work area, even if it is shared with other employees, *O'Connor v. Ortega,* 480 U.S. 709, 714-19 (1987) (public employee's office); *United States v. Lefkowitz,* 285 U.S. 452 (1932) (business office); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 311-15 (1978) (employees' work areas in factory building); *Mancusi v. DeForte,* 392 U.S. 364 (1968) (union office shared by defendant and other union officials); *Villano v. United States,* 310 F.2d 680 (10th Cir. 1962), *limited on other grounds* in *United States v. Price*, 925 F.2d 1268 (10th Cir. 1991) (employee's desk in retail store); *United States v. Blok,* 188 F.2d 1019 (D.C. Cir. 1951) (employee's desk in government office).

(vi) "Public" places in which it is customary to allow temporary exclusive occupancy with a measure of privacy, such as taxicabs, *Rios v. United States,* 364 U.S. 253, 262 n.6 (1960); *but cf. Rakas v. Illinois,* 439 U.S. at 149 n.16 (dictum), pay telephone booths, *Katz v. United States,* 389 U.S. 347 (1967), public lavatory cabinets, *Bielicki v. Superior Court,* 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); *People v. Mercado,* 68 N.Y.2d 874, 501 N.E.2d 27, 508 N.Y.S.2d 419 (1986), and rented lockers in commercial storage facilities, *United States v. Karo,* 468 U.S. at 720 n.6 (dictum). *Compare Hudson v. Palmer,* 468 U.S. 517 (1984); *Bell v. Wolfish,* 441 U.S. 520, 556-58 (1979).

For discussion of privacy rights in the interior of automobiles, see § 23.23 *infra.*

§ 23.15(c) "Curtilage" and "Open Fields"; Multifamily Apartment Complexes

The "curtilage" of a home – that is, "the area immediately surrounding a dwelling house," *United States v. Dunn,* 480 U.S. 294, 300 (1987) – is treated as "part of the home itself for Fourth Amendment purposes," *Oliver v. United States,* 466 U.S. 170, 180 (1984), and thus receives the same "Fourth Amendment protections," *id. Accord*, *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("the curtilage of the house . . . enjoys protection as part of the home itself"); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010).

In determining whether any particular area is or is not within the curtilage, "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. . . . [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. . . . [T]hese factors are useful analytic tools . . . to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn,* 480 U.S. at 300-01. Applying this four-part analysis in *Dunn,* the Court concluded that "the area near a barn, located approximately 50 yards from a fence surrounding a ranch house" (*id.* at 296) and "60 yards from

the house itself" (*id.* at 302) "lay outside the curtilage of the ranch house" (*id.* at 301) and was not entitled to Fourth Amendment protection because (i) "the substantial distance" from not only the house but also the fence surrounding the house "supports no inference that the barn should be treated as an adjunct of the house," *id.* at 302; (ii) "[v]iewing the physical layout of respondent's ranch in its entirety, . . . it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house," and the area in question "stands out as a distinct portion of respondent's ranch, quite separate from the residence" (*id.*); (iii) "the law enforcement officials possessed objective data indicating . . . that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent's home" (*id.* at 302-03); and (iv) "[r]espondent did little to protect the barn area from observation by those standing in the open fields . . . [since] the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas," *id.* at 303.

In the urban context, application of the four-part test of *United States v. Dunn* will ordinarily produce the result that "curtilage" is coextensive with a fenced yard. *See Oliver v. United States,* 466 U.S. at 182 n.12 ("for most homes, the boundaries of the curtilage will be clearly marked"); *California v. Ciraolo,* 476 U.S. 207, 212-13 (1986) (treating the area within a fenced yard as curtilage under an analysis that anticipates *Dunn*'s); *Estate of Smith v. Marasco*, 430 F.3d 140, 156-58 (3d Cir. 2005); *People v. Morris*, 126 A.D.3d 813, 814, 4 N.Y.S.3d 305, 307 (N.Y. App. Div., 2d Dep't 2015); *People v. Theodore*, 114 A.D.3d 814, 816-17, 980 N.Y.S.2d 148, 151 (N.Y. App. Div., 2d Dep't 2014). This is consistent with pre-*Dunn* caselaw. *See, e.g., Weaver v. United States,* 295 F.2d 360 (5th Cir 1961); *Hobson v. United States,* 226 F.2d 890 (8th Cir. 1955); *State v. Parker,* 399 So. 2d 24 (Fla. App. 1981), *review denied,* 408 So. 2d 1095 (Fla. 1981); *People v. Pakula,* 89 Ill. App. 3d 789, 411 N.E.2d 1385, 44 Ill. Dec. 919 (1980). Separate closed structures on residential property – garages, for example – are generally held protected by the Fourth Amendment without reference to the ordinary indicia of "curtilage," such as fencing in. *Taylor v. United States,* 286 U.S. 1 (1932); *see, e.g., State v. Daugherty,* 94 Wash. 2d 263, 616 P.2d 649 (1980). *See also Commonwealth v. Ousley*, 393 S.W.3d 15, 27-29 (Ky. 2013) (trash cans, which were "sitting on the driveway very near the home," were within the "curtilage" even though "the area in question" was not "enclosed by a fence": "The home was in an urban area that does not lend itself to enclosures" and a resident's decision to forego fencing "(for example, because the lot on which his home sits is small) cannot deprive him of having curtilage surrounding his home"); *State v. Kruse*, 306 S.W.3d 603, 611-12 (Mo. App. 2010) ("The State argues that Kruse did not have an expectation of privacy in his backyard. The State notes that there were no gates or objects to hinder entrance into the backyard. Nothing obstructed a person's view into the back yard except the buildings. There appears to be a well-travelled route from the driveway to the rear of the property, marked by large pieces of wood resembling railroad ties. The two 'no trespassing' signs were posted on doors, which the State says implies that access was denied to the interior of the residence or shed without permission. ¶ We cannot agree that there was no expectation of privacy in the backyard. The officers arrived at the Kruse residence after midnight. No exterior lights were on to welcome the public to come on the

premises. The entrance to the residence is in the front yard. The 'no trespassing' signs would ordinarily be understood to assert a privacy interest on the entire property. The back yard could not be seen from the road and was not in plain view. The back yard and backdoor were enclosed by trees on three sides and the home on the fourth side. ¶ By entering into the back yard, the police were entering onto property as to which there was a privacy interest protected by the Fourth Amendment"). *Cf. Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam) (dealing inconclusively with a situation that might have stirred "curtilage" issues).

With respect to tenants living in multifamily apartment complexes, some courts have viewed their "curtilage" as very limited. *See, e.g.*, *Commonwealth v. Thomas,* 358 Mass. 771, 774-75, 267 N.E.2d 489, 491 (1971). However, if the building is secured against entry by the general public, then any of the tenants may be able to rely upon the collective expectation of privacy in the corridors and hallways (*e.g.*, *United States v. Heath*, 259 F.3d 522 (6th Cir. 2001); *United States v. Carriger,* 541 F.2d 545, 549-52 (6th Cir. 1976); *United States v. Booth,* 455 A.2d 1351 (D.C. 1983); *see also United States v. Whitaker*, 820 F.3d 849, 853-54 (7th Cir. 2016) (although the defendant, who lived in a multi-apartment building with "closed hallways," did not have "a reasonable expectation of complete privacy in the hallway," this "does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public"; accordingly, the "police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs")), and the basement (*e.g., Garrison v. State,* 28 Md. App. 257, 345 A.2d 86 (1975)). *Compare McDonald v. United States,* 335 U.S. 451 (1948), *with United States v. Dunn*, 480 U.S. 294 (1987). Similarly, if the backyard to the building is not accessible to the general public, and particularly if it is surrounded by a fence, the backyard area may be "sufficiently removed and private in character that [a tenant] . . . could reasonably expect privacy," *Fixel v. Wainwright,* 492 F.2d 480, 484 (5th Cir. 1974). *See also United States v. Burston*, 806 F.3d 1123, 1125, 1127-28 (8th Cir. 2015) (even though the defendant lived in an "eight-unit apartment building," and even though the lawn in front of his apartment window "was not in an enclosed area" and "the public [was not] physically prevented from entering or looking at that area other than by the physical obstruction of . . . [a] bush," the court nonetheless classifies the area as curtilage under the four-part analysis of *United States v. Dunn*, *supra*, because the area "was in close proximity to Burston's apartment – six to ten inches"; "Burston made personal use of the area by setting up a cooking grill between the door and his window"; and "[o]ne function of the bush," which was "planted in the area in front of the window, [and] which partially covered the window," "was likely to prevent close inspection of Burston's window by passersby"). Counsel urging these results can argue that, in light of the established principle that "the Fourth Amendment accords special protection to the home," *United States v. Johnson,* 457 U.S. 537, 552 n.13 (1982); *see, e.g., Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Wilson v. Layne*, 526 U.S. 603, 610 (1999); *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984); *Florida v. Jardines*, 133 S. Ct. at 1414*; Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring), it would be anomalous to deny at least as much protection to shared residential facilities as is given to shared workplace facilities (see § 23.15(b) subdivision (v)

supra).

The Fourth Amendment's protection of the home and its "curtilage" does not extend to "'the open fields.'" *United States v. Dunn,* 480 U.S. at 300; *Oliver v. United States,* 466 U.S. at 180; *Hester v. United States,* 265 U.S. 57 (1924). "[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas." *Oliver v. United States,* 466 U.S. at 179.

Moreover, if a police officer, while situated in an "open field" – or in any area accessible to the general public – engages in "naked-eye observation of the curtilage" (*California v. Ciraolo,* 476 U.S. 207, 213 (1986)), that observation is not treated as a "search" subject to Fourth Amendment restrictions. See §§ 23.16, 23.22(b) *infra.*

§ 23.15(d) Police Search or Seizure of an Object Belonging to the Respondent from Premises in Which the Respondent Has No Privacy Interest

Even if the respondent does not have a privacy interest in any premises searched by the police, s/he may nevertheless challenge a police examination or seizure of an object during a police search of the premises if the respondent is the owner of that object. As the Court observed in *United States v. Jacobsen,* 466 U.S. 109, 113 (1984), "an individual's possessory interests in [a certain piece of] . . . property" confers upon that individual a Fourth Amendment right to challenge a police officer's "meaningful interference with [his or her] . . . possessory interests in that property." *Id.* Thus, in *Jacobsen,* the Court concluded that the defendant had the requisite privacy interest to challenge government agents' assertion of control over, and search of, a package which the defendant had consigned to a private freight carrier, even though the defendant obviously had no privacy interest in the Federal Express office where the search took place. *Id.* at 114-15. *See also, e.g.*, *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 374 n.3 (2009); *Bond v. United States*, 529 U.S. 334, 336-37, 338-39 (2000); *Walter v. United States,* 447 U.S. 649 (1980); *United States v. Barber*, 777 F.3d 1303, 1305 (11th Cir. 2015) (passenger in a car stopped by the police had standing to challenge the search of the bag at his feet, "even if he lacked standing to contest the search of the car," because it was "his bag" and he "had a reasonable expectation of privacy in his bag"); *State v. Crane*, 329 P.3d 689, 694-95 (N.M. 2014) (construing the state constitution to hold that a motel occupant had a reasonable expectation of privacy in garbage that was placed in "opaque garbage bags," which were "sealed from plain view . . . [and] placed directly in the dumpster, rather than being left in the motel room for disposal by the housekeeping staff").

The individual's privacy interest in objects that s/he owns extends to "[l]etters and other

sealed packages [since these objects] are in the general class of effects in which the public at large has a legitimate expectation of privacy." *United States v. Jacobsen,* 466 U.S. at 114. This is the case as well for the contents of a cell phone. *See Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (discussed in § 23.08(b) *supra*) ("Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans 'the privacies of life'" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (pre-*Riley* decision holding that the defendant, whose car was stopped by border patrol agents and who agreed to the agents' request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, "had a reasonable expectation of privacy in the phones" and could challenge an agent's actions in accepting an incoming call and "passing himself as Lopez" and thereby obtaining information that incriminated Lopez: "Lopez had possession of the phones and was using them. He certainly had the right to exclude others from using the phones. He also had a reasonable expectation of privacy in incoming calls and a reasonable expectation that the contents of those calls 'would remain free from governmental intrusion.'"). *See also Tracey v. Florida*, 152 So. 3d 504, 522, 525-26 (Fla. 2014) (an individual has a reasonable "expectation of privacy of location as signaled by one's cell phone – even on public roads"; "Simply because the cell phone user knows or should know that his cell phone gives off signals that enable the service provider to detect its location for call routing purposes, and which enable cell phone applications to operate for navigation, weather reporting, and other purposes, does not mean that the user is consenting to use of that location information by third parties for any other unrelated purposes."; because "no warrant based on probable cause authorized the use of Tracey's real time cell site location information to track him," police officers' use of "cell site location information emanating from his cell phone in order to track him in real time" was an unlawful search and "the evidence obtained as a result of that search was subject to suppression"); *Commonwealth v. Augustine*, 467 Mass. 230, 231, 232, 4 N.E.3d 846, 849, 850 (2014) (construing the state constitution to hold that the state must obtain a search warrant in order to acquire "historical cell site location information for a particular cellular telephone" from "a cellular telephone service provider"; the court observes that although the information "at issue here is a business record of the defendant's cellular service provider, he had a reasonable expectation of privacy in it"); *State v. Earls*, 214 N.J. 564, 569, 70 A.3d 630, 633 (2013) (construing the state constitution to hold that "cell-phone users have a reasonable expectation of privacy in their cell-phone location information, and that police must obtain a search warrant before accessing that information"); *State v. Reid*, 194 N.J. 386, 399, 945 A.2d 26, 33-34 (2008) (state constitution "protects an individual's privacy interest in the subscriber information he or she provides to an Internet service provider"). *But see City of Ontario v. Quon*, 560 U.S. 746, 761-62 (2010) (upholding a police department's review of text messages sent and received on a government-owned pager that was issued to a police officer and that was reviewed by the department for the purpose of "determin[ing] whether [the officer's] overages were the result of work-related messaging or personal use," where the officer had been given advance notice "that his [text] messages were subject to auditing").

§ 23.15(e) "Automatic Standing"

In some States, criminal defendants and juvenile respondents have "automatic standing" to challenge seizures of contraband whenever they are charged with possession of that contraband; they need not show any proprietary interest or expectation of privacy in the place from which the contraband was seized. This "automatic standing" rule was the law of the Fourth Amendment before *United States v. Salvucci,* 448 U.S. 83 (1980). When the Supreme Court abolished it in *Salvucci,* some state courts responded by reinstating the rule as a matter of state constitutional law. *E.g., State v. Settle,* 122 N.H. 214, 447 A.2d 1284 (1982); *Commonwealth v. Porter P.*, 456 Mass. 254, 261 n.5, 923 N.E.2d 36, 45 n.5 (2010); *State v. Alston,* 88 N.J. 211, 440 A.2d 1311 (1981); *Commonwealth v. Sell,* 504 Pa. 46, 470 A.2d 457 (1983); *State v. Simpson,* 95 Wash. 2d 170, 622 P.2d 1199 (1980); *see also People v. Millan,* 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987) (adopting a version of automatic standing that grants standing whenever a charge of criminal possession is based upon a statutory presumption of constructive possession). In States that have not reconsidered the "automatic standing" issue since *Salvucci,* counsel should draw upon the reasoning of these decisions to urge the state courts to restore "automatic standing." See § 7.09 *supra.*

§ 23.16 POLICE ENTRY OF PREMISES: GENERAL PRINCIPLES

An entry into a building is a "search" within the Fourth Amendment. *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 325 (1979). To be constitutional, any police entry of a building must either: (i) be authorized by a search warrant, see § 23.17 *infra;* or (ii) "fall[ ] within one of the narrow and well-delineated exceptions to the warrant requirement" (*Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (quoting *Katz v. United States,* 389 U.S. 347, 357 (1967)), see §§ 23.18-23.20 *infra. E.g.*, *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) ("Because '"the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"' stands '"[a]t the very core" of the Fourth Amendment,' . . . , our cases have firmly established the '"basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable'" (quoting *Payton v. New York,* 445 U.S. 573, 586 (1980)); *id*. at 590 ("the Fourth Amendment has drawn a firm line at the entrance to the house"); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *United States v. Karo,* 468 U.S. 705, 714-15 (1984) ("[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances"); *Welsh v. Wisconsin,* 466 U.S. 740, 750 (1984) (a "presumption of unreasonableness . . . attaches to all warrantless home entries"); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("when it comes to the Fourth Amendment, the home is first among equals"). *See also State v. Jackson*, 742 N.W.2d 163, 177 (Minn. 2007) ("in order to be constitutionally reasonable, nighttime searches [of the home] require additional justification beyond the probable cause required for a daytime search"); *State v. Gill*, 755 N.W.2d 454, 459-60 (N.D. 2008) (joining several federal circuits in holding that warrantless entries of a home cannot be justified by a so-called "community caretaking function of law enforcement officers").

Entries and inspections of commercial premises are the subject of specialized canons of

Fourth Amendment doctrine usually identified by the rubrics "searches of licensed dealers in regulated industries" and "administrative searches." Warrantless entries and inspections are permissible in the case of a few "'pervasively regulated business[es],' . . . and . . . 'closely regulated' industries 'long subject to close supervision and inspection,'" *Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978), but this category is a narrow one. *See Los Angeles v. Patel*, 135 S. Ct. 2443, 2454-55 (2015) ("Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise,' *Barlow's, Inc.*, 436 U.S., at 313 . . . . Simply listing these industries refutes petitioner's argument that hotels should be counted among them. Unlike liquor sales, *Colonnade Catering Corp. v.United States*, 397 U.S. 72 . . . (1970), firearms dealing, *United States v. Biswell*, 406 U.S. 311. . . (1972), mining, *Donovan v. Dewey*, 452 U.S. 594 . . . (1981), or running an automobile junkyard, *New York v. Burger*, 482 U.S. 691 . . . (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare. ¶ Moreover, '[t]he clear import of our cases is that the closely regulated industry . . . is the exception.'"). For "administrative" searches and inspections of other sorts of business premises and commercial enterprises, a search warrant or subpoena is required but may be issued without an individualized showing of cause. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). What is required in these latter cases, "in order for an administrative search to be constitutional, [is that] the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Los Angeles v. Patel*, 135 S. Ct. at 2452. *See, e.g., Michigan v. Tyler,* 436 U.S. 499, 507-08 (1978) ("To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors. Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum.").

If a police entry of a building violates the applicable Fourth Amendment rules, all observations made by the police within the building and all objects seized by the entering officers are excludable. *Johnson v. United States,* 333 U.S. 10 (1948); *Chapman v. United States,* 365 U.S. 610 (1961); *Work v. United States,* 243 F.2d 660 (D.C. Cir. 1957); *United States v. Merritt,* 293 F.2d 742 (3d Cir. 1961). Evidence derived from these observations or things is also excludable. See § 23.37 *infra.*

The concept of a "search" also encompasses situations in which police officers, although not physically entering an area, use artificial contrivances like peepholes or electronic surveillance equipment to extend their presence into a private area. *See, e.g., Silverman v. United States,* 365 U.S. 505 (1961); *Regalado v. California,* 374 U.S. 497 (1963) (per curiam); *United States v. Karo,* 468 U.S. 705, 714 (1984); *Kyllo v. United States*, 533 U.S. at 34-35, 40; *United States v. Jones*, 132 S. Ct. 945, 949 (2012); *cf. Grady v. North Carolina*, 135 S. Ct. 1368, 1370-71 (2015) (per curiam). *See also Florida v. Jardines*, 133 S. Ct. at 1417-18 ("The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."). If, on the other hand, the police merely used technology as a means for viewing what was exposed to observation by the public at large, then there is no "search" for Fourth Amendment purposes. *See, e.g., Texas v. Brown,* 460 U.S. 730, 740 (1983) (plurality opinion) (officer's use of flashlight to examine interior of automobile was not "search" since "the interior of an automobile . . . may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers"); *United States v. Dunn,* 480 U.S. 294, 305 (1987) ("the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment"); *see also, e.g., California v. Ciraolo,* 476 U.S. 207, 215 (1986) (warrantless observation of marijuana plants in the fenced yard of a home, made possible because police officers flew over the yard in a private plane and observed it from an altitude of 1,000 feet, did not violate the homeowner's reasonable expectation of privacy because the marijuana plants were "visible to the naked eye," albeit only with the assistance of the aircraft); *cf. Dow Chemical Co. v. United States,* 476 U.S. 227, 237-39 (1986) (in the context of inspections of commercial property, where "the Government has 'greater latitude,'" the Court approves the use of an aerial camera that enhanced human vision "somewhat" but was not "so revealing of intimate details as to raise constitutional concerns"; the Court notes that use of "[a]n electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions").

The basic principle in this area was established by *Katz v. United States,* 389 U.S. 347, 353 (1967), holding that "electronically listening to and recording . . . words [spoken in a zone of] . . . privacy upon which [a person] . . . justifiably relied" is a "search" for Fourth Amendment purposes, without regard to "the presence or absence of a physical intrusion into any given enclosure." The principle is illustrated by comparing the decisions in *United States v. Knotts,* 460 U.S. 276 (1983), and *United States v. Karo,* 468 U.S. 705 (1984). In *Knotts,* the Court held that police officers' tracing of the movements of an automobile by means of an electronic beeper planted in a can of chloroform purchased by a drug manufacturing suspect was not a "search" since it revealed nothing more than what could be observed through "[v]isual surveillance from public places." 460 U.S. at 282. In *Karo,* the police employed the same tactic of installing an electronic beeper in a can of ether, but the can thereafter ended up inside a private home. Distinguishing the *Knotts* case as limited to surveillance of a public area, the Court in *Karo* held that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of

the residence." 468 U.S. at 714. *See also*, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 29, 31 (2001) ("the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment": "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . constitutes a search – at least where (as here) the technology in question is not in general public use"). *Compare United States v. Jones*, 132 S. Ct. at 949 ("hold[ing] that the Government's installation of a GPS [Global-Positioning-System] device on a target's vehicle, . . . and its use of that device to monitor the vehicle's movements, constitutes a 'search'" – although basing this ruling on a "common-law trespassory test" rather than "the *Katz* reasonable-expectation-of-privacy test" – and concluding that the government's attachment of the GPS tracking device to the underside of Jones' vehicle constituted a "physical intrusion" into "private property for the purpose of obtaining information" and thus a "'search' within the meaning of the Fourth Amendment when it was adopted"), *with id*. at 957-58, 964 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer & Kagan, JJ.) (rejecting the majority's reliance on "18th-century tort law" and reaching the same result as the majority by "asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove," and concluding that although "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable," "the use of longer term GPS monitoring" – such as occurred in this case, where "law enforcement agents tracked every movement that respondent made in the vehicle he was driving" for "four weeks" – "impinges on expectations of privacy" and thus constitutes a "search" for purposes of the Fourth Amendment). *And see Grady v. North Carolina*, 135 S. Ct. at 1369, 1370-71 (applying *United States v. Jones* to hold that a satellite-based monitoring program for recidivist sex offenders, which tracked program participants by means of a tracking device that participants were required to "wear . . . at all times," "effect[ed] a Fourth Amendment search": "a State . . . conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements"; "The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.").

§ 23.17 ENTRY OF PREMISES PURSUANT TO A SEARCH WARRANT

Search warrants are issued by a magistrate (or, in some jurisdictions, by a judge) in an *ex parte* proceeding. Defense attorneys thus are almost never in a position to contest the sufficiency of the application for a warrant before the warrant is executed. Their first opportunity to challenge a search made pursuant to a search warrant ordinarily comes after the search has been completed, the respondent arrested, and charges filed.

In *United States v. Leon,* 468 U.S. 897 (1984), and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), the Supreme Court limited the grounds for such challenges. *Leon* and *Sheppard* held that evidence obtained by a search conducted under a search warrant should not be suppressed if the police officers executing the warrant reasonably relied on the magistrate's determination of

probable cause in issuing the warrant, even though the magistrate's finding of probable cause was erroneous. *Leon* and *Sheppard* are not substantive constitutional decisions; they do not modify the explicit Fourth Amendment rule that a search warrant issued without probable cause is unconstitutional; they simply withdraw the ordinary Fourth Amendment exclusionary rule as a means of enforcing this particular constitutional command. See also the concluding paragraph of § 23.03 *supra*, describing a handful of other circumstances in which the Supreme Court has created a "good faith" exception to the exclusionary rule *a là Leon* and *Sheppard*.

In the wake of *Leon* and *Sheppard,* there are essentially seven situations in which defense counsel can seek suppression of the proceeds of a search conducted pursuant to a search warrant: (i) when the affidavit submitted in support of the issuance of the warrant states merely "'bare bones'" conclusions, *United States v. Leon,* 468 U.S. at 915, 923 n.24, 926, or is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" *id.* at 923; (ii) when the police knowingly or negligently fail to limit their application for a warrant to the pertinent unit of a multiunit building; (iii) when "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.* at 923; (iv) when the affidavit includes information obtained by an earlier unconstitutional search or seizure and this information is necessary to sustain a finding of probable cause; (v) when the magistrate who issues the warrant is not neutral and detached, thereby rendering reliance on the warrant unreasonable, *id.*; (vi) when the warrant is "so facially deficient – *i.e.,* in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid," *id.;* and (vii) when the police, in executing the warrant, exceeded the authority granted by it. These seven situations are discussed in greater detail in the following subsections.

The retraction of the Fourth Amendment exclusionary rule in *Leon* and *Sheppard* does not, of course, control the evidentiary consequences of state constitutional violations in the issuance of warrants. Defense counsel can and should ask state courts to reject *Leon* and *Sheppard* as a matter of state constitutional law and continue to suppress evidence obtained by any search made pursuant to a warrant issued without probable cause. *See, e.g., State v. Novembrino,* 105 N.J. 95, 157-58, 519 A.2d 820, 856-57 (1987); *People v. Bigelow,* 66 N.Y.2d 417, 426-27, 488 N.E.2d 451, 457-58, 497 N.Y.S.2d 630, 636-37 (1985). The argument for state constitutional repudiation of regressive criminal-procedure decisions handed down by the post-Warren Supreme Court of the United States (see § 7.09 *supra*) is particularly forceful in this context. Over the past half-century the "basic conclusion" of the Kerner Commission that "[o]ur nation is moving toward two societies, one black, one white – separate and unequal" (NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 1 (1968)), has proved increasingly prophetic. More and more, police activity has become the paradigmatic, iconic locus for the fact and for the public awareness that government treats white people differently than people of color. More and more, minority communities have focused their disillusionment, their outrage, their anger, and their fear upon the police as the prime agency of governmental oppression. Ferguson Missouri, Staten Island New York, and their prominent precursors and progeny are only the most

obvious demonstrations of this. In a world where minority communities fundamentally distrust the police, any legal ruling that visibly countenances illegal activity carried out by police officers will enhance that distrust. And this is a matter that should concern state judges of every ideological bent, because minority-community bitterness against the police specifically and against law-enforcement processes more generally is all too likely to increase the level of violence which it is the purpose of policing and of the criminal law to prevent. Particularly for ghetto-dwellers who are "without means of escape from an oppressive urban environment"(FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY ["EISENHOWER COMMISSION"] xxi (1969)) and for whom the police stand as the primary agents and symbols of that oppression (*see, e.g.*, ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY(2014)), any retrenchment of visible judicial control over the police can only add to the legitimate feelings of frustration which are "poisoning the spirit of trust and cooperation that is essential to [the] . . . proper functioning" of legal institutions (EISENHOWER COMMISSION xv-xvi). Rulings like *Leon* and *Sheppard*, which forswear judicial redress for *conceded* constitutional violations committed by police officers as a result of systemic failings that the police themselves cannot prevent, can only subvert law enforcement as well as the rule of law.

