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FOREWORD

It would take many volumes and thousands of pages to fully explore search and seizure law. Law libraries are filled with such volumes. It is difficult to put together a booklet like this because there are pressures to include too much or too little. This booklet only scratches the surface of search and seizure law. Some areas are not discussed at all (booking-strip searches, mail searches, drug testing cases, etc.) and other areas are mentioned only briefly (probation officer searches, border cases). The situations which are covered in some detail are those which occur most frequently - levels of contact, vehicle searches, preparation of search warrants and some exceptions to the warrant requirement.

Not all 4th Amendment situations have been decided by the U.S. Supreme Court and thus

we have to look at decisions by State Supreme Courts or by various Federal Courts to help assess proper police action. If there are a substantial majority of courts that agree on a ruling for a certain type of fact situation, those cases are cited in this manual as the probable correct answer, whether the ruling is for or against the police action. If there is a substantial split of opinion, then cases holding both opinions are cited. The material contains frequent reference to cases and citations for those cases. The emphasis is on Nevada law and United States Supreme Court law whenever one of these courts has decided a specific issue.

The booklet was first designed as an educational supplement to the many hours of training in search and seizure law provided at the Las Vegas Metropolitan Police Department Academy and in-service training and classroom training at all other police agencies. This particular printing has been modified for use by prosecutors and other legal or judicial persons as a quick reference. A table of authorities has been added.

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

Thomas L. Leen

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II

THE FOURTH AMENDMENT IN A NUTSHELL

A. THE FOURTH AMENDMENT

History - In 1791 Congress enacted and states ratified the Fourth Amendment to the U.S. Constitution.

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

The colonists had been abused by the King's rule - people were arrested on mere suspicion by soldiers -homes were searched either without a warrant or with a "writ of assistance" - a wide-open search warrant. ("Go look for crime and criminals anywhere and anytime" signed George III). The 4th Amendment is designed to place restraints on the power of the executive branch of government (police). Understanding the reasons for and limits of the various aspects of search and seizure law is an essential ingredient of modern police work.

B. WHO IS PROTECTED BY FOURTH AMENDMENT?

The rules in this outline apply to all interactions between police and persons within the U.S. whether the persons are citizens, criminals, or even aliens who are legally in this country. But, in **U.S. v. Verdugo-Urquidez**, 110 S. Ct. 1056 (1990), the Fourth Amendment was held not to apply to the search and seizure by U.S. agents of property owned by a non-resident alien and located in a foreign country.

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

INTRODUCTION

The concept of privacy is extremely important for law enforcement persons to understand. The reason is that (1) if there is a "right" (expectation) of privacy by a person who has committed a crime, police **must comply** with the various rules of the 4th Amendment (shown in this manual) regarding the contact or discovery of evidence with

the (suspect) person. Otherwise the court will suppress the evidence and the criminal may go free and (2) there are a number of lawful police practices which can be done in which the courts hold that a person has no expectation of privacy, in which case all evidence gathered by police is admissible. Law enforcement officers must learn the basic difference between these two situations.

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

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

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

In a series of cases starting with **Katz v. United States**, 389 U.S. 347 (1967) the Court said that the Fourth Amendment protects "people not places." It is not a physical area "per se" that is protected from government (police) intrusion, but an individual's "**legitimate and reasonable expectation of privacy**" -- note: it must be <u>both</u> legitimate <u>and</u> reasonable.

"Reasonable" is a subjective concept, i.e., what would common sense indicate was private to an average person.

"Legitimate" is an objective concept, i.e., as a policy matter, how much privacy (in different situations) is our society - as interpreted by the courts - willing to recognize.

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

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

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

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

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

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

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

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

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

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

D. THE DIFFERENCE BETWEEN SEARCH & SEIZURE

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

1. A "search" is a police intrusion on a legitimate expectation of privacy.
2. A "seizure" (a) of the person occurs when police interfere with an individual's freedom of movement; (b) of property is an interference with a person's right to possess or control the item.

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

(1) Seizures of the person (stop and frisk and arrests).

(2) All other searches and seizures (interference with privacy or possession).

THE CARDINAL RULE is different for #1 & #2

#1 Seizures of persons need justification but generally don't need a search warrant even if there is time to get a warrant. There are two main exceptions when an arrest or search warrant is required in an arrest situation. (**Payton** rule and **Steagald** rule - discussed later).

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

E. THE SUPREME COURT AND THE EXCLUSIONARY RULE

For about 100 years after 1791 few U.S. Supreme Court cases were decided concerning the meaning of the Fourth Amendment. Between 1886 and 1914 several cases were decided ending with **Weeks v. U.S.** (1914) that said in all Federal courts, evidence seized in violation of the Fourth Amendment would be excluded.

In 1961, the U.S. Supreme Court decided **Mapp v. Ohio**, 367 U.S. 643 saying the Federal exclusionary rule applied in State court proceedings as well. The theory used by the Court to justify this ruling was that the exclusionary rule would deter unlawful police conduct by removing the incentive to act unlawfully. (Note: no scientific or statistical study, either before or since **Mapp**, has ever proved or disproved this theory of the

Court.).

F. FRUIT OF THE POISONED TREE

In 1963, the U.S. Supreme Court decided **Wong Sun v. United States,** 371 U.S. 407 (1963) and held that if there is a 4th Amendment violation by police, the evidence thrown out is not only that which is immediately recovered but all evidence that derives directly from it. For this reason, a defense lawyer will focus on the earliest aspect of the police contact with the defendant and try to find fault with the police conduct. This rule means that, in most cases, if police commit a 4th Amendment violation, it will poison or "taint" evidence obtained later in the same investigation even if police, after committing the violation, then followed lawful 4th Amendment procedures before seizing the evidence.

An example of this rule is found in the case of **Arterburn v. State**, 111 Nev. 1121(1996). In that case, police were investigating a person for theft of a motor vehicle and learned that Arterburn was associated with the suspect. Arterburn was seen near the car parked at a motel. Police stopped him and, according to the Supreme Court's view of the facts, required him to go to the police station for questioning. At the station, he consented to a search of his person which turned up drugs for which he was convicted. The Nevada Supreme Court said that even if the consent to search at the station was lawful, the drugs would be suppressed because the prior actions of the police amounted to his "arrest" without probable cause and the consent was the "fruit" of the 4th Amendment violation. (See this outline "Levels of Contact" as to why this was an "arrest.").

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

However - over the years up to and including the present the U. S. Supreme Court has refused to apply the strict **Wong Sun** (fruit of poisoned tree) rule in some cases. Note: these situations in which a prior (in time) 4th Amendment violation does not result in suppression of all subsequent evidence in the same investigation are the **exception**, not the rule, and the burden is on the police-prosecution side to prove the exception.

(1) INDEPENDENT SOURCE DOCTRINE: **Segura v. United States**, 468 U.S. 796 (1984). If there is an illegal police activity which leads to discovery of the evidence but there is also a legal and valid independent source by which police recovered the evidence - it will not be suppressed. (See "Premises Freeze" in Search Warrant Section).

(2) INEVITABLE DISCOVERY DOCTRINE: **Nix v. Williams**, 467 U.S. 431 (1984). If the evidence would have been discovered anyway - it will not be suppressed based on illegal police conduct. The theory of the exclusionary rule is that police should not profit from their misconduct. This rationale is furthered by putting the police in the same position, but not a worse position than if no misconduct had occurred.

"Inevitable discovery" does not mean that there is no suppression of evidence if the police "could have" gotten the evidence lawfully, but didn't. The burden is on the prosecution to show by a preponderance of the evidence that the police "would have" discovered the evidence by lawful means. (**Nix v. Williams**) It requires more than an argument about things that in retrospect the police could have done. For example, in **U.S. v. Allen, 159 F.3d 82 (4th Cir. 1998)** the court said, "We reject the contention that inevitable discovery applies where police have probable cause and then search without a warrant (but argue that they "could have" gotten a search warrant) because then there would never be a reason for police to seek a search warrant." See also, **U.S. v. Brown, 64 F.3d 1083 (7th Cir. 1995**).

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

Cocaine was found by police without a warrant in a misrouted suitcase but the court held that the cocaine would have been found by the airline when it searched the suitcase for identity of the owner **U.S. v. Kennedy**, 61 F.3d 494 (6th Cir. 1995). In **U.S. v. Larsen, 127 F.3d 984 (10th Cir. 1997)**, the court held "inevitable discovery applies whenever an independent investigation would have inevitably led to the discovery of the evidence whether or not the investigation was ongoing at the time of the illegal police action." (An independent investigation is not valid if made as a result of things learned by illegal police action) Other cases upholding inevitable discovery are **U.S. v. Woody**, 55 F.3d 1257 (7th Cir. 1995), **Yeoman v. State**, 92 Nev. 368 (1976), **Clough v. State**, 92 Nev. 603 (1976) and **Carlisle v. State**, 98 Nev. 128 (1982).

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

In **United States v. Ceccolini**, 435 U.S. 268 (1978) the Court refused to suppress the testimony of a live witness whose identity was learned as a result of a 4th Amendment violation. The factors were: passage of time between illegal search and contact with witness, the fact that witness was testifying of her own free will and the fact that the police illegality was not designed or intended to discover the identity of witnesses. See also **U.S. v. McKinnon, 92 F.3d 244 (4th Cir. 1996**).

In **United States v. Crews**, 445 U.S. 463 (1980) the defendant was arrested in violation of the 4th Amendment. A booking photo was used in a lineup and a witness to the crime identified Crews. The Court said that the photo lineup identification was

suppressed but did allow the witness to testify at trial and identify Crews based on her recollection from the time of the crime because the ability to identify him came before the police misconduct. The defendant's face was not the "fruit" of the illegal arrest.

"The body or identity of a defendant in a criminal proceeding is never itself suppressible as the fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search or interrogation occurred." **INS v. Lopez- Mendoza**, 468 U.S. 1032 (1984).

In **New York v. Harris**, 110 S.Ct. 1640 (1990) the defendant was arrested in his home in violation of the 4th Amendment. The police had probable cause for the arrest but didn't get a warrant in violation of the **Payton** rule (see "Arrest" section of this outline). Harris was Mirandized and confessed at his home; then after he got to the police station he was Mirandized again and confessed a second time. The first confession was suppressed as the fruit of the Payton violation but the second was not the "fruit" of the illegal arrest. (Note: this case is different from Brown v. Illinois where there was **no probable cause** for the arrest and Miranda warnings at the police station didn't cure the "taint"because the confession was immediately tied or connected to the illegal due to lack of P/C "arrest.").

(4) IMPEACHMENT: In **United States v. Havens**, 100 S.Ct. 1912 (1980) the Court ruled that evidence obtained in violation of the 4th Amendment, although suppressed in the prosecution's case in chief, could be used in rebuttal to contradict false evidence (defendant's testimony) introduced by the defense. "There is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility." See also **Walder v. U.S.**, 347 U.S. 62 (1954).

(5) GRAND JURY PROCEDURES: The U.S. Supreme Court has specifically held that although evidence seized in violation of the 4th Amendment is inadmissible at trial, such evidence can be presented to a grand jury in order to obtain an indictment. **U.S. v. Calandra**, 414 U.S. 338 (1974) This was reaffirmed in **U.S. v. R. Enterprises**, 489 U.S. 292 (1991).

G. STATE AUTHORITY TO INCREASE SEARCH AND SEIZURE PROTECTION

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

This extra restriction on police can be done by legislation or by State Supreme Court decision. Nevada has chosen to limit police authority more than what the 4th Amendment requires in some situations including NRS 171.123 (placing 60 minute limit on "Terry Stops"); **State v. Greenwald**, 109 Nev. 808 (1993) which prohibits searching

the passenger compartment of a car when an occupant is arrested even though such a search is lawful per the U.S. Supreme Court and most states when done contemporaneously with the arrest and **State v. Harnisch**, 954 P.2d 1180 (Nev. 1998) which placed some limits on ability of police to search a vehicle with P/C but without a search warrant.

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

H. EXCLUSIONARY RULE AND THE OBJECTIVE TEST

Many times more than one legal justification for a search may exist contemporaneously on a certain set of facts. Must the officer select the "right" or "best" justification? The United States Supreme Court suggested the answer is "NO" in the case of **Scott v. United States**, 436 U.S. 128 (1978). Although most of the decision involved a wiretap issue, it held the court should "examine the challenged search under a standard of objective reasonableness without regard to the motivation of the officers involved."

Thus, you may think you are making a legal search on an "inventory theory" and the court rules that it wasn't a valid inventory but if the search can be justified as a "search incident to arrest" or "probable cause search" the evidence will be admissible.

See State v. Greenwald, 109 Nev. 808 (Nev. 1993) in which the Nevada Supreme Court held that both types of searches were invalid on the facts of that case, but clearly ruled that if police searched or seized under a warrant exception that police thought was valid but that the court deemed incorrect, suppression **would not occur if, based on the totality of facts and circumstances of the encounter there was a valid objective justification under a different theory for the police action.**

In Surianello v. State, 92 Nev. 492 (1976) the court said that because probable cause to arrest (or reasonable suspicion to stop) is determined by objective facts, it was immaterial that the officer **testified that he didn't think he had enough facts for an arrest**; his action was nonetheless lawful if the court determines that the legal justification (R/S for a stop or P/C for an arrest) was present.

I. MISTAKES BY POLICE IN SEARCH & SEIZURE

In real life, there are times when police make mistakes about the facts pertaining to a situation and base what we'll call "4th Amendment type decisions" on erroneous facts. When this occurs, suppression of evidence is not always the result, as long as the police and prosecutor can carry the burden of showing that the mistake was a reasonable one and was not the result of police negligence.

For example, in **Hill v. California**, 401 U.S. 645 (1971), police were investigating a robbery and developed Hill as a suspect. They went to Hill's apartment and a man who fit Hill's description answered the door and admitted the police. The man said he was Miller, not Hill but the police arrested him anyway and a search incident to arrest disclosed evidence that was used to convict Hill at trial. It turned out that the man in Hill's place was really Miller. The U.S. Supreme Court upheld the search, stating that although **"good faith" alone would not have justified** the police action, under the facts of that case, the police mistake was **objectively reasonable**.

Other examples include a police officer stopping a car based on a computer entry saying that the driver had an outstanding warrant when the warrant had been quashed, but that had not been entered in the computer by the court clerk. **Arizona v. Evans**, 115 S.Ct. 1185 (1995) (error not created by police) See also, **U.S. v. Shareef, 100 F.3d 1491 (10th Cir. 1996)** and **U.S. v. Santa, 180 F.3d 20 (2d Cir. 1999)**.

When police entered a residence based on consent from a person who, after questioning by the officers appeared to have common authority over the premises, but who later on turned out not to have such authority, the police search was held valid in **Illinois v. Rodriguez**, 110 S. Ct. 2793 (1990) and **Snyder v. State**, 103 Nev. 275 (1987). (As long as police make a reasonable effort to learn the current facts: "Why can this person give consent?").

The same rationale upheld a search in **Maryland v. Garrison**, 107 S. Ct. 1013 (1987) where police had a search warrant for the 3rd floor apartment at a certain address. In fact, unknown to police, the 3rd floor had been divided into two separate apartments and both were searched with drugs being found in the "wrong" apartment. The U. S. Supreme Court ruled "no suppression" saying that the legality of the police action had to be based on the information available to police at the time of the action; **the mistake occurred despite reasonable efforts by police to investigate and learn the correct facts.**

"A policeman's mistaken belief of fact can contribute to a P/C determination and can count just as much as a correct belief as long as the mistaken belief was reasonable in light of all the circumstances." **U.S. v. Gonzales**, 969 F.2d 999 (11th Cir. 1992). See also **Stuart v. State** (Nevada 1978) and **U.S. v. Alvarez** in section on "What Is Reasonable Suspicion**).**

J. "GOOD FAITH"

"Good faith" is a term which is often used by police and prosecutors without a full understanding of whether it helps avoid suppression of evidence. The basic rule established by the U.S. Supreme Court many years ago is that an officer's "good faith" is irrelevant in deciding whether or not there has been a 4th Amendment violation. There are many reasons for this basic rule, not the least of which is that it is impossible for a judge or anyone else to read a person's mind. Also, according to the U.S. Supreme Court, a judge deciding a motion to suppress on 4th Amendment grounds must use an objective test. **Florida v. Bostick**, 111 S.Ct. 2382 (1991). Therefore, "subjective" or "true inner belief" good faith generally means nothing."If subjective good faith alone were the test the protections of the 4th Amendment would evaporate and people would be secure in their persons, houses, papers and effects only in the discretion of the police." **Beck v. Ohio**, 379 U.S. 89 (1964).

However, in a few situations, when there is "objective" or outwardly provable good faith by a police officer, the U.S. Supreme Court has used the term "good faith" to result in admission rather than suppression of evidence.

In **Michigan v. DeFillipo**, 443 U.S. 31 (1979) and **Illinois v. Krull**, 480 U.S. 340 (1987) police officers made arrests or searches acting pursuant to a state statute which was later held by the courts to be unconstitutional. The U.S. Supreme Court upheld the police action in both cases because of the officer's reliance on the statute. However, the Court noted that this result would not follow if (a) the legislature wholly abandoned its responsibility to enact constitutional laws or (b) if a reasonably well trained officer should have known that the statute was unconstitutional.

In **United States v. Leon**, 468 U.S. 897 (1984) the Court held that if police got a search warrant signed by an impartial judge and the facts submitted by the police in the affidavit were true (in the sense that they were not intentionally or recklessly false) then no suppression would occur even if another judge found after the search that there was not enough P/C. Once again, the Court limited this to cases where a reasonably well trained officer would not have realized that there was insufficient P/C.

The **Leon** case has been followed in state supreme courts on a ratio of about four to one. The Nevada Supreme Court cited **Leon** in its decision in **Powell v. State**, 113 Nev. 41 (1997).

III

SITUATIONS WHERE THE FOURTH AMENDMENT DEFENSE IS NOT APPLICABLE

The following are some examples of facts and circumstances where the U.S. Supreme Court and other courts have construed the "expectation of privacy" test and concluded that no Fourth Amendment privacy intrusion occurred. These are Open View, Standing, Trash Searches, Dog Sniff Prison and jail Cases, and Abandonment and Standing. In addition, the 4th Amendment does not apply to searches and seizures done by private citizens unless done with police direction or instigation.

A. OPEN VIEW CASES

Open View and Plain View Compared

"Open view"and "plain view"are not the same thing. Items of contraband or evidence that are in "plain view" can be seized without a warrant as long as the officer had a lawful right to be in the position where he is when seeing the item. **Plain view** is a theory concerning **warrantless seizures** of evidence. **Open view** concerns **warrantless "searches"** or gathering of information.

This concept is important because the courts take the position that "open view" observations by police are not "searches" as that term is used in the Fourth Amendment even if police are "looking" for evidence of crimes. The Supreme Court has said that "what a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection." Open view is another way of saying that there is no "reasonable and legitimate expectation of privacy "in a given situation. **U.S. v. Lee**, 47 S.Ct. 746(1921)

Thus, facts learned in “open view” cases do not have to be laying out in the middle of a field or street as long as there are a significant number of people who are not connected to the person “claiming” privacy who have access to the information, such as records kept by the phone or electric company**. Open view is another word for a valid and legal police discovery of information that helps to develop probable cause or reasonable suspicion.**

"Plain view" is discussed later in this outline. Here are some examples of “open view.”

VISUAL SIGHTING

1**. Oliver v. United States** 466 U.S. 517 (1984) (Open Fields). Even though defendant had posted "no trespassing" signs around fields and had fenced them in -

warrantless search OK. Fourth Amendment protects "persons, houses, papers and effects - not extended to "open fields."

An "open field" may actually be a thickly wooded area but there is no reasonable expectation of privacy as long as it is outside the "curtilage". (Any unoccupied or undeveloped area outside the curtilage).

2. In United States v. Dunn, 107 S.Ct. 1134 (1987), a barn surrounded by its own fence on a 198 acre farm located 60 yards from suspect's home and 50 yards from fence surrounding the home was not within the curtilage of the home and was not protected by the Fourth Amendment. Factors to determine curtilage issue are:

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

Several cases have adopted the use of the 4 "Dunn" factors: **U.S. v. Benish,** 5 F.3d 20 (3rd Cir. 1993)**, U.S. v. Kremer,** 108 F.3d 339 (9th Cir. 1996)**.** In **U.S. v. Jenkins,** 124 F.3d 768 (6th Cir. 1997**)** the suspects lived in a house in a rural area with a large back yard, not surrounded by a fence, and several acres behind the back yard. The police discovered marijuana in the foliage filled acres and the court ruled that action lawful, without a warrant, but rejected evidence found in the back yard, holding that the yard was within the curtilage

3. In **California v. Ciraolo**, 106 S.Ct. 1809 (1986), the court held that where the suspect had erected a 10 foot high fence around his back yard and police flew over in an airplane at 1000 feet and looked with naked eye and saw marijuana plants growing - there was no intrusion on the suspect's reasonable expectation of privacy - any member of the flying public could have seen the same thing.

4. In **Florida v. Riley**, 109 S.Ct. 693 (1989), the court applied Ciraolo to uphold a helicopter view of growing marijuana from 400 feet.

But - a helicopter view of marijuana growing in a barn from 50 feet in the air did constitute an intrusion on privacy**. Comm. v. Oglialoro**, 547 A.2d 387 (Pa. 1990).

APPROACHING A RESIDENCE

5. Approaching a house by means available to the public has been held to be valid, including looking through an uncurtained window as long as the place had no "No trespassing" sign. **U.S. v. Taylor,** 90 F.3d 903 (4th Cir. 1996)**.** In two other cases, this procedure was upheld. **U.S. v. Ward,** 166 F.3d 336 (4th Cir. 1998) and **U.S. v. Hersh,** 464 F.2d 228 (9th Cir. 1972).

Also, OK to go around back of house to see if there is another door if no gate or wall is in the way and both doors are readily accessible from a public place such as a driveway after knocking on the front door and getting no answer. **U.S. v. Garcia,** 997 F.2d 1273 (9th Cir. 1993) and **U.S. v. Daoust,** 916 F.2d 757 (1st Cir. 1990).

In **U.S. v. Evans**, 27 F.3d 1219 (7th Cir. 1994) FBI agents approached a garage by going up a driveway and found evidence of stolen cars. The Court upheld the FBI action because " there was not any "no trespassing" sign and "a route which any visitor could use is not private under the 4th Amendment."

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

But note: approaching a residence in the curtilege which is a non-public area is generally held to be a search covered by the 4th Amendment. **U.S. v. Blount**, 98 F.3d 1489 (5th Cir. 1996).

6. **United States v. Martin**, 806 F.2d 204 (8th Cir., 1986), police officer serving search warrant for firearms at suspect's house. Officers looked in window of truck outside house and saw gun parts. Held: this is an "open view" observation which did not violate the Fourth Amendment. Same result in **U.S. v. Wesley, 918 F. Supp.** 81 (W.D. New York, 1996).

SMELL, HEARING AND TOUCHING

7. Related to open view are (a) open smell and (b) non-electronic augmented hearing. The courts look at these basically the same way and upheld the overhearing with the naked ear of a phone conversation at an unenclosed telephone in a public place. United States v. Muckenthaler, 584 F.2d 240 (8th Cir. 1978) and **Siripongs v. Calderon**, 35 F.3d 1308 (9th Cir. 1994). In **U.S. v. Aquapito**, 620 F.2d 324 (7th Cir. 1980) and **U.S. v. Hessling**, 845 F.2d 617 (6th Cir. 1998) the facts were the same (police listened to conversation in adjoining hotel room without electronic equipment (naked ear)) and both courts held no 4th Amendment violation. Same ruling in **State v. Ortiz**, 257 Neb. 784 (1999). However, in cases where police used electronic equipment to augment hearing and gain information, virtually all courts hold that this is a 4th Amendment privacy violation.