§ 23.17(a) "Bare Bones" Affidavits

In *United States v. Leon, supra*, the Court recognized that a search warrant and a search conducted pursuant to that warrant are patently invalid if the affidavit submitted in support of the issuance of the warrant states merely "'bare bones'" conclusions, *Leon,* 468 U.S. at 923 n.24, 926, or is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" *id.* at 925. The inadequacy of such an affidavit is so well settled in Fourth Amendment jurisprudence that an officer would be grossly derelict not to know it. *See, e.g., Nathanson v. United States,* 290 U.S. 41 (1933); *Aguilar v. Texas,* 378 U.S. 108 (1964); *Riggan v. Virginia,* 384 U.S. 152 (1966) (per curiam); *Illinois v. Gates,* 462 U.S. 213, 239 (1983) (dictum) ("[a]n officer's statement that '[a]ffiants have received reliable information from a credible person and do believe' that heroin is stored in a home, is likewise inadequate"). In these situations, the logic of *Leon* – to preserve the exclusionary rule in warrant cases when any adequately trained police officer would know that a search warrant is unconstitutional – implies that suppression is required. *See State v. Castagnola*, 145 Ohio St. 3d 1, 46 N.E.3d 638 (2015) ("[W]hen a defendant's motion to suppress evidence challenges the validity of a search warrant, claiming that an undisclosed inference stated as an empirical fact usurped the magistrate's inference-drawing authority, a reviewing court should consider (1) whether the inference was so significant that it crossed the line between permissible interpretation and usurpation of the magistrate's role in finding probable cause, considering both the relevance and the complexity of the inference and (2) whether the affiant intended the inference to deprive the magistrate of his or her authority to determine whether probable cause existed." 145 Ohio St. 3d at 24, 46 N.E.3d at 661-62. Applying *Leon*'s standards – under which '[s]uppression remains an appropriate remedy (1) when an officer relies on a warrant that is based on an affidavit "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"' and (2) when a

warrant is 'so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid'" (145 Ohio St. 3d at 22-23, 46 N.E.3d at 660) – "we suppress the evidence at issue here because the search-warrant affidavit lacked indicia of probable cause and the search warrant failed to state with particularity the items to be searched for on Castagnola's computer [so] that the detective could not have relied upon it in good faith." 145 Ohio St. 3d at 25, 46 N.E.3d at 662.). Searches based on wholly conclusionary affidavits – those that merely recite the ultimate fact in issue or the affiant's belief of it (for example, that *X* has a sawed-off shotgun in a certain house) – thus remain challengeable under *Leon* and *Sheppard*. Conclusory assertions that the person to be arrested or whose house is to be searched is a "known criminal" or is "known" to deal in narcotics should be accorded "no weight." *See Spinelli v. United States,* 393 U.S. 410, 414, 418-19 (1969). Allegations that the person named in the warrant *consorts* with "known" criminals, narcotics dealers, and the like, are doubly worthless. *See United States v. Hatcher,* 473 F.2d 321 (6th Cir. 1973).

§ 23.17(b) Improper Multi-unit Warrant Applications

If officers seeking a warrant know "or even if they should have known" that the premises described in their application includes separate units with different occupants, they are constitutionally obliged to limit the application to the unit that they are presenting probable cause to search. *Maryland v. Garrison,* 480 U.S. 79, 85-87 (1987) (dictum); *see also United States v. Voustianiouk*, 685 F.3d 206, 215 (2d Cir. 2012). A violation of this obligation should entail exclusion of any evidence seized from the other units, because the rationale of *Leon* and *Sheppard* is to withdraw the exclusionary rule as a remedy for *magistrates'* errors in the search warrant process but preserve it as a remedy for *police errors.*

§ 23.17(c) Affidavits Containing "Deliberate Falsehoods" or Statements Manifesting a "Reckless Disregard for the Truth"

In *Franks v. Delaware,* 438 U.S. 154 (1978), the Court held

> "that, 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, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." (*Id.* at 155-56.)

The rule of *Franks* "has a limited scope, both in regard to when exclusion of the seized evidence

is mandated, and when a hearing on allegations of misstatements must be accorded." *Id.* at 167.

> "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing." (*Id* at 171-72.)

Accord, United States v. Leon, 468 U.S. at 914, 923. *See*, *e.g.*, *United States v. Glover*, 755 F.3d 811, 819-21 (7th Cir. 2014) ("The government's response to Glover's motion to suppress revealed Doe's history as an informant, his multiple convictions, his prior gang affiliation, his use of aliases, and his interest in being paid for useful information. Glover renewed his request for a hearing under *Franks v. Delaware*, . . . to determine whether the officer acted with reckless disregard for the truth by omitting the credibility information from the probable cause affidavit. To obtain a *Franks* hearing, the defendant must make a 'substantial preliminary showing' of (1) a material falsity or omission that would alter the probable cause determination, and (2) a deliberate or reckless disregard for the truth. . . . This is a burden of production. Proof by a preponderance of the evidence is not required until the *Franks* hearing itself. . . . ¶ In this case, the omitted credibility information was clearly material . . . .¶ The district court did not show that it considered whether the credibility omissions themselves, even in the absence of more direct evidence of the officer's state of mind, provide sufficient circumstantial evidence to support a reasonable and thus permissible inference of reckless disregard for the truth. We hold that they do. . . . ¶ On remand the government may provide a satisfactory explanation for the omission of the damaging information about the informant's credibility, but Glover is entitled to test its explanation. We therefore REVERSE the denial of defendant's motion to suppress and REMAND for a *Franks* hearing.").

§ 23.17(d) Warrants Based on Tainted Evidence

If an affidavit in support of a search warrant includes information that is the product of an earlier unconstitutional search or seizure by the police and does not contain sufficient independent evidence to make out probable cause without reference to the tainted evidence, the resulting warrant and any search made under its authority are invalid. *United States v. Karo,* 468

U.S. 705, 719-21 (1984) (dictum); see § 23.40 *infra.* To the extent that the earlier unconstitutionality was the consequence of improper police conduct rather than improper magisterial conduct, it continues to invoke the exclusionary sanction that *Leon* and *Sheppard* retain as a curb on the police and withdraw only as a curb on magistrates. *United States v. Nora*, 765 F.3d 1049, 1058-60 (9th Cir. 2014).

§ 23.17(e) Neutral and Detached Magistrate

Exclusion of evidence seized under a warrant is obligatory, even when the police acted in "good faith," if the magistrate who issued the warrant was not neutral and detached. *Leon,* 468 U.S. at 923. This principle would include situations "where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979)," *Leon,* 468 U.S. at 923, "allow[ing] himself to become a member, if not the leader, of the search party which was essentially a police operation . . . [and] acting . . . as an adjunct law enforcement officer." *Lo-Ji,* 442 U.S. at 327. It would also include situations in which the magistrate "'serve[s] merely as a rubber stamp for the police.'" *Leon,* 468 U.S. at 914.

§ 23.17(f) The Particularity Requirement

The *Leon/Sheppard* doctrine does not alter the longstanding Fourth Amendment requirement that a warrant must identify the premises to be searched and the things to be seized with reasonable particularity. *Leon,* 468 U.S. at 923; *Sheppard,* 468 U.S. at 988 n.5; *see, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 557-63 (2004); *Maryland v. Garrison,* 480 U.S. 79, 84 (1987) (dictum). The Supreme Court has "clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Groh v. Ramirez*, 540 U.S. at 559. "The manifest purpose of this particularity requirement [is] . . . to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison*, 480 U.S. at 84. *See also Groh v. Ramirez*, 540 U.S. at 557-58 ("The fact that the *application* [for the warrant] adequately described the 'things to be seized' does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents."; the Court declines to reach the question of whether "the Fourth Amendment prohibits a warrant from cross-referencing other documents," noting that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant"); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. at 325-26; *Stanford v. Texas,* 379 U.S. 476 (1965); *Dalia v. United States,* 441 U.S. 238, 255-56 (1979) (dictum); *Stanford v. Texas,* 379 U.S. 476 (1965); *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) ("Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives

of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain."); *State v. Castagnola*, 145 Ohio St. 3d 1, 19-21, 46 N.E.3d 638, 657-59 (2015) ("the search warrant lacked particularity and was therefore invalid" because the authorization to search "'[r]ecords and documents stored on computers'" in the defendant's home "did not contain any description or qualifiers of the 'records and documents stored on the computer' that the searcher was permitted to look for"); *Wheeler v. State*, 135 A.3d 282, 304-05 (Del. 2016) ("warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances. . . . ¶ . . .Where, as here, the investigators had available to them a more precise description of the alleged criminal activity that is the subject of the warrant, such information should be included in the instrument and the search and seizure should be appropriately narrowed to the relevant time period so as to mitigate the potential for unconstitutional exploratory rummaging"); *State v. Henderson*, 289 Neb. 271, 289, 854 N.W.2d 616, 633 (2014) ("a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search"); *In re Appeal of Application for Search Warrant*, 71 A.3d 1158, 1162, 1172, 1174, 1181, 1183 (Vt. 2012) (judicial officer who "granted a warrant to search the residence and to seize electronic devices to be searched at an off-site facility" had the authority to attach *ex ante* conditions "requiring that the search [of the electronic devices] be performed by third parties or trained computer personnel separate from the investigators and operating behind a firewall," "requiring that the information be segregated and redacted prior to disclosure," "requiring police to use focused search techniques," and "prohibiting the use of specialized search tools without prior court authorization"; "Because modern computers contain a plethora of private information, exposing them to wholesale searches presents a special threat of exposing irrelevant but damaging secrets."; "especially in a nonphysical context, particularity may be achieved through specification of how a search will be conducted"). *But cf. United States v. Grubbs*, 547 U.S. 90, 98-99 (2006) ("The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause," and, in the case of an anticipatory search warrant, "does not require that the triggering condition . . . be set forth in the warrant itself").

§ 23.17(g) Scope of the Search Permitted in Executing a Warrant

The "good faith" doctrine of *Leon* and *Sheppard* does not in any way affect the courts' obligation to review "the reasonableness of the manner in which [a search warrant] . . . was executed." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987).

The permissible scope of a search pursuant to a warrant is strictly limited to the premises specified in the warrant. *Id.* at 86-87. *See, e.g.*, *United States v. Bershchansky*, 788 F.3d 102, 105, 111-12 (2d Cir. 2015) (Department of Homeland Agents, who were authorized by a warrant to search "Apartment 2 at the location where Bershchansky lived," exceeded the scope of the warrant "by searching Apartment 1 instead"). When the officers who are applying for a warrant know or should know that a particular building contains multiple units, their application and the

warrant are required to specify the individual unit to be searched. See § 23.17(b) *supra.* If, however, they reasonably believe that the entire building is a single unit and in good faith obtain a warrant for the building as a whole, their "failure to realize the overbreadth of the warrant" will be deemed "objectively understandable and reasonable," *Maryland v. Garrison,* 480 U.S. at 88, and their search of any portion of the building will be sustained until such time as it discloses that separate units do exist within the building. *Id.* at 86-89. At that time a continuation of the search beyond the unit for which probable cause was shown to the magistrate – and perhaps any further search at all until the warrant is reissued with a more limited specification of the place to be searched – is unconstitutional, *id.* at 86-87, and the products of the search are suppressible.

Within the premises specified by the warrant, "the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" *Id.* at 84. See § 23.22(a) *infra*. This is a corollary of the pervasive Fourth Amendment principle that "'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible'" (*New York v. Belton,* 453 U.S. 454, 457 (1981) (dictum). *See also Birchfield v. North Dakota*, 136 S. Ct. 2160, 2181 (2016) (dictum) ("Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. . . . Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search – that is, the area that can be searched and the items that can be sought."). The officers may search "the entire area in which the object of the search may be found," performing whatever additional "acts of entry or opening may be required to complete the search. Thus a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found." *United States v. Ross,* 456 U.S. 798, 820-21 (1982) (dictum); *cf. Dalia v. United States,* 441 U.S. 238, 257-58 (1979) (dictum). However, the search may not extend into areas that could not contain the objects specified in the warrant. *See United States v. Ross,* 456 U.S. at 824 (dictum). "[A] warrant to search for a stolen refrigerator would not authorize the opening of desk drawers." *Walter v. United States,* 447 U.S. 649, 657 (1980) (plurality opinion) (dictum).

Nor may the officers seize anything not specified in the warrant, *Marron v. United States,* 275 U.S. 192, 196-98 (1927); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 394 n.7 (1971) (dictum); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 323 (1978) (dictum); *see also United States v. Ganias*, 755 F.3d 125, 137-38 (2d Cir. 2014) (government exceeded the scope of a "warrant for the seizure of particular [business record] data on a computer" by retaining a forensic mirror image of the computer's hard drive for two-and-a-half years "until [the government] finally developed probable cause to search and seize" computer files containing "personal financial records . . . not covered by the . . . [original search] warrant"); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013) ("The question we consider de novo is whether the search was unreasonable because agents relied on the affidavit in support of the warrant to expand the authorized scope of items detailed in the warrant itself." "The plain text of the warrant . . . clearly delineates what is to be seized." "May a broad ranging

probable cause affidavit serve to expand the express limitations imposed by a magistrate in issuing the warrant itself? We believe the answer is no. The affidavit as a whole cannot trump a limited warrant."); *cf. Lo-Ji Sales, Inc. v. New York,* 442 U.S. at 325.

The sole exception to the four-corners-of-the-warrant limitation upon objects that can be seized is grounded in the "plain view" doctrine discussed in § 23.22(b) *infra*: Objects not encompassed by the warrant's terms but which the officer encounters while conducting a search of the limited scope described in the preceding paragraph may be seized if, but only if, their appearance and situation give the officer probable cause to believe that they are contraband or otherwise subject to seizure. *Arizona v. Hicks,* 480 U.S. 321 (1987); *Texas v. Brown,* 460 U.S. 730 (1983) (plurality opinion).

Regarding searches of *persons* found on the premises, see § 23.22(c) *infra.*

§ 23.18 WARRANTLESS ENTRIES OF BUILDINGS AND SEARCHES ON CONSENT

The police may enter a building without a warrant whenever they obtain the valid consent of a party who has the authority to admit persons to the building. *Washington v. Chrisman,* 455 U.S. 1, 9-10 (1982). "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?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). *Cf. United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (although the defendant consented to a border patrol agent's request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, "the agent's answering of the phone [which led to the acquisition of information that incriminated the defendant] exceeded the scope of the consent that [the agent] obtained and, thus, violated Lopez's Fourth Amendment right").

§ 23.18(a) Voluntariness of the Consent

In order to be valid, the consent must be voluntary. *Amos v. United States,* 255 U.S. 313 (1921). It must "not be coerced, by explicit or implicit means, by implied threat or covert force . . . no matter how subtly . . . applied." *Schneckloth v. Bustamonte,* 412 U.S. 218, 228 (1973) (dictum). "'[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving [by a preponderance of the evidence, *see United States v. Matlock,* 415 U.S. 164, 177, 177-78 n.14 (1974)] that the consent was, in fact, freely and voluntarily given.'" *Schneckloth v. Bustamonte,* 412 U.S. at 222, and cases cited; *see also Florida v. Royer,* 460 U.S. 491, 497 (1983) (plurality opinion); *United States v. Mendenhall,* 446 U.S. 554, 557 (1980) (dictum).

As with confessions, see § 24.03 *infra,* the test of voluntariness is said to turn upon "the totality of all surrounding circumstances," *Schneckloth v. Bustamonte,* 412 U.S. at 226: "[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable

subjective state of the person who consents," *id.* at 229; *cf. United States v. Watson,* 423 U.S. 411, 424-25 (1976). Factors that may render a person "vulnerable" and particularly susceptible to coercion include youth, emotional disturbance, lack of education, and mental deficiency. *See, e.g.*, *State v. Butler*, 232 Ariz. 84, 88-89, 302 P.3d 609, 613-14 (2013); *In re J.M.*, 619 A.2d 497, 502-04 (D.C. 1992); and see § 24.05 *infra. See generally* Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L. & SOC. CHANGE 1 (2014).

Courts are loth to find voluntary consent when police entry is sought under an apparent show of authority to enter and is merely acquiesced in by the occupant. *Johnson v. United States,* 333 U.S. 10 (1948); *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 329 (1979). *See also United States v. Shaw*, 707 F.3d 666, 669 (6th Cir. 2013) ("An officer may not falsely tell a homeowner that he has an arrest warrant for a house, then use that falsity as the basis for obtaining entry into the house."). Valid consent may be obtained from an individual who is in police custody, *United States v. Watson,* 423 U.S. at 424, but "courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Schneckloth v. Bustamonte,* 412 U.S. at 240 n.29. *See, e.g., United States v. Hall,* 565 F.2d 917, 920 (5th Cir. 1978); *Guzman v. State,* 283 Ark. 112, 120, 672 S.W.2d 656, 659-60 (1984); *Commonwealth v. Smith,* 470 Pa. 220, 228, 368 A.2d 272, 277 (1977). *See also Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (per curiam) (police officers' removal of a 17-year-old suspect from his home in the middle of the night and transporting of him to the stationhouse could not be deemed "consensual" even though the suspect said "'Okay'" in response to an officer's statement "'we need to go and talk'" because there was "no reason to think [the suspect's] answer was anything more than 'a mere submission to a claim of lawful authority'"). Consent during a period of *illegal* custody should be *eo ipso* ineffective. *Florida v. Royer,* 460 U.S. at 507-08 (plurality opinion); *id.* at 508-09 (concurring opinions of Justices Powell and Brennan); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *State v. Betts*, 194 Vt. 212, 219-21, 75 A.3d 629, 635-36 (2013) (the rule that "consent obtained during an illegal detention is invalid" necessarily calls for holding as well that "consent for a search is not voluntary when obtained in response to the threat of an unlawful detention"). See § 23.37 *infra.*

At least with regard to persons who have not been taken to the stationhouse or other place of closed confinement, the police may obtain valid consent for a warrantless search without first warning the consenting party of his or her Fourth Amendment rights, *see Coolidge v. New Hampshire,* 403 U.S. 443, 484-90 (1971); *Schneckloth v. Bustamonte,* 412 U.S. at 234; *United States v. Matlock*, 415 U.S. at 167 n.2; *United States v. Watson,* 423 U.S. at 424-25; *Edwards v. Arizona,* 451 U.S. 477, 483-84 (1981) (dictum), since "knowledge of a right to refuse is not a prerequisite of a voluntary consent," *Schneckloth v. Bustamonte,* 412 U.S. at 234; *see also United States v. Drayton*, 536 U.S. 194, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). *But cf*. *State v. Budd*, 185 Wash. 2d 566, 573, 374 P.3d 137, 141 (2016) (2016) (reaffirming a state constitutional rule that when the police engage in a so-called "knock and talk," in which they "go to a home without a warrant and ask for the resident's consent to search the premises," the "police 'must, prior to entering the home, inform the person from whom consent is sought that he

or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home'"; "Officers must give these warnings before entering the home because the resident's knowledge of the privilege is a 'threshold requirement for an intelligent decision as to its exercise.'"). Even with respect to these persons, however, "knowledge of the right to refuse consent is one factor to be taken into account" in determining the voluntariness of consent for federal Fourth Amendment purposes, *Schneckloth v. Bustamente*, 412 U.S. at 227; *see also United States v. Drayton*, 536 U.S. at 206; *United States v. Mendenhall,* 446 U.S. at 558-59, and the Court has not rejected the argument that explicit warnings should be required in the case of persons who *are* in police custody "in the confines of the police station," *United States v. Watson,* 423 U.S. at 424, or in similar settings where "the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation," *Schneckloth v. Bustamonte,* 412 U.S. at 247, in which the reasoning of *Miranda v. Arizona*, 384 U.S. 436 (1966), see §§ 24.07-24.08 *infra,* appears to be fully applicable, *Berkemer v. McCarty,* 468 U.S. 420, 437-40 (1984); *Arizona v. Roberson,* 486 U.S. 675, 685-86 (1988); *United States v. Washington,* 431 U.S. 181, 187 n.5 (1977) (dictum); *Roberts v. United States,* 445 U.S. 552, 560-61 (1980) (dictum). *And see Schneckloth v. Bustamonte*, 412 U.S. at 240 n.29, 247 n.36. *Cf. Ohio v. Robinette*, 519 U.S. at 35 (motorist who was stopped for speeding on the open road, and who was thereafter given a verbal warning and received his driver's license back from the police officer, did not have to be "advised that he is 'free to go'" in order for his consent to the officer's request to search the car to be "recognized as voluntary").

The extent to which state law can require *ex ante* blanket consent to certain searches and seizures as a condition of receiving various licences, privileges, or benefits is largely an open question. The convoluted reasoning in *United States v. Knights*, 534 U.S. 112 (2001), summarized in § 23.15(b) *supra* plainly implies that a State cannot condition a convict's release on probation upon his or her agreement to be subject to searches and seizures that would violate the Fourth Amendment in the case of non-probationers. Since Knights "signed . . . [a] probation order, which stated immediately above his signature that "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME," and since one of those terms was "that Knights would '[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer" (*id*. at 114), the case would have been a no-brainer if consents of this sort were legally effective. Conspicuously avoiding this straightforward approach (which the Government forcefully advocated), the Court wrote that it "need not decide whether Knights' [sic] acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, . . . because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' . . . with the probation search condition being a salient circumstance (*id*. at 118) because "[t]he probation condition . . . significantly diminished Knights' [sic] reasonable expectation of privacy" (*id*. at 119-20). A generation later, in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), summarized in § 25.14 subdivision (d) *supra*, the

Supreme Court, "[h]aving concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample" from a motorist arrested for drunk driving (*id*. at 2185), was required to address the question whether "such tests are justified based on the driver's legally implied consent to submit to them" (*id*.) under state "implied-consent laws" that "go beyond" the "typical penalty for . . . [refusal to submit to blood testing for sobriety – namely,] suspension or revocation of the motorist's license" – and "make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired" (*id*. at 2166-67). The Court answered that question in the negative, but on extremely narrow grounds. "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them. ¶ It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.¶ . . . [R]easonableness is always the touchstone of Fourth Amendment analysis, . . . [a]nd applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 2185-86. Pending the descent of the other shoe, defense counsel should take the position that consents extracted in advance as the price for receiving government "privileges" are void by analogy to cases like *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), which hold that "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution" (*id*. at 805). In each of these Fifth Amendment cases, the "potent sanctions" threatened were nothing more or less than the termination of public employment or of "the opportunity to secure public contracts" (*id*. at 806) – advantages which the State had no obligation to extend to any particular individuals in the first place.

§ 23.18(b) Authority To Consent: Consent by a Party Other Than the Respondent

Consent by a party other than the respondent is a significant issue in juvenile court because the police routinely obtain consent for entry of a respondent's room and search of his or her belongings from the respondent's parent.

The test of a third party's authority to consent is whether the third party possessed – or reasonably appeared to the police to possess – "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). *See also Frazier v. Cupp*, 394 U.S. 731, 740 (1969); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) ("the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant"); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). "Common authority is, of course, not to be implied from the mere property interest a third party has in the

property. The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. at 171 n.7. *See also Georgia v. Randolph*, 547 U.S. at 111 ("The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."); *Stoner v. California*, 376 U.S. 483 (1964) (hotel manager's consent to the entry of a guest's room is ineffective); *Chapman v. United States*, 365 U.S. 610 (1961) (landlord's consent to the entry of a tenant's house is ineffective); *cf. Payton v. New York*, 445 U.S. 573, 583 (1980) (three-year old child's opening of the door to the house could not constitute valid consent to a police entry to arrest the child's father).

Although "voluntary consent of an individual possessing [or reasonably appearing to possess the requisite] authority" may suffice "*when the suspect is absent*," *Georgia v. Randolph*, 547 U.S. at 109 (emphasis added), a different standard applies when a co-occupant "who later seeks to suppress the evidence . . . is present at the scene and expressly refuses to consent." *Id*. at 106. In *Georgia v. Randolph*, the Court addressed the latter scenario and held that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id*. at 122-23. *Accord*, *Fernandez v. California*, 134 S. Ct. 1126, 1133 (2014) (dictum). *See also United States v. Johnson*, 656 F.3d 375, 377-79 (6th Cir. 2011) (the defendant's objection to the search at the scene was sufficient to override the consent given by his wife and her grandmother, even though the defendant "was not a full-time resident of the home and his possessory interest was therefore inferior to that of" the consenting individuals, "who lived there full-time": the Supreme Court in *Randolph* "expressly avoided making . . . distinctions" between "relative degrees of possessory interest among residential co-occupants"). *Compare Fernandez v. California*, 134 S. Ct. at 1130, 1134 (a domestic violence victim's consent to police entry of the home she shared with the defendant was valid, notwithstanding the defendant's objection at the time the police arrived, because the "consent was provided by [the] . . . abused woman well after her male partner had been [lawfully] removed" by the police: when "an occupant . . . is absent due to a lawful detention or arrest," the absent occupant "stands in the same shoes as an occupant who is absent for any other reason"; the Court emphasizes, however, that the defendant did not "contest the fact that the police had reasonable grounds for removing him from the apartment so that they could speak with . . . an apparent victim of domestic violence, outside of [the defendant's] . . . potentially intimidating presence," and did "not even contest the existence of probable cause to place him under arrest"), *with State v. Coles*, 218 N.J. 322, 328, 347-48, 95 A.3d 136, 139, 150-51 (2014) ("As the United States Supreme Court's *Fernandez* opinion makes clear, valid third-party consent is subject to the exception that the third party's consent cannot be manufactured through the unlawful detention of the defendant"; the New Jersey Supreme Court holds on state constitutional grounds, "bolstered by Fourth Amendment principles," that the officers' initially valid detention of the defendant became unlawful once his identity and residence were confirmed and thus he "was

being unlawfully detained by police, a few houses away from his home" at the time the police obtained consent from his aunt to search his bedroom in her house; the "asserted consent-based search" therefore was unlawful because "[t]he officer's action detaining defendant in a patrol car when probable cause to arrest was lacking effectively prevented any objection from defendant" and "[it] also prevented him from disputing his aunt's statements in response to police inquiries about control over the room").

It should be noted that in *Randolph* the objecting party and the consenting party were both adults; it is unclear whether the result would be different if the objecting party were a juvenile and the consenting party were his or her adult relative, caretaker or other owner of a possessory interest in the premises that the juvenile lacks; but prosecutors will predictably argue that a child cannot countermand an adult possessor's consent to a police entry into premises. In cases of this sort, courts may well draw distinctions between different portions of the premises, holding, for example, that the child's objection cannot exclude the police from common portions of a dwelling but can preclude them from searching the child's own room or areas of it reserved for storage of the child's personal effects. *See Georgia v. Randolph*, 547 U.S. at 112, quoted in the paragraph after next; and *cf.* § 23.35 *infra*.

At least in the absence of a child's refusal of consent to police entry and search of the home, a parent ordinarily will be deemed to have the authority to consent to an entry of the home in which s/he lives with the respondent and to an inspection of any of the "common areas" of the home. The question whether a parent has the authority to consent to a search of his or her child's room is a far less clear-cut issue. In *Griffin v. Wisconsin,* 483 U.S. 868 (1987), the Court observed in *dictum* that the interest of "parental custodial authority" would weigh against the application of the warrant requirement to a "search of a minor child's room," *id.* at 876, but that issue was not before the Court, and the majority decision does not purport to address the constitutional interests that could outweigh the interest of "parental custodial authority." Some lower courts have chosen to adopt a general rule on this subject, either recognizing an absolute parental right to consent emanating from the parent's ownership of, or control over, the premises, *see, e.g., United States v. Stone,* 401 F.2d 32, 34 (7th Cir. 1968); *Maxwell v. Stephens,* 348 F.2d 325, 336-38 (8th Cir. 1965), or conversely holding that the right to consent to a search of one's room is a personal right that cannot be waived by one's parent, *People v. Flowers,* 23 Mich. App. 523, 527, 179 N.W.2d 56, 58 (1970).