8. In **U.S. v. Gault**, 92 F.3d 990 (10th Cir. 1996) police officer lifted a gym bag from the aisle of a train. The court ruled that this action was not a search. Similar facts, same ruling in **U.S. v. Ward**, 144 F.3d 1024 (7th Cir. 1998) Smelling marijuana coming from packages or baggage is OK. S**ims v. State**, 425 So.2d 563, (Fla. 1983). In **Bond v. U.S.**, 529 U.S. (2000) the Court ruled that police could not manipulate a passenger's soft luggage bag without consent because such action would violate the passenger's right to privacy.

9. In **U.S. v. McDonald**, 100 F.3d 1320 (7th Cir. 1996) and **U.S. v. Guzman**, 75 F.3d 1090 (6th Cir. 1996) the Courts both ruled that a police officer on a public transportation vehicle could grab and feel (without opening) bags which were on overhead racks. However, some courts hold that such conduct by police is a search, and if

done without P/C, the results would be suppressed. **U.S. v. Nicholson**, 144 F.3d 632 (10th Cir. 1998).

USE OF FLASHLIGHT, BINOCULARS, ELECTRONIC DEVICES

10. **Texas v. Brown**, 103 S.Ct. 1535 (1983) held that using a flashlight to see something at night which would have been in the open during the day did not violate the Fourth Amendment. See also **State v. Wright**, 104 Nev. 521 (1988), which OK'd shining a flashlight into a car, and **State v. Calvillo**, 792 P.2d 1157 (N.M. 1990), which held that police shining a flashlight into a residence was not a search. Other cases holding that use of a flashlight to see what could have been seen in daylight was lawful are **U.S. v. Willis,** 37 F.3d 313 (7th Cir. 1994) and **U.S. v. Ortiz,** 63 F.3d 1952 (10th Cir. 1995).

11. The great majority of decisions have held that use of an airborne "FLIR" device to detect heat coming from premises was not a search under the Fourth Amendment. United States v. Penny-Feeney, 773 F. Supp. 220 (Haw. 1991) (upheld on other grounds but no specific holding for or against the FLIR in this case in the 9th Cir.. Penny-Feeney 984 F.2d 1053 (9th Cir 1993). Other courts approving FLIR as a "non search" are United States v. Deaner, 1 F.3d 192 (3rd Cir. 1993); **U.S. v. Myers**, 46 F.3d 668 (7th Cir. 1995); **U.S. v. Robinson**, 62 F.3d 1325 (11th Cir. 1995); and **U.S. v. Ishmael,** 48 F.3d 850 (5th Cir. 1995). United States v. Kyllo, 809 F. Supp. 787 (Ore. 1992) (Note: This decision was reversed by 9th Cir. 140 F.3d 1249 (1998) but that decision was withdrawn and it is unknown now how the 9th Circuit will rule).In **U.S. v. Cusamano,** 83 F.3d 1247 (10th Cir. 1996) the Court held that the search warrant which included use of FLIR was valid on the basis that there was enough additional P/C for the warrant. The Court refused to rule on whether the FLIR was a search. A few courts have reached the opposite result on use of FLIR saying that it was a search.

12. There is a conflict in holdings with regard to looking into the interior of a house or an office building through a telescope or binoculars. Some courts say that it is an invasion on 4th Amendment privacy. See **U. S. v. Taborda**, 635 F.2d 131, 138-39 (2d Cir.1980); **People v. Arno**, 153 Cal. Rptr. 624 (1979); **U. S. v. Kim**, 415 F.Supp. 1252, 1255-57 (D.Haw.1976). But there is contrary authority on telescopic and binocular observation, stating that it is not an invasion on 4th Amendment privacy. **Commonwealth v. Hernley**, 263 A.2d 904 (Penn.1970), and dicta in two Supreme Court decisions, **On Lee v. U. S.**, 343 U.S. 747 (1952), and **U. S. v. Lee**, 274 U.S. 559 (1927) Several State Supreme Courts upheld the concept that use of vision enhancing devices such as binoculars or night vision scopes does not intrude on a reasonable and legitimate expectation of privacy. State v. Carter, 790 P.2d 1152 (Ore. 1990) (reversed in 1988 on other grounds), State v. Vogel, 428 N.W.2d 272 (S.D. 1988), Saylor v. State, 365 S.E.2d 493 (Ga. 1988).

13. **U. S. v. Knotts**, 460 U.S. 276 (1983) police put a beeper on a suspect's car and used the beeper to trail the car. Court said that since the police could have followed the car by visual surveillance as it moved around in public areas, monitoring of the beeper signals did not invade any legitimate expectation of privacy.

PUBLIC UTILITY AND BUSINESS RECORDS

14. Phone company records. **Smith v. Maryland**, 442 U.S. 735 (1979) said "in all probability a person had no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not legitimate." Consequently, the use of a pen register was not a search and no warrant was required. (See section on Electronic Surveillance in this manual). Same ruling **U.S. v. Plunk**, 153 F.3d 1011 (9th Cir. 1998) "there is no expectation of privacy in phone company records."

15. **United States v. Miller**, 425 U.S. 435 (1976) said, " defendant urges he has a 4th Amendment interest in records kept by (his) bank. Even with original checks and deposit slips, we perceive no legitimate expectation of privacy."

16. Western Union customers have no privacy interest in W.U. records as they are not the customers' property. **In re Grand Jury Subpoena Duces Tecum**, 827 F.2d 301 (8th Cir. 1987). In **U.S. v. Phibbs**, 999 F.2d 1053 (6th Cir. 1993) federal officials could subpoena business records, credit cards and phone company records. The information was accessible to employees of those companies during the normal course of business, and there was no standing for the customers to complain because there was no expectation of privacy.

17. In **Commonwealth v. Cote**, 556 N.E.2d 45 (Mass., 1990) the Massachusetts Supreme Court held that there was no expectation of privacy in messages taken down by a contracted answering service as use of such service "necessarily involved a conveyance of information to that third party."

18. In **State v. Maxfield**, 886 P.2d 123 (Wash., 1994) the Washington Supreme Court held that there was no expectation of privacy in power consumption records.

B. STANDING

This term means that the only person who can even complain about alleged police violation of the Fourth Amendment is **a person whose own reasonable and legitimate expectation of privacy was intruded upon**. This means that the person must have authority, dominion, control and access to the place or item searched. Property rights are a factor in determining expectation of privacy, but not the only factor.

Cautionary Note: Illegal actions by officers may result in civil and/or criminal liability for the officer even though the Fourth Amendment's exclusionary rule might not apply because of "no standing" by a particular suspect.

Burden of Proof: "The proponent of the suppression motion has the burden of showing his own 4th Amendment rights were violated." **In order to have standing, it is the burden of the accused to demonstrate that the accused had ownership and control or permission from the owner to have authority and control (temporarily)**.

Rakas v. Illinois, 439 U.S. 128 (1978) and **U.S. v. Ponce**, 947 F.2d 646 (2d Cir. 1991) "Must show standing by a preponderance of the evidence." **U.S. v. Carr**, 939 F.2d 1442 (10th Cir. 1991). "The defendant can't rely on the government's pleadings or theory of the case but must present (their own) evidence or use evidence presented by the government." **U.S. v. Zermeno**, 66 F.3d 1058 (9th Cir. 1995).

Because the accused must have standing, it is necessary for police to gather evidence on this issue when they engage in a search and/or seizure.

In cases with a search warrant, police always look for items which tend to show a suspect's dominion and control, such as receipts for utilities, leases or deeds, photographs, and addressed letters.

In cases where police don't have a search warrant but use one of the exceptions to the warrant requirement **it is important for the police to obtain information from the suspect as to whether that person has control, dominion and/or authority to possess the item or the place to be searched**. **If not, the suspect has no standing.**

This should be done before the person is arrested, or, if arrested, after Miranda warnings. Ask the suspect if the suspect owns the place or item to be searched. If the answer is "Yes" ask to find where proof showing that claim exists. **Beware of situations where the suspect says that the place or item is not owned by the suspect. If the person denies ownership, it is a serious mistake for police to immediately search/seize the location or item**. Denying ownership is not the same as a statement by suspect that the place or item "..is not mine **and I have no connection with it.**" (This shows abandonment).

The reason for this is shown in cases 12, 13 & 14 in this section. If the person disclaims ownership, police should ask, "Who is the owner?" "Did the owner give you permission to have temporary control and authority over the place or item?" "What is the address, location, phone number, place to contact the (alleged) owner so that we can confirm what you say?" **Make note of or record this conversation so that, if the suspect claims permission from the owner, police can rebut this claim of privacy by the suspect's inability to give meaningful answers to these questions.**

(1) In Rakas v. Illinois, 439 U.S. 128 (1978), officers stopped a car matching the description of a car used in an armed robbery and ordered passengers out. Car was searched and a sawed-off rifle was found under the seat and shells were found in the locked glove compartment. Court held: passengers have no standing to contest search where they didn't own the car and did not claim to own the items seized. This was true even though they were in the car with the permission of the owner. The items seized were in areas where a passenger would not normally expect privacy. Same holding in **Scott v. State**, 110 Nev. 622 (1994) although the Nevada Supreme Court said in **Scott** that a person other than the owner might have a 4th Amendment privacy interest in a car (for example, you leave town for 2 weeks and let your friend use your car).

(2) In **McKee v. State**, 112 Nev. 642 (1996) the owner of the car was a passenger

when it was stopped by police. The car was searched and several pounds of methamphetamine were recovered. The Court held that although the owner had standing, McKee, the driver, did not because the owner hadn't relinquished control to him.

(3) In Rawlings v. Kentucky, 448 U.S. 98 (1980), police lawfully entered a house where Rawlings was a guest. He stashed his drugs in a woman's purse without her consent. Police searched the purse and found the drugs. Rawlings admitted ownership of the drugs. Court held - no standing even though Rawlings claimed ownership of the drugs. He had no right of privacy in the woman's purse. He had only known the woman a few days and had no right to exclude others from the purse.

(4) United States v. Salvucci, 448 U.S. 83 (1980), held that it is not inconsistent for the prosecution to claim that a person has no standing to contest the search for and seizure of an item and still contend at trial that the defendant has possession and control of the item.

(5) Simmons v. United States, 390 U.S. 377 (1968), held that a person could testify at a suppression hearing that he owned a container (or place) in order to obtain standing and that his testimony could not be used against him at trial.

(6) In Minnesota v. Olson, 110 S.Ct. 1684 (1990), an armed robbery/murder occurred. Police developed probable cause that Olson was the getaway driver. Officers entered an apartment where Olson was staying as an overnight guest without a warrant to arrest Olson. The lower court found no emergency, and evidence obtained after the police entered was suppressed. The United States Supreme Court held that Olson <u>had standing</u> to contest the Fourth Amendment issue as an overnight guest. A person doesn't have standing just because he is "legitimately on the premises", but an overnight guest does. The Court does not say exactly where the line is drawn

(7) **Minnesota v. Carter**, 119 S.Ct. 469 (1998) The defendant was a drug dealer who arrived and stayed at the home of another person for 2 hours to help package the cocaine. A police officer approached the front of the house and looked through a window where the blinds were partially open. The court did not decide whether the police action was lawful under "open view" but did decide that the suspect, under these circumstances, had no standing to contest the police entry and search.

(8) In **U.S. v. Gordon,** 168 F.3d 1222 (10th Cir. 1999), a drug dealer who paid another person to rent a motel room and then sold drugs out of the room had no expectation of privacy and no standing to contest a police search. This case cited **Minnesota v. Carter**, 119 S.Ct. 469 (1998).