Unless defense counsel is in a jurisdiction that has already adopted a categorical rule concerning a parent's power to consent to the search of his or her child's room, counsel's safest course will usually be to elicit facts showing that this particular family treated the respondent's room as reserved for his or her private occupancy and use, to the exclusion of other family members, including the parent(s). Such a showing would bring the case within the general rule that a parent cannot consent to search of an area or object that has been clearly demarcated as reserved for the child's use. *See, e.g., In re Scott K.,* 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979) (a parent's authority to consent to search of the home did not extend to consenting to the search of a child's locked toolbox inside the child's bedroom); *State v. Peterson,* 525 S.W.2d

599, 608-09 (Mo. App. 1975) (a father could not validly consent to search of his child's room because the room was exclusively reserved for the child's occupancy and use); *see also United States v. Peyton*, 745 F.3d 546, 552-56 (D.C. Cir. 2014) (an adult defendant's great-great-grandmother, with whom he shared a one-bedroom apartment, lacked both actual and apparent authority to consent to a search of a closed shoebox of his that was next to his bed: "The fact that a person has common authority over a house, an apartment, or a particular room, does not mean that she can authorize a search of anything and everything within that area."); *State v. Colvard*, 296 Ga. 381, 381-82, 383, 768 S.E.2d 473, 474, 475 (2015) (an adult defendant's uncle, in whose apartment the defendant lived, did not have authority to consent to a search of the defendant's bedroom, which was "used exclusively" by the defendant, had a lock on the door for which the uncle did not have a key and the "Uncle could not go into the bedroom when the door was locked," and the bedroom door was locked at the time of the police entry of the home although "it did not appear that the bedroom door was securely fastened" since the police were able to "pop [it] open" easily); *cf. Georgia v. Randolph*, 547 U.S. at 112 ("when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; 'a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted,' 4 LaFave § 8.4(c), at 207 (4th ed. 2004), but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom"); *Reeves v. Warden,* 346 F.2d 915 (4th Cir. 1965) (a co-tenant cannot consent to entry of an area reserved for the defendant's private occupancy and use). In making such a showing, counsel should stress any of the following facts that can be proved: The respondent's room has a lock on it and is normally locked when the respondent is not inside the room; the parent does not normally enter the respondent's room without asking the respondent's permission (and the parent does not regularly enter the room at will for the purpose of cleaning it); the family has an understanding that the room has been set aside for the respondent's private use, and this was done for the sake of giving the respondent an area that s/he could view as private and exclusively his or her own.

§ 23.18(c) Application of the "Private Search" Doctrine to Home Entries by Law Enforcement Officers

This subject – which is analytically distinct from the subject of consent searches but bears some situational and analogical similarity to it – is canvassed throughly, with discussion of the relevant authorities, in *State v. Wright*, 221 N.J. 456, 459-78, 114 A.3d 340, 342-53 (2015):

> "In this case, we consider whether the 'third-party intervention' or 'private search' doctrine applies to a warrantless search of a home.
>
> "The doctrine originally addressed situations like the following: Private actors search an item, discover contraband, and notify law enforcement officers or present the item to them. The police, in turn, replicate the search without first getting a warrant. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109 (1984) [§ 23.22(b) subdivision (ii) *infra*].

Because the original search is carried out by private actors, it does not implicate the Fourth Amendment. And if the officers' search of the item does not exceed the scope of the private search, the police have not invaded a defendant's protected privacy interest and do not need a warrant.

"The State now seeks to expand the doctrine to a very different setting: the search of a private home. In this case, a resident reported a leak in her apartment to her landlord, who showed up the following day with a plumber. The landlord and plumber entered the apartment while no one was home, spotted the leak in the kitchen, and checked elsewhere for additional leaks. In the rear bedroom, the plumber saw drugs on top of a nightstand and inside an open drawer. He and the landlord notified the police.

"Instead of using that information to apply for a search warrant, an officer walked into the apartment and looked around the kitchen and bedroom area. He, too, noticed the drugs and found a scale as well. The police conducted a full search moments later, with the resident's consent, and found other contraband.

" . . . . . .

"Relying on the protections in the State Constitution, we conclude that the private search doctrine cannot apply to private dwellings. Absent exigency or some other exception to the warrant requirement, the police must get a warrant to enter a private home and conduct a search, even if a private actor has already searched the area and notified law enforcement.

"To be sure, whenever residents invite someone into their home, they run the risk that the third party will reveal what they have seen to others. . . . A landlord, like any other guest, may tell the police about contraband he or she has observed. And the police, in turn, can use that information to apply for a search warrant. . . . But that course of events does not create an exception to the warrant requirement.

" . . . . . .

"We recognize that residents have a reduced expectation of privacy in their home whenever a landlord or guest enters the premises. But residents do not thereby forfeit an expectation of privacy as to the police. In other words, an invitation to a plumber, a dinner guest, or a landlord does not open the door to one's home to a warrantless search by a police officer.

" . . . . . .

"The proper course under the State and Federal Constitutions is the simplest and most direct one. If private parties tell the police about unlawful activities inside a

person's home, the police can use that information to establish probable cause and seek a search warrant. In the time it takes to get the warrant, police officers can secure the apartment or home from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence. *Illinois v. McArthur*, 531 U.S. 326, 334 . . . (2001) [§ 23.06(c), fifth paragraph *supra*]. But law enforcement cannot accept a landlord's invitation to enter a home without a warrant unless an exception to the warrant requirement applies."

§ 23.19 WARRANTLESS ENTRY FOR THE PURPOSE OF MAKING A VALID ARREST

If the police possess a valid *arrest* warrant for an occupant of a building, they may enter the premises without a *search* warrant for the purpose of effecting the arrest. *Payton v. New York,* 445 U.S. 573, 602-03 (1980) (dictum).

Before the decisions in *Payton v. New York* in 1980 and *Steagald v. United States,* 451 U.S. 204 (1981), there was a substantial body of caselaw permitting "arrest entries" without any sort of warrant in a variety of circumstances. The only warrantless arrest entries that survive *Payton* and *Steagald* are those made "in 'hot pursuit' of a fugitive," *Steagald v. United States,* 451 U.S. at 221, or under other "exigent circumstances" (see § 23.20 *infra*) that make it impracticable to obtain a warrant, *Steagald v. United States,* 451 U.S. at 213-16, 218, 221-22. *See United States v. Johnson,* 457 U.S. 537 (1982); *Minnesota v. Olson,* 495 U.S. 91, 100-01 (1990), elaborated in § 23.20 *infra.* The mere "'inherent mobility' of persons" sought to be arrested does not suffice to establish this exception to the warrant requirement because the police can cope with that problem "simply by waiting for a suspect to leave the third person's home before attempting to arrest that suspect." *Steagald v. United States,* 451 U.S. at 221 n.14. *Cf. Payton v. New York,* 445 U.S. at 583 (dictum). *See also United States v. Allen*, 813 F.3d 76, 79, 85-86 (2d Cir. 2016) (the defendant, who opened his apartment door at police officers' request and spoke to the officers from "'inside the threshold' while the officers stood on the sidewalk," "was under arrest" when "[t]he officers told Allen that he would need to come down to the police station to be processed for the assault," and the police thereby violated *Payton* even though the police had not yet physically entered the apartment; "While it is true that physical intrusion is the 'chief evil' the Fourth Amendment is designed to protect against, . . . we reject the government's contention that this fact requires that *Payton*'s warrant requirement be limited to cases in which the arresting officers themselves cross the threshold of the home before effecting an arrest. The protections of the home extend beyond instances of actual trespass. . . . By advising Allen that he was under arrest, and taking control of his further movements, the officers asserted their power over him *inside his home*."); *United States v. Nora*, 765 F.3d 1049, 1054, 1060 (9th Cir. 2014) ("The government properly concedes that the police arrested Nora 'inside' his home for purposes of the *Payton* rule. Although officers physically took Nora into custody outside his home in the front yard, they accomplished that feat only by surrounding his house and ordering him to come out at gunpoint. We've held that forcing a suspect to exit his home in those circumstances constitutes an in-home arrest under *Payton*." "Although Nora's arrest was supported by probable

cause, the manner in which officers made the arrest violated *Payton*. Evidence obtained as a result of Nora's unlawful arrest must be suppressed."); *People v. Gonzales*, 111 A.D.3d 147, 148-50, 972 N.Y.S.2d 642, 643-44 (N.Y. App. Div., 2d Dep't 2013) (police who were told by a complainant that her cousin's boyfriend had assaulted her in a basement apartment went to the door of that apartment accompanied by the complainant; they knocked; "[w]hen the defendant opened the door, the police asked the complainant if he was the person who had assaulted her, and she said yes. The defendant, who had never left the apartment, even partially, tried to close the door, but the police pushed their way inside and handcuffed him. Minutes later, still inside the apartment, the defendant made an inculpatory statement. . . . ¶ In *Payton v. New York*, 445 U.S. 573 . . . the United States Supreme Court announced a clear and easily applied rule with respect to warrantless arrests in the home: 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant' . . . . The rule under the New York Constitution is the same (see N.Y. Const., art. 1, § 12; *People v. Levan*, 62 N.Y.2d 139, 144, 476 N.Y.S.2d 101, 464 N.E.2d 469). *Payton* and *Levan* require suppression of the defendant's statement under the clear, undisputed facts of this case.").

Police making any of the permissible types of arrest entry without a search warrant – entries pursuant to an arrest warrant, "hot pursuit" entries, and entries under exigent circumstances – are governed by the following rules:

(i) The intended arrest itself must be valid within the principles of § 23.07 *supra.* If the arrest is not valid, the arrest entry falls with it. *E.g., Massachusetts v. Painten,* 368 F.2d 142 (1st Cir. 1966), *cert. dismissed,* 389 U.S. 560 (1968).

(ii) There must be probable cause to believe that the person sought to be arrested is within the premises. *E.g., Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966); see *Steagald v. United States,* 451 U.S. at 214 n.7 (by implication); *Payton v. New York,* 445 U.S. at 583, 603 (by implication). An arrest entry can be sustained only when the officers "[p]ossessing an arrest warrant . . . [have] probable cause to believe [that the person named in the warrant] was in his home" (*Maryland v. Buie,* 494 U.S. 325, 332 (1990) (dictum)).

(iii) Upon entry, the police may "search anywhere in the house that . . . [the person sought] might . . . [be] found." *Id.* at 330. However, the entry and search may not exceed the bounds appropriate in hunting for a person, *id.* at 335-36, and they may not intrude into closed areas too small to contain a human being, *see United States v. Ross,* 456 U.S. 798, 824 (1982) (dictum), unless the officers have probable cause to believe that the person sought to be arrested is armed and that they therefore "need to check the entire premises [for weapons] for safety reasons," *Payton v. New York,* 445 U.S. at 589 (dictum); *see Warden v. Hayden,* 387 U.S. 294, 298-300 (1967). *Cf. Arizona v. Hicks,* 480 U.S. 321 (1987), elaborated in § 23.22(b) *infra*.

(iv) "Once . . . [the person sought has been] found, . . . the search for him . . . [is] over, and there . . . [is] no longer that particular justification for entering any rooms that had not yet

been searched." *Maryland v. Buie,* 494 U.S. at 333. "[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. See also § 23.08 *supra.* "Beyond that, however, . . . [the only basis for continuing the search or entering additional rooms after the arrest is the "protective sweep" doctrine described in § 23.22(d) *infra,* which requires] articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie,* 494 U.S. at 334.

Another limited exception to the search warrant requirement is a kind of hybrid of "arrest entry" reasoning and "consent" reasoning. In *Washington v. Chrisman,* 455 U.S. 1 (1982), the United States Supreme Court held that when a person who has been validly arrested in a location other than his or her home requests and receives permission from the arresting officer to return home before being taken to the lockup, the officer may accompany that person into the home, as an exercise of "the arresting officer's authority to maintain custody over the arrested person" (*id.* at 6). *Contra, State v. Chrisman,* 100 Wash. 2d 814, 676 P.2d 419 (1984) (on remand, the Washington Supreme Court rejects the *Washington v. Chrisman* holding on state constitutional grounds).

§ 23.20 WARRANTLESS ENTRY UNDER "EXIGENT CIRCUMSTANCES"

As mentioned earlier in § 23.19 *supra*, the police may make a warrantless entry for the purpose of effecting an arrest under "exigent circumstances" that preclude the acquisition of an arrest warrant. Thus, in *Warden v. Hayden,* 387 U.S. 294 (1967), the Court approved a building entry by officers without a warrant for the purpose of arresting a fugitive under circumstances of "hot pursuit": The police observed the defendant flee from the crime scene, saw him enter the building, and reached the building less than five minutes after the defendant. *Cf. United States v. Santana,* 427 U.S. 38, 42-43 & n.3 (1976); *Steagald v. United States,* 451 U.S. 204, 218, 221-22 (1981) (dictum).

"[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin,* 466 U.S. 740, 749-50 (1984). "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Id.* at 750. *Accord, Vale v. Louisiana,* 399 U.S. 30, 34-35 (1970); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 358-59 (1977); *Mincey v. Arizona,* 437 U.S. 385, 393-94 (1978); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "[I]n the absence of hot pursuit there must be at least probable cause to believe that [facts constituting exigent circumstances – such as the "'imminent destruction of evidence, . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling'" – are] . . . present." *Minnesota v. Olson,* 495 U.S. 91, 100 (1990). *See, e.g.*, *United States v. Collins*, 510 F.3d 697, 701 (7th Cir. 2007) (the government's claim of

"exigent circumstances" for a warrantless entry of a dwelling, based on an asserted risk of destruction of evidence, is rejected because "[t]he government has failed to show that in this case the police had probable cause to believe that evidence was being, or was about to be, destroyed when they entered"); *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012) (hotel room occupant's "attempt to shut the door once he became aware of the police presence outside [the] room" – by partially opening the door in response to an officer's knocking and claiming to be housekeeping staff – did not provide a reasonable basis for believing that "the destruction of evidence was imminent": the occupant "was under no obligation to allow the officers to enter the premises at that point and was likewise within his bounds in his attempt to close the door"); *Turrubiate v. State*, 399 S.W.3d 147, 149, 154 (Tex. Crim. App. 2013) (an exigent circumstances exception is not supported by "probable cause to believe that illegal drugs are in a home coupled with an odor of marijuana from the home and a police officer making his presence known to the occupants"; there must be "additional evidence of . . . attempted or actual destruction based on an occupant's movement in response to the police knock"). *Compare Kentucky v. King*, 563 U.S. 452, 455, 462, 471 (2011) (if the police had a reasonable basis to believe that evidence in a dwelling was at risk of imminent destruction, which the Court "assume[s] for purposes of argument," the exigent circumstances exception could justify a warrantless entry of the dwelling even though "the police, by knocking on the door of a residence and announcing their presence, cause[d] the occupants to attempt to destroy evidence." As long as "[t]he conduct of the police prior to their entry into the apartment was entirely lawful," and "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment," "the exigent circumstances rule applies"), *with King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012), *cert. denied*, 133 S. Ct. 1995 (2013) (on remand of *Kentucky v. King* from the U.S. Supreme Court, the Kentucky Supreme Court holds that "the Commonwealth failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry" because "the sounds . . . [from inside the dwelling that the police] described at the suppression hearing [as evidencing efforts to destroy evidence] were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door"), *and State v. Campbell*, 300 P.3d 72, 74, 78-79 (Kan. 2013) ("the exigent circumstances exception does not apply in light of the officer's unreasonable actions in creating the exigency" by not "simply knock[ing] on the door and wait[ing] for an answer . . . [or "announc[ing] his presence" but instead] covering the peephole and positioning himself to block the occupant's ability to determine who was standing at the door," thereby causing an occupant to "open[ ] the door about a third of the way" while visibly armed with a gun).

In *Welsh v. Wisconsin,* the Court held that in cases of arrest entries under a claim of exigent circumstances, "an important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." 466 U.S. at 753. Explaining that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed," *id.,* the Court in *Welsh* struck down a warrantless home entry to make an arrest for the offense of driving while intoxicated. The Court found that "the best indication of the State's interest in precipitating an arrest" was the State's classification of

the offense as "a noncriminal, civil forfeiture offense" and refused to allow an arrest entry for such an offense, notwithstanding the risk that "evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id.* at 754. The *Welsh* opinion did not go quite as far as holding that "warrantless entry to arrest a misdemeanant is never justified, but only that such entry should be rare." *Stanton v. Sims*, 134 S. Ct. 3, 6 (2013) (per curiam). There is, however, language in the *Welsh* opinion that supports a categorical rule limiting warrantless arrest entries under exigent circumstances to felony arrests. *See Welsh v. Wisconsin*, 466 U.S. at 750 n.12, 752-53. At the very least, *Welsh* "counsel[s] that suspicion of minor offenses should give rise to exigencies only in the rarest of circumstances." *White v. Stanley*, 745 F.3d 237, 240-41 (7th Cir. 2014) ("smell of burning marijuana" inside a house did not provide a basis for exigent-circumstances entry of the house). *See also Minnesota v. Olson,* 495 U.S. at 100-01 (holding that the lower court "applied essentially the correct standard in determining . . . that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered," and approving the lower court's "fact-specific application of th[is] . . . proper legal standard . . . [to reject a claim of exigent circumstances even though the] grave crime [of murder] was involved . . . [because] respondent 'was known not to be the murderer but thought to be the driver of the getaway car,' . . . and . . . the police had already recovered the murder weapon"); *Harris v. O'Hare*, 770 F.3d 224, 235 (2d Cir. 2014). *Cf. Brigham City v. Stuart*, 547 U.S. at 405 (distinguishing *Welsh v. Wisconsin* on the ground that "*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated" and "the 'only potential emergency' confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level)" whereas "[h]ere, the officers were confronted with ongoing violence occurring within the home"); *Stanton v. Sims*, 134 S. Ct. at 6 (noting that in *Welsh* "'there was no immediate or continuous pursuit of [Welsh] from the scene of a crime'" and cautioning that "despite our emphasis in *Welsh* on the fact that the crime at issue was minor – indeed, a mere nonjailable civil offense – nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit*"; the "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect," *id*. at 5 (citing cases)).

When the police make a valid arrest entry in "hot pursuit," they may lawfully observe anything in the building that comes into "plain view" while they are seeking out the suspect and effecting his or her arrest, and they may seize objects in "plain view" if, but only if, there is probable cause to believe that the objects are contraband or crime-related. See § 23.22(b) *infra.* They may not search the premises more intensively or intrusively than is necessary to find the person sought to be arrested, *see Arizona v. Hicks,* 480 U.S. 321 (1987), except when that person is known to be armed. In *Warden v. Hayden,* the Court did allow police who entered a building in "hot pursuit" of an armed fugitive to make a warrantless search within the building to the extent necessary to find weapons. 387 U.S. at 298-300. *But see, e.g., People v. Jenkins*, 24 N.Y.3d 62, 65, 20 N.E.3d 639, 641, 995 N.Y.S.2d 694, 696 (2014) (although the police lawfully broke down the door of an apartment as they pursued an armed suspect into the apartment and also acted lawfully in searching the apartment and arresting the defendant and another man who were

hiding under a bed, the officers' subsequent search of a closed box – which was found to contain a gun – was unlawful and therefore the gun should have been suppressed: "by the time [the] Officer . . . opened the box, any urgency justifying the warrantless search had abated" because "[t]he officers had handcuffed the men and removed them to the living room where they (and the two women) remained under police supervision," and thus "the police 'were in complete control of the house'" and "there was no danger that defendant would dispose of or destroy the weapon . . ., nor was there any danger to the public or the police"; accordingly, "the police were required to obtain a warrant prior to searching the box").

In addition to "hot pursuit" arrest entries, law enforcement officers may make warrantless building entries in the "exigent circumstances" presented by a manifest need to render assistance to an occupant who is in physical danger or to prevent serious bodily injury. *See City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774-75 (2015) (police officers, who were dispatched to a group home for mentally ill residents to help take a resident to a secure ward at a hospital, did not violate the Fourth Amendment by using a social worker's key to enter the resident's room when she did not respond to the officers' knocking on her door, announcing their identity, and saying that they wanted to help her; the officers' subsequent reentry of the apartment, after they initially retreated in the face of the resident's approaching them with a knife and threatening to kill them, also was justified as "'part of a single, continuous'" entry in a "'continuing emergency'" in which the police "knew that delay could make the situation more dangerous"); *Michigan v. Fisher,* 558 U.S. 45, 47-49 (2009) (per curiam) (the "emergency aid exception" to the warrant requirement – which permits "law enforcement officials . . . [to] 'enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury'" – justified a warrantless entry of a home by police officers who "respond[ed] . . . . to a report of a disturbance" and, upon "arriv[ing] at the scene," "encountered a tumultuous situation in the house," "found signs of a recent injury, perhaps from a car accident, outside," and "could see violent behavior inside" the house; the circumstances were sufficient to justify a reasonable belief on the officers' part that an occupant "had hurt himself (albeit non-fatally) and needed treatment that in his rage he was unable to provide, or that [the occupant] was about to hurt, or had already hurt someone else."); *Brigham City v. Stuart*, 547 U.S. at 403 ("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"); *Michigan v. Tyler,* 436 U.S. 499, 509-10 (1978) (firefighting officials require neither "a warrant [n]or consent before entering a burning structure to put out the blaze," *id*. at 509; and, because "[f]ire officials are charged not only with extinguishing fires, but with finding their causes," *id.* at 510, they "need no warrant [or consent] to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished," *id.*). *See also, e.g.*, *Ryburn v. Huff*, 132 S. Ct. 987, 990-92 (2012) (per curiam); *United States v. Barone,* 330 F.2d 543 (2d Cir. 1964); *Mincey v. Arizona,* 437 U.S. at 392-93 (dictum), and authorities cited; *but see Carlson v. Fewins*, 801 F.3d 668 (6th Cir. 2015) (exigency dissipated).

In *dicta,* the Supreme Court has frequently suggested the existence of a more general "exigent circumstances" exception to the warrant requirement. *See, e.g., Johnson v. United*

States, 333 U.S. 10, 14-15 (1948); *United States v. Jeffers,* 342 U.S. 48, 51 (1951); *Chapman v. United States,* 365 U.S. 610, 615 (1961); *Mincey v. Arizona,* 437 U.S. at 392-94; *Michigan v. Summers,* 452 U.S. 692, 702 n.17 (1981); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173-74 (2016); *cf. Torres v. Puerto Rico,* 442 U.S. 465, 471 (1979); *New York v. Belton,* 453 U.S. 454, 457 (1981). However, the Court has never sustained a warrantless building entry on the "exigent circumstances" theory when the purpose of the entry was to make a *search* unassociated with an arrest or with the peacekeeping responsibilities of the police to provide emergency aid and to avert serious bodily injury. Probably the "exigent circumstances" exception extends no further than "hot pursuit" and "emergency assistance" cases, *see Vale v. Louisiana*, 399 U.S. at 34-35; *Mincey v. Arizona*, 437 U.S. at 392-93, although the tenor of some of the Supreme Court *dicta* does. *See State v. Vargas*, 213 N.J. 301, 305, 313-17, 321-26, 63 A.3d 175, 177, 182-84, 187-89 (2013) (reviewing relevant decisions of the U.S. Supreme Court and concluding that these decisions do not support treating the "community-caretaking" function of the police – as manifested here by the police officers' seeking to "check on the welfare of a resident" in response to concerns expressed by the landlord – as "a justification for the warrantless entry and search of a home in the absence of some form of an objectively reasonable emergency").

§ 23.21 "KNOCK AND ANNOUNCE" REQUIREMENTS: RESTRICTIONS UPON THE MANNER OF POLICE ENTRY

The preceding sections deal with restrictions upon the *circumstances* under which building entries can be made. There are also legal restrictions upon the *manner* of police entry.

In most jurisdictions, "knock and announce" statutes require that the police announce their presence and identity as officers, explain the purpose of their intended entry, and request to be admitted peaceably, before they may break and enter. *See, e.g., Miller v. United States,* 357 U.S. 301 (1958) (construing 18 U.S.C. § 3109 and the local law of the District of Columbia). Although these statutes are commonly framed in terms of police "breaking" open a door, their requirements are usually held to apply whenever the police open any door, whether locked or unlocked, forcibly or nonforcibly, *see Sabbath v. United States*, 391 U.S. 585 (1968), and in some jurisdictions the statutes are also applied to police entries through an already open door, *People v. Buckner,* 35 Cal. App. 3d 307, 313-14, 111 Cal. Rptr. 32, 36-37 (1973).

The statutes or cases construing the statutes usually provide for emergency exceptions to the "knock and announce" requirement. The exceptions commonly include situations in which there is reasonable ground to believe that an announcement would (i) jeopardize the safety of the entering officer, (ii) cause the destruction of evidence, or (iii) be a "useless gesture" because it is apparent from the surrounding circumstances that the occupants of the premises already know of the authority and purpose of the police. *See, e.g., Miller v. United States,* 357 U.S. at 308-10; *Sabbath v. United States,* 391 U.S. at 591; *cf. Dalia v. United States,* 441 U.S. 238, 247-48 (1979); *Washington v. Chrisman,* 455 U.S. 1, 10 n.7 (1982).

The Supreme Court has recognized that "knock and announce" requirements are

embodied in the Fourth Amendment. *See Wilson v. Arkansas*, 514 U.S. 927 (1995) (the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment"). *Accord*, *United States v. Banks*, 540 U.S. 31, 36-37 (2003); *United States v. Ramirez*, 523 U.S. 65, 70 (1998); *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997); *and see Terebesi v. Torresso*, 764 F.3d 217, 241-43 (2d Cir. 2014). *Cf*. *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam). The Court has held, however, that the exclusionary rule is not available to suppress evidence obtained in the course of a building entry that is unconstitutional solely because the entering officers violated the Fourth Amendment "knock and announce" rule. *Hudson v. Michigan*, 547 U.S. 586, 599-600, 602 (2006). *See id*. at 602-03 (Justice Kennedy, concurring in part and concurring in the judgment, thus supplying the vote necessary to produce a 5-Justice majority, but writing separately to "underscore[ ]" the following "[t]wo points": "First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order . . . [and] [t]he Court's decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression."). Because *Hudson v. Michigan* concerned only the consequences of a federal Fourth Amendment violation, it does not preclude state courts from enforcing their respective state-law "knock and announce" requirements by exclusion and suppression. *See*, *e.g.*, *State v. Jean-Paul*, 295 P.3d 1072, 1076 (N.M. App. 2013) (adhering to New Mexico's pre-*Hudson* exclusionary rule: "[W]hile both the federal and state constitutions include the knock-and-announce requirement, the remedies for a violation under the two constitutions are not the same."); *State v. Rockford*, 213 N.J. 424, 453, 64 A.3d 514, 530 (2013) (reserving the question "whether the exclusionary rule is the appropriate remedy for an unconstitutional execution of a knock-and-announce warrant under our State Constitution" in the wake of *Hudson*); § 7.09 *supra*. For the reason stated in § 23.17 concluding paragraph *supra*, the case for state-law rejection of *Hudson* is a strong one. *See, e.g.*, *State v. Cable*, 51 So. 3d 434 (Fla. 2010) ("[I]n *Benefield v. State*, 160 So. 2d 706 (Fla.1964), . . . this Court held that a violation of Florida's knock-and-announce statute vitiated the ensuing arrest and required the suppression of the evidence obtained in connection with the arrest." *Id*. at 435. "[T]he [*Benefield*] Court noted that '[s]ection 901.19, Florida Statutes, . . . appears to represent a codification of the English common law . . . . ¶ 'Entering one's home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. It was condemned by the yearbooks of Edward IV, before the discovery of this country by Columbus. . . . ¶ This sentiment has moulded our concept of the home as one's castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly.'" *Id*. at 439. "[B]ecause *Hudson* does not address the remedy for state-created statutory violations, *Hudson* does not require us to recede from *Benefield*." *Id*. at 442.); *Berumen v. State*, 182 P.3d 635 (Alaska App. 2008) ("[T]he issue before us is one of state

law, so the United States Supreme Court's decision in *Hudson* does not bind us." *Id*. at 637. "The police officers in this case violated a longstanding requirement of Alaska law that is designed to protect the privacy and dignity of this state's citizens. On the issue of whether the police must announce their claimed authority and purpose, and on the related issue of whether the police are allowed to break into a building if they have neither sought nor been refused admittance, the statute is written in clear and unambiguous terms. . . . ¶ . . . [T]he evidence found in the hotel room was 'secured through such a flagrant disregard' of the procedure specified by the Alaska legislature that it 'cannot be allowed to stand without making the courts themselves accomplices in [willful] disobedience of [the] law.'" *Id*. at 642.).

Police entries that involve SWAT-squad tactics or other exercises of massive force can be challenged as unreasonable searches and as violations of Due Process under both the Fourth and Fourteenth Amendments (*see, e.g., Estate of Smith v. Marasco*, 430 F.3d 140, 151-53 (3d Cir. 2005); *Milan v. Bolin*, 795 F.3d 726 (7th Cir. 2015); *Carlson v. Fewins*, 801 F.3d 668 (6th Cir. 2015)), and state law if they are excessively violent. *Hudson* should not withdraw the Fourth Amendment exclusionary remedy in such cases, because they would evoke the independent principle of *Rochin v. California*, 342 U.S. 165 (1952), which is, at its root, a prohibition against *"convictions* . . . brought about by methods that offend 'a sense of justice'" (*id*. at 173 (emphasis added)) or governmental "conduct that shocks the conscience" (*id*. at 172).

§ 23.22 SCOPE OF PERMISSIBLE POLICE ACTIVITY AFTER ENTERING THE PREMISES

§ 23.22(a) The Requisite Relationship Between Police Activity Inside the Dwelling and the Purpose of the Entry

The scope of an officer's investigatory powers, once inside a building, is defined by the circumstances that permitted his or her entry under the principles of §§ 23.16-23.20 *supra*. *United States v. King*, 227 F.3d 732, 750-54, 755 (6th Cir. 2000); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013); *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006). This is a corollary of the general rule that "the purposes justifying a police search strictly limit the permissible extent of the search." *Maryland v. Garrison,* 480 U.S. 79, 87 (1987) (dictum). *Accord, id.* at 84 ("the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found'"). *See also, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 611 (1999) (dictum) ("the Fourth Amendment . . . require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion"); *New York v. Belton,* 453 U.S. 454, 457 (1981) (dictum) ("'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible'"); *Horton v. California,* 496 U.S. 128, 140 (1990) (dictum) ("[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more"). A search must be "carefully tailored to its justifications," so as to avoid "tak[ing] on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to

prohibit." *Maryland v. Garrison,* 480 U.S. at 84. *See also Maryland v. Buie,* 494 U.S. 325, 335-36 (1990). *Cf. United States v. Foster*, 100 F.3d 846, 849 (10th Cir. 2006) ("Under the law of this circuit, 'even evidence which is properly seized pursuant to a warrant must be suppressed if the officers executing the warrant exhibit "flagrant disregard" for its terms.' . . . The basis for blanket suppression when a search warrant is executed with flagrant disregard for its terms 'is found in our traditional repugnance to "general searches" which were conducted in the colonies pursuant to writs of assistance.' . . . To protect against invasive and arbitrary general searches, the Fourth Amendment mandates that search warrants 'particularly describ[e] the place to be searched and the persons or things to be seized.'").

Thus, as explained in § 23.17(g) *supra,* when the police enter a dwelling or other premises pursuant to a search warrant, the search ordinarily may not extend into areas that are not covered by the warrant or into areas that could not contain the objects specified in the warrant. If the entry was predicated upon the consent of a member of the household, the officers' movement within the home is limited by the scope of the consent that was given and the extent of the individual's authority to consent. See § 23.18 *supra.* If the entry was made for the purpose of effecting an arrest, whether with or without a warrant, the officers possess only the freedom of movement necessary to locate and to apprehend the person sought to be arrested (see § 23.19 *supra*), unless they can justify a further search of the premises as a "protective sweep" (see § 23.22(d) *infra*). If the entry was made in the exercise of the officers' peacekeeping functions, they may not undertake even the most minimal search beyond the needs of those functions. *Arizona v. Hicks,* 480 U.S. 321 (1987). *See, e.g.*, *In the Matter of the Welfare of J.W.L.*, 732 N.W.2d 332, 339 (Minn. App. 2007) (police officer, who lawfully entered a dwelling without a warrant under the exigent circumstances exception due to a 911 call from inside the dwelling, thereafter violated the Fourth Amendment by taking photographs of graffiti in a bedroom that were subsequently used to connect the respondent to graffiti incidents).

§ 23.22(b) Police Officers' Search and Seizure of Objects While Searching the Premises; The "Plain View" Exception to the Warrant Requirement

Often, while inside a building, dwelling unit, or other premises, police officers catch sight of an object that they believe to be contraband or evidence of a crime. The officer will then inspect the object further or will seize it.

As explained in § 23.15(d) *supra,* a respondent has a constitutionally protected interest against the search or seizure of an object that belongs to him or her, regardless of whether s/he is on the premises at the time the search or seizure takes place, and regardless of whether s/he has any privacy interest in the premises. Like other searches and seizures made without a warrant, "warrantless searches of such effects are presumptively unreasonable," *United States v. Jacobsen,* 466 U.S. 109, 114-15 (1984), and must be brought within one of the exceptions to the warrant requirement in order to be valid.

However, an officer's mere observation of an object from a location where the officer is

entitled to be is not considered a "search" within the meaning of the Fourth Amendment. See § 23.16 *supra.* "[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view" may be scrutinized without any further justification and without Fourth Amendment limitation. *Harris v. United States,* 390 U.S. 234, 236 (1968); *see Arizona v. Hicks,* 480 U.S. 321, 325 (1987) (dictum). As long as the officer's entry and movement to the location were justified by either a warrant or an exception to the warrant requirement, the "viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place." *Id.* at 327.

Although simple observation of the object is not a constitutionally regulated "search," any action by the police that "'meaningfully interfere[s]' with [a] respondent's possessory interest in [an object] . . . amount[s] to a seizure" within the Fourth Amendment. *Arizona v. Hicks,* 480 U.S. at 324; *Horton v. California,* 496 U.S. at 136-37. And any physical manipulation of the object that reveals its hidden features or contents is a "search" of the object. Thus, in *Hicks,* when officers who had entered a residence in an emergency peace-keeping situation observed what they suspected to be stolen stereo equipment, the Court acknowledged in *dictum* that their "mere recording" of a stereo component's serial number would not constitute a search or seizure if the serial number was in plain view, 480 U.S. at 324, but the Court held that when the officers went beyond merely observing the stereo equipment and moved it slightly for the purpose of disclosing serial numbers that were *not* in plain view, their action constituted a "*search* of objects in plain view," *id.* at 327. This was an "independent search," "unrelated to the objectives of the authorized intrusion" into the residence, which "produce[d] a new invasion of respondent's privacy," and it consequently violated the Fourth Amendment in the absence of adequate justification. *Id.* at 325.

To justify a "seizure" or a "search" of an object which is in "plain view," the prosecution must demonstrate that the following three conditions are satisfied:

(i) The officer must be lawfully in the location from which s/he observed the object. *See, e.g., Arizona v. Hicks,* 480 U.S. at 326 ("'the initial intrusion that brings the police within plain view of such [evidence] [must be] . . . supported . . . by one of the recognized exceptions to the warrant requirement,' . . . such as the exigent-circumstances [exception]"); *Horton v. California,* 496 U.S. at 137 ("[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010); *cf. Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993), discussed in § 23.10 *supra* (police must be "lawfully in a position from which they view an object").

(ii) The seizure or search of the object must be justified by "probable cause to believe the [object] . . . was stolen," *Arizona v. Hicks,* 480 U.S. at 328, or is "contraband," *id.* at 327 (dictum), or was an instrument or is evidence of a crime. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 (police must have "probable cause to believe that an object in plain view is contraband"). As

the Court explained in *Arizona v. Hicks,* a seizure or search of an object discovered "during an unrelated search and seizure" must be justified under the same "standard of *cause*" that "would have been needed to obtain a warrant for that same object if it had been known to be on the premises." *Id.* at 327. The "incriminating character [of the object] must . . . be 'immediately apparent.'" *Horton v. California,* 496 U.S. at 136. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 ("If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – *i.e.,* if 'its incriminating character [is not] "immediately apparent,"' . . . – the plain-view doctrine cannot justify its seizure."). Thus, in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), the plain view exception did not justify a police seizure of "two automobiles parked in plain view on the defendant's driveway . . . [because even though] the cars were obviously in plain view, . . . their probative value remained uncertain until after the interiors were swept and examined microscopically." *Horton v. California,* 496 U.S. at 134-37 (explaining the holding in *Coolidge*). *Compare id*. at 142 (upholding a police seizure of firearms and stun guns in plain view under circumstances in which "it was immediately apparent to the officer that they constituted incriminating evidence"). *See also, e.g.*, *People v. Sanders*, 26 N.Y.3d 773, 775, 777-78, 47 N.E.3d 770, 771-72, 27 N.Y.S.3d 491, 492-93 (2016) (a police officer's warrantless seizure of the hospitalized defendant's clothes, which "were in a clear plastic bag that rested on the floor of a trauma room a short distance away from the stretcher on which defendant was situated in a hospital hallway," was not justified by the plain view exception because, although the officer "knew defendant to have been shot," the officer did not have "probable cause to believe that defendant's clothes were the instrumentality of a crime" since the officer did not know at that time "that entry and exit wounds were located on an area of defendant's body that would have been covered by the clothes defendant wore at the time of the shooting."). If a police officer has probable cause to believe that a substance seized in plain view is a narcotic, then the additional seizure involved in destroying a minute amount of the substance in the course of a narcotic "field test" does not necessitate a search warrant. *United States v. Jacobsen*, 466 U.S. at 124-26.

(The probable-cause requirement just described is subject to a narrow exception under exigent circumstances when "the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime." *Arizona v. Hicks,* 480 U.S. at 327. The limits of this principle are discussed in the second paragraph of § 23.12 *supra*.)

(iii) In cases in which a police seizure of an object involves an invasion of the respondent's interests above and beyond the initial observation of the object, the additional intrusion also must be constitutionally justified. "[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself," *Horton v. California,* 496 U.S. 128, 137 (1990). *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 ("the officers [must] have a lawful right of access to the object"). Thus, for example, "'[i]ncontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.'" *Horton v. California*,

496 U.S. at 137 n.7. *See, e.g.*, *People v. Vega*, 276 A.D.2d 414, 414, 714 N.Y.S.2d 291, 291-92 (N.Y. App. Div., 1st Dep't 2000) (police officers, who observed contraband in the defendant's room from the officers' "lawful vantage point" in "the hallway in th[e] residential hotel" could not rely on the "plain view" doctrine to enter the room and seize the contraband: "it was still necessary to establish that the police had lawful access to the [interior of the defendant's room] . . . either by way of a search warrant or some exception to the warrant requirement, such as exigent circumstances.").

In *Coolidge v. New Hampshire,* a plurality of the Court concluded that the plain view doctrine should also be subject to a requirement that "the discovery of [the] evidence in plain view . . . be inadvertent," 403 U.S. at 469. Subsequently, in *Horton v. California,* a majority of the Court rejected this rule, holding that "even though inadvertence is a characteristic of most legitimate 'plain view' seizures, it is not a necessary condition." 496 U.S. at 130. However, in the two decades between the *Coolidge* and *Horton* decisions, state court decisions in 46 States had followed the *Coolidge* plurality's approach of recognizing an "inadvertent discovery" requirement for "plain view" searches and seizures. *Horton,* 496 U.S. at 145 (dissenting opinion of Justice Brennan); *see id.* at 149-52, Appendix A (listing the state court decisions). In many of these States, it may be possible to persuade the state courts to retain the "inadvertent discovery" rule as a matter of state constitutional law. *See, e.g.*, *State v. Meyer*, 78 Hawai'i 308, 314 & n.6, 893 P.2d 159, 165 & n.6 (1995); *Commonwealth v. Balicki*, 436 Mass. 1, 9-10, 762 N.E.2d 290, 298 (2002). See generally § 7.09 *supra*.

§ 23.22(c) Detention and Searches of Persons Found on the Premises

Sometimes, in executing a search warrant for a dwelling, the police detain and search one or more individuals who were on the premises at the time the police entered.

If the search warrant specifically names a certain person and authorizes the search of that person, then the police may conduct the search as long as the warrant and the search comply with the requirements described in § 23.17 *supra.* If the warrant does not authorize the search of individuals but merely authorizes a search of the premises to find certain objects, then the officers cannot extend their search of the premises to the individuals present on the premises. "[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place." *Ybarra v. Illinois,* 444 U.S. 85, 92 n.4 (1979). *See also United States v. Watson*, 703 F.3d 684, 689-94 (4th Cir. 2013). If the police have specific and articulable facts giving rise to a reasonable belief that a particular individual on the premises is armed and dangerous, then the officers may conduct a *Terry* frisk of that individual. See § 23.10 *supra.* But "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized . . . search is taking place." *Ybarra v. Illinois,* 444 U.S. at 94.

In *Ybarra,* the Court struck down a police pat-down of a patron of a bar, who was on the

premises during the execution of a search warrant for the bar and the bartender. The Court explained that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." 444 U.S. at 91. As several lower courts have recognized, the principles established in *Ybarra* necessarily apply not only to searches of patrons of a commercial establishment but also to searches of individuals who are visiting a private home at the time that the police effect an entry and search of the home. *See, e.g., United States v. Clay,* 640 F.2d 157, 161-62 (8th Cir. 1981); *People v. Tate*, 367 Ill. App. 3d 109, 853 N.E.2d 1249, 304 Ill. Dec. 883 (2006); *State v. Vandiver*, 257 Kan. 53, 891 P.2d 350 (1995); *Beeler v. State,* 677 P.2d 653 (Okla. Crim. App. 1984); *Lippert v. State,* 664 S.W.2d 712 (Tex. Crim. App. 1984). *Cf. Leveto v. Lapina*, 258 F.3d 156, 163-65 (3d Cir. 2001) (Alito, J.) (IRS agents executing a search warrant could not validly frisk a homeowner in the absence of justification for a *Terry* frisk). *See also Guy v. Wisconsin*, 509 U.S. 914, 914-15 (1993) (Justice White, dissenting from denial of *certiorari*) (describing a division of authority among lower courts with regard to "whether this Court's holding in *Ybarra v. Illinois* . . . applies where a search warrant for drugs is executed in a private home").

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), and *Muehler v. Mena*, 544 U.S. 93 (2005), the Court did hold that an owner or resident of premises may be detained and prevented from leaving the premises while the police execute a search warrant of the premises. *See also Bailey v. United States*, 133 S. Ct. 1031 (2013); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam); *Illinois v. McArthur*, 531 U.S. 326 (2001), discussed in § 23.06(c) *supra*. Using broad language, the Court stated in *Summers*, and reiterated in *Muehler*, that "a warrant to search for contraband . . . implicitly carries with it the limited authority to detain the occupants of the premises while a proper search [of the premises themselves] is conducted." *Summers*, 452 U.S. at 705; *Muehler*, 544 U.S. at 98 (quoting *Summers*); *Los Angeles County v. Rettele*, 550 U.S. at 613 (quoting *Summers*); *Bailey*, 133 S. Ct. at 1037 (quoting *Summers*). However, the facts of these cases and the reasoning of the opinions demonstrate that the phrase "occupant[ ] of the premises" is meant to refer solely to "residents" (terms that are used interchangeably by the *Summers* Court, *see id*. at 701-03; *see also Rettele*, 550 U.S. at 609, 615; *Muehler*, 544 U.S. at 106, 110 (Justice Stevens, concurring) (concurring opinion, representing the views of 4 Justices, describes occupants as "resident[s]," each of whom "had his or her or own bedroom") and not to persons who happen to be visiting the premises at the time when the police effect their entry. In *Summers*, in which the Court announced the rule that an occupant may be detained while the police search a home pursuant to a warrant, the defendant owned the house that was searched and several of the Court's rationales for upholding the detention were predicated upon the defendant's status as the owner of the premises. The Court explained that the defendant, as owner of the house, could facilitate the search by "open[ing] locked doors or locked containers to avoid the use of force that is . . . damaging to property," 452 U.S. at 703; the Court pointed out that "residents" like the defendant would ordinarily wish to "remain in order to observe the search of their possessions," *id*. at 701; and it observed that since the place of detention was the detainee's own residence, the seizure would "add only minimally to the public stigma associated with the search itself," *id*. at 702. In *Muehler*, the Court did not revisit the reasoning for the rule, treating its earlier holding in *Summers* as "categorical[ly]" authorizing the detention of a resident

who "was asleep in her bed" when the police executed the warrant and "entered her bedroom" (544 U.S. at 96, 98), and the Court focused on a new question presented by the facts of *Muehler*: whether the police improperly engaged in the additional intrusion of handcuffing this resident for the duration of the search. The Court concluded that handcuffing is permissible if this measure is necessitated by "inherently dangerous" circumstances such as those that existed in the *Muehler* case, where the "warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises" and there was a "need to detain multiple occupants." *Id*. at 100. *But cf*. *id*. at 102 (Justice Kennedy, concurring and thus supplying the vote necessary to produce a 5-Justice majority: "[t]he restraint should . . . be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search."). In *Bailey*, the Court made clear that the *Summers* rule is strictly limited to "cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant" (133 S. Ct. at 1038). "A spatial constraint defined by the immediate vicinity of the premises to be searched is . . . required for detentions incident to the execution of a search warrant. The police action permitted here – the search of a residence – has a spatial dimension, and so a spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe." (*Id*. at 1042.) *Dicta* in the *Bailey* opinion use the term "occupant" without specifying the precise connection that it implies between the premises being searched and the individual whose detention is in question under *Summers* (*see id*. at 1038-41), but the Court does describe the *Summers* rule as involving a "detention [that] occurs in the individual's own home" (*id*. at 1041), and the Court emphasized that the "exception [that *Summers* created] to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale" (*id*. at 1038).

As some lower courts have concluded, the *Summers* rule cannot be construed as authorizing detentions of individuals who happen to be visiting the premises at the time of a police entry. *See, e.g.*, *Lippert v. State*, 664 S.W.2d 712 (Tex. Crim. App. 1984); *State v. Broadnax*, 98 Wash. 2d 289, 654 P.2d 96 (1982). *See also Commonwealth v. Catanzaro*, 441 Mass. 46, 51-52 & n.10, 803 N.E.2d 287, 291 & n.10 (2004). In order to detain visitors, the police must have the specific and articulable facts necessary to conduct a *Terry* stop. *See* § 23.09 *supra*. Nor does the *Summers* rule authorize a *frisk* of anyone – visitor, resident or owner – in the course of executing a search warrant for premises. *See, e.g.*, *Leveto v. Lapina*, 258 F.3d 156, 163-66 (3d Cir. 2001) (Alito, J.); *Denver Justice and Peace Committee, Inc. v. City of Golden*, 405 F.3d 923, 928-32 (10th Cir. 2005). As § 23.10 *supra* indicates, the power to detain an individual briefly for investigation, whether under *Terry* or under *Summers*, carries with it no automatic power to frisk that individual; any frisk must be justified by a particularized and objectively reasonable suspicion that the detainee is armed and dangerous. *See, e.g.*, *id*. at 932.

§ 23.22(d) "Protective Sweep" of the Premises

"A 'protective sweep' is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie,* 494 U.S. 325, 327 (1990). When the police "effect[ ] the arrest of a suspect in his home pursuant to an arrest warrant, [the police] may conduct a warrantless protective sweep of all or part of the premises . . . if the searching officer 'possesse[s] . . . a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] . . ." the officer in believing' . . . that the area swept harbor[s] . . . an individual posing a danger to the officer or others." *Id.* at 327-28. *See also id.* at 334, 335-37. The Court in *Buie* "emphasize[d] that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is . . . not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. . . . The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 335-36.

Part D. Automobile Stops, Searches, Inspections, and Impoundments

§ 23.23 THE THRESHOLD ISSUE: RESPONDENT'S INTEREST IN THE AUTOMOBILE OR EXPECTATION OF PRIVACY INSIDE IT

Just as a respondent who seeks to challenge a police entry and search of premises must have a constitutionally protected interest or legitimate expectation of privacy in the premises, see § 23.15 *supra,* so, too, a respondent who seeks to challenge a police stop or search of an automobile must have a sufficient possessory or privacy interest in the vehicle – or, alternatively, a sufficient personal interest in its unhindered movement – to complain about the particular police action in question.

A respondent has the requisite interest to complain of an unconstitutional automobile search in each of the following situations:

(i) The automobile belongs to the respondent, even though it is out of his or her possession at the time of the search, *see, e.g., Cash v. Williams,* 455 F.2d 1227, 1229-30 (6th Cir. 1972); *United States v. Powell*, 929 F.2d 1190, 1196 (7th Cir. 1991) (an absentee owner has standing to challenge the search of a vehicle although s/he does not have standing to challenge the mere stopping of the vehicle for a purported traffic violation); *State v. Foldesi*, 131 Idaho 778, 963 P.2d 1215 (Idaho App. 1998), as long as the respondent has not given up possession of the vehicle in a manner that deprives him or her of any remaining legitimate expectation of privacy in it, *United States v. Jenkins*, 92 F.3d 430, 434-35 (6th Cir. 1996); *see generally Rakas v. Illinois,* 439 U.S. 128 (1978).

(ii) The automobile is in the respondent's lawful possession under circumstances that comport the possessor's ordinary right to exclude undesired intrusions by others, *see Rakas v. Illinois,* 439 U.S. at 144 n.12 (dictum). This would certainly include situations in which the respondent is driving a family member's or friend's automobile with the permission of the owner. *See, e.g.*, *United States v. Valdez Hocker*, 333 F.3d 1206 (10th Cir. 2003); *People v. Lewis*, 217 A.D.2d 591, 593, 629 N.Y.S.2d 455, 457 (N.Y. App. Div., 2d Dep't 1995). *Cf. Minnesota v. Olson,* 495 U.S. 91, 96-100 (1990); *Jones v. United States,* 362 U.S. 257 (1960), as explained in *Rakas v. Illinois,* 439 U.S. at 141. It would also include situations in which the respondent has rented the vehicle from a car rental agency (*United States v. Walton*, 763 F.3d 655 (7th Cir. 2014) (granting standing even though the renter's driving license was suspended); *United States v. Cooper*, 133 F.3d 1394 (11th Cir. 1998) (granting standing even though the rental agreement had expired before the search); *United States v. Henderson*, 241 F.3d 638, 646-47 (9th Cir. 2000) (dictum) (same)) or is "listed on a rental agreement as an authorized driver" (*United States v. Walker*, 237 F.3d 845, 849 (7th Cir. 2001), and cases cited). When a rental agreement limits the persons who may drive the vehicle, the question of the standing of an unauthorized driver – someone to whom the renter has entrusted the vehicle in violation of that limitation – has divided the courts. *See United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006) (holding that an unauthorized driver has standing if, but only if, he or she has received the renter's permission to use the car), and cases collected in *id*. at 1196-97.

(iii) The vehicle is a taxicab in which the respondent is a lawful passenger. *See Rios v. United States,* 364 U.S. 253, 262 n.6 (1960).

(iv) The respondent is a lawful occupant of any vehicle at the time of the search, *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006) ("when a vehicle is illegally stopped by the police, no evidence found during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged," *id*. at 251), and cases cited; *see also United States v. Kimball*, 25 F.3d 1, 5-6 (1st Cir. 1994), and the search invades an area of the vehicle in which, as a lawful occupant, the respondent has "any legitimate expectation of privacy," *Rakas v. Illinois,* 439 U.S. at 150 n.17 (dictum). *See also Bond v. United States*, 529 U.S. 334, 338-39 (2000) ("a bus passenger [who] places a bag in an overhead bin" has a reasonable expectation that "other passengers," "bus employees," and police officers will not "feel the bag in an exploratory manner").

A respondent can complain of an unconstitutional *stop* of an automobile if s/he was in the vehicle at the time of the stop. *Brendlin v. California*, 551 U.S. 249, 251, 257 (2007) ("When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the

constitutionality of the stop."; "A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver"); *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003). If the respondent was not in the automobile at the time of the stop, s/he can nevertheless challenge the stop if s/he is the owner of the automobile, *see Cash v. Williams,* 455 F.2d at 1229-30, or if s/he has established a sufficient privacy interest in the automobile through repeated use to invoke the same rights as an owner. *Cf. Jones v. United States,* 362 U.S. 257 (1960), as explained in *Rakas v. Illinois,* 439 U.S. at 141; *Minnesota v. Olson,* 495 U.S. at 96-100.

Even when an individual has the requisite possessory interest or expectation of privacy in an automobile, s/he cannot claim any privacy rights with respect to the car's Vehicle Identification Number (VIN) located on the dashboard "because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view." *New York v. Class,* 475 U.S. 106, 114 (1986). In *Class,* the Court held that the public nature of the VIN empowers the police to move papers obstructing the VIN, in order to view the number in the course of a valid stop for a traffic violation, at least under circumstances in which the driver on his or her own initiative leaves the vehicle and therefore is not in a position to accede to a lawful request to move the papers so that the number can be inspected. *See id.* at 114-16. *Contra, People v. Class,* 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (reaffirming, on state constitutional grounds, the opinion reversed in *New York v. Class, supra*). In cases in which an entry into a car was not justified by a traffic violation, some lower courts have ruled that the public nature of the VIN does not justify the opening of the vehicle for the purpose of inspecting the VIN. *See People v. Piper,* 101 Ill. App. 3d 296, 427 N.E.2d 1361, 56 Ill. Dec. 815 (1981); *State v. Simpson,* 95 Wash. 2d 170, 622 P.2d 1199 (1980); *but see United States v. Forrest,* 620 F.2d 446 (5th Cir. 1980).

For discussion of the "automatic standing" principle and of the evolution of the general concepts governing "standing" to challenge searches and seizures, see § 23.15 *supra.*

§ 23.24 EVIDENTIARY SEARCHES OF AUTOMOBILES: THE "AUTOMOBILE EXCEPTION" TO THE WARRANT REQUIREMENT

Automobiles are the subject of a specialized Fourth Amendment jurisprudence stemming from *Carroll v. United States,* 267 U.S. 132 (1925). As presently interpreted, *Carroll* permits warrantless stopping and search of moving vehicles if, but only if, the searching officers have probable cause to believe that seizable objects are concealed in the vehicle. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 315 n.10 (1978) (dictum); *Wyoming v. Houghton*, 526 U.S. 295, 300-01 (1999); *compare Chambers v. Maroney*, 399 U.S. 42 (1970), *and Colorado v. Bannister,* 449 U.S. 1 (1980) (per curiam), *and Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam), *with Preston v. United States,* 376 U.S. 364 (1964), *and Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968). *See also California v. Carney,* 471 U.S. 386 (1985) (extending the *Carroll* rule to a motor home parked in a downtown parking lot); *Florida v. White*, 526 U.S. 559, 565, 566 (1999) (the *Carroll* rule permitting search of a vehicle

based on probable cause to believe that it contains contraband may permit seizure of the car based on "probable cause to believe that the vehicle *itself* was contraband" as long as "the warrantless seizure . . . did not involve any invasion of respondent's privacy" because, for example, the vehicle was in "a public area").

If there is probable cause to believe that seizable objects may be concealed in any part of the vehicle, then the police may search every part of the vehicle and every container within it which is capable of holding the seizable object. *Wyoming v. Houghton*, 526 U.S. at 307; *California v. Acevedo*, 500 U.S. 565, 580 (1991); *United States v. Ross,* 456 U.S. 798 (1982); *United States v. Johns,* 469 U.S. 478, 482-83 (1985). The only limitation on the scope of the search is that it may not extend into areas incapable of holding the object, including containers that are not "capable of concealing the object of the search." *Wyoming v. Houghton*, 526 U.S. at 307 (dictum); *United States v. Ross,* 456 U.S. at 820-21, 823-24 (dictum).