(9) In United States v. Padilla, 113 S.Ct. 1936 (1993), a highway patrol officer in Arizona stopped a car in which Areiniega was the sole occupant. A search of the car revealed 560 pounds of cocaine in the trunk. Subsequent investigation proved that Padilla was part of a conspiracy to distribute the cocaine. United States Supreme Court held that Padilla <u>did not have standing</u> to contest the search of the car merely because

Padilla was a co-conspirator. He needed a reasonable/legitimate expectation of privacy in the place searched.

(10) At least 3 U.S. Circuit Courts have held that a person has no standing to contest the search of a rental car where it was rented by someone else, the defendant's name did not appear on the rental documents and the agreement stated that the renter had no authority to give control of the vehicle to another person. **U.S. v. Boruff**, 909 F.2d 111 (5th Cir. 1990); **U.S. v. Wellons**, 32 F.3d 117 (4th Cir. 1994); **U.S. v. Jones,** 44 F.3d 860 (10th Cir. 1995); **U.S. v. Bastidas**, 142 F.3d 1233 (10th Cir. 1999); and **People v. Bower,** 685 N.E. 2d 393 (Illinois, 1997).

(11) In **U.S. v. Cooper,** 133 F.3d 1394 (11th Cir. 1998) the arrestee had rented a car from Budget and was 4 days overdue on the rental. He was stopped by a Florida Highway Patrol officer for a traffic ticket. The officer was shown the rental and saw that it was overdue and called Budget. Budget said to impound and tow the car. He did so and contraband was found. The court ruled that the driver still had an expectation of privacy in the car because he could have called in and asked for more time, the contract he signed said that he would have to pay overtime, and the Budget people had not yet made a complaint to the police before the phone call from the officer.

(12) In **U.S. v. Pena**, 961 F.2d 333 (2nd Cir 1992), the court ruled that the borrower of an automobile can possess a privacy interest. To mount a challenge to a search of a vehicle, defendants must show, among other things, a legitimate basis for being in it, such as permission from the owner. Where the person shows sufficient evidence that he has permission of the owner to use the vehicle, then he has a reasonable expectation of privacy in the vehicle and standing.

(13) In **United States v. Perea**, 986 F.2d 633 (2d Cir.1993), the defendant entered a cab with a dufflebag which was put in the trunk. Police stopped the car and the taxi driver opened the trunk voluntarily. The police removed and opened the bag which contained a large amount of narcotics. The Court ruled that opening the trunk was OK because Perea had no expectation of privacy in the taxi's trunk but did hold that the defendant's testimony in the lower court was sufficient to show the he had authority to temporarily possess the item (as a "bailee" ie: a person who is given authority and control over an item for a temporary time by the owner) even though the defendant (obviously) was not able to produce the (alleged) owner.

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

(14) In **U.S. v. Austin**, 66 F.3d 1115 (10th Cir. 1995), Austin asked a civilian at an airport to watch his carry on bag for him. The Court ruled that he left his bag in the care of Hollis; thus, Hollis was in lawful possession of it. (holding that a bailee in legal

possession and control of a suitcase has a legitimate expectation of privacy in its contents). Hollis had control of the bag and the authority to exclude others' access to the bag. Hollis also had the authority, however, to allow others access to the object in his lawful possession. By leaving his bag in the possession and control of Hollis, defendant assumed the risk that Hollis would allow the authorities access to the bag.

(15) In **U.S. v. Porter**, 107 F.3d 582 (8th Cir. 1997) Officer Hicks entered a bus to perform a Bostick type investigation. He encountered Porter and voluntarily examined his ID and ticket. Porter told Hicks he had only one piece of luggage. After Hicks found a second bag in the luggage compartment with a ticket that said "Kelvin Porter" and "2 of 2," he asked Porter if the second bag belonged to him. Porter replied that "it did not" and that "he had never seen it before." Hicks asked Porter for permission to search the bag, and Porter told him he "could go ahead and search the bag, it was not his and he had never seen it before." Inside the bag, Hicks found a box containing two kilograms of cocaine. The Court ruled that Porter had abandoned the 2nd bag.

(16) **Bond v. U.S.**, 77 F.3d 1009 (7th Cir. 1996). Defendant, subsequently convicted in drug conspiracy, had no expectation of privacy in hotel room in which he left suitcase containing $128,000, where he was not registered in the room and had no key to room; fact that he left suitcase there under these facts, together with his disavowal of owning suitcase just before police searched it, indicated he had abandoned suitcase, even if disavowal by itself did not amount to abandonment.

C. TRASH SEARCH

California v. Greenwood, 486 U.S. 35 (1988). held that there was no reasonable and legitimate expectation of privacy in a trash container left outside the curtilage of a premises.

United States v. Hedrick, 922 F.2d 396(7th Cir 1991). extended Greenwood to trash cans located on driveway 50 feet from house and 25 feet from sidewalk.

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

U.S. v. Long, 176 F.3d 1304 (10th Cir. 1999). Trash search OK next to trailer located close to public alleyway where passerbys had access to the area.

U.S. v. Hall, 47 F.3d 1091 (11th Cir. 1995). police took trash bags from dumpster located in parking area for the employees of a company. The court said that the owner of commercial property has expectation of privacy in this situation only if affirmative steps have been taken to exclude the public.

D. DOG SNIFF CASES

In United States v. Place, 462 U.S. 696 (1983), the court held that random dog sniffs of luggage in an airport terminal do not require probable cause or even reasonable suspicion, so long as the luggage itself is not "detained." The dog's ability to detect odors coming from the suitcase is not a search under the Fourth Amendment.

Suppose a vehicle is parked in a public place or is lawfully stopped for a routine traffic offense. Can police bring a drug sniffing dog up to the exterior of the car to determine whether the vehicle contains drugs, as long as doing so does not extend the normal time duration of the traffic stop of the vehicle? In **U.S. v. Ludwig,** 10 F.3d 1523 (10th Cir. 1994) the court OK'd a police drug dog sniffing various cars in a public motel parking lot.

The majority view is that police need no legal justification to do a dog sniff of a vehicle or luggage or other containers as long as there is no **unjustified seizure** (containers) **or unjustified stop** (cars)of the item sniffed. (But see section on roadblocks where there is a split of opinion) In **Gama v. State**, 112 Nev. 833 (1996), the Court held that where a police officer stopped a car for speeding but the additional reason was a hunch that the driver of the car was smuggling drugs and the drug dog arrived on the scene **prior to the time the citation was completed** and there was no evidence to suggest that the trooper delayed in issuing the citation. The sniff and the warrantless search were upheld.

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

In United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991) where police stopped a car because the driver was leaning out the window yelling at another car. The driver had no license and the car was impounded. Later a drug dog sniffed and alerted.

All of these cases also hold that an alert by a dog with proper training and credentials does constitute probable cause.

Dog sniff of an <u>apartment</u> from the outside was held to be a search under the Fourth Amendment in United States v. Thomas, 757 F.2d 1359 (2nd. Cir. 1985). The court said that a residence has a much higher expectation of privacy than a suitcase being shipped by airplane (as in <u>Place</u>) or a vehicle as in the other cases mentioned here. Same ruling in **State v. Ortiz**, 600 N.W.2d 805 (Neb. 1999).

Drug dog sniff of self storage unit held lawful in **U.S. v. Ayala,** 887 F.2d 62 (5th Cir. 1989). Same ruling in **U.S. v. Lingenfelter**, 997 F.2d 632 (9th Cir. 1993).

Drug dog sniff of human beings is unconstitutional without P/C or R/S. **Horton v. Goose Creek School District**, 690 F.2d 470 (5th Cir. 1982) and **B.C. v. Plumas School**

District, 192 F.3d 1260 (9th Cir. 1999) in which the Court stated "intensive smelling of people by dogs is indecent and demeaning."

E. PRISON & JAIL CASES

Hudson v. Palmer, 468 U.S. 517 (1984) held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell" and that "determining whether an expectation is legitimate involves balancing the interests of society and of the person." The court noted that constant surveillance is needed to maintain prison order and security.

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

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

Wolff v. McDonnell, 418 U.S. 539 (1974). It is settled that an inmate's **legal mail** may be opened by prison officials only in the presence of the inmate. To facilitate the identification of legal mail, prison officials may require that such material be specially marked by the sender. The privileged treatment accorded legal mail stems from its importance in protecting inmates' right of access to the courts.

Procunier v. Martinez, 416 U.S. 396 (1974) is a case which **does not hold** that prison officials cannot read incoming mail. The Court did hold that officials cannot censor or remove portions of incoming mail and/or refuse to deliver certain books and printed materials to inmates.

Martin v. Brewer, 830 F.2d 76 (7th Cir. 1987). All mail unless specially marked (by lawyer) can be open and read by prison officials prior to delivery. Same ruling in **Kensu v. Haigh**, 87 F.3d 172 (6th Cir. 1996).

Withrow v. Paff, 52 F.3d 264 (9th Cir. 1995) holds that it is OK for prison officials to open outgoing mail to examine for contraband, noting that inmates may send feces to people they dislike, but outgoing mail cannot be read.

U.S. v. Williams, 951 F.2d 853 (7th Cir. 1992). In an institutional setting letters may pose threats to security; thus the incoming and outgoing mail of prisoners may be subjected to surveillance to minimize their opportunity for developing escape plans. Same ruling in **Madrid v. Gomez**, 899 F. Supp. 1146 (ND Cal. 1995) which held OK to open and read non-legal mail because prison gang activity poses a threat to security. In **Smith v. Shrimp**, 562 F.2d 423, (7th Cir.1977) same decision as Williams was applied to

jail as opposed to prison.

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

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

F. ABANDONMENT

A person can't complain of a warrantless search of premises he has abandoned. Abel v. U.S., 362 U.S. 628 (1959). For example, in Obermeyer v. State, 97 Nev. 158 (1981) the court held that property found in the defendant's hotel room was lawfully seized where rental period had expired and rent was past due and owing when police entered. In State v. McNichols, 106 Nev. 651 (1990), where defendant was evicted from his home and foreclosure was started and he broke back in and had drugs there - warrantless search OK - no reasonable expectation of privacy.

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

A person rented a hotel room for 1 day with a credit card and returned 2 days later and the hotel had billed the credit card for 2 days - no abandonment. U. S. v. Mulder, 808 F.2d 1346 (9th Cir. 1987). Where a motel had a policy of not immediately evicting those who stayed beyond checkout time, the renter still had a reasonable and legitimate expectation of privacy while staying slightly beyond check-out time when his roommate called the desk and paid $100 toward future stay. U. S. v. Owens, 782 F.2d 146 (10th Cir. 1986). In **U.S. v. Kitchens**, 114 F.3d 29 (4th Cir. 1997) the court held that a guest may have a reasonable expectation of privacy after hotel/motel room rental period terminated **if there is a pattern or practice by the management that would make the**

expectation reasonable.

U. S. v. Reyes, 908 F.2d 281 (8th Cir. 1990) found abandonment where a bus station locker was searched 12 days after expiration of rental period. It made no difference that the renter was in jail during that time and the business had placed an obstruction on the lock.

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

U. S. v. Tolbert, 692 F.2d 1041 (6th Cir. 1982) found abandonment where an air traveler appeared willing to leave her baggage at the airport **and** strenuously denied owning the bags. But failure to immediately retrieve a checked suitcase even when the person left the airport did not, by itself, constitute abandonment. **U. S. v. Rem**, 984 F.2d 806 (7th Cir. 1993). This was an airport where the airlines held baggage for a short time while notifying the passenger.