The *Carroll* decision and its progeny establishing special rules for automobile searches and seizures are based in substantial part upon the inherent mobility of automobiles, which renders the securing of a warrant impracticable. *See Wyoming v. Houghton*, 526 U.S. at 304; *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam); *California v. Carney,* 471 U.S. at 390-91. (The caselaw also mentions two other factors that distinguish automobiles from buildings – the lesser degree of privacy that an automobile offers, *e.g.*, *Pennsylvania v. Labron*, 518 U.S. at 940; *South Dakota v. Opperman,* 428 U.S. 364, 367 (1976), and the fact that automobiles are subject to extensive noncriminal regulation by the state, *e.g.*, *Pennsylvania v. Labron*, 518 U.S. at 940; *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973). But the latter factors have never been invoked independently to uphold a warrantless police search that invades what privacy an automobile *does* afford, in a case where no noncriminal regulatory concern drew police attention to a particular vehicle.) Accordingly, in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), the Court held that an almost totally immobilized automobile could not be searched without a warrant. *Coolidge* arguably forbids the application of *Carroll*'s automobile exception to the warrant requirement in situations in which there are no reasonable grounds to apprehend that a vehicle may be moved before a warrant can be obtained. *See id.* at 462 (plurality opinion) (except "where 'it is not practicable to secure a warrant,' . . . the 'automobile exception,' despite its label, is simply irrelevant"); *Preston v. United States,* 376 U.S. 364 (1964)*; United States v. Bradshaw*, 490 F.2d 1097 (4th Cir. 1974); *State v. LeJeune*, 276 Ga. 179, 182-83, 576 S.E.2d 888, 892-93 (2003) (alternative ground); *United States v. Bazinet*, 462 F.2d 982, 986 n.3 (8th Cir. 1972) (dictum); *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974); *cf. State v. Gonzales*, 236 Or. App. 391, 236 P.3d 834 (2010), *subsequent history in* 265 Or. App. 655, 337 P.3d 129 (2014). The *Carroll* rule applies, in other words, only "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise." *California v. Carney,* 471 U.S. at 392. *Compare State v. Witt*, 223 N.J. 409, 447-48, 126 A.3d 850, 872-73 (2015) ("In . . . [*State v. Alston*, 88 N.J. 211, 233, 440 A.2d 1311 (1981)] we held that the automobile exception authorized the warrantless search of an automobile only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances

giving rise to probable cause are unforeseeable and spontaneous. . . . ¶ Here, we part from the United States Supreme Court's interpretation of the automobile exception under the Fourth Amendment and return to the *Alston* standard, this time supported by Article I, Paragraph 7 of our State Constitution. *Alston* properly balances the individual's privacy and liberty interests and law enforcement's investigatory demands. *Alston*'s requirement of 'unforeseeability and spontaneity,' . . . does not place an undue burden on law enforcement. For example, if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so. In this way, we eliminate the . . . fear that 'a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs.' . . . In the case of the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.").

When the police have probable cause to make a warrantless search of a vehicle under *Carroll* but, instead of searching it on the street, they lawfully impound it, they may exercise the *Carroll* prerogative to search it without a warrant later at the police station (*e.g., Chambers v. Maroney,* 399 U.S. at 52; *Michigan v. Thomas,* 458 U.S. 259, 261-62 (1982) (per curiam); *Florida v. Meyers,* 466 U.S. 380 (1984) (per curiam); *and see United States v. Ross,* 456 U.S. at 807 n.9 ("if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded")), at least when no additional invasion of privacy interests results from their delay in making the search and when the delay is not inordinate (*see United States v. Johns,* 469 U.S. at 487 (dictum), citing Justice White's dissenting opinion in *Coolidge v. New Hampshire,* 403 U.S. at 525). The same rule permitting delayed searches applies to closed containers found in the vehicle. *United States v. Johns*, 469 U.S. at 482-83. *But see State v. Witt*, 223 N.J. at 448-49, 126 A.3d at 873 ("We also part from federal jurisprudence that allows a police officer to conduct a warrantless search at headquarters merely because he could have done so on the side of the road. . . . 'Whatever inherent exigency justifies a warrantless search at the scene under the automobile exception certainly cannot justify the failure to secure a warrant after towing and impounding the car' at headquarters when it is practicable to do so. . . . Warrantless searches should not be based on fake exigencies. Therefore, under Article I, Paragraph 7 of the New Jersey Constitution, we limit the automobile exception to on-scene warrantless searches.").

§ 23.25 INVENTORY SEARCHES OF IMPOUNDED VEHICLES

The immediately preceding section dealt with the circumstances under which the police can conduct warrantless searches of automobiles "for the purpose of investigating criminal conduct, with the validity of the searches . . . dependent on the application of the probable cause and warrant requirements of the Fourth Amendment." *Colorado v. Bertine,* 479 U.S. 367, 371 (1987). "By contrast, an inventory search may be 'reasonable' under the Fourth Amendment even though it is not conducted pursuant to warrant based upon probable cause." *Id.*

The police may conduct an "inventory search" of the contents of an impounded

automobile, including an examination of the contents of containers found in the automobile (*id.* at 374-75), if the inventory search complies with the following three requirements:

(i) The search must be conducted in accordance with "standardized procedures," *id.* at 372, based upon "reasonable police regulations relating to inventory procedures," *id. Accord, Florida v. Wells,* 495 U.S. 1, 4 (1990) ("standardized criteria . . . or established routine"); *South Dakota v. Opperman,* 428 U.S. 364, 366, 376 (1976). *See, e.g., Wells,* 495 U.S. at 4-5 (suppressing contraband found in the course of an alleged inventory search because "the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search . . . [and] absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment").

(ii) The police must not be acting "in bad faith or for the sole purpose of investigation," *Colorado v. Bertine,* 479 U.S. at 372. *See also id.* at 374 (speaking of "reasonable police regulations relating to inventory procedures administered in good faith"); *id.* at 376 (noting that "[t]here was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity"); *Florida v. Wells,* 495 U.S. at 4 ("an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"); *South Dakota v. Opperman,* 428 U.S. at 376 (police had no "investigatory . . . motive"); *Cady v. Dombrowski,* 413 U.S. 433, 447 (1973) (officer conducting the search had no purpose to look for criminal evidence). *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000) (dictum) (discussing "inventory search" caselaw).

(iii) The automobile must be lawfully "in the custody of the police," *Colorado v. Bertine,* 479 U.S. at 372, in the sense that an adequate justification exists for the police to impound the vehicle, *see South Dakota v. Opperman,* 428 U.S. at 365-66, 375; *Cady v. Dombrowski,* 413 U.S. at 443. Depending upon state law, the police may be empowered to impound an automobile for traffic or parking violations, *South Dakota v. Opperman,* 428 U.S. at 365-66, 375; incident to the arrest of the driver, *Colorado v. Bertine,* 479 U.S. at 368 & n.1; and in connection with routine highway management duties, such as the removal of a disabled vehicle that was "a nuisance along the highway," *Cady v. Dombrowski,* 413 U.S. at 443.

In approving an inventory search in *South Dakota v. Opperman,* the Court emphasized that the car's owner was "not present to make other arrangements for the safekeeping of his belongings." 428 U.S. at 375. In its subsequent decision in *Colorado v. Bertine,* the Court held that the Fourth Amendment does not require the police to forgo an inventory search in favor of the "'less intrusive'" procedure of offering a driver "the opportunity to make other arrangements for the safekeeping of his property." 479 U.S. at 373. Arguably, *Bertine* means only that the police need not opt for "'less intrusive'" procedures in deciding whether to conduct an inventory search incident to impoundment, whereas *Opperman* implies that the police do have to consider less intrusive alternatives in determining whether it is necessary to impound the car in the first place. The *Bertine* opinion recognizes that impoundments must be based on "standardized criteria, related to the feasibility and appropriateness of parking and locking [the] . . . vehicle

rather than impounding it," 479 U.S. at 376, but because the only challenge made to the impoundment in *Bertine* was a claim that the applicable police regulation gave too much discretion to individual officers, *see id.* at 375-76, the Court there did not elaborate this parking-and-locking passage or consider what other constitutional requirements, if any, govern impoundments as a distinct species of Fourth Amendment "seizures" of automobiles. Some state courts have found impoundments to be unreasonable and violative of the Fourth Amendment when the sole purpose of the impoundment was safekeeping of the automobile while the driver was in custody and that goal could have been achieved by the less intrusive measures of turning the car over to an unarrested passenger, *Virgil v. Superior Court,* 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968), or leaving the car parked in a legal parking space if this would not be unduly time-consuming for the police and would not expose the car to undue risk of theft or vandalism, *State v. Slockbower,* 79 N.J. 1, 397 A.2d 1050 (1979); *State v. Simpson,* 95 Wash. 2d 170, 662 P.2d 1199 (1980).

If the police have the authority to impound an automobile and to conduct an inventory search of it, they can make the search at the scene, at the police station, or at other locations. *Colorado v. Bertine,* 479 U.S. at 373 (inventory search was not rendered unreasonable simply because the vehicle "was towed to a secure, lighted facility"). "[T]he security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims." *Id.*

The state courts have been active in developing independent state constitutional restrictions upon inventory searches. *See, e.g., State v. Daniel,* 589 P.2d 408, 417 (Alaska 1979) (police cannot open "closed, locked or sealed luggage, containers, or packages contained within a vehicle" during an inventory search); *State v. Opperman,* 247 N.W.2d 673, 675 (S.D. 1976) ("noninvestigative police inventory searches of automobiles without a warrant must be restricted to safeguarding those articles which are within plain view of the officer's vision"). This is an area in which defense counsel is particularly advised to follow the suggestion of § 7.09 *supra* and invoke state-law principles as alternative grounds for challenging searches and seizures.

§ 23.26 SEARCHES OF AUTOMOBILES INCIDENT TO THE ARREST OF THE DRIVER OR OCCUPANTS

Automobiles may be subjected to a warrantless search of limited scope incidental to the valid arrest of their drivers or occupants, under the doctrine of "search incident to arrest" (see § 23.08 *supra*), as modified by the Supreme Court in *Arizona v. Gant*, 556 U.S. 332 (2009) to account for certain "circumstances unique to the vehicle context" (*id*. at 343). These searches may be made without a warrant only at the immediate time and place of the arrest. *See Preston v. United States,* 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); *Chambers v. Maroney* 399 U.S. 42, 47 (1970); *Cardwell v. Lewis,* 417 U.S. 583, 591-92 n.7 (1974); *id.* at 599 n.4 (Stewart, J., dissenting); *United States v. Chadwick,* 433 U.S. 1, 14-15 (1977). This "search incident to arrest" rule applies not only in "situations where the officer makes contact with the occupant [of a vehicle] while the occupant is inside the vehicle" but also

"when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle." *Thornton v. United States*, 541 U.S. 615, 617 (2004). In accordance with the search-incident-to-arrest rule that applies to all situations including the automobile context, the search may "include 'the arrestee's person and the area "within his immediate control" – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" *Arizona v. Gant*, 556 U.S. at 339. *See also id*. at 343 (narrowing *New York v. Belton,* 453 U.S. 454 (1981), to clarify that the customary search-incident-to-arrest rule "authorizes police to 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"). In *Gant*, the Court responded to "circumstances unique to the vehicle context" by holding that police officers also may search a vehicle incident to the arrest of a "recent occupant" "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id*. *See also id*. at 343-44 (explaining that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence," "[b]ut in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein"; the Court applies its new rule to hold a vehicle search unlawful because "Gant clearly was not within reaching distance of his car at the time of the search" and thus the search could not be justified under the customary search-incident-to-arrest rule, and "Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car"). *See also State v. Noel*, 236 W. Va. 335, 779 S.E.2d 877 (2015). *Compare State v. Snapp*, 174 Wash. 2d 177, 181-82, 275 P.3d 289, 291 (2012) (construing the state constitution to reject that portion of the *Gant* rule that allows a search of a vehicle incident to the arrest of a recent occupant when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle").

When an automobile is stopped to ticket the driver for a traffic violation, a warrantless "search of the passenger compartment of [the] . . . automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect [driver or occupant] is dangerous and the suspect may gain immediate control of weapons [from the vehicle]." *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). Unlike a search incident to arrest, which is authorized by the mere fact of a valid arrest, this latter sort of weapons search requires *both* a valid stop *and* reasonable grounds to believe that the driver or occupant is dangerous and may grab a weapon from the car to use against the officers. *Id.* at 1046-53 & nn.14, 16.

So far as the Fourth Amendment is concerned, an officer who sees a driver violate the traffic laws may choose either to make an arrest and thereby acquire the full power of search incident to arrest or to issue a ticket or other form of summons and acquire only the relatively limited search power described in *Long*. *See Virginia v. Moore*, 553 U.S. 164, 176-77 (2008); *Knowles v. Iowa*, 525 U.S. 113, 114, 118-19 (1998); *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v. Florida,* 414 U.S. 260 (1973). Even if state law categorizes the traffic infraction as one that must be handled by a ticket or other form of summons rather than a full-

scale arrest, an arrest which thus violates state law does not give rise to a Fourth Amendment basis for suppressing evidence unless either the arrest or the search incident to that arrest violated the Fourth Amendment rules summarized in §§ 23.07(b)-23.08(d). *See Virginia v. Moore*, 553 U.S. 164, 167, 171, 177-78 (even though police officers' arrest of Moore for driving on a suspended license violated Virginia state law, which restricted the officers to "issu[ing] Moore a summons instead of arresting him," the arrest satisfied the applicable Fourth Amendment standard of "probable cause to believe a person committed . . . [a] crime in [the officer's] presence," and accordingly the contraband obtained by the police in a valid search incident to arrest was not suppressible under the Fourth Amendment). Suppression in such cases may be available, however, on state constitutional grounds. *See, e.g., Commonwealth v. Hernandez*, 456 Mass. 528, 531-32, 924 N.E.2d 709, 711-12 (2010); and see § 7.09 *supra.*

§ 23.27 "*TERRY* STOPS" OF AUTOMOBILES AND ATTENDANT SEARCHES

"The law is settled that in Fourth Amendment terms a . . . stop [of a moving vehicle] entails a seizure of the driver [and any passengers in the vehicle] 'even though the purpose of the stop is limited and the resulting detention quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007). *See also Arizona v. Johnson*, 555 U.S. 323, 327 (2009). By analogy to the *Terry* stop doctrine (§ 23.09 *supra*), "law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity." *United States v. Hensley,* 469 U.S. 221, 226 (1985); *see, e.g., United States v. Sharpe,* 470 U.S. 675 (1985); *Delaware v. Prouse,* 440 U.S. 648 (1979) (dictum). In limited circumstances, the police can also conduct a *Terry* stop of an automobile "to investigate past criminal activity." *United States v. Hensley,* 469 U.S. at 228. See § 23.09 *supra.* Neither sort of investigative stop may be made in the absence of "reasonable suspicion." *Brendlin v. California*, 551 U.S. at 254 n.2, 255-56. *See also United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006). The standard of "reasonable suspicion" for an automobile stop is the same as that for a pedestrian stop, discussed in § 23.09 *supra*. *See*, *e.g.*, *United States v. Uribe*, 709 F.3d 646, 649-50 (7th Cir. 2013); *United States v. Cohen*, 481 F.3d 896 (6th Cir. 2007); *State v. Teamer*, 151 So. 3d 421, 427-30 (Fla. 2014).

"[A]s in the case of a pedestrian reasonably suspected of criminal activity," the *Terry* frisk doctrine permits "a patdown of the driver or a passenger [of a lawfully stopped vehicle] during a . . . [vehicle] stop" if the police have "reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. at 327. Also by analogy to *Terry*, police who validly stop a vehicle may search some areas of it for weapons if the officers possess a reasonable belief, based on specific and articulable facts, that a detained suspect is dangerous and that s/he can gain immediate control of weapons from the vehicle. *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). The search must, however, be "limited to those areas [of the vehicle] in which a weapon may be placed or hidden." *Id.*

§ 23.28 TRAFFIC STOPS AND ATTENDANT SEARCHES

Automobiles may, of course, be stopped for traffic violations (*see United States v.*

Robinson, 414 U.S. 218 (1973); *Whren v. United States*, 517 U.S. 806 (1996)) if – but only if – the police have "reasonable suspicion" to justify the traffic stop. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Brendlin v. California*, 551 U.S. 249, 254 n.2, 255-56 (2007); *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). (*Heien* also holds that a police officer's "*objectively* reasonable" mistake of law – a plausible interpretation of an ambiguous traffic-code provision which is subsequently construed by a state appellate court in a manner contrary to the officer's "reasonably, even if mistakenly" advised reading of it (*id*. at 535) – does not invalidate the "reasonable suspicion" required for a traffic-violation stop if the officer's visual observations of the vehicle bring it, factually, within his mistaken reading. See § 23.03 concluding paragraph *supra.*). *See also United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014 (7th Cir. 2016) ("The government failed to establish that the officer [who stopped the defendant's car] had probable cause or a reasonable suspicion that Paniagua was violating the no-texting [while driving] law. The officer hadn't seen any texting; what he had seen was consistent with any one of a number of lawful uses of cellphones."); *United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012) (the trial court did not err in rejecting, as incredible, a police officer's testimony at a suppression hearing that he observed the defendant's car exit the interstate without signaling and thus in violation of traffic laws); *State v. Kooima*, 833 N.W.2d 202, 210 (Iowa 2013) ("Cases decided by us and other courts require a personal observation of erratic driving, other facts to substantiate the allegation the driver is intoxicated, or details not available to the general public as to the defendant's future actions in order to spawn a reasonable inference . . . [that an anonymous] tipster had the necessary personal knowledge that a person was driving while intoxicated and the stop comports with the requirements of the Fourth Amendment. To hold otherwise would cause legitimate concern because such tips would let the police stop persons on anonymous tips that might have been called in for vindictive or harassment purposes or based solely on a hunch or rumor.").

An officer making this sort of stop may order the driver out of the car, whether the officer proposes to arrest the driver or merely to give the driver a summons. *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) (per curiam). In the former case, the officer may conduct a complete search of the driver's person and may also search the passenger compartment of the car incident to the driver's arrest, to the extent indicated in § 23.26 *supra*; in the latter, the officer may frisk the driver and search the passenger compartment of the car for weapons if, but only if, the requisite conditions for a *Terry* frisk (see §§ 23.10, 23.26 *supra*) are met. If the officer invokes the *Mimms* doctrine to order the driver out of the car, the officer can detain the driver outside the car for the period necessary to conduct an inquiry and inspect the Vehicle Identification Number. *New York v. Class,* 475 U.S. 106, 115-16 (1986); *Arizona v. Johnson,* 555 U.S. at 333; see § 23.23 *supra*. *See also Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (traffic stops often "include[ ] 'ordinary inquiries incident to [the traffic] stop,'" which "[t]ypically . . . involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance"; an officer may conduct these checks but "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."). *Compare Sharp v. United States*, 132 A.3d 161, 169-70 (D.C. 2016) (when "the encounter does not begin with a stop for a traffic

violation" – as in this case of a defendant who was seated behind the wheel of a lawfully parked car – an officer cannot ask the driver to exit the vehicle in a manner that would appear to a reasonable person to foreclose "a genuine choice to decline the request and stay in the car," absent "reasonable articulable suspicion to justify the seizure"); *State v. Keaton*, 222 N.J. 438, 442, 448, 450, 119 A.3d 906, 908, 912, 913 (2015) (a police officer does not have "a legal right to enter an overturned car in order to obtain registration and insurance information for the vehicle, without first requesting permission, or allowing defendant an opportunity to retrieve the documents himself"; although a police officer who conducts a lawful traffic stop "may search the car for evidence of ownership" "[i]f the vehicle's operator is unable to produce proof of registration," such a "warrantless search of a vehicle is only permissible after the driver has been provided the opportunity to produce his credentials and is either unable or unwilling to do so."). Regarding DWI sobriety testing, see § 23.14 subdivision (a) *supra*.

The *Mimms* doctrine also allows "an officer making a traffic stop . . . [to] order passengers to get out of the car pending completion of the stop." *Maryland v. Wilson*, 519 U.S. 408, 415 (1997). *See Arizona v. Johnson,* 555 U.S. at 333 ("The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop."); *but see Maryland v. Wilson*, 519 U.S. at 415 n.3 (expressly reserving the question whether "an officer may forcibly detain a passenger for the entire duration of the stop"); *and cf. United States v. Hensley,* 469 U.S. 221, 235-36 (1985); *People v. Porter*, 136 A.D.3d 1344, 1345, 24 N.Y.S.3d 470, 472 (N.Y. App. Div., 4th Dep't 2016) (the police unlawfully detained the passenger of a lawfully stopped car, who had "asked whether he could leave the scene," by telling him that "he must remain present with them until the inventory search [of the arrested driver's car] was complete"; "the justification for th[e] stop [of the car and for detaining the passenger pursuant to that stop] ended once the driver had been arrested for th[e] [traffic] offense."). The officer also can conduct a protective "patdown of . . . a passenger during a [lawful] traffic stop" under the customary *Terry* frisk standard if the officer has a "reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. at 327, 333; see § 23.10 *supra*. Search activity exceeding the scope of a *Terry* frisk is not permitted; and when an officer, during a traffic stop, requests and receives permission from a passenger to conduct a search of his or her possessions for evidence unrelated to the traffic violation that justified the stop, the request has been held impermissible, the consent tainted, and the ensuing search and seizure unconstitutional. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

Because "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a [Fourth Amendment] 'seizure' of 'persons'" (*Whren v. United States*, 517 U.S. at 809), and because "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures," a "seizure justified only by a police-observed traffic violation . . . 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Rodriguez v. United States*, 135 S. Ct. at 1612. "Authority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." *Id*. at 1614. "On-scene

investigation into other crimes . . . detours [*that's a verb*] from that mission," as do "safety precautions taken in order to facilitate such detours." *Id*. at 1616. Accordingly, the Court held in *Rodriguez* that a dog sniff of a car stopped for a traffic infraction, which resulted in the dog's alerting to the presence of drugs and an ensuing search of the car and seizure of drugs violated the Fourth Amendment because it was "conducted after completion of . . . [the] traffic stop" and thus "'prolonged [the traffic stop] beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id*. at 1612.

§ 23.29 LICENSE CHECKS; STOPS OF AUTOMOBILES AT ROADBLOCKS AND CHECKPOINTS

In *Delaware v. Prouse,* 440 U.S. 648 (1979), the Court condemned the previously widespread practice of "stop checks" of vehicles selected by roving patrols. The Court in *Prouse* held that the Fourth Amendment does not permit the flagging down of selected automobiles for the purpose of "check[ing] [the] . . . driver's license and the registration of the automobile" unless "there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered." 440 U.S. at 663.

The Court in *Prouse* suggested, however, that it might sustain other "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion" by police officers. *Id.* It included "[q]uestioning of all oncoming traffic at roadblock-type stops [as] . . . one possible [constitutional] alternative." *Id.* In the subsequent case of *Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990), the Court upheld the constitutionality of "a State's use of highway sobriety checkpoints" (*id.* at 447), in which motorists passing through selected sites were "briefly stopped" (*id.* at 455), "briefly examined for signs of intoxication" (*id.* at 447), and asked some questions (*id.*), in accordance with established "guidelines setting forth procedures governing checkpoint operations [and] . . . site selection" (*id.*). "The average delay for each vehicle was approximately 25 seconds." *Id.* at 448. The Court acknowledged that "a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint." *Id*. at 450. *Accord*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment."). The *Sitz* Court concluded, however, that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped" (496 U.S. at 455) provided the requisite constitutional justification for the use of the sobriety checkpoint procedure. The Court emphasized that the "'objective' intrusion [upon seized motorists], measured by the duration of the seizure and the intensity of the investigation, [w]as minimal" (*id.* at 452) and that the procedure did not suffer from the same "degree of 'subjective intrusion' and . . . potential for generating fear and surprise [on the part of seized motorists]" (*id.*) as did the roving-patrol stops condemned in *Prouse* (*see Sitz,* 496 U.S. at 452-53). The Court in *Sitz* further distinguished the sobriety checkpoint procedure from the roving-patrol stops on the grounds that the "checkpoints are selected pursuant to . . . guidelines, and uniformed police officers stop every approaching vehicle" (*id.* at 453), thereby avoiding the "'kind of standardless and unconstrained discretion

[which] is the evil the Court has discerned . . . in previous cases'" (*id.* at 454 (quoting *Prouse,* 440 U.S. at 661)) and the state in *Sitz* presented "empirical data" (*id.*) demonstrating that the checkpoint procedure made at least some measurable contribution to controlling "the drunken driving problem" (*id.* at 451; *see id.* at 454-55). Finally, the Court in *Sitz* took pains to make clear "what our inquiry is *not* about." *Id.* at 450. Explaining that the issue "address[ed] [was] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers[,]" the Court noted that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Id.* at 450-51. The Court further cautioned that "[n]o allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint." *Id.* at 450.

Thereafter, in *City of Indianapolis v. Edmond*, the Court struck down a "highway checkpoint program whose primary purpose . . . [was] the discovery and interdiction of illegal narcotics" (531 U.S. at 34), in which the police stopped a predetermined number of vehicles, conducted a license and registration check, and walked around each stopped car with a narcotics-detection dog (*see id*. at 34-35). In holding this practice to be unconstitutional, the Court distinguished *Sitz* and also an earlier decision that had upheld the routine stopping of vehicles and the brief questioning of their occupants by immigration authorities at designated checkpoints near an international border (*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), discussed in § 23.30 *infra*). "In none of these cases," the Court explained, "did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 38. Emphasizing that "our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion" (*id*. at 41), the Court declared that "[w]e decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes" (*id*. at 44). *See also id*. at 34, 41-42, 48; *Singleton v. Commonwealth*, 364 S.W.3d 97, 104-06 (Ky. 2012) (applying *Edmond* to strike down a traffic checkpoint that was designed to catch violators of a city ordinance requiring that motor vehicles display a "city sticker" that shows residence or employment within city limits).

The Court returned to these issues in *Illinois v. Lidster*, 540 U.S. 419 (2003), rejecting a Fourth Amendment challenge to "a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident." *Id*. at 421. The Court distinguished *Edmond* on the ground that that case "involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles" (*id*. at 423) whereas the "primary law enforcement purpose [of the checkpoint in *Lidster*] was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others [and] . . . [t]he police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals." *Id*. at 423. Applying the criteria the Court had previously employed in *Sitz*, the Court upheld the checkpoint in *Lidster* because "[t]he relevant public concern was grave" in that "[p]olice were investigating a crime that had

resulted in a human death . . . [a]nd the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort"; "[t]he stop advanced this grave public concern to a significant degree" in that "[t]he police appropriately tailored their checkpoint stops to fit important criminal investigatory needs"; and, "[m]ost importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect," in that "each stop required only a brief wait in line – a very few minutes at most," "[c]ontact with the police lasted only a few seconds," "[p]olice contact consisted simply of a request for information and the distribution of a flyer," and, "[v]iewed subjectively, the contact provided little reason for anxiety or alarm" since "[t]he police stopped all vehicles systematically" and "there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops." *Id*. at 427-28.

In addition to approving the checkpoints in *Sitz* and *Lidster* and border stops by immigration authorities in *Martinez-Fuerte*, the Court has indicated that it is likely to accept standardized checkpoint procedures in other settings if the stops are not protracted, do not involve any physical searches of the car or occupants, and are not made solely at the discretion of officers in the field. In *Texas v. Brown,* 460 U.S. 730 (1983), the Court and all parties appear to have assumed the constitutionality of a "routine driver's license checkpoint." *See id.* at 733 (plurality opinion). And in *Prouse,* the Court noted that its holding did not "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." 440 U.S. at 663 n.26.

In light of the Court's opinions in these cases, the validity of various spot-check practices (for example, pollution emission tests, agricultural produce inspections, and game wardens' inspections, as well as driver's license and registration inspections) involving the brief stopping of vehicles without a reasonable suspicion that the particular vehicle stopped is being operated in violation of an applicable regulatory law appears to turn upon four considerations:

First is whether the "primary purpose [of the checkpoint program] was to detect evidence of ordinary criminal wrongdoing" (*City of Indianapolis v. Edmond*, 531 U.S. at 41) by one or more of the "vehicle's occupants" (*Illinois v. Lidster*, 540 U.S. at 423). Such situations are governed by "an *Edmond*-type rule of automatic unconstitutionality." *Id*. at 424. The Court stated in *dicta* in *Edmond* that an exception to this rule may apply to "emergency" situations, such as where the police set up "an appropriately tailored roadblock . . . to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." *Edmond*, 531 U.S. at 44. But, in the absence of such "exigencies" (*id*.), *Edmond* prohibits a checkpoint "program whose primary purpose is ultimately indistinguishable from the general interest in crime control," except when, as in *Lidster*, "[t]he stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others" and "[t]he police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals" (*Lidster*, 540 U.S. at

423).