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

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

See cases in "Standing" Section regarding expectation of privacy by a person who is not the owner of the item to be searched

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

The existence of a police investigation, or even pursuit, does not of itself render the abandonment involuntary. **U. S. v. Trimble**, 986 F.2d 384 (10th Cir. 1993) and **California v. Hodari D**, 111 S.Ct.1547 (1991), but the abandonment must not be the result of a 4th Amendment violation by police, such as seizure of the suspect without reasonable suspicion (Terry Stop) or probable cause (arrest). If so, the abandonment is a "fruit of the poisoned tree." **U. S. v. Hernandez**, 48 F.3d 858 (5th Cir. 1995).

In **U.S. v. Garzon**, 119 F.3d 1446 (10th Cir. 1997), a police officer entered a bus to conduct a Bostick type encounter. The officer told all the passengers that they would have to leave the bus with their personal belongings so that a drug dog could sniff the luggage. This order was made without P/C or R/S. Garzon failed to obey the officer's unlawful order to remove his personal belongings from the bus and to parade them past a drug-sniffing dog.

The court ruled that it is not unreasonable to disregard an officer's **unlawful** order to remove personal belongings from a place where they are entitled to be kept for the purpose of facilitating a drug search. Does the act of refusal constitute an objective abandonment of the property in question? The answer is no - evidence suppressed.

G. SEARCH BY PRIVATE CITIZEN

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

> (1) a government employee (**Burdeau v. McDowell,** 25 U.S. 465(1921) and
> (2) has a job involving traditional police functions (protect, gather evidence, investigate) will be considered "POLICE" in the sense that the Fourth Amendment will fully apply. Dyas v. Superior Court, 522 P.2d 674 (Calif. 1974) (involving housing authority) and in **In Re** Fredrick B., 237 Cal. Rptr. 338 (1987) (involving a school security officer). Also, in **New Jersey v. T.L.O.,** 105 S.Ct. 733 (1985) Justice O'Connor's concurring opinion says that police officers are persons that have **law enforcement responsibility.**

The Fourth Amendment does not apply to private citizens, hotel security guards, department store security, as long as they are not acting as agents of governmental police. Radkus v. State, 90 Nev. 406 (1974).

In U.S. v. Jacobsen, 104 S.Ct. 1652 (1984), Federal Express employees opened a damaged box and found newspapers covering a tube which, when opened was found to contain plastic bags of white powder. Police were contacted, but before their arrival, Fed. Ex. put items back in the box. Police reopened and field tested for drugs. Court ruled search OK. "Police action was not a significant expansion of the earlier private search - no warrant required."

But note: it is a rare instance where police can retrace the footsteps of a private search and/or seizure. In **U.S. v. Johnson**, 22 F.3d 674 (6th Cir. 1994) a victim searched the suspect's residence and found guns. Police then entered without a warrant and seized the guns from the closet where the victim had found them. The court said, "If the victim had seized the guns and turned them over to police, there would be no government action, but the officers' entry and seizure (were governed by the 4th Amendment)."

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

"To determine whether a private party's search implicates the 4th Amendment examine (1) whether the government knew of and acquiesced in the conduct and (2) whether the party intended to assist police or further his own ends." **U.S. v. Cleaveland**, 38 F.3d 1092 (9th Cir. 1994). Same test was used in **U.S. v. Pervaz,** 118 F.3d 1 (1st Cir.

1987).

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

In **U.S. v. Leffal,** 82 F.3d 343 (11th Cir. 1996), an airline freight employee decided to open a package he thought was suspicious and might contain unarmed explosives or drugs. He took the package to the airport police office and opened it in front of an officer, found contraband and gave it to the officer. The court ruled that this was a private action because the employee's motive was to further his own ends.

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

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

IV

SEARCHES AND SEIZURES OF THE PERSON

A. LEVELS OF CONTACT AND THE OBJECTIVE TEST

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

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

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

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

The United States and Nevada Supreme Courts have recognized three levels of police-citizen contacts. **Arterburn v. State**, 111 Nev. 1121 (1995). The problem is that although the theory establishing the three levels is well-recognized, the place where the line is drawn between levels in a particular case is often unclear. However, you must know the rules to win in court.

TYPE OF ACTION	STANDARD REQUIRED
Arrest ➠	Probable Cause
Investigative Detention ➠	Reasonable Suspicion
Consensual Encounter ➠	No Justification

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

(1) Both investigative detention ("Terry" Stop) and arrest are seizures of the person. There is a difference between these two levels. "While the suspect was not free to leave, this does not mark the point where a Terry stop escalates into an arrest, since in neither a stop nor an arrest is a suspect free to leave." **U. S. v. Edwards**, 53 F.3d 616 (3rd Cir. 1995).

(2) A person doesn't have to be physically touched to be seized, since a command or order from a police officer (wearing a uniform or displaying a badge) to which a person submits is a seizure. **California v. Hodari D., 111 S. Ct. 1547 (1991)** "A seizure occurs when all of the circumstances communicate to a reasonable person that he was not at liberty to ignore the police presence and go about his business." **Florida v. Bostick**, 111 S.Ct. 2382 (1991) Relevant factors include threatening presence of several officers, display of weapon, physical touching by police, use of language or tone that commands rather than requests. **U.S. v. Packer**, 15 F.3d 654 (7th Cir. 1994) and **U.S. v. Dockter**, 58 F.3d 1284 (8th Cir. 1995).

(3) The more restrictive and intrusive the level of police conduct (Investigative stop or Arrest) the more justification must exist for the police conduct. In determining how to characterize the level of police intrusion on the citizen's Fourth Amendment right (privacy - freedom of movement) the court will use an **objective test.** This means that the court will examine the words and actions of the officer(s) and judge the effect of the words and conduct on "a reasonable **innocent** person in the position of the citizen," to decide the level of contact, **Florida v Bostick** . The subjective (internal) intentions or thoughts of the officer are not a factor unless that intention is communicated to the citizen.

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

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

B. LEVELS OF CONTACT AND MIRANDA

The basic rule is that Miranda warnings are not required when police interrogate a person who is in levels one or two (Non-Seizure and Terry Stop).

In **Stansbury v. California**, 511 U.S. 318 (1994), police in Baldwin Park were investigating the rape and murder of a 10 year old girl. Police learned that the girl had

planned to buy ice cream and called several companies to learn the name of the truck drivers, one of whom was Stansbury. Police went to his trailer and asked him if he would come to the police station to answer some questions. Stansbury agreed. At the police station, officers questioned him about his whereabouts and other matters. Some of his answers made the police suspicious that he was the perpetrator. **None of the police internal thoughts were communicated to him**. After some time (less than 30 minutes) police asked and learned from Stansbury that he had been convicted for rape, kidnapping and child molestation and gave Miranda warnings at which time he requested an attorney and questioning ceased. He was arrested.

The issue before the Supreme Court was whether the information the police learned through interrogation **before arrest** was a violation of Miranda because the police had **focused** on him as a suspect. The Supreme Court held that the internal thoughts of the police (i.e. Focusing on him as a suspect) **had nothing to do with the requirement of giving Miranda because the police did not convey these thoughts to the suspect**. The Court said that the sole issue was whether he was in an arrest level of custody in the first part of the interview.

In **State v. Lanning,** 109 Nev. 1198 (1993) police suspected Ms. Lanning of being a forger (felony). She was asked her to come to the police station to answer some questions about the checks. When she got there she was told that she was not under arrest and could leave at any time. She was not given Miranda warnings. During the interview she told police that she should see an attorney so as not to incriminate herself. The detective told her that she was not in custody and could leave. She then confessed. The Nevada Supreme Court held that Miranda warnings were not required because she was not "in custody."

In Berkemer v. McCarty, 468 U.S. 420 (1984), the court held: no Miranda required in initial stages of routine traffic stop or in a Terry-type stop. This case was followed and explained in **U. S. v. Leshuk**, 65 F.3d 1105 (4th Cir. 1995) where the Court said "the perception that one is not free to leave does not convert a Terry stop into an arrest. Terry stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion. From these standards we conclude that a lawful stop (where the suspect is not free to leave) is not necessarily elevated into a custodial arrest for Miranda purposes." The Nevada Supreme Court cited **Berkemer** in a case where the court held that in a police routine traffic stop based on suspicion of drunk driving the suspect did not require Miranda warnings were not necessary because the person was not in an arrest level. **Dixon v. State,** 103 Nev. 272 (1987).

In **Silva v. State**, 113 Nev. 1365, 951 P.2d 591 (1997) A suspect in a robbery-murder in a local bar agreed to go to the police station to talk to police. He was asked questions about the crimes and he denied knowledge. Detectives left and returned 15 minutes later and continued the interview telling Silva"you are not under arrest, do you understand that?" Silva said, "If you're going to charge me with something, I see a lawyer." Detective said, "I'm giving you a chance to get it out on the table . . . if you want to talk to a lawyer, all you gotta do is tell me so"

Later in the 2nd interview Silva made incriminating statements. Both interviews were recorded. The police said, "Do you think that we ought to start over with a complete statement?" Silva said he thought he should have a lawyer and the detective said, "if you want a lawyer, I'll go and get you one." Silva asked to speak to his sister and then the detectives read him his Miranda warnings. Silva signed the waiver of his rights and then confessed.

At the beginning of the 3rd statement, the police told Silva he was not free to go. Silva was convicted and on appeal argued that he requested an attorney during the 2nd statement but was ignored and not given his Miranda warnings. The Nevada Supreme Court ruled that Silva was not in custody during the 2nd interview, noting that whether a person is in custody for Miranda purposes depends on whether a reasonable person would believe he was free to leave (if the person is in a police dominated location), citing **Rowbottom v. State**, 105 Nev. 472 (1989) and **California v. Behler**, 463 U.S. 1121 (1983) where the suspect of committing murders went voluntarily to the police station and was told that he was not under arrest.

In **State v. Taylor,** 114 Nev. 1071 (1998) the Court ruled that an individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process, (see **Garcia v. Singletary**, 13 F.3d 1487, 1489 (11th Cir.1994), or where the individual questioned is merely the focus of a criminal investigation. (see **United States v. Jones**, 21 F.3d 165, 170 (7th Cir.1994).

The factors stated by the Nevada Supreme Court which determine whether the level of custody was arrest include (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated (ie: in a police station); (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning. All seven factors need not be present in order to determine that the suspect was or was not in custody. The Court held that an individual is deemed "in custody" where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave. This is an objective test which looks at all the circumstances of the encounter. A suspect's or the police's subjective view (police believe that the person is a suspect in a crime but do not mention this to the person) of the circumstances does not determine whether the suspect is in custody. (Citing Oregon v. Mathiason, 97 S.Ct. 711 (1977) and **Stansbury v. California**, 511 U.S. 318 (1994).

"We conclude that the totality of the circumstances makes evident that Taylor was not in custody when the statements at the airport were made. The officers did not physically move or restrain Taylor during their brief questioning of him, did not handcuff Taylor or draw their guns, and neither accused Taylor of anything nor informed him that he was not free to leave. Taylor did not ask to leave and did not make any statements that would lead a reasonable person to believe that he would be arrested immediately. Additionally, Taylor was not under arrest at the time he made his statements, he

voluntarily responded to the officers' questions, he could move about freely during the questioning, and the officers did not employ strong-arm tactics or deception. " **Taylor v. State**, 114 Nev. 107 (1998).

In **U.S. v. Sheets**, 188 F.3d 829 (7th Cir. 1999) police officers were detaining Sheets on reasonable suspicion and had not yet objectively acted in such a manner as to make the encounter an arrest. Sheets talked to the police without Miranda warnings. "This court has held that Miranda warnings are not required where a suspect has been detained pursuant to a Terry investigatory stop."

Although a person in jail is in custody for an unrelated charge, **jail still amounts to custody for purposes of requiring Miranda when interrogation is about a new or different crime**.

Many cases hold that a person in **prison** after conviction on one crime can be interrogated about a different crime without Miranda. These cases hold that if the inmate is in his own cell, or in a "public" area (available to all inmates) it is the same as being in his home, and that "custody" does not occur unless police action is more restrictive and **coercive**. **U. S. v. Turner,** 28 F.3d 981 (9th Cir. 1994); **U. S. v Conley,** 779 F.2d 790 (4th Cir. 1985); **Garcia v. Singletary,** 13 F.3d 487 (11th Cir. 1994).

The Nevada Supreme Court has decided two cases on this issue with opposite results. In **Walker v. State,** 106 Nev. 290 (1986), the Court ruled that an inmate interviewed in his locked down cell by a corrections person, after a fight that took place in prison in which another inmate was seriously hurt, and the subject of the interview was the cause of the fight that had just occurred, and it appeared that the inmate had to talk to the investigator, Miranda warnings had to be given

However, in **Mitchell v. State**, 114 Nev. 1417 (1998) where two LVMPD homicide detectives went to Soledad prison in California to interview Mitchell whom they suspected of participating in a robbery, the Court held that prison inmates are not automatically deemed to be "per se 'in custody.'

To determine whether Miranda warnings were necessary in a prison setting, "we look to some act which places further limitations on the prisoner." Under this concept, we consider "the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him ... to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting."

The Court concluded that, despite Mitchell's assertions to the contrary, based on the totality of the circumstances, Mitchell was not "in custody" for purposes of Miranda. The two-hour interview at Soledad Prison took place in an unlocked room, Mitchell was not under arrest for the San Remo robbery at the time, and the detectives testified that they told Mitchell that although he was a suspect in the robbery, he could leave the interview at any time.

C. LAWYERS' COURTROOM TACTICS

Raising the level of contact:

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

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

Remember it's not just whether you say "you're under arrest" that counts. The court will look at the entire circumstances of the encounter from the viewpoint of a hypothetical "reasonable man" in the position of the "subject" to determine whether the subject was detained or arrested. The prosecutor will, of course, argue to the contrary but police should be mindful of the "game" being played on these issues.

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

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

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

The "Fact-Isolation" Game:

Another "tactic" which the defense will use in court is the attempt to isolate (one from the other) the various factors which formed the basis of the stop. So - you will get the question "isn't it a fact that you stopped the defendant because he was standing on a street corner in a "high drug incidence" area? If your answer is "yes" and the District

Attorney drops the ball by not questioning you more, the judge may conclude that this alone was not enough and you made an illegal "stop." If the true answer is "yes - in part" then say so and go on to relate all the articulable circumstances that caused you to act.

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

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

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

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

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

This is not like a Miranda warning which is rigid and lengthy. In a street encounter just a casual statement like, "Thanks for taking a few minutes to talk to me," or after a traffic stop, giving the driver his signed citation and having returned all license, registration, etc and saying, "Drive carefully and be sure to go to court on the date on the ticket."

This should objectively indicate to a person that he or she can leave. If an officer then asks for consent to search the person's response will be controlling.

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

See section in this manual on Automobile Consent searches

(2) Avoid involuntary restraint or movement of the subject. (i.e.: patdown, touching, ordering "step over to the police car.").

(3) Avoid lengthy contact - the briefer the contact the less likely a court will call it a seizure.

The benefit of this approach is that it completely avoids Fourth Amendment

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

Therefore, if you operate this way and you contact a person who is not innocent, you can gain information through sight, smell, hearing, asking questions, etc. which may give you reasonable suspicion to make an investigative detention. Probable cause, arrest and recovery of evidence may follow.

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

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

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

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

2. In Florida v. Bostick, 111 S.Ct. 2382 (1991), the United States Supreme Court clearly recognized the difference between a consensual encounter and an investigative detention. Police on a drug task force approached Bostick where he was seated on a bus. The police officers did not display any weapons. They asked Bostick for some identification. He provided it to the officers and they immediately returned it to him. Same procedure with his bus ticket. The police did not station themselves in a position which would block Bostick from getting up an leaving the bus. They asked him for consent to search his luggage, got consent, found drugs. Police conceded they had no individualized suspicion whatsoever concerning Bostick when they approached him.

The court said: a consensual encounter does not trigger Fourth Amendment scrutiny. The question is not simply whether a reasonable person in the subject's position would feel "free to leave", because Bostick may not have wanted to leave the bus which was about to depart. The question is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter. The subjective thoughts or motives of the officers are irrelevant if not communicated to the subject. (Mental discipline works.) The court noted that officers used a low-key approach and specifically told Bostick he could refuse consent to search his luggage. The court also said the "reasonable person" standard presupposed a reasonable "innocent" person not a

"guilty" one and so rejected Bostick's argument that he must have been seized because no reasonable person would consent to a search which would turn up proof of his guilt.

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

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

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

4. This rationale was followed in **Allen v. City of Portland**, 73 F.3d 232 (9th Cir. 1995) where the Court said "the proper focus in determining whether an arrest or detention occurred is not on the subjective belief of the police ... but whether a reasonable innocent person would not have felt free to leave after brief questioning."

5. In Rowbottom v. State, 105 Nev. 472 (1989), holding no seizure of subject who voluntarily went to the police station to be interviewed and who was told by police that he was free to leave.

6. "A seizure does not occur simply because an officer approaches a person to ask a few questions or even requests to search an area even if the officer has no reason to suspect the person provided the officer does not indicate that compliance with his request is required." **U.S. v. White**, 81 F.3d 775 (8th Cir. 1996) and **U.S. v. Lambert**, 46 F.3d 1064 (10th Cir. 1995). One court noted that even though "very few people think themselves free not to stop when a policeman accosts them" as long as the officer **asks rather than commands**, the protections of the 4th Amendment do not attach. **U.S. v. De Berry**, 76 F.3d 884 (7th Cir. 1996). Same ruling in **U.S. v. Cardoza**, 129 F.3d 6 (1st Cir. 1997). The Nevada Supreme Court followed the rationale in these cases in upholding a consent search of the person after a non-seizure contact in **Burkholder v. State**, 112 Nev. 535 (1996).

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

(1) THE TERRY CASE AND NEVADA STATUTES:

In 1968 the U.S. Supreme Court said in Terry v. Ohio, 392 U.S. 1 (1968) that police could stop (conduct an investigative detention where the suspect was not free to leave) a person based on "articulable and reasonable suspicion" that the person "is committing, has committed or is about to commit a crime," even where there is not

probable cause for an arrest.

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

Terry is codified in **N.R.S. 171.123** as follows:

171.123 Temporary detention by peace officer of person suspected of criminal behavior: Limitations.

> 1. Any peace officer may detain any person whom such officer encounters under circumstances which reasonably indicate that such person has committed, is committing or is about to commit a crime.
>
> 2. The officer may detain such person only to ascertain the identity of such person and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
>
> 3. No person may be detained longer than is reasonably necessary to effect the purpose of this section, and in no event longer than 60 minutes. Such detention shall not extend beyond the place or the immediate vicinity of the place where the detention was first effected. (1969, p.535; 1973, p.597, 1975).

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

> 1. If any peace officer reasonably believes that any person whom he has detained or is about to detain pursuant to NRS 171.123 is armed with a dangerous weapon and is a threat to the safety of the peace officer or another, the peace officer may search such person to the extent reasonably necessary to ascertain the presence of such weapon. If the search discloses a weapon or any evidence of a crime, such weapon or evidence may be seized.

The question arises as to whether the police, during a "Terry type stop" can lawfully require that the person identify him or her self. In **Adams v. Williams**, 407 U.S. 143 (1972) where the court found that a seizure of the person had occurred, the court implied that questioning as to the person's identity and a request for identification were not in violation of the 4th Amendment.

In **Brown v. Texas**, 443 U.S. 47 (1979) the police arrested Brown when he refused to identify himself. However, the Court noted that the investigative stop of Brown was invalid because police had no reason to stop him. The request for

identification, refusal and arrest were "fruits of the poisoned tree." In **Kolander v. Lawson**, 461 U.S. 352 (1983) a Calif state law required a person lawfully stopped by police to produce a "credible and reliable id." The Court held that this language was unconstitutionally vague. **Neither case held that it was unconstitutional for police to require identification from a person in a lawful "Terry Stop."**

In **Martinelli v. City of Beaumont**, 820 F.2d 491 (9th Cir. 1987) the court ruled that officers had reasonable suspicion to stop the person, but the Calif. Statute allowing arrest if the person refused to identify himself was unconstitutional. The 9th Circuit Court erroneously construed the U.S. Supreme Court's decision in Kolander v. Lawson to justify this ruling even though it is clear that the U.S. Supreme Court has never decided this question.

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

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

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

The Nevada Supreme Court has not ruled on this issue although a requirement for identification is in NRS 171.123. The cases of **Brown v. Texas** and **Kolander v Lawson** do not rule on the identity requirement in NRS 171.123 (see detailed explanation in **Albright v. Rodriguez**).

Until the Nevada Supreme Court rules on this issue, police officers should be selective in arresting for failure to ID with factors such as the strength of the articulable suspicion for the stop and the type of crime suspected. For example if police see a person continuously hanging around a grade school with minor children present. a Terry stop is valid. If the person has a prior record for molestation of minor children it would be devastating for the community if the police officer was not permitted to request identification.

A related issue about police obtaining identification during a valid Terry Stop is

whether police can pat down or search the person for documentable ID such as driver's license. The cases in this area are few and the validity of the practice is uncertain.

In People v. Long, 254 Cal. Rptr. 483 (1987), the officer had R/S to stop Long in a bar where he was with an under aged girl. The officer asked for ID and Long stated his name but said he didn't have any ID. The officer noted a wallet sized bulge in his rear pants pocket, again asked for written ID and Long said he had none. The officer directed Long to look through his wallet, which Long did, and the officer saw some plastic baggies containing drugs. The Court upheld the officer's demand for written ID, citing Flynn and Adams v. Williams. Same ruling in **People v. Loudermilk**, 194 Cal. App.3d 447 (1987) where an officer had R/S to stop a person suspected of firing a gun. Pat down felt wallet but person refused to ID, and in **Harper v. State,** 532 So. 2d 1091 (Fla. 1988).

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

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

The Hodari D. case and the Bostick case define the pre-stop or pre-seizure area. Remember a "Terry stop" is a form of seizure - the person is not free to go. Drawing the line between a "Bostick encounter" and a "Terry stop" has to be done on a case by case basis. Remember, the defense lawyer will try to push the time of the "Terry stop" as early as possible in the contact when the officer has less articulable suspicion, hoping to persuade the court that you made an illegal Terry stop and if so, wiping out your case with a fruit of P.T. argument.

CASE EXAMPLES:

1. U. S. v. Garcia, 866 F.2d 147 (6th Cir. 1989), an important factor in distinguishing seizures from casual contacts is when the person is asked to accompany the police to a place where the person had not planned to go. An officer may approach a traveler in an airport and ask to speak to him, and continue that conversation until a reasonable person would no longer feel that the person was free to go. Once that point has been reached, the officer must have a reasonable articulable suspicion, or else the stop or detention is illegal, and fruits of that search must be suppressed. Garcia was not seizure because "there were only two agents present, no weapon was displayed, he was not physically touched , and the agents did not raise their voices or threaten him in any way."

2. **U.S. v. Glass**, 128 F.3d 1398 (10th Cir. 1997) has some factors that courts use in determining whether a police-citizen contact is a seizure. These factors include:

(a) Telling a person that he is a suspect for a particular type of crime

(b) The number of officers that are present

(c) Moving the conversation from public to private place or whether the contact

is in a public or private place
(d) Whether the person is told that he need not talk to the officers
(e) Whether the person's egress was blocked

3. **U.S. v. Kim**, 27 F.3d 947 (3rd Cir. 1994) utilizing essentially the same factors in the Glass case which had been related in earlier US Circuit Court cases held that none of these factors **alone** is determinative regarding whether a 4th Amendment seizure of the person occurs.