Second is the extent to which some sort of spot check is necessary and will likely be effective to enforce the regulatory scheme in question. *See Illinois v. Lidster*, 540 U.S. at 427; *Michigan Department of State Police v. Sitz*, 496 U.S. at 451; *Delaware v. Prouse,* 440 U.S. at 658-61. Counsel challenging a checkpoint stop should contend that the standard of necessity is high. In approving the use of sobriety checkpoints in *Sitz,* the Court cited statistical and anecdotal evidence of the extent of "alcohol-related death and mutilation on the Nation's roads" (496 U.S. at 451 & n.*) and observed that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Id*. at 451; *accord*, *id*. at 455-56 (Justice Blackmun, concurring). Similarly, in sustaining immigration checkpoint stops in border regions, see § 23.30 *infra,* the Supreme Court has repeatedly emphasized "the enormous difficulties of patrolling a 2,000-mile open border," *United States v. Cortez,* 449 U.S. 411, 418 (1981), and the vital national importance of patrolling it effectively. *See, e.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 273 (1973); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878-79, 881 (1975); *United States v. Martinez-Fuerte,* 428 U.S. at 551-57. And, in upholding a "highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident," the Court in *Illinois v. Lidster* explained that "[t]he relevant public concern was grave . . . [in that] [p]olice were investigating a crime that had resulted in a human death . . . [and] [t]he stop advanced this grave public concern to a significant degree." 540 U.S. at 421, 427. *See also id*. at 425 ("voluntary requests [of "members of the public in the investigation of a crime"] play a vital role in police investigatory work"). With regard to the assessment of "'the degree to which . . . [a checkpoint procedure] advances the public interest'" (*Sitz,* 496 U.S. at 453), the Court has made clear that reviewing courts may not strike down a law enforcement technique that is a reasonable means of dealing with the problem simply because some "[e]xperts in police science" might view a different technique as "preferrable" [sic] (*id.*). However, a procedure may be found to violate the Fourth Amendment if the state fails to present empirical data justifying the procedure (*see Sitz,* 496 U.S. at 454-55) or if the procedure falls below an as yet unspecified threshold of effectiveness (*see Sitz,* 496 U.S. at 454-55 (finding that the sobriety checkpoint procedure under review sufficiently advanced the state's interest in controlling drunk driving because it resulted in arrests of "approximately 1.6 percent of the drivers passing through the checkpoint," which compared favorably with the "0.5 percent" "ratio of illegal aliens detected to vehicles stopped" by the immigration checkpoint procedure approved in *Martinez-Fuerte*)).

Third is the extent to which the visibility and regularity of the spot-check practice are likely to reduce motorists' apprehensions of danger and the feeling that they are being singled out for official scrutiny. *See Illinois v. Lidster*, 540 U.S. at 425, 427-28; *Michigan Department of State Police v. Sitz,* 496 U.S. at 452-53; *Delaware v. Prouse,* 440 U.S. at 657.

Fourth is the extent to which the spot-check procedures limit and control the exercise of discretion by individual officers in determining which vehicles to stop and which ones to detain for longer or shorter periods. *See Michigan Department of State Police v. Sitz,* 496 U.S. at 452-53; *Delaware v. Prouse,* 440 U.S. at 653-55, 661-63. This latter factor is probably the most

significant, for the Supreme Court's Fourth Amendment decisions have increasingly recognized that restricting police discretion in the execution of the search-and-seizure power is the Amendment's central purpose. *See, e.g., Johnson v. United States,* 333 U.S. 10, 13-17 (1948); *McDonald v. United States,* 335 U.S. 451, 455-56 (1948); *Beck v. Ohio,* 379 U.S. 89, 97 (1964); *See v. City of Seattle,* 387 U.S. 541, 545 (1967); *United States v. United States District Court for the Eastern District of Michigan,* 407 U.S. 297, 316-17 (1972); *United States v. Martinez-Fuerte,* 428 U.S. at 558-59, 566; *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 357 (1977); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 323-24 (1978); *Mincey v. Arizona,* 437 U.S. 385, 394-95 (1978); *Brown v. Texas,* 443 U.S. 47, 51 (1979); *Steagald v. United States,* 451 U.S. 204, 220 (1981); *Donovan v. Dewey,* 452 U.S. 594, 599, 601, 605 (1981); *New York v. Burger,* 482 U.S. 691, 703 (1987) (dictum). As in other fields of constitutional law in which excessive discretion embodied in a statutorily or administratively prescribed procedure may void it, factual evidence of divergent and particularly of discriminatory police practices in the administration of the procedure should be admissible and persuasive on this last issue. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).

§ 23.30 BORDER SEARCHES OF AUTOMOBILES

The "border search" doctrine allows customs and immigration officials to stop and search all vehicles (or persons) entering the United States from abroad. It requires no warrant, probable cause, *Terry*-type "reasonable suspicion," or other justification. This unfettered search power is, however, limited to the "border itself [or] . . . its functional equivalents." *Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973). *See also United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) ("the expectation of privacy is less at the border than it is in the interior").

Other than at the border and its functional equivalents, customs and immigrations *searches* of automobiles may not be made without a warrant or probable cause. *Almeida-Sanchez v. United States*, 413 U.S. at 274-75 (condemning a warrantless "roving patrol" search without probable cause); *United States v. Ortiz,* 422 U.S. 891 (1975) (condemning a warrantless "fixed check point" search without probable cause). Roving patrols of customs or immigration agents are permitted to make brief warrantless *stops* of vehicles in regions near the border on the basis of "reasonable suspicion" that a particular vehicle contains smuggled goods or illegal aliens. *United States v. Brignoni-Ponce,* 422 U.S. 873, 880-84 (1975); *United States v. Villamonte-Marquez,* 462 U.S. 579, 587-88 (1983) (dictum) (discussing the border-search doctrines applicable to automobiles while developing a somewhat different rule for ships "located in waters offering ready access to the open sea"). These roving-patrol stops are akin to domestic *Terry* stops and are governed by similar rules. See §§ 23.04-23.06, 23.09, 23.27 *supra.* "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States v. Brignoni-Ponce,* 422 U.S. at 881-82.

Equally limited stops of all or selected vehicles may be made routinely at fixed checkpoints in the border area, without a warrant, probable cause, or "reasonable suspicion." *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). But the "claim that a particular exercise of [administrative] discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." *Id.* at 559. Routine checkpoint stops, like roving-patrol stops made upon "reasonable suspicion," must be restricted to "brief questioning" and may not include either prolonged detention or search in the absence of "consent or probable cause." *Id.* at 566-67. *See also United States v. Flores-Montano*, 541 U.S. at 155 n.2 (reserving "the question 'whether, and under what circumstances, a border search might be deemed "unreasonable" because of the particularly offensive manner in which it is carried out'").

The opinions in *Ortiz* and *Brignoni-Ponce* purport to reserve the question whether searches and more extensive detentions in connection with immigration stops (either by roving patrols or at fixed checkpoints) may be made without reasonable suspicion or probable cause concerning the individual vehicle stopped, under the authorization of a search warrant "issued to stop cars in a designated area on the basis of conditions in the area as a whole," *Brignoni-Ponce,* 422 U.S. at 882 n.7; *see also Ortiz,* 422 U.S. at 897 n.3. This question was generated by Justice Powell's concurring opinion in *Almeida-Sanchez,* which adopts the concept of an "area" search warrant from the Supreme Court's building-code cases (*see Camara v. Municipal Court,* 387 U.S. 523 (1967)) and suggests that such a warrant might validate immigration searches in border areas. Because Justice Powell's concurrence was necessary to make up a 5-4 majority in *Almeida-Sanchez* and the Court has not become more sympathetic to Fourth Amendment rights since his departure, the likelihood is strong that "area" search warrants will be sustained in border-region immigration cases. *See also United States v. Martinez-Fuerte,* 428 U.S. at 555, 564 n.18.

The "border search" principles described in this section are limited to *international* borders and do not apply to interstate boundary lines. *Torres v. Puerto Rico,* 442 U.S. 465, 472-73 (1979); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 702 (1965) (by implication); *see also United States v. Flores-Montano*, 541 U.S. at 152 ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."); *United States v. Montoya De Hernandez,* 473 U.S. 531, 538 (1985) ("the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior"); *id.* at 544 ("at the international border, . . . the Fourth Amendment balance of interests leans heavily to the Government").

Part E. Probable Cause or Articulable Suspicion Based on Information Obtained from Other Police Officers or Civilian Informants

§ 23.31 POLICE ACTION BASED ON INFORMATION LEARNED FROM OTHER POLICE OFFICERS

Frequently, Officer *A* concludes that a person is guilty of an offense and conveys that

conclusion to Officer *B* – directly or through some form of police bulletin or dispatch or "wanted flyer" – in connection with a request or directive that the person be arrested or held for questioning. Some courts were inclined to sustain *B*'s arrest or stop of the person in this situation, even though *A* lacked probable cause or articulable suspicion for *A*'s conclusion, on the theory that *B* had probable cause or articulable suspicion generated by a communication from an apparently reliable informant – namely, fellow officer *A.* This bootstrap has, however, been firmly rejected by the Supreme Court on the obvious ground that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Whiteley v. Warden,* 401 U.S. 560, 568 (1971). *Accord, United States v. Hensley,* 469 U.S. 221, 230 (1985). Police dispatches gain no credibility from the mere fact of their internal transmission. *Cf. Franks v. Delaware,* 438 U.S. at 163-64 n.6.

Thus, when police officers rely on a flyer or dispatch to make an arrest, the admissibility of evidence uncovered during a search incident to that arrest "turns on whether the officers who *issued* the flyer [or dispatch] possessed probable cause to make the arrest." *United States v. Hensley,* 469 U.S. at 231 (dictum). *See, e.g.*, *People v. Powell*, 101 A.D.3d 756, 758, 955 N.Y.S.2d 608, 610 (N.Y. App. Div., 2d Dep't 2012). Similarly, in cases of *Terry* stops based on a flyer or dispatch, "[i]f the flyer [or dispatch] has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment." *United States v. Hensley,* 469 U.S. at 232. Of course, this adequacy of the underlying information is only the necessary condition – not a sufficient condition – for the validity of a detention based upon internal police communications. In addition, the officer who effects the detention must be aware of the communication and must be able to identify the person detained as the individual sought. *See State v. Gardner*, 135 Ohio St. 3d 99, 104-05, 984 N.E.2d 1025, 1029-30 (2012) (even if there is a valid arrest warrant for an individual, a police seizure of that individual cannot be predicated on the existence of the warrant unless the arresting officer "knew that there was a warrant for the individual's arrest").

§ 23.32 POLICE ACTION BASED ON INFORMATION LEARNED FROM A CIVILIAN INFORMANT

§ 23.32(a) The General Standard

Unless a police officer witnessed the crime or some objective manifestation of criminal conduct, police action – whether it be an arrest, a search, a *Terry* stop or a *Terry* frisk – will usually depend upon information learned from civilians. The source of the information may be either an ordinary citizen (a complainant or an eyewitness) or a "police informer" who is trading the information for cash or leniency on criminal charges to which s/he is subject. The identity of the source of the information may not even be known to the police, as in the case of an anonymous phone tip or an informant relaying information that s/he heard "on the street" without revealing the precise source of the information.

Defense attorneys usually confront the issue of informants' tips in either of two contexts:

(i) when the officer presented the information to a magistrate in support of a request for a search warrant or arrest warrant and defense counsel is challenging a search or arrest made pursuant to the resulting warrant, or (ii) when the officer relied on the informant's tip in making a warrantless arrest, search, stop, or frisk. If the officer acted pursuant to a warrant, the scope of review of the magistrate's reliance upon information derived from nonpolice informants will be quite limited under Fourth Amendment doctrine, although it may be more expansive under state constitutional law. See § 23.17 *supra.* Essentially, the issue in warrant cases is whether the informant's information, as presented in the police affidavit in support of the warrant, was "'so lacking in indicia of probable cause as to render'" the issuance of a warrant manifestly unreasonable. *United States v. Leon,* 468 U.S. 897, 923 (1984); see § 23.17(a) *supra.*

In cases in which the officer acted without a warrant, the reviewing court must engage in a far more piercing examination of the reliability and sufficiency of the informant's communications to the police. Judicial review of police reliance on information from informants was formerly governed by a two-pronged test of "veracity" and "basis of knowledge" established in *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969). The *Aguilar-Spinelli* standard has been preserved in several States as a matter of state constitutional law, *see, e.g., Commonwealth v. Upton,* 394 Mass. 363, 476 N.E.2d 548 (1985); *People v. Johnson,* 66 N.Y.2d 398, 405-07, 488 N.E.2d 439, 444-45, 497 N.Y.S.2d 618, 623-24 (1985); *State v. Jackson,* 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984), but federal Fourth Amendment doctrine is now controlled by the opinion in *Illinois v. Gates,* 462 U.S. 213 (1983). Although the *Gates* case itself involved a warrant, its rules have generally been accepted as governing warrantless police action based on hearsay information.

Under the *Gates* opinion, the question whether information received from an informant supplies the requisite predicate for a search and seizure (whether that predicate be probable cause or articulable suspicion) is to be determined by the "totality of the circumstances," including, *inter alia,* the "informant's 'veracity,' 'reliability,' and 'basis of knowledge.'" 462 U.S. at 230-39. Whereas the *Aguilar-Spinelli* standard treated "veracity" and "basis of knowledge" as separate criteria, both of which had to be satisfied, the *Gates* standard treats them as intertwined aspects of a "totality-of-the-circumstances analysis" in which "a deficiency in one [aspect] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 426 U.S. at 233. In *Gates,* the Court concluded that it was possible to overlook the lack of direct evidences of "veracity" and "basis of knowledge" of an anonymous letter because the information in the letter was so detailed as to imply that the informant must be highly knowledgeable and accurate, and "independent investigative work" by the police had corroborated substantial portions of the details relating to conduct by the suspects which "at least suggested" criminal activity. *Id.* at 243-46. *See also Navarette v. California*, 134 S. Ct. 1683, 1686, 1688-90 (2014) (an anonymous 911 call reporting that "a vehicle had run [the caller] . . . off the road" "bore adequate indicia of reliability for the officer to credit the caller's account" and to rely on this information in conducting a traffic stop because (1) the caller's report that "she had been run off the road by a specific vehicle – a silver Ford F-150 pickup, license plate 8D94925 – . . . necessarily claimed eyewitness knowledge of the alleged dangerous

driving" and "[t]hat basis of knowledge lends significant support to the tip's reliability"; (2) police confirmation of "the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call) . . . suggests that the caller reported the incident soon after she was run off the road," and "[t]hat sort of contemporaneous report has long been treated as especially reliable"; and (3) "the caller's use of the 911 emergency system," which has "features that allow for identifying and tracing callers," is an additional "indicator of veracity," although this is not "to suggest that tips in 911 calls are *per se* reliable"; the Court majority in this 5-4 decision acknowledges that "this is a 'close case.'"). *Compare Florida v. J.L.*, 529 U.S. 266, 270, 271-72 (2000) (an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for a stop and frisk, even though the police found a person matching the description at that precise location, because "'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity'" and, although "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop,'" the "unknown, unaccountable informant . . . neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the subject]" and the police confirmation of the accuracy of the tipster's "description of [the] subject's readily observable location and appearance . . . does not show that the tipster has knowledge of concealed criminal activity": "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."); *United States v. Freeman*, 735 F.3d 92, 94, 97-103 (2d Cir. 2013) (an anonymous caller's two calls to 911 reporting that an individual "'is possibly armed with a firearm' and was 'arguing with a female'" and describing this individual's appearance in detail and giving his precise location "did not provide the police with the reasonable suspicion needed to stop Freeman": "[t]he fact that the call was recorded and that the caller's apparent cell phone number is known does not alter the fact that the identity of the caller is still unknown, leaving no way for the police (or for the reviewing court) to determine her credibility and reputation for honesty"; the detailed information about the individual's appearance and location "does nothing to 'show that the tipster has knowledge of concealed criminal activity'"; and "the facts that the stop occurred at night in a 'high crime' area" do not "enhance the reliability of the phone call by confirming in it some individualized detail."); *United States v. Martinez*, 486 F.3d 855, 863 (5th Cir. 2007) (finding no reasonable suspicion where the "police had verified information that the person in the car they stopped was the 'Angel' whom the informant desired to accuse" but "had no verified information . . . that linked Martinez to any criminal behavior" and "[t]he informant also provided no verifiable predictive information about Martinez's future behavior that would have indicated any 'inside knowledge' about Martinez"); *United States v. Brown*, 448 F.3d 239, 252 (3d Cir. 2006) (concluding that "an excessively general description, combined with an honest but unreliable location tip [*i.e.*, a tip by a citizen whose identity is known but whose reliability is not known to the police,] in the absence of corroborating observations by the police, does not constitute reasonable suspicion under the 'narrowly drawn authority' of *Terry v. Ohio*"); *State v. Kooima*, 833 N.W.2d 202, 210-11 (Iowa 2013) ("we hold a bare assertion [of drunk driving] by an anonymous tipster, without relaying to the police a personal observation of erratic driving, other facts to establish the driver is intoxicated, or details

not available to the general public as to the defendant's future actions does not have the requisite indicia of reliability to justify an investigatory stop. Such a tip does not meet the requirements of the Fourth Amendment.").

The pre-*Gates* caselaw applying the *Aguilar-Spinelli* test contains extensive discussion of the concepts of "veracity" and "basis of knowledge" with respect to informants' tips. Although *Gates* overrules the *Aguilar-Spinelli* approach of treating these factors as separate and independent criteria, it acknowledges the relevance of both and does not undermine the earlier judicial analyses of "veracity" and "basis of knowledge."

§ 23.32(b) "Veracity" of the Informant

The "veracity" inquiry examines whether there are facts showing either that the informant is generally credible or that the information that s/he gave on this particular occasion is reliable. *Aguilar v. Texas,* 378 U.S. at 114-15. Information from an informant of unknown or doubtful reliability is worth little. *E.g., Wong Sun v. United States,* 371 U.S. 471, 480-81 (1963); *Taylor v. Alabama,* 457 U.S. 687, 688-89 (1982); *Florida v. J.L.*, 529 U.S. at 270-71. *See*, *e.g.*, *United States v. Glover*, 755 F.3d 811, 815-16 (7th Cir. 2014) ("Officer Brown's affidavit did not include any available information on Doe's credibility. . . . ¶ . . . The complete omission of information regarding Doe's credibility is insurmountable, and it undermines the deference we would otherwise give the decision of the magistrate to issue the search warrant."). "Even a known informant's information may require corroboration if an affidavit supplies little information concerning that informant's reliability." *United States v. Clay*, 630 Fed.Appx. 377, 385 (6th Cir. 2015).

"[T]he ordinary citizen who has never before reported a crime to the police" is generally viewed as "more reliable than one who supplies information on a regular basis." *United States v. Harris,* 403 U.S. 573, 599 (1971) (Harlan, J., dissenting). If the source of information is an informant who "supplies information on a regular basis," then a critical question is whether the information supplied in prior cases proved to be accurate. *See, e.g., McCray v. Illinois,* 386 U.S. 300, 303-04 (1967); *United States v. Ross,* 456 U.S. 798, 817 n.22 (1982). Mere conclusory allegations about the accuracy of the informant in prior cases are insufficient, *see Gates,* 462 U.S. at 239; *Aguilar v. Texas,* 378 U.S. at 114-15; details must be supplied concerning the number of times the informant has provided information in the past and the extent to which that information led to arrests and convictions. *See, e.g., State v. Robinson*, 185 Vt. 232, 239, 969 A.2d 127, 132 (2009) ("The mere statement that the informant had in the past provided unspecified, albeit purportedly 'creditable,' 'accurate,' or "reliable' information that 'concerned' drug deals or dealers does not establish the informant's inherent credibility"); *United States v. Neal*, 577 Fed. Appx. 434, 441 (6th Cir. 2014) ("This Court has repeatedly held that an affidavit that furnishes details of an informant's track record of providing reliable tips to the affiant can substantiate the informant's credibility, such that other indicia of reliability may not be required when relying on the informant's statements. ¶ However, where the affidavit does not aver facts showing the relationship between the affiant and the informant, or detail the affiant's knowledge regarding the

informant providing prior reliable tips that relate to the same type of crimes as the current tip concerns, this Court has generally found that other indicia of reliability must be present to substantiate the informant's statements."). *Compare McCray v. Illinois,* 386 U.S. at 303-04 (credibility of an informant was sufficiently established by the informant's having supplied information on fifteen to twenty prior occasions that proved accurate and resulted in numerous arrests and convictions), *with State v. Betts*, 194 Vt. 212, 224-25, 75 A.3d 629, 638-39 (2013) (trooper's affidavit, which "indicated that the confidential informant [who was the source of the information upon which the police relied] had 'provided . . . information in the past that has led to the arrest of at least three separate individuals for various narcotics offenses'" – but which "contain[ed] no indication as to the actual nature of the informant's cooperation or information in the past, how the information 'led' to the alleged arrests, or the final outcome of any of the cases in which he or she was involved" – failed to provide the reviewing court with a sufficient "basis upon which to discharge its constitutional duty to independently analyze the informant's credibility"). In cross-examining a police officer on the issue of prior performance of an informant, defense counsel should try to pin down precisely how many *bad* tips the informant has given in the past. Although the courts have not squarely confronted the question of how high a "batting average" is necessary to establish the credibility of an informant and although it certainly is not "required that informants used by the police be infallible," *Illinois v. Gates,* 462 U.S. at 245 n.14, there will be a point at which the number of prior instances of inaccuracy tips the scales in favor of a finding of unreliability. *See id.* at 234 (courts must engage in "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip"); *Massachusetts v. Upton,* 466 U.S. 727, 732 (1984) (per curiam) (dictum) (same).

Apart from the general credibility of the informant, information given on a particular occasion gains reliability if it is an admission against penal interest. *See, e.g., United States v. Harris,* 403 U.S. at 583-85 (plurality opinion); *Spinelli v. United States,* 393 U.S. at 425 (Justice White, concurring); *United States v. Ruiz*, 623 Fed. Appx. 378 (9th Cir. 2015). Conversely, when the informant is known to have an incentive to give incriminating information – when, for example, the informant was paid for the information – there is reason to distrust the information. *See, e.g., Rutledge v. United States,* 392 A.2d 1062, 1066 (D.C. 1978) ("the expectation of reward for services is an ambiguous variable which very well could furnish reason to be honest and accurate in the hope of being utilized again or, conversely, reason to distort or fabricate, in order to earn at least one payment"). For an excellent enumeration and analysis of the factors to be considered in evaluating the veracity of a citizen informant, *see United States v. Brown*, 448 F.3d 239, 249-51 (3d Cir. 2006).

The necessary showing of veracity "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, 529 U.S. 266, 272 (2000) ("Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. . . . These contentions misapprehend the reliability needed for a tip to justify a Terry stop. ¶ An accurate description of a subject's readily observable location and appearance is of

course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. . . . *Cf.* 4 W. LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed.1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases)."

§ 23.32(c) The Informant's "Basis of Knowledge"

Whereas the "veracity" inquiry focuses on whether the informant is likely to be telling the truth, the inquiry into the informant's "basis of knowledge" is concerned with whether the informant has a sufficient basis for knowing the information s/he relates, even assuming that s/he is telling the truth. In *Aguilar v. Texas,* the Court held that one of the principal defects in a police officer's affidavit was its failure to reveal "some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were." 378 U.S. at 114.

The "basis of knowledge" concern is satisfied whenever the informant asserts a direct perceptual basis for knowing the facts: when, for example, the informant personally saw criminal behavior or contraband, *see, e.g., United States v. Bruner,* 657 F.2d 1278, 1297 (D.C. Cir. 1981), or was a participant in the crime, *see, e.g., United States v. Estrada,* 733 F.2d 683, 686 (9th Cir. 1984). Mere conclusory recitations, such as that "the informant had personal knowledge," will not suffice, *United States v. Long,* 439 F.2d 628, 630-31 (D.C. Cir. 1971); *People v. Leftwich*, 869 P.2d 1260, 1266-67 (Colo. 1994); *State v. Baca*, 97 N.M. 379, 381, 640 P.2d 485, 487 (1982): There must be some concrete, factual indication of the basis for the informant's "personal knowledge." *See*, *e.g.*, *United States v. Wall*, 277 Fed. Appx. 704 (9th Cir. 2008).

The Court explained in *Spinelli v. United States, supra*, that "[i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation" (393 U.S. at 416). When testing this sort of "self-verifying detail" (*United States v. Gifford*, 727 F.3d 92, 99 (1st Cir. 2013)), the courts must critically consider whether the details are such that they must have been derived from direct observation or insider information, as distinguished from scuttlebutt. *See id*. at 100 ("While the Government offers the informant's statements regarding the contemporaneous state of the marijuana grow as well as the autumn grow as self-authenticating, without any statements as to the informant's basis of knowledge, there is no means of determining whether that information was obtained first-hand or through rumor. The information is not so specific and specialized that it could only be known to a person with inside information. Further, information about Gifford's former and current occupation are not so self-verifying to establish the reliability of the informant."). *See also, e.g.*, *United States v. Martinez*, 486 F.3d 855, 861-64 (5th Cir. 2007) (finding no reasonable suspicion where an informant "provided no verifiable predictive information . . . that would have indicated any

'inside knowledge'"); *United States v. Bush,* 647 F.2d 357, 364 & n.6 (3d Cir. 1981) (the informant's statement that two men had flown to New York to obtain heroin and would return that evening was not an adequate "self-verifying detail," since it was not the type of fact that "arguably would only be known to someone with reliable information" and it was "surely equally probable that the informant was merely repeating a rumor overheard on the street"); *Shivers v. State*, 258 Ga. App. 253, 573 S.E.2d 494 (2002); *West v. State*, 137 Md. App. 314, 768 A.2d 150 (2000).

§ 23.32(d) Partial Corroboration of the Informant's Statement Through Police Investigation

In upholding reliance on the informant's tip in *Illinois v. Gates,* the Court stressed that the information "had been corroborated in major part" as a result of police investigation. 462 U.S. at 243. The Court explained that "[t]he corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true." *Id.* at 244. These events, though not necessarily dispositive of criminal activity, were viewed by the Court as "suggestive of a prearranged drug run." *Id.* at 243. In contrast, in *Florida v. J.L.*, the Court held that an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for stopping and frisking that individual, even though the police observations corroborated that there was a person matching the description at that precise location, because the corroborating observations must support the reliability of the tip's "assertion of illegality," not just the reliability of its "identif[ication] [of] a determinate person." 529 U.S. at 272; see § 23.22(b) concluding paragraph *supra*. Thus, in gauging whether an informant's tip has been adequately corroborated through police investigation, the courts have been careful to require that the activity witnessed by the police be at least "suspicious," *Rutledge v. United States,* 392 A.2d 1062, 1066-67 (D.C. 1978), or "suggestive of . . . criminal activity," *People v. Elwell,* 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477, 428 N.Y.S.2d 655, 662 (1980). *See also, e.g.*, *United States v. Reaves*, 512 F.3d 123, 127-28 (4th Cir. 2008).

In some circumstances, the corroboration can come from prior reports of criminal activity. Thus, in *Massachusetts v. Upton,* 466 U.S. 727 (1984), the Court found that an informant's tip describing stolen goods concealed in her former boyfriend's motor home was partially corroborated by police reports of recent burglaries in which the descriptions of certain of the items stolen "tallied with" the informant's descriptions of the stolen goods. *See id.* at 733-34.

§ 23.32(e) Disclosure of the Informant's Name at the Suppression Hearing

In cases in which a search or seizure was based either wholly or partly on an informant's tip, defense counsel almost invariably will want to obtain the informant's name from the police or the prosecutor, so as to be able to make an independent investigation of the informant's prior "track record," the informant's "basis of knowledge," and any bias that the informant may have

against the respondent. Disclosure of the informant's identity is not available as a matter of right, but can be ordered in the discretion of the judge presiding at a suppression hearing. *See, e.g., Schmid v. State*, 615 P.2d 565, 570-71 (Alaska 1980). The so-called "informer's privilege" and its effect upon the respondent's right to disclosure of the names of confidential informants at a suppression hearing is discussed in § 9.10(a) *supra.*

Part F. School Searches and Seizures

§ 23.33 APPLICABILITY OF FOURTH AMENDMENT PROTECTIONS TO THE SCHOOL SETTING

It has always been clear that the Fourth Amendment applies to searches and seizures made by police officers inside a school building. *See, e.g., Piazzola v. Watkins,* 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd,* 442 F.2d 284 (5th Cir. 1971). It is equally clear that if a school official conducts a search or seizure of a student at the behest of the police, the school official is acting as an "agent" of the police and is subject to the same restrictions that would govern police conduct under the circumstances. See § 23.36 *infra.*

Prior to *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), there was some debate about whether school officials were subject to the restrictions of the Fourth Amendment in conducting searches and seizures on their own initiative without any instigation by the police. In *T.L.O.*, the Court concluded that the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials." *Id.* at 333. The *T.L.O.* opinion decisively rejects the argument that school officials' *in loco parentis* status confers the untrammeled search prerogatives of parents, saying:

> "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." (*Id.* at 336-37.)

Accord, *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 377 (2009) ("difference" between "[p]arents" and "school official[s]" "is that the Fourth Amendment places limits on the official"); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655 (1995).

Although holding that the Fourth Amendment governs school officials' searches, the Court in *T.L.O.* did not demand that such searches comply with the same rules that regulate police searches. The rules for assessing the validity of a school official's search of a student's person are discussed in § 23.34 *infra.* The topic of school officials' searches of students' desks and lockers is taken up in § 23.35 *infra. Compare J.P. ex rel. A.P. v. Millard Public Schools*, 285 Neb. 890, 892, 905, 908-09, 830 N.W.2d 453, 457, 465, 466-67 (2013) ("*T.LO.*['s] school-needs

exception . . . for the search of students on school grounds" did not apply to a school official's search of a student's truck that was "parked on a public street across from the school" and thus "was not in the school environment or under the dominion and control of the school"). Finally, § 23.36 *infra* examines the standards that must be applied when a school official acts at the behest of the police rather than on his or her own initiative. *See generally* Barry C. Feld, T.L.O *and* Redding's *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011); Annot., *Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision*, 31 A.L.R.5th 229 (1995, updated). The lower courts are divided on whether school security officers (sometimes called "school resource officers" or "school safety officers") should be classified as "school officials" or "law enforcement officers" for purposes of the *T.L.O.* doctrine. *See, e.g.*, *State v. Meneese*, 174 Wash. 2d 937, 947, 282 P.3d 83, 88 (2012) (discussing the caselaw of other jurisdictions and holding under the federal and state constitutions that the "school search exception" of *T.L.O.* did not apply to a school resource officer's search of a student's backpack because the officer was "a fully commissioned law enforcement officer employed by the Bellevue Police Department who has no ability to discipline students" and who "was seeking to obtain evidence for criminal prosecution, not evidence for informal school discipline").

It should be noted that the Court in *T.L.O.* expressly declined to address the question whether "the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities." *T.L.O.,* 469 U.S. at 333 n.3. It was unnecessary for the Court to reach this issue because the Court found the search of T.L.O. constitutionally valid. However, as the lower courts have concluded in applying the substantive rules announced in *T.L.O.,* the interests served by the exclusionary rule necessarily call for the exclusion of evidence unlawfully seized by school officials. *See, e.g., In re William G.,* 40 Cal. 3d 550, 567 n.17, 709 P.2d 1287, 1298 n.17, 221 Cal. Rptr. 118, 129 n.17 (1985); *R.S.M. v. State*, 911 So. 2d 283 (Fla. App. 2005); *In re Doe*, 104 Hawai'i 403, 91 P.3d 485 (2004), *partially overruled on another issue*, *In re Doe*, 105 Hawai'i 505, 100 P.3d 75 (2004); *State v. Pablo R.*, 139 N.M. 744, 137 P.3d 1198 (N.M. App. 2006); *In the Interest of Dumas,* 357 Pa. Super. 294, 515 A.2d 984 (1986). Although the goal of deterring police misconduct is not implicated in this context, the exclusionary rule's other goals of assuring that individuals' rights to privacy are protected and of preserving "that judicial integrity so necessary in the true administration of justice" (*Mapp v. Ohio,* 367 U.S. 643, 660 (1961)) can only be effectuated by excluding unlawfully seized evidence from juvenile delinquency trials. *In re William G.,* 40 Cal. 3d at 567 & n.17, 709 P.2d at 1298 & n.17, 221 Cal. Rptr. at 129 & n.17. And because school officials are "state actors" charged with heeding the "strictures of the Fourth Amendment," *T.L.O.,* 469 U.S. at 336-37, and simultaneously charged with disciplinary responsibilities that may tempt them to disregard those strictures, there is much the same constitutional need to deter their misconduct as there is to deter police misconduct. *See, e.g., State v. Baccino,* 282 A.2d 869, 871 (Del. Super. 1971). Moreover, as Justice Stevens pointed out in an opinion concurring in part and dissenting in part in *New Jersey v. T.L.O.,* "[i]n the case of evidence obtained in school searches, the 'overall educative effect' of the exclusionary rule adds important symbolic force to this utilitarian judgment. . . . Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing

citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly." 469 U.S. at 373-74.

§ 23.34 SEARCHES OF THE STUDENT'S PERSON BY SCHOOL OFFICIALS

In developing a standard to regulate school officials' searches of students, the Court in *T.L.O.* balanced "the child's interest in privacy" against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." *T.L.O.,* 469 U.S. at 339. The Court concluded that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," *id.* at 340, including the warrant requirement and the probable cause requirement. *Id.* at 340-41. *Accord*, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828-30 (2002); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995). *See also Shuman ex rel. Shertzer v. Penn Manor School District*, 422 F.3d 141, 147 (3d Cir. 2005) (extending the *T.L.O.* standard for "searches in public schools" to "seizures in that context," and holding that a student was "'seized' within the meaning of the Fourth Amendment" when an assistant principal "told [him] to remain in the conference room under [the assistant principal's] direction for several hours," and that "reasonableness is the appropriate benchmark to determine whether [such] a seizure in the public school context survives Fourth Amendment scrutiny").

Under the standard adopted in *T.L.O.,* "the legality of a search of a student . . . depend[s] simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341. The determination of "the reasonableness of any search involves a two-fold inquiry: first, one must consider 'whether the . . . action was justified in its inception,' . . .; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.*

> "Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." (*New Jersey v. T.L.O.,* 469 U.S. at 341-42 (footnotes omitted).)

See also Safford Unified School District # 1 v. Redding, 557 U.S. 364, 371 (2009) ("Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability,' . . . or a 'substantial chance,' . . . of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing."); *id*. at 372 n.1 ("[w]hen the object of a school search is the enforcement of a school rule," "the rule's legitimacy" also may be at issue because a search can be found to be "unreasonable owing to

some defect or shortcoming of the rule it was aimed at enforcing").

Applying the standard to the facts of the *T.L.O.* case, the Court concluded that (i) the school vice-principal's "decision to open T.L.O.'s purse was reasonable," *id.* at 347, because a teacher had observed T.L.O. smoking cigarettes in the girls' bathroom in violation of school rules and it was therefore reasonable to suspect that T.L.O. had cigarettes in her purse, *id*. at 345-46; (ii) when the vice-principal, in opening and removing a pack of cigarettes, observed a package of rolling papers, the "reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse . . . justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money," *id.* at 347; and (iii) "[u]nder these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of 'people who owe me money' as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify [the vice-principal] . . . in examining the letters to determine whether they contained any further evidence." *Id.* Thus school searches, like all other searches, are subject to the general rule that each increasing level of intrusiveness must be justified by additional facts warranting the intensification of the intrusion.

In applying the *T.L.O.* standard in *Safford Unified School District # 1 v. Redding*, the Court similarly scrutinized the record carefully to determine whether the facts known to the school officials justified the initial intrusion and the subsequent level of additional intrusion. The Court concluded that (i) an assistant principal had adequate "suspicion . . . to justify a search of [a student's] . . . backpack and outer clothing" in the student's "presence and in the relative privacy of [the assistant principal's] . . . office," based upon information from other students giving rise to a reasonable suspicion that the student was "giving out contraband pills" in violation of a school rule and that the student was "carrying [such pills] . . . on her person and in the [backpack]"; but that (ii) when the school nurse and an administrative assistant thereafter conducted a more intrusive search of the student's person in the nurse's office, directing the student to "remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants," "thus exposing her breasts and pelvic area to some degree," this "quantum leap from outer clothes and backpacks to exposure of intimate parts" violated the Fourth Amendment because the facts known to the school officials did not indicate that there was "danger to the [other] students from the power of the drugs [that the student was "reasonably suspected of carrying"] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear." *Safford*, 557 U.S. at 368-69, 373-77.

In challenging school searches, defense counsel should argue that the *T.L.O.* standard incorporates the *Terry* "articulable suspicion" requirement, see § 23.09 *supra.* Significantly, when the Court applied the first prong of its *T.L.O.* test – the inquiry into whether there are "reasonable grounds for suspecting that the search will turn up evidence" (*id.* at 342) – the Court relied on *Terry* and its progeny to define the requisite quantum of suspicion. *Id.* at 346 (saying

that the inquiry demands more than the type of "'inchoate and unparticularized suspicion or "hunch"'" condemned in *Terry* and equating the required level of certainty with the *Terry*-level showing called for in *United States v. Cortez,* 449 U.S. 411 (1981)). *See also Safford Unified School District # 1 v. Redding*, 557 U.S. at 370 (reiterating *T.L.O.*'s ruling that "searches by school officials" are to be judged "'by a Fourth Amendment standard of reasonableness that stops short of probable cause'" and then referencing prior Fourth Amendment caselaw on probable cause in the adult criminal context to observe that "[p]erhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability,' . . . or a 'substantial chance,' . . . of discovering evidence of criminal activity" while "[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing"); *id*. at 373-74 (scrutinizing the record carefully to determine whether the specific facts known to school officials were sufficient to "justify a search of [the student's] backpack and outer clothing" based upon "reasonable suspicion" that the student was "carrying . . . . ["contraband pills"] on her person and in the carryall"); *id*. at 370 (summarizing the *T.L.O.* rule by saying that "[w]e have . . . applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student"). In applying *T.L.O.,* the lower courts have analyzed school officials' actions under this *Terry* standard of justification. *See, e.g., G.C. v. Owensboro Public Schools*, 711 F.3d 623, 633-34 (6th Cir. 2013) (in a decision issued even before the Supreme Court's announcement of strict privacy protections for cell phones' digital content in *Riley v. California*, 134 S. Ct. 2473 (2014), the court of appeals holds that school officials' search of a cell phone confiscated from a student violated *T.L.O.*, notwithstanding the school officials' "background knowledge of [G.C.'s] drug abuse . . . [and] depressive tendencies" because "there is no evidence in the record to support the conclusion . . . that the school officials had any specific reason at the inception of the . . . search to believe that G.C. then was engaging in any unlawful activity or that he was contemplating injuring himself or another student"); *In re William G.,* 40 Cal. 3d 550, 566, 709 P.2d 1287, 1297, 221 Cal. Rptr. 118, 128 (1985) (the *T.L.O.* "standard is more stringent than other 'less than probable cause' standards . . . because it depends on objective and articulable facts"); *In the Interest of Dumas,* 357 Pa. Super. 294, 298, 515 A.2d 984, 986 (1986) (striking down a school search under the *T.L.O.* standard because the assistant principal "was unable to articulate any reasons for [ ]his suspicion" that the student who had been caught smoking cigarettes was "involved with marijuana").

Counsel should further argue that factors such as "furtive gestures" and refusal to answer questions should be accorded no greater weight in the school setting than in the context of a *Terry* stop and frisk. *See, e.g.*, *William G.*, 40 Cal. 3d at 567, 709 P.2d at 1297, 221 Cal. Rptr. at 128 (citing *Terry* caselaw for the conclusion that a student's "'furtive gestures' in trying to hide his calculator case from [school official's] view cannot, standing alone, furnish sufficient cause to search"); *see id.* (citing *Terry* caselaw for the proposition that "William's demand for a warrant did not create a reasonable suspicion upon which to base the search. Such conduct merely constitutes William's legitimate assertion of his constitutional right to privacy and to be free from unreasonable searches and seizures. There are many reasons why a student might assert these rights, other than an attempt to prevent disclosure of evidence that one has violated a

proscribed activity. A student cannot be penalized for demanding respect for his or her constitutional rights."). For discussion of the relevance of these factors in the *Terry* context, see § 23.11 *supra.*

In litigating under the *T.L.O.* standard, counsel can also draw upon the caselaw dealing with a police officer's right to rely on hearsay information in conducting a *Terry* stop or frisk, see §§ 23.31-23.32 *supra. See Safford Unified School District # 1 v. Redding*, 557 U.S. at 370-71 (recognizing that the Court's prior decisions on probable cause, including cases dealing with police reliance on hearsay, "have an implicit bearing on the reliable knowledge element of reasonable suspicion" even though "these factors cannot rigidly control" the "lesser standard" governing "the required knowledge component" of reasonable suspicion for any particular school search since "the standards are 'fluid concepts that take their substantive content from the particular contexts' in which they are being assessed"); *id*. at 381-82 (Justice Ginsburg, concurring in part and dissenting in part) (disagreeing with the majority's conclusion that an assistant principal who conducted an unconstitutional search had qualified immunity, and explaining that the unreasonableness of the school official's actions is shown by, *inter alia*, his reliance "on the bare accusation of another student whose reliability the Assistant Principal had no reason to trust"). Thus, as a state court concluded in applying a general-reasonableness standard to a school search in a pre-*T.L.O*. case, there must be scrutiny of "the probative value and reliability of the information used as a justification for the search." *Doe v. State,* 88 N.M. 347, 352, 540 P.2d 827, 832 (N.M. App. 1975).

Counsel should insist that the reviewing court strictly enforce the second prong of the *T.L.O.* standard – that the "scope" of a search be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.,* 469 U.S. at 342. The Court's analysis of the *T.L.O.* record under this prong can be used to illustrate the limitations it imposes on the scope of search. When the vice-principal knew nothing more than that a highly reliable source, a teacher, had observed a student smoking cigarettes in violation of a school rule, the vice-principal was permitted to take the limited step of opening the student's purse and removing the cigarettes. *See id.* at 344-46. When that action revealed evidence of the criminal act of possession of marijuana, the vice-principal could engage in "further exploration" of the purse. *See id.* at 347. It was only after the discovery of marijuana itself – a discovery that in the police context would justify an arrest and a full-scale search incident to arrest – that the vice-principal was permitted to make the additional intrusion of examining the interior of the zippered compartment. *See id.* Finally, it was only after this intrusion revealed evidence of the far more serious crime of narcotics sale that the vice-principal was permitted to take the ultimate step of reading T.L.O.'s letters. *See id. Compare, e.g.*, *In the Interest of Doe*, 77 Hawai'i 435, 442-43, 887 P.2d 645, 652-53 (1994) (principal's search of a student's handbag conformed to *T.L.O.* standard because the principal had "reasonable grounds to suspect that Minor may be concealing marijuana in her purse" and "the search ceased" after the student emptied her purse, disclosing a bag of marijuana), *and State v. Drake*, 139 N.H. 662, 667, 662 A.2d 265, 268 (1995) (principal's search of a student's knapsack complied with *T.L.O.* because the principal had reasonable grounds to believe that the student was "likely using, and

possibly distributing, drugs" and would have drugs with him in school that day, and the principal first asked the student to empty his pockets, resulting in the discovery of a rolling paper package with what appeared to be marijuana on it, whereupon the principal asked the student to open his knapsack and thereby found several bags of marijuana), *with Coronado v. State*, 835 S.W.2d 636, 637, 641 (Tex. Crim. App. 1992) (although "the first prong of *T.L.O.* is met" in that the assistant principal had "reasonable grounds to suspect that [the student] was violating school rules by 'skipping'" class and leaving school early, the assistant principal's "searches of [the student's] clothing and person, locker, and vehicle were excessively intrusive in light of the infraction of skipping school," notwithstanding the assistant principal's reasons for suspecting that the student was selling drugs to other students).

In its post-*T.L.O.* decision in *Safford Unified School District # 1 v. Redding*, the Court elaborated upon *T.L.O.*'s general statements about "excessive[ ] intrus[ions]" by addressing the criteria that apply when school officials engage in a search that involves "exposure of [a student's] intimate parts." 557 U.S. 364, 370, 374-77 (2009). In *Safford*, a school nurse and an administrative assistant "directed [the student] to remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants," which "necessarily exposed her breasts and pelvic area to some degree." *Id*. at 374. The Court characterized such a search as a "quantum leap" beyond less intrusive searches of "outer clothes and backpacks" (*id*. at 377), and explained:

> "[B]oth subjective and reasonable societal expectations of personal privacy support the treatment of such a search [that exposes a student's "intimate parts"] as categorically distinct [from less intrusive searches], requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.
>
> "[Student] Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. . . . The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be, see, *e.g.*, New York City Dept. of Education, Reg. No. A-432, p. 2 (2005), online at http://docs.nycenet.edu/ docushare/dsweb/Get/Document-21/A-432.pdf ("Under no circumstances shall a strip-search of a student be conducted").
>
> "The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*, that "the search as actually conducted [be]

> reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S., at 341 (internal quotation marks omitted). The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id*., at 342. . . .
>
> ". . . The meaning of such a search [which exposes "intimate parts" of the student's body], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." (*Safford*, 557 U.S. at 374-77.)

See also id. at 380 (Justice Stevens, concurring in part and dissenting in part) ("I have long believed that '"[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude."'" (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980))); *id*. at 381-82 (Justice Ginsburg, concurring in part and dissenting in part) ("humiliating stripdown search" of the 13-year-old student "was abusive"); *T.L.O.*, 469 U.S. at 382 n.25 (Justice Stevens, concurring in part and dissenting in part) (*T.LO.*'s prohibition of excessively intrusive searches of students precludes "the shocking strip searches that are described in some cases that have no place in the schoolhouse"); *Tarter v. Raybuck,* 742 F.2d 977, 982-83 (6th Cir. 1984) (body cavity search of student would be *per se* unreasonable). In *Safford*, the Court held that the school officials' "quantum leap from outer clothes and backpacks to exposure of intimate parts" violated the Fourth Amendment because the facts known to the school officials did not indicate that there was "danger to the [other] students from the power of the drugs [that the student was "reasonably suspected of carrying"] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear." *Safford*, 557 U.S. at 374, 376-77.

In cases involving older students, especially students close to the age of eighteen, defense counsel should argue that *T.L.O.*'s requirement that searches be tempered according to the "age . . . of the student," *T.L.O.,* 469 U.S. at 342, stringently restricts the authority of school officials in searching students whose privacy interests are more closely akin to adults'. Counsel can point out that the greater maturity of an older student renders it less justifiable to subordinate the student's privacy rights to the needs of the school. *Cf. Smyth v. Lubbers,* 398 F. Supp. 777, 785-86 (W.D. Mich. 1975) (college's assertion of the right to search students' dormitory rooms is rejected in part because the adult status of the students precludes their being denied the same privacy rights as adults outside the educational institution).

A question reserved in *T.L.O.* was "whether individualized suspicion is an essential element of the reasonableness standard . . . for searches by school authorities." 469 U.S. at 342 n.8. The Court explained that "[b]ecause the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules, . . . we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion." *Id*. *See also Vernonia School District 47J v. Acton*, 515 U.S. at 653 ("The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on

individualized *suspicion* of wrongdoing."). Thereafter, the Court has, on two occasions, upheld a program of random drug testing, without individualized suspicion, of students who voluntarily participated in extracurricular activities. *See Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. at 830-38 (school district's policy of random drug testing of students voluntarily participating in competitive extracurricular activities is upheld by applying a three-pronged standard – which considers the nature of privacy interest affected; the character of the intrusion; and the nature and immediacy of the government's concerns and the efficacy of the policy in meeting them – and concluding that (1) the privacy interests of the children were diminished because they voluntarily chose to participate in extracurricular activities which were highly regulated; (2) urinalysis was a "negligible" intrusion, especially given that the test results were not turned over to law enforcement officials, the only consequence of refusing to participate in drug testing was nonparticipation in the extracurricular activity, and students did not face expulsion or suspension or any other school-related sanctions even if they tested positive; and (3) there was sufficient evidence of student use of drugs to justify the need for the drug testing program.); *Vernonia School District 47J v. Acton*, 515 U.S. at 646, 648, 654-65 (school district's policy of "random urinalysis drug testing of students who participate in the District's school athletics programs" is upheld by applying the same three-pronged analytic apparatus employed in *Earls*, and concluding that (1) the very nature of school sports results in a lesser degree of privacy, and student athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally"; (2) the urinalysis testing process, as administered under the district's guidelines, involved a "negligible" degree of intrusion; and (3) there was concrete evidence of a significant increase in the use of drugs by the student body, "'particularly those involved in interscholastic athletics,'" and there was a basis for concluding that "drug use by school athletes" gives rise to a "particularly high" "risk of immediate physical harm to the drug user or those with whom he is playing his sport."). As the Court's analyses in *Acton* and *Earls* make clear, the constitutionality of a search of students without individualized suspicion turns upon a balancing of context-specific facts and circumstances. *See, e.g.*, *Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 351, 354-56 (8th Cir. 2004) (rejecting a school district's attempt to apply *Acton* and *Earls* to justify a district practice of "subject[ing] secondary public school students to random, suspicionless searches of their persons and belongings," and explaining that, "[u]nlike the suspicionless searches of participants in school sports and other competitive extracurricular activities that the Supreme Court approved in *Vernonia* and *Earls*, in which 'the privacy interests compromised by the process' of the searches were deemed 'negligible,' . . . the type of search at issue here invades students' privacy interests in a major way"; "[i]n sharp contrast to these cases, the fruits of the searches at issue here are apparently regularly turned over to law enforcement and are used in criminal proceedings against students whose contraband is discovered"; and the district had failed to present the kinds of "particularized evidence" offered by the school districts "[i]n both *Vernonia* and *Earls* . . . to 'shore up' their assertions of a special need to institute administrative search programs for extracurricular-activity participants."); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1268 & nn.10-11 (9th Cir. 1999) (rejecting a school district's attempt to apply *Acton* to justify the use of a drug-sniffing dog to sniff all of the students in a classroom for drugs, and explaining that, "[i]n contrast [to *Acton*], the search in this case took place in a

classroom where students were engaged in compulsory, educational activities," and that, "[i]n sharp contrast" to *Acton*, "the record here does not disclose that there was any drug crisis or even a drug problem" at the school at the time of the search). *See also York v. Wahkiakum School District No. 200*, 163 Wash. 2d 297, 299, 178 P.3d 995, 997 (2008) (rejecting *Vernonia School District 47J v. Acton* on state constitutional grounds and holding that "warrantless random and suspicionless drug testing of student athletes violates the Washington State Constitution").

§ 23.35 SEARCHES OF STUDENTS' LOCKERS OR DESKS BY SCHOOL OFFICIALS

T.L.O. expressly reserved "the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies," and what "standards (if any) govern[ ] searches of such areas by school officials or by other public authorities acting at the request of school officials." 469 U.S. at 337 n.5.

A number of lower court decisions have concluded that students have a reasonable expectation of privacy in their lockers, at least in the absence of an express school policy or state regulation that could render such an expectation unreasonable, *see, e.g.*, *Commonwealth v. Snyder*, 413 Mass. 521, 526, 597 N.E.2d 1363, 1366 (1992) (citing caselaw from other jurisdictions). In situations involving a school policy or state regulation establishing a school's right of access to the contents of students' lockers, some courts have found that students lacked a reasonable expectation of privacy in their lockers, *see, e.g.*, *In Interest of Isiah B.*, 176 Wis. 2d 639, 649-50, 500 N.W.2d 637, 641 (1993) (there was a written school policy "retaining ownership and possessory control of school lockers . . ., and notice of the locker policy is given to students"), or had a reduced expectation of privacy in the locker, *see, e.g.*, *Commonwealth v. Cass*, 551 Pa. 25, 38-39, 709 A.2d 350, 356-57 (1998) (given that the Code of Student Conduct "forewarned [students] that their lockers are subject to a search by school officials without prior warning" and that "school officials . . . possess a master key that can open all combination locks" and "are constantly in the student lockers to make general repairs as needed, without first giving notice to the students," the students – although "possess[ing] a legitimate expectation of privacy in their assigned lockers" – had only a "minimal" "privacy expectation"), while other courts have held that students possess an undiminished expectation of privacy in their lockers even when a school policy or state regulation purports to render such a privacy expectation unreasonable, *see, e.g.*, *State v. Jones*, 666 N.W.2d 142, 147-48 (Iowa 2003) (a student "maintained a legitimate expectation of privacy in the contents of his locker" even though both "school district policy . . . and state law . . . clearly contemplate and regulate searches of school lockers").

Defense counsel can draw on language in the *T.L.O.* opinion to mount a persuasive argument that students should be viewed as having a privacy interest in lockers and desks assigned to them for the storage of personal belongings. The Court observed:

> "Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no

> legitimate expectations of privacy. . . . Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." (469 U.S. at 338-39.)

See also Safford Unified School District # 1 v. Redding, 557 U.S. 364, 374 n.3 (2009) ("it is common ground that [a 13-year-old student] . . . had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack").

In rebutting the argument that the school's proprietary interest in the locker or desk confers the right to search at will, defense counsel can analogize the student's privacy interest in his or her locker or desk to the privacy interest of a government employee in a locker or a desk provided by a governmental employer for the employee's exclusive use in a government building. In *O'Connor v. Ortega,* 480 U.S. 709 (1987), a plurality of the Court concluded that considerations similar to those involved in *T.L.O.*'s analysis of schoolhouse searches of students were pertinent to "workplace" searches of a public employee's desk and filing cabinet by his or her governmental employer. *See id.* at 719-26. Although there was a 4-1-4 split on several issues in *O'Connor,* five Justices agreed that the government employee in that case had a constitutionally protected privacy interest in his office; all nine Justices agreed that he had such an interest in his desk and file cabinets; and all nine agreed that a government employee *could* acquire a constitutionally protected privacy interest in the whole of an office assigned for his or her exclusive use despite its physical location in a government-owned building. *Id.* at 714-19 (plurality opinion); *id.* at 731 (concurring opinion of Justice Scalia) ("I would hold . . . that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter"); *id.* at 741 (dissenting opinion of Justice Blackmun) ("Dr. Ortega clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here"). The plurality in *O'Connor* applied a *T.L.O.* standard to gauge the reasonableness of a search of the employee's desk and file cabinets, *see id.* at 725-26, and approvingly cited lower court caselaw applying a similar standard to an employer's search of an employee's locker. *See id.* at 721, citing *United States v. Bunkers,* 521 F.2d 1217 (9th Cir. 1975). Thus counsel can argue that the opinions in *O'Connor* demonstrate that the *T.L.O.* standard should apply to a teacher's or principal's search of a student's locker or desk, at least when the locker or desk is set aside for the student's personal use, the student stores "personal items" in the locker or desk, and the school has not published regulations discouraging students from storing personal items in their lockers and desks. *See O'Connor,* 480 U.S. at 718-19; *see also Vernonia School District 47J v.*

Acton, 515 U.S. 646, 665 (1995) (analogizing the issues that arise in a school search "when the government acts as guardian and tutor" of students to the issues that arise "when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example)," and citing *O'Connor v. Ortega*); *United States v. Speights,* 557 F.2d 362 (3d Cir. 1977) (police officer had a legitimate expectation of privacy in a locker at the stationhouse); *Commonwealth v. Gabrielle,* 269 Pa. Super. 338, 409 A.2d 1173 (1979) (employee had legitimate expectation of privacy in a workplace locker).

§ 23.36 SEARCHES BY SCHOOL OFFICIALS AT THE BEHEST OF THE POLICE

The Supreme Court in *T.L.O.* also reserved the "question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." 469 U.S. at 341 n.7.