4. A few federal cases (pre Bostick) gave strong weight in their analysis of seizure to a police officer's asking directly incriminating and focused questions, almost to the point of per se rule making such contacts a seizure. **U. S. v. Nunley**, 873 F.2d 182 (8th Cir.1989) **U.S. v. Jaramillo**, 891 F.2d 620 (7th Cir.1989) However, Nunley was modified by **U.S. v. Perdue**, 961 F.2d 723 (8th Cir. 1992) and Jaramillo was reversed by **U.S. v. Ornelas-Ledesma**, 16 F.3d 714 (7th Cir. 1994)(Both post Bostick cases).

5**. U.S. v. Cardoza,** 129 F.3d 6 (1st Cir 1997) Defendant was not "seized" within meaning of Fourth Amendment before police saw him with contraband, even though police cruiser turned wrong way up one-way street, making clear officer's intent to come into contact with him, and officers asked him what he was doing out at that time; reasonable person would not have concluded that he was not free to leave, as officers did not use flashing lights or sirens, and officers did not ask defendant to stop, or even to approach patrol car. The result, therefore, "is the directive that police conduct, viewed from the totality of the circumstances, must **objectively** communicate that the officer is exercising official authority to restrain the individual's liberty of movement before we can find a seizure occurred."

6. U.S. v. Rodriguez-Franco, 749 F.2d 1555 (11th Cir. 1985), held that INS agents approached a group of "Hispanic looking" persons in a mall and asked questions about citizenship and asked (not commanding) two persons to step over to a bench there was no Terry stop. (This type of police procedure might arguably have been improper had it been done by other than INS agents. See the next case).

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

7. Ozhuwan v. State, 786 P.2d 918 (Alaska, 1990), held that a Terry stop occurred when an officer partially blocked a person's car with the police car while activating the overhead lights.

8. U.S. v. Waskal, 709 F.2d 653 (11th Cir. 1983), held that a Terry stop occurred when police spoke to a person in an airport and took his ticket and asked him to go to a

nearby office without returning the ticket.

9. U.S. v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990), held no Terry stop where an officer knocked on a door to a person's train compartment, asked permission to ask questions and requested and received a train ticket and personal identification, then promptly returned them.

10. **U.S. v. Torres-Guevara**, 147 F.3d 1261 (10th Cir. 1998) Officers encountered the defendant at an airport and asked for and received her identification and an airline ticket. The officers looked at these items returned them immediately and told her she was not under arrest and could leave.

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

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

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

(3) WHAT CONSTITUTES "REASONABLE SUSPICION?"

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

For example, read the Case of U.S. v. Mendenhall, 446 U.S. 544 (1980), involving an encounter between police and a suspected drug courier at an airport. Three Supreme Court Justices thought that the contact between the police and Mendenhall was a non-seizure contact requiring no justification. Three other Justices thought it was a Terry stop, but that reasonable suspicion existed. Three other Justices thought it was a Terry stop, but was illegal because there was not R/S.

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

NERVOUSNESS

(1) In **U.S. v Wood**, 106 F.3d 942 (10th Cir 1997) the Court ruled, “We have

repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion "in all cases of this kind must be treated with caution."

"It is common knowledge that most citizens, whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness." Same ruling on nervousness in **U.S. v. Peters**, 10 F.3d 1517, 1521 (10th Cir.1993) and **U.S. v. Beck**, 140 F.3d 1129 (8th Cir. 1998). See **U.S. v. McRae**, 81 F.3d 1528 (10th Cir. 1996) holding that nervousness along with other objective factors may contribute to R/S.

REFUSAL TO COOPERATE

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

TRAINED OBSERVATIONS

(3) Several US Circuit court cases hold that, "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis
for suspicion." **U.S. v. Sholola**, 124 F.3d 803 (7th Cir. 1997) and **U.S. v. Lujan**, 188 F.3d 520 (10th Cir. 1999).

(4) U.S. v. Cortez, 449 U.S. 1 (1981), dealt with an investigation by the Border Patrol into smuggling aliens. Over several months, officers saw sets of footprints, one of which had a unique pattern, coming across the border and ending up near a highway which ran parallel to the border. The tracks led into obstacles which would have been visible during the day. The tracks turned eastward at the highway, then disappeared after a short distance.

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

The U.S. Supreme Court held: reasonable suspicion did exist on these facts to justify a stop of the truck. Prosecutors should read and cite this case often. It contains language telling courts that even "innocent" actions when viewed by police officers who have knowledge of the modes or patterns of certain types of criminal activity can give R/S. **"A trained officer draws inferences from data that might well elude an**

untrained person." "The test for reasonable suspicion is <u>not</u> in weighed in terms of library analysis by scholars."

(5) **U.S. v. Lender**, 985 F.2d 151(4th Cir.1993) officers observed four or five men "huddled on a corner" in a known drug area. One of the men "had his hand stuck out with his palm up, and the other men were looking down toward his palm." When the group saw the police , they "began to disperse, and the defendant walked away from the officers with his back to them." Based on the hour of the day, the group's dispersal upon seeing the officers, the known character of the neighborhood, and the officers' practical experience in recognizing drug transactions, the court upheld the stop.

(6) **U.S. v. Mattarlo**, 191 F.3d 1082 (9th Cir. 1999) Late at night, an officer was on a dark secluded country road and saw a pickup truck in the driveway of a fenced construction storage area, with the gate closed. The truck left the driveway with a three-foot square crate in the back. At that hour there was no business activity. The officer stopped the defendant.

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

See section on Basis for Frisk for other part of Mattarlo case

(7) **U.S. v. Quinn**, 83 F.3d 917 (7th Cir. 1996) An officer saw three men on a street corner in a high drug crime area. Upon seeing the officer, one threw a plastic bag down and they split up and began to walk away. One man went one way and the other two went in the opposite direction. The officer ordered Quinn to stop and saw that he was carrying a leather jacket "wadded up in his arms."

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

The Court held the police action lawful, "the defendant's presence in a high crime area is an insufficient ground (by itself) to stop or search. However, courts may consider the defendant's presence in a high crime area as part of the totality of circumstances confronting the officer at the time of the stop.

DEFINING REASONABLE SUSPICION

(8) **U.S. v. Perrin**, 45 F.3d 869 (4th Cir. 1995) the court held "reasonable suspicion is a less demanding standard than probable cause not only because R/S can be established with information that is less in quantity than that required to show P/C, but also from information that is less reliable than needed for P/C."

(9) U.S. v. Hensley, 105 S.Ct. 675 (1985), is important for at least two points. The United States Supreme Court held that the "fellow officer" rule applies to Terry stops so that the officer actually making the stop could rely on a "wanted for investigation" flier issued by police in another state so long as the issuing police had reasonable suspicion. Also, this case extended the authority to make a Terry stop beyond reasonable suspicion that "criminal activity was afoot" (i.e., a presently occurring crime) to a serious crime (armed robbery) that had occurred weeks earlier.

(10) In **Ornelas v. U.S.**, 116 S.Ct. 1657 (1996) police in Milwaukee who were trained in drug interdiction saw a 1981 Oldsmobile with California plates in a motel parking lot in December. The police checked the registered owner through dispatch and then learned from the DEA that the R/O was in NADDIS (DEA computer) as a "suspected" drug trafficker. Police learned from the motel manager that Ornelas and another man checked in at 4am without reservations. Police also knew that older model GM cars had large spaces in the doors and other locations.

The U.S. Supreme Court said that these facts constituted R/S. The Court said that although the mosaic which is analyzed for R/S or P/C is multi faceted and one determination will seldom be useful precedent for another a court should look at all the precedents in making a decision. The court should determine the "historical facts" (ie: the specific facts of the case) and then make a legal decision as to whether the facts satisfy the constitutional standard.

(11) In **State v. Sonnefeld**, 114 Nev. 631 (1998) the Court ruled that a deputy sheriff had reasonable suspicion sufficient to make investigatory stop of vehicle based on his corroboration of bartender's detailed tip to dispatcher that inebriated customer had left bar and was driving under influence; bartender provided color of car, description of distinguishing roof rack, license plate number, physical description of driver and direction in which vehicle was heading, all of which were confirmed by the officer thereby establishing R/S.

(12) Other Nevada cases are Wright v. State, 88 Nev. 460 (1972), Jackson v. State, 90 Nev. 266 (1974), Nelson v. State, 96 Nev. 363 (1980), and Idelfonso v. State, 88 Nev. 307 (1972). All of these required very little in terms of "articulable facts" to show R/S.

ANONYMOUS AND OTHER TIPS

(13) Alabama v. White, 110 S.Ct. 2412 (1990), held that an anonymous tip that a female would leave a particular apartment complex at a particular time, would drive a certain described car, would go to a certain destination and would be carrying drugs was enough for reasonable suspicion when police corroborated the details of the tip and stopped the car as it neared the destination. It made no difference that all the actions observed by the police were "innocent." Ms. White's subsequent consent to search, which turned up the dope, was not the fruit of an unlawful Terry stop.

(14) In **U.S. v. Price**, 184 F.3d 637 (7th Cir. 1999), the Police received an

anonymous tip stating that a white Mercury Cougar, with a license plate containing the letters "FLJ," would be delivering one kilogram of cocaine to a specific residence in Milwaukee. The tipster told the police that the car had left Sheboygan at about 9:00 p.m. (About 60 miles from Milwaukee.) and also stated that the car would contain two black women, Charlene and Patricia , and one black man named Calvin (also gave last names) Police arrived at the vicinity of the suspect residence in an unmarked car at around 10:45 p.m.. The officers did not verify who lived at the residence, and did not perform record checks of three people named by the tipster.

At approximately 11:20 p.m., a white Mercury Cougar arrived containing two black women and two black men. The driver double-parked the car and left the engine running. The license plate contained the letters "GJL." All four occupants got out and approached the residence. Police stopped them at the sidewalk and indicated that they were investigating a narcotics complaint. Several of the occupants produced ID confirming the names given by the informant. Later, narcotics were found. The Court held that the stop was based on R/S.(Alabama v. White.).

(15) In **U.S. v. Bell**, 183 F.3d 846 (8th Cir. 1999) Police acted on a tip from Ms. Harris, who provided detailed information that criminal activity was afoot.

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

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

INDIVIDUAL SUSPICION

(16) Ybarra v. Illinois, 100 S.Ct. 338 (1979), was a case where police had a search warrant for a tavern and the bartender, based on probable cause, that he was selling drugs at the bar. Police entered the tavern during business hours to serve the search warrant, and patted down the patrons. One of the patrons was Ybarra who had dope in his pocket which was seized. The United States Supreme Court held: illegal search - no reasonable suspicion that Ybarra was engaged in criminal activity and/or that he might have a weapon, just because he was in the bar. Reasonable suspicion and probable cause must be individualized.

(17) A recent case demonstrates the rule that reasonable suspicion must be individualized. The difference was whether the R/S did or did not cover more than one person. In **U.S. v. Johnson**, 170 F.3d 708 (7th Cir. 1999) police were approaching a residence for a "knock and talk." As they arrived, a person exited the residence and was Terry stop detained by police. The detention and pat down were held to be unlawful because there was no individualized suspicion as to that person.

REASONABLE MISTAKE OF FACTS

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

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

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

(19) U.S. v. Alvarez, 899 F.2d 833 (9th Cir. 1990), an unidentified caller told police that tall Hispanic male would rob certain bank within 10 minutes and had explosives in trunk of white Mustang. Police saw white Mustang backed into parking space facing bank with Hispanic driver. Car pulled out when police arrived. Police stopped car and patted down driver. Found gun then searched car and found guns and drugs in trunk. Before trial, caller was identified and it was shown that his "robbery plan" claim was false. Held: police action OK. Even anonymous tip can provide P/C or R/S for Terry stop where police can corroborate all details of tip. Fact that all of suspect's actions were "innocent" makes no difference. **Police didn't know tip was false-police had objectively reasonable articulable basis for stop.**

(20) But - you must be careful about a stop based on wrong information. If the officer's (or police department's) negligence causes or produces the incorrect information which, on the surface, justifies the stop - later on the court will probably say stop is no good. For example: stop no good where police office called in wrong license number, or else dispatcher heard it wrong and told officer plates didn't match. Later determined that plates did match. Evidence from the stop was tainted. United States v. DeLeon-Reyna, 898 F.2d 486 (5th Cir. 1990) - same result in Ott v. State, 600 A.2d 111 (Md. 1992). (Note: this is still true even after the decision in **Arizona v, Evans** (see section on "police mistakes) because there the error was done by the court clerk's office not by the police department).

UNPROVOKED FLIGHT FROM POLICE

(21) In **Illinois v. Wordlaw** (decided January 2000) the majority of the U.S.

Supreme Court held that, although a person standing in an area known for heavy narcotics trafficking, by that fact alone is not subject to a Terry stop. If the person fleas from the police presence without provocation, that person can be Terry stopped. Police did so; did a pat-down because, in the officer's experience it was common for weapons to be around drug transactions, and found a weapon on Wordlaw, which was held admissible.

Two following cases hold that although unprovoked flight from police alone is not enough for R/S, that the flight along with other factors, can support R/S/

(22) State v. Stinnett, 104 Nev. 398 (1988), police were on patrol in area with high incidence of drug crimes and saw several men huddled in front of abandoned residence. One of the group noticed the police, he ran toward the back of the residence chased by the police. A few minutes later, police entered the abandoned home and found suspect huddled in a closet with drugs nearby. Held: The suspect was not detained when he ran from the police. When the suspect was found inside the abandoned house, he was detained, but all the circumstances including his unprovoked flight justified an investigative detention.

(23) In **U.S. v. Jackson**, 175 F.3d 600 (8th Cir. 1999) the Court ruled that It was reasonable for officer to tackle defendant to effect investigative stop when officers were responding to call that shots had been fired at address in high-crime neighborhood, defendant was behind area where shots were fired and nervously began to flee when officers approached in marked squad car, officers noticed that defendant appeared to be clutching something at his side as he ran, and continued to flee after officers announced that they were officers and told defendant to stop.

(4) "PROFILING"

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

1. In United States v. Sokolow, 109 S.Ct. 1581 (1989), DEA agents stopped the suspect at Honolulu Airport because **(1)** he had paid $2,100 cash for airline tickets, **(2)** he traveled under a name that did not match the name under which the phone number he used was listed, **(3)** his destination had been Miami which was a "source city", **(4)** he stayed in Miami only 48 hours, **(5)** he appeared nervous and **(6)** he had no checked luggage. DEA found 1 kilo of cocaine in his carry-on luggage after a trained drug sniffing dog alerted on the luggage and DEA obtained a search warrant. Held: Reasonable suspicion for a Terry stop existed. Although each factor taken alone was insufficient to justify a stop, when taken together they amount to reasonable suspicion. The "profile" factors shown here are "probative" and amount to reasonable suspicion even though none of them are "criminal". The fact that the person fit a "profile" did not in and of itself equal reasonable suspicion.

2. In **Karnes v. Skrutski**, 62 F.3d 485 (3rd Cir. 1995) the Court ruled that "the drug courier profile has little meaning independent of the objective facts" presented by the law enforcement officer as sufficient to demonstrate reasonable suspicion. In other words, the factors that the law enforcement officer uses to establish P/C or R/S must be articulated (ie: specified) based on the circumstances of each case. The profile itself does not provide any additional support for finding P/C or R/S. Same ruling in **U.S. v. Malone**, 886 F.2d 1162 (9th Cir. 1989), **U.S. v. Moore**, 22 F.3d 241 (10th Cir. 1994) and **U.S. v. $53,082 in US Currency**, 985 F.2d 285 (6th Cir. 1993) as well as numerous state supreme court cases.

3. See the section on "Pretext Stops" in this manual. The modern law based on the **Whren** case from the U.S. Supreme Court and **Gama** case from the Nevada Supreme Court make it clear that as long as an officer has any objective basis for making a stop, the officer's internal motives are irrelevant. This means that an officer can make a stop based on a "profile" but only so long as there is some other basis for the stop. There is no longer any such thing as an illegal pretext stop.

4. Use of indicators such as membership in certain racial groups in drug courier profiling has been sharply challenged. "Defendant's nationality (Mexican) and his friends' use of Spanish cannot support reasonable suspicion of smuggling drugs" according to **United States v. Garcia**, 23 F.3d 1331 (8th Cir. 1994).

(5) WHAT FORMS THE BASIS TO FRISK ?

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

1. In **Sibron v. New York**, 392 U.S. 40 (1968) and **Ybarra v. Illinois**, 444 U.S. 85 (1979) the U.S. Supreme Court said that the general rule is that a "frisk" is not always justified because the "stop" is justified. The officer has to be able to point to particular facts that made him think the suspect "may be" armed.

2. In Minnesota v. Dickerson, 113 S.Ct. 2130 (1993), the "plain feel" case, Justice Scalia's concurring opinion makes it clear that the right to "frisk" does not automatically accompany the right to "stop." (This is the opposite of "search incident to arrest" rule which does automatically accompany any lawful custodial arrest.).

3. Adams v. Williams, 407 U.S. 143 (1972), held that where a reliable informant told an officer that a person sitting in a parked car had a concealed weapon. The officer asked the person to step from the car, but instead Adams rolled down the window. The officer reached in the window to his waistband and felt, then seized, a gun. This was enough reasonable suspicion for a stop and frisk.

4. In **U.S. v. Mattarolo**, 191 F.3d 1082 (9th Cir. 1999) the Court ruled that an officer may conduct a limited protective search for concealed weapons if there is a reason to believe the suspect may have a weapon. The officer must choose between being sure that the suspect is not armed and jeopardizing his own safety. An officer making a stop

under the suspicious circumstances of the present case who failed to patdown the suspect for weapons within the limited scope of Terry could be taking substantial and unnecessary risks." Distinguishing an earlier case, the Court that the stop in that case was in a bank parking lot during the daylight hours, not on a remote section of road at midnight. The person stopped was a suspected counterfeiter, not a suspect caught possibly in the act of committing a nighttime burglary and therefore more likely to be armed.

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

5. In **U. S. v. Sinclair**, 983 F.2d 598 (4th Cir. 1993) the Court held that "the officer's reasonable belief may derive as much from his experiences in similar cases as from his knowledge of the dangerous propensities of the suspect at hand."

6. In **U. S. v. Gibson**, 64 F.3d 617 (11th Cir. 1995) the Court said that where the officer had corroborated every item of information from an anonymous tipster about a certain suspect, the officer had reason to believe the tipster's statement that the suspect was armed.

7. In **U.S. v. Taylor**, 162 F.3d 12 (1st Cir. 1998) the Court ruled that Informant's tip that occupants of automobile were in possession of crack cocaine and weapons and were delivering narcotics exhibited sufficient indicia of reliability to justify investigatory stop of automobile and frisk of the occupants; informant had provided reliable information in the past, tip included such details as make and color of car and description of its occupants, and tip was corroborated in significant aspects by the officer.

8. In **U.S. v. Campbell**, 178 F.3d 345 (5th Cir. 1999) the Court ruled it was not unreasonable for police officer to draw his weapon, order armed bank robbery suspect to lie on ground, handcuff suspect with his hands behind his back, and frisk suspect during course of investigatory stop, even though suspect complied with officer's orders and robbery had occurred approximately 30 hours prior to stop; suspect matched description of armed bank robber and he was getting into driver's side of automobile matching description of getaway car, there were other people in area during stop, and there were only three officers to control three suspects.

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

9. **U.S. v. Raymond**, 152 F.3d 309 (4th Cir. 1998) Police stopped a car for speeding. Raymond was a passenger and the police ordered him out of the car. He got out clutching his stomach. The officer patted him down and felt a large disc like object which he thought might be a weapon. It turned out to be a 7" rock cocaine disk. The

court ruled that the circumstances gave rise to an articulable suspicion that he might have been armed with a weapon. There was a reasonable basis for conducting a patdown search based on his strange exit from the car, as if he were attempting to conceal something under his jacket, and the awkward way in which he leaned against the car while talking to police.

10. **U.S. v. Rahman**, 189 F.3d 88 (2d Cir. 1999) the Court held that seizure of forged passports by agents was reasonable, where agents learned that vehicle used in bombing of office building in New York City had been rented by person listing his address as suspect's address, agents obtained warrant to search such address, agents observed suspect returning to the building at accelerated pace when they entered to search, suspect resisted being frisked, and agents felt firm rectangular object in his pocket that they could have reasonably expected was an explosive device, but turned out to be envelope containing passports.

11. **U.S. v. Edwards**, 53 F.3d 616 (3rd Cir. 1995) the Court ruled police were justified in conducting Terry protective patdown for weapons and opening envelope found in pocket of jacket on defendant's lap. Police responded to report of credit card fraud in progress, and were justifiably concerned that small-caliber handgun could be concealed in envelope, which measured four by six inches and felt from outside as if it held hard, bulky object.(found stolen credit cards-OK).

12. **U.S. v. Strahan**, 984 F.2d 155 (6th Cir. 1993) the Court recognized the rule that where an officer is doing a lawful "frisk" and feels an object that reasonably appears to be some sort of weapon, the officer can remove that item, and if it turns out that it was not actually a weapon, but is contraband, the seizure of the contraband is lawful. (Bulge and hard item turned out to be money clip)

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

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

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

14. **U.S. v. Campbell**, 178 F.3d 345 (5th Cir. 1999) Court held removal, during

course of investigatory stop, of contents of suspected armed bank robber's pocket was reasonable and within scope of permissible Terry frisk, where police officer had not ruled out possibility that large bulge, formed by over $1,400 in currency and cardboard box containing gold chain, was a weapon.

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

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

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

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

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

Certain Types of Crime Do Justify an "automatic" Frisk

Many, but not all, courts hold that certain types of criminal activity are commonly associated with weapons, thereby justifying a frisk for weapons if there is reasonable suspicion of that type of criminal activity.

For example, "high level" drug dealing has been viewed this way in the following cases: **U.S. v. Brown**, 903 F.2d 540 (8th Cir. 1990), People v. Lee, 240 Cal. Rptr. 32 (1987), U.S. v. Peay, 885 F.Supp. 1 (DC D.C. 1995), **U. S. v. McMurray**, 34 F.3d 1405

(8th Cir.1994) and **U.S. v. Salas**, 879 F.2d 530 (9th Cir. 1989) **U.S. v. Price**, 184 F.3d 637 (7th Cir.1999).

Violent domestic disputes can qualify, People v. Barber, 537 N.E.2d 1171 (Ill. 1989), State v. Vasquez, 807 P.2d 520 (Ariz. 1991).

Armed robbery: **U.S. v. Abokhi**, 829 F.2d 666 (8th Cir.1987) and **U.S. v. Lang**, 81 F.3d 1405 (8th Cir. 1994).

Burglary: **U.S. v. Walker**, 924 F.2d 1 (1st Cir. 1991), **U.S. v. Moore**, 817 F.2d 1105 (4th Cir. 1987).

(6) "PLAIN FEEL"

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

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

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

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

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

In **State v. Conners**, 116 Nev. ____, 994 P2d 44 (Feb 4, 2000) an officer lawfully stopped and frisked Satan Renee Conners. After ruling out a weapon the officer changed his grip on a pocket to determine what an object was and removed a small vial of methamphetamine. The item was suppressed based upon the Dickerson ruling.

Westlaw computer research discloses that many federal courts have followed the

rule established by Minnesota v. Dickerson and that more than 90% of State Supreme Courts which have dealt with the issue have adopted the same rule.

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

The General Rule

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

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

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

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

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

N.R.S. 171.1231. **Arrest if probable cause appears**. At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for an arrest appears. If, after inquiry into the circumstances which prompted