With virtual unanimity the lower courts have held that when school officials act in cooperation with the police in conducting a search, the search must be judged under the ordinary rules that govern police searches, including the warrant requirement and the probable cause standard. *See, e.g., Picha v. Wielgos,* 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976); *Piazzola v. Watkins,* 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd,* 442 F.2d 284 (5th Cir. 1971); *M.J. v. State,* 399 So. 2d 996 (Fla. App. 1981); *State v. Heirtzler*, 147 N.H. 344, 349-52, 789 A.2d 634, 638-41 (2001). *Contra, Doe v. Renfrow,* 475 F. Supp. 1012 (N.D. Ind. 1979), *remanded in part on other grounds,* 631 F.2d 91 (7th Cir. 1980) (school search conducted by school officials in conjunction with police officers was not subject to the full protections of the Fourth Amendment because the school officials had initiated the search and invited the participation of the police and the police had agreed that no arrests would be made as a result of finding drugs on students). *See generally* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

The caselaw holding that the involvement of the police calls forth the full panoply of Fourth Amendment protections is consistent with the long-established doctrine that even a search or seizure by a private citizen, normally not regulated at all by the Fourth Amendment, *United States v. Jacobsen,* 466 U.S. 109, 113-15 (1984); *Burdeau v. McDowell,* 256 U.S. 465 (1921), will be subject to Fourth Amendment restrictions if:

(i) The search was ordered or requested by a government official, *see, e.g., United States v. Hardin*, 539 F.3d 404, 417-20 (6th Cir. 2008) (apartment building "manager was acting as an agent of the government" when he entered the defendant's apartment at the request of police officers); *Corngold v. United States,* 367 F.2d 1 (9th Cir. 1966) (alternative ground) (customs agent asked an airline transportation agent to open a package placed with the airline for shipment); *People v. Barber,* 94 Ill. App. 3d 813, 419 N.E.2d 71, 50 Ill. Dec. 204 (1981) (police officers requested that landlord enter tenant's apartment); *Commonwealth v. Dembo,* 451 Pa. 1, 301 A.2d 689 (1973) (police officer seeking evidence of criminal conduct asked postal

authorities to open package; postal authorities had contractual authority to open any package to verify shipping rate); *compare United States v. Jacobsen,* 466 U.S. at 115 n.10 (in holding that Federal Express employee's opening of package was private action not subject to Fourth Amendment restrictions, the Court points out that "the lower courts found no governmental involvement in the private search"); or

(ii) The search was a "joint endeavor" of a private individual and the police, in that: (A) the police conducted the search jointly with the private citizen, *see, e.g., State v. Scrotsky,* 39 N.J. 410, 189 A.2d 23 (1963) (detective and defendant's landlady entered suspect's apartment together to recover landlady's stolen goods); *Nicaud v. State ex rel. Hendrix,* 401 So. 2d 43 (Ala. 1981) (police accompanied shipyard foreman onto shrimp boat); or (B) the officer tacitly encouraged the private citizen to conduct the search, *see, e.g., Moody v. United States,* 163 A.2d 337 (D.C. 1960); *State v. Becich,* 13 Or App. 415, 509 P.2d 1232 (1973); *Commonwealth v. Borecky,* 277 Pa. Super. 244, 419 A.2d 753 (1980). (It should be noted that although the probation officer's search of a probationer's home in *Griffin v. Wisconsin,* 483 U.S. 868 (1987), involved a police escort, *id.* at 871 – apparently requested by the probation officer in light of his articulable suspicion that the probationer possessed a handgun, *see id.* – the Court's opinion treats the search as having been "carried out entirely by the probation officers," *id.* Accordingly, the *Griffin* decision does not have any implications for the "joint endeavor" doctrine.)

Part G. Derivative Evidence: Fruits of Unlawful Searches and Seizures

§ 23.37 THE CONCEPT OF "DERIVATIVE EVIDENCE": EVIDENCE THAT MUST BE SUPPRESSED AS THE FRUITS OF AN UNLAWFUL SEARCH OR SEIZURE

When government agents have violated the restrictions of the Fourth Amendment or state constitutional or statutory protections against unlawful searches or seizures, the court must suppress not only evidence directly obtained by the violation but also "derivative evidence," that is, evidence to which the police are led "'by the exploitation of that illegality.'" *Wong Sun v. United States,* 371 U.S. 471, 488 (1963); *see also Brown v. Illinois,* 422 U.S. 590, 597-603 (1975); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Oregon v. Elstad,* 470 U.S. 298, 305-06 (1985) (dictum). "Under the Court's precedents, the exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called '"fruit of the poisonous tree."'" *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (dictum).

"*Wong Sun* . . . articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: 'The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.' 371 U.S., at 484. . . . As subsequent cases have confirmed, the exclusionary sanction applies to any 'fruits' of a constitutional violation – whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused

obtained during an illegal arrest and detention." *United States v. Crews,* 445 U.S. 463, 470 (1980) (dictum). It also applies to the testimony of witnesses that has a sufficiently close "causal connection" to the constitutional violation, *United States v. Ceccolini,* 435 U.S. 268, 274 (1978); *see id.* at 274-75 (dictum), although in order to exclude "live-witness testimony . . . , a closer, more direct link between the illegality and that kind of testimony is required," *id.* at 278; *see also id.* at 280, except perhaps "where the search was conducted by the police for the specific purpose of discovering potential witnesses," *id.* at 276 n.4; *see also id.* at 279-80.

The possible chains of causal connection may be elaborate, *e.g., Smith v. United States,* 344 F.2d 545 (D.C. Cir. 1965); *United States v. Tane,* 329 F.2d 848 (2d Cir. 1964), and counsel should be alert to follow them out. "[T]he question" determining the excludability of any particular piece of evidence is said to be "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews,* 445 U.S. at 471. *Accord*, *Utah v. Strieff*, 136 S. Ct. at 2061; *compare Dunaway v. New York,* 442 U.S. 200, 216-19 (1979), *and Taylor v. Alabama,* 457 U.S. 687 (1982), *with Rawlings v. Kentucky,* 448 U.S. 98, 106-10 (1980); *and see United States v. Ceccolini,* 435 U.S. at 276 ("we have declined to adopt a *'per se* or "but for" rule' that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest"); *id.* at 273-74.

Categories of derivative evidence that have been held tainted by a respondent's unconstitutional arrest or detention, so as to require their suppression include:

(a) *Any physical object or substance seized without a warrant at or after the time of arrest, the validity of whose seizure depends on the arrest. Beck v. Ohio*, 379 U.S. 89 (1964); *Sibron v. New York,* 392 U.S. 40, 62-66 (1968); *Whiteley v. Warden,* 401 U.S. 560 (1971). Searches incident to arrest (§ 23.08 *supra*) and "frisks" incident to a *Terry* stop (§ 23.10 *supra*) are unconstitutional if the arrest or stop is unconstitutional. *E.g., United States v. Di Re,* 332 U.S. 581 (1948); *Henry v. United States,* 361 U.S. 98 (1959). Similarly, if an unconstitutionally arrested or detained person attempts to drop or throw away objects or exposes them to the police when attempting to discard them, their observation and seizure are tainted by the arrest or detention. *Reid v. Georgia,* 448 U.S. 438 (1980) (per curiam); see § 23.13 *supra.*

(b) *Any observations made in the course of effecting the arrest – before, during, or after the arrest – whose validity depends on the arrest. Johnson v. United States*, 333 U.S. 10 (1948). Thus, when police enter a building pursuant to the "arrest entry" doctrine (§ 23.19 *supra*), unconstitutionality of the arrest or intended arrest will invalidate their observations of objects in "plain view" (§ 23.22(b) *supra*) within the building and their subsequent searches or seizures of those objects. *See Johnson v. United States*, 333 U.S. at 12-13, 17; *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed,* 389 U.S. 560 (1968).

(c) *Confessions or statements made in custody after the arrest or otherwise induced by*

pressures flowing from the arrest "unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is '"sufficiently an act of free will to purge the primary taint."'" *Taylor v. Alabama,* 457 U.S. at 690. *See Wong Sun v. United States,* 371 U.S. at 484-88; *Brown v. Illinois*, 422 U.S. at 597-603; *Dunaway v. New York*, 442 U.S. at 216-19; *Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam); *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam). *Compare Rawlings v. Kentucky,* 448 U.S. 98, 106-10 (1980); *and cf. United States v. Ceccolini,* 435 U.S. at 273-79 (dictum). *But cf. New York v. Harris*, 495 U.S. 14, 21 (1990) ("where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton* [v. *New York*, 445 U.S. 573 (1980)]"). *Compare State v. Luuertsema*, 262 Conn. 179, 192-97, 811 A.2d 223, 231-34 (2002), *partially overruled on other grounds*, *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008) (rejecting the *New York v. Harris* rule as a matter of state constitutional law); *People v. Harris*, 77 N.Y.2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) (same).

(d) *Any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent, when the consent is given in custody after the arrest or otherwise induced by pressures flowing from the arrest.* Consent to a police search or seizure (§ 23.18 *supra*) is ineffective if given during an unlawful confinement, *Florida v. Bostick*, 501 U.S. 429, 433-34 (1991) (if Bostick's consent to search had been obtained during a period of unlawful detention, the results of that search "must be suppressed as tainted fruit"); *Florida v. Royer,* 460 U.S. 491, 507-08 (1983) (plurality opinion); *id.* at 509 (concurring opinion of Justice Powell); *id.* (concurring opinion of Justice Brennan); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *Watson v. United States,* 249 F.2d 106 (D.C. Cir. 1957); *United States v. Klapholz,* 230 F.2d 494 (2d Cir. 1956), just as a confession or incriminating statement would be. See § 24.15 *infra.*

(e) *Fingerprint exemplars taken after the arrest*, *Davis v. Mississippi,* 394 U.S. 721 (1969); *Hayes v. Florida,* 470 U.S. 811 (1985); *Bynum v. United States,* 262 F.2d 465 (D.C. Cir. 1958); *see Taylor v. Alabama,* 457 U.S. at 692-93 (dictum), and, by the same logic, any other evidence obtained through physical custody of the respondent – lineup identifications, body-test results, and so forth (see § 23.14 *supra*). *E.g.*, *United States v. Crews*, 445 U.S. 463, 472 (1980) (the Court assumes the Government is correct in conceding that pretrial photo and lineup identifications following an arrest made without probable cause must be suppressed); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012) (state court order suppressing the complainant's lineup identification as the fruit of an unconstitutional arrest without probable cause also should have precluded an in-court identification by the complainant because "the State failed to meet its burden to prove an independent basis [for an in-court identification] by clear and convincing evidence")*; People v. Teresinki*, 30 Cal. 3d 822, 832, 180 Cal. Rptr. 617, 622-23, 640 P.3d 753, 758-59 (1982) (a pretrial identification by an eyewitness to a robbery based upon booking photos resulting from a vehicle stop and investigative detention made without reasonable suspicion must be suppressed); *Ferguson v. State*, 301 Md. 542, 547-53, 483 A.2d 1255, 1257-60 (1984) (an identification by a robbery victim in a holding cell showup following an arrest without probable

case must be suppressed); *State v. Le*, 103 Wash. App. 354, 360-67, 12 P.3d 653, 656-60 (2000) (an identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a showup at the scene of the defendant's warrantless arrest in his home – a dwelling entry that violated the rule of *Payton v. New York* – should have been suppressed, although the trial court's failure to suppress it was harmless error because of other overwhelming evidence of guilt); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(g) (5th ed. 2012); *but see United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest – in this case, an arrest tainted by an investigative stop without reasonable suspicion – is required only if the arrest was made for the purpose of obtaining that evidence). Different kinds of police lawlessness may entail different evidentiary consequences. *Compare People v. Gethers*, 86 N.Y.2d 159, 654 N.E.2d 102, 630 N.Y.S.2d 281 (1995) (a police-arranged identification following an arrest without probable cause must be excluded), *with People v. Jones*, 2 N.Y.3d 235, 810 N.E.2d 415, 778 N.Y.S.2d 133 (2004) (a police-arranged identification following a warrantless home arrest in violation of *Payton v. New York* ordinarily needs not be excluded).

(f) *Evidence derived from any of the foregoing sources. See*, *e.g.*, *United States v. Nora*, 765 F.3d 1049 (9th Cir. 2014). However, evidence obtained by the police following an unconstitutional search or seizure is not suppressible if the prosecution shows that (i) the police officers' knowledge of the evidence and access to it derived from an "independent source" unconnected with the search or seizure, *Segura v. United States,* 468 U.S. 796 (1984); *Murray v. United States,* 487 U.S. 533 (1988), or (ii) the evidence "ultimately or inevitably would have been discovered by lawful means" in the course of events even if the search or seizure had not produced it, *Nix v. Williams,* 467 U.S. 431, 444 (1984) (a Sixth Amendment decision placed on grounds equally applicable to the Fourth Amendment exclusionary rule); or (iii) "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained'" (*Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016)). This third exception to the exclusionary rule goes by the name of "the attenuation doctrine" (*id*.). Applying it in the *Strieff* case, the Court held that the "doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest" (*id*. at 2059). "The three factors articulated in *Brown v. Illinois*, 422 U.S. 590 (1975), guide our analysis. First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. . . . Second, we consider 'the presence of intervening circumstances.' . . . Third, and 'particularly' significant, we examine 'the purpose and flagrancy of the official misconduct.'" *Utah v. Strieff*, 136 S. Ct. at 2062. The latter two considerations were determinative, the Court wrote, because (a) "the second factor, the presence of intervening circumstances, strongly favors the State"; "the warrant was valid, it predated . . . [the] investigation [which generated the *Terry* stop of Strieff], and it was entirely unconnected with the stop. And once . . . [the investigating officer] discovered

the warrant, he had an obligation to arrest Strieff." (*Utah v. Strieff*, 136 S. Ct. at 2062); and (b) the investigating officer "was at most negligent . . . [i]n stopping Strieff": he made "errors in judgment" but "there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house": "[I]t is especially significant that there is no evidence that . . . [this] illegal stop reflected flagrantly unlawful police misconduct." (*Id.* at 2063).

§ 23.38 PROSECUTORIAL BURDEN OF DISPROVING "TAINT" OF UNLAWFUL SEARCH AND SEIZURE

When unconstitutional activity by the police or other government agents has been shown that may have led to evidence proffered by the prosecution, the prosecutor has the burden of demonstrating that the evidence is untainted. *See Harrison v. United States,* 392 U.S. 219, 224-26 (1968); *Brown v. Illinois,* 422 U.S. 590, 604 (1975); *Dunaway v. New York,* 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky,* 448 U.S. 98, 107, 110 (1980); *Taylor v. Alabama,* 457 U.S. 687, 690 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam); *United States v. Paroutian,* 299 F.2d 486 (2d Cir. 1962), *aff'd after remand,* 319 F.2d 661 (2d Cir. 1963); *cf. Alderman v. United States,* 394 U.S. 165, 183 (1969) (dictum); *and compare Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 286-87 (1977). *See*, *e.g.*, *United States v. Stokes*, 733 F.3d 438, 446 (2d Cir. 2013) (the trial court erred in finding that the government had satisfied its burden of proving " by a preponderance of the evidence that the guns and ammunition would inevitably have been discovered": the trial court "failed to account for all of the demonstrated historical facts in the record, and in doing so, failed adequately to consider . . . plausible contingencies that might not have resulted in the guns' discovery"); *Rodriguez v. State*, 187 So. 3d 841, 849 (Fla. 2015) ("The question before this Court is whether the inevitable discovery rule requires the prosecution to demonstrate that the police were in the process of obtaining a warrant prior to the misconduct or whether the prosecution need only establish that a warrant could have been obtained with the information available prior to the misconduct."; "Because the exclusionary rule works to deter police misconduct by ensuring that the prosecution is not in a better position as a result of the misconduct, the rule cannot be expanded to allow application where there is only probable cause and no pursuit of a warrant. If the prosecution were allowed to benefit in this way, police misconduct would be encouraged instead of deterred, and the rationale behind the exclusionary rule would be eviscerated.").

In *Nix v. Williams,* 467 U.S. 431, 444 n.5 (1984), the Supreme Court implied that "the usual burden of proof" on this issue is "a preponderance of evidence." It may, however, be greater in situations in which the illegality is peculiarly likely to have tainted the sort of evidence that the prosecution is offering or when there is peculiar "difficulty in determining" questions of cause and effect because these involve "speculative elements." *Id.* Both considerations were mentioned in *Nix* as distinguishing *United States v. Wade,* 388 U.S. 218, 240 (1967), which held that the prosecutor's burden of proof in showing that in-court identification testimony is not tainted by the witness's exposure to the accused in an earlier, unconstitutional identification

confrontation is "clear and convincing evidence." *See also Moore v. Illinois,* 434 U.S. 220, 225-26 (1977) (dictum). *And see Kastigar v. United States,* 406 U.S. 441, 461-62 (1972), holding that when an individual has given compelled testimony under an immunity grant, the prosecution bears "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *See also Braswell v. United States,* 487 U.S. 99, 117 (1988); *United States v. Hubbell*, 530 U.S. 27, 40 & n.22 (2000). Both *Nix* and *Wade* were Sixth Amendment right-to-counsel cases; *Kastigar* and *Braswell* and *Hubbell* were Fifth Amendment self-incrimination cases; the Supreme Court has not squarely addressed the prosecutor's burden of proving its evidence untainted following a Fourth Amendment search-and-seizure violation. But there appears to be no reason to distinguish among kinds of constitutional violations when it comes to the standards for determining whether derivative evidence is "'purged of the primary taint.'" *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972). The *Nix* opinion derived its statement of the "usual burden of proof at suppression hearings" from Fourth and Fifth Amendment caselaw (*see also Colorado v. Connelly,* 479 U.S. 157, 167-69 (1986)); *Wade*'s companion case, *Gilbert v. California,* 388 U.S. 263, 272-73 (1967), expressly adopted principles of taint that were first announced in the Fourth Amendment context (*see also Moore v. Illinois,* 434 U.S. at 226, 231); the Court in *Harris v. New York,* 401 U.S. 222, 224-25 (1971), relied upon a Fourth Amendment case, *Walder v. United States,* 347 U.S. 62 (1954), when deciding the exclusionary consequences of a *Miranda* violation; and it later treated *Harris* as authoritative in another Fourth Amendment case, *United States v. Havens,* 446 U.S. 620, 624-27 (1980). The exclusionary rules that enforce the Fourth, Fifth, and Sixth Amendments are said to have the same essential purpose: "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it," *Elkins v. United States,* 364 U.S. 206, 217 (1960). *See Colorado v. Connelly,* 479 U.S. at 166; *Linkletter v. Walker,* 381 U.S. 618, 633, 636-37 (1965) (Fourth Amendment); *Stone v. Powell,* 428 U.S. 465, 484-88 (1976) (same); *Illinois v. Krull,* 480 U.S. 340, 347 (1987) (same); *Johnson v. New Jersey,* 384 U.S. 719, 729-31 (1966) (Fifth Amendment); *Stovall v. Denno,* 388 U.S. 293, 297 (1967) (Sixth Amendment); *cf. United States v. Payner,* 447 U.S. 727, 735-36 n.8 (1980); *United States v. Johnson,* 457 U.S. 537, 561 (1982). Rules for litigating issues of taint under all three Amendments are therefore presumptively similar. *But see Oregon v. Elstad,* 470 U.S. 298, 304-09 (1985).

State constitutional decisions may heighten the prosecution's burden of dissipating taint. *See*, *e.g., State v. Rodrigues*, 128 Hawai'i 200, 211-15, 286 P.3d 809, 820-24 (2012) (discussing and applying a state constitutional rule that follows Justice Brennan's dissent in *Nix v. Williams* by requiring that the prosecution "'satisfy a heightened burden of proof'" of "clear and convincing evidence" in order to rely on the inevitable discovery exception); and see generally § 7.09 *supra.*

§ 23.39 RELEVANCE OF THE "FLAGRANCY" OF THE POLICE CONDUCT IN ASCERTAINING "TAINT"

A passage in *Brown v. Illinois,* 422 U.S. 590, 604 (1975), indicates that "the purpose and flagrancy of . . . official misconduct are . . . relevant" in determining the scope of taint that flows

from Fourth Amendment violations. *See also Dunaway v. New York,* 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky,* 448 U.S. 98, 109-10 (1980); *Taylor v. Alabama,* 457 U.S. 687, 693 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam).

The *Brown* case itself involved the question of the admissibility of a confession following an illegal arrest (as did *Dunaway, Rawlings, Taylor*, and *Kaupp*). The *Brown* majority opinion leaves unclear whether the "flagrancy" principle is limited to that issue or is applicable to determinations of taint in other contexts. Arguably, "flagrancy" is particularly relevant in connection with the inquiry whether confessions – "(verbal acts, as contrasted with physical evidence)," 422 U.S. at 600 – are tainted by unconstitutional police treatment of a suspect because the *degree* of official disregard of a suspect's rights is particularly likely to affect the suspect's choice to confess. *See Oregon v. Elstad,* 470 U.S. 298, 312 (1985). The *Brown* majority notes specifically that "[t]he manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605. If this is the rationale for considering "flagrancy" as a factor in the exclusionary calculus in confession cases, then "flagrancy" should also be considered in cases involving motions to suppress the tangible fruits of searches and seizures based on consent given after an unconstitutional arrest or stop, or in unconstitutional detention, or as a result of other unconstitutional police conduct that is potentially intimidating. And the courts do consistently consider the "flagrancy of . . . official misconduct" in consent-search cases. *E.g.*, *United States v. Martinez*, 486 F.3d 855, 865 (5th Cir. 2007) (applying the flagrancy principle in determining to exclude firearms seized in a dwelling search based upon consent given following a stop made without reasonable suspicion); *United States v. Robeles-Ortega*, 348 F.3d 679, 684-85 (7th Cir. 2003) (applying the flagrancy principle in determining to exclude drugs seized in a dwelling search based upon consent given following a forcible, warrantless entry by five DEA agents with drawn guns); *United States v. Jones*, 234 F.3d 234, 243 (5th Cir. 2000) (applying the flagrancy principle in determining to exclude drugs seized in a vehicle search based on consent given after a vehicle stop was unconstitutionally prolonged); *State v. Munroe*, 244 Wis. 2d 1, 13-14, 630 N.W.2d 223, 228-29 (Wis. App. 2001) (applying the flagrancy principle in determining to exclude drugs seized in a motel-room search based on consent given after an entry to request identification was unconstitutionally prolonged).

But the "flagrancy" principle appears to apply more broadly than in cases involving intimidating police conduct that may influence a suspect's will to confess or consent. The *Brown* majority supports its "flagrancy" statement with a footnote citing lower court decisions that involved both confessional and nonconfessional evidence (*Brown v. Illinois,* 422 U.S. at 604 n.9); and it purports, at the outset of its opinion, to be explicating the principles announced in *Wong Sun v. United States,* 371 U.S. 471 (1963), "to be applied where the issue is whether statements *and other evidence* obtained after an illegal arrest or search should be excluded" (422 U.S. at 597 (emphasis added)). A concurring opinion by Justice Powell explains the relevance of "flagrancy" by reference to a notion which has appeared in a few other Supreme Court decisions (*see, e.g., United States v. Peltier,* 422 U.S. 531, 542 (1975); *United States v. Janis,* 428 U.S. 433, 454 n.28, 458-59 n.35 (1976)), that the exclusionary rule "is most likely to be effective" in cases of willful or gross police violations of the Constitution (422 U.S. at 611). If *this* is the

rationale for the "flagrancy" principle – or any part of its rationale – then the principle should apply to all exclusionary-rule issues. "In view of the deterrent purposes of the exclusionary rule[,] consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate. . . ." *Scott v. United States,* 436 U.S. 128, 135-36 (1978) (dictum). *See also id.* at 139 n.13; *United States v. Leon,* 468 U.S. 897, 911 (1984). Strong support for the proposition that "flagrancy" is relevant in this broader manner to the adjudication of issues bearing on the excludability of derivative evidence is provided by the Supreme Court's opinion in *Utah v. Strieff*, 136 S. Ct. 2056 (2016), summarized in § 23.37 subdivision (f) *supra*. As noted there, *Strieff* repeatedly refers to the "'flagrancy of the official misconduct" as "'particularly' significant" (*id*. at 2062) and "especially significant" (*id*. at 2063) and explains that its consideration "reflects . . . [the exclusionary rule's core deterrent] rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant" (*id*.). For additional cases that take account of the flagrancy of unconstitutional police conduct in applying the exclusionary rule to evidence other than confessions and the products of consent searches, *see*, *e.g.*, *People v. Sampson*, 86 Ill. App. 3d 687, 694, 408 N.E.2d 3, 9, 41 Ill. Dec. 657, 663 (1980) (requiring a hearing on a motion to suppress a lineup identification following an arrest without probable cause); *Ferguson v. State*, 301 Md. 542, 549-53, 483 A.2d 1255, 1258-60 (1984) (excluding a show-up identification following an arrest without probable cause); *Hill v. State*, 692 S.W.2d 716, 723 (Tex. Crim. App. 1985) (excluding a lineup identification following an arrest without probable cause or any legal authorization, made for the purpose of exhibiting the defendant in the lineup); *State v. Le*, 103 Wash. App. 354, 360-62, 12 P.3d 653, 657-58 (2000) (holding that a pretrial identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a show-up at the scene of the defendant's warrantless home arrest in violation of the rule of *Payton v. New York*, 445 U.S. 573 (1980), should have been suppressed, although its admission was harmless because of other overwhelming evidence of guilt); *and cf. United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest is required only if the arrest was made for the purpose of obtaining that evidence). *Compare Brendlin v. California*, 551 U.S. 249, 259-61, 263 (2007) (rejecting a lower court approach that would have permitted a police claim of lawful intent to *uphold* a seizure – by treating an officer's assertion that s/he had no intent to seize an individual as a basis for finding that no such seizure took place – and instead announcing a rule that is designed to avert the "powerful incentive" that police have to engage in certain "kind[s] of" conduct the Court has previously found to be unlawful). *But cf. Whren v. United States*, 517 U.S. 806 (1996) (rejecting the argument that an objectively valid traffic stop is unconstitutional when it is used as a pretext for an impermissible investigative search, and stating more generally that, in making the initial determination whether police action is constitutional, the Supreme Court has "never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment" (*id*. at 812); thus, that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" (*id*. at 813)); *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam) (same); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.").

See § 22.05(a), third paragraph *supra* for a tactical *caveat* regarding defense recourse to "flagrancy" analysis.

§ 23.40 UNAVAILABILITY OF "TAINTED" EVIDENCE AS JUSTIFICATION FOR ANY SUBSEQUENT POLICE ACTION

Illegally obtained evidence or information that may not be used in court also may not be used to justify any subsequent police action. The fruits of an illegal search, for example, may not be used to supply the probable cause required for a later arrest, *Johnson v. United States,* 333 U.S. 10 (1948), or search, *see United States v. Paroutian,* 299 F.2d 486 (2d Cir. 1962), *aff'd after remand,* 319 F.2d 661 (2d Cir. 1963); *cf. New Jersey v. T.L.O.,* 469 U.S. 325, 344 (1985) (dictum), or for the issuance of a warrant, *United States v. Giordano,* 416 U.S. 505, 529-34 (1974); *Steagald v. United States,* 451 U.S. 204 (1981) (by implication); *Hair v. United States,* 289 F.2d 894 (D.C. Cir. 1961). When they are so used, the products of the second police action are tainted by the illegality of the first, *see Alderman v. United States,* 394 U.S. 165, 177 (1969) (dictum); *United States v. Karo,* 468 U.S. 705, 719 (1984) (dictum), unless the prosecution shows "sufficient untainted evidence" (that is, information not derived in any way from the first action) to justify the later one (*id.*). This evidence must be "genuinely independent of [the] . . . earlier, tainted [police action]," a condition that cannot be met if either (1) the police "decision to seek [a] . . . warrant [or conduct the second search] was prompted by what they had seen during the initial entry," or (2) "information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant [or is necessary to justify the second search without a warrant, if it was so made]." *Murray v. United States,* 487 U.S. 533, 542 (1988). *Cf. United States v. Hubbell*, 530 U.S. 27 (2000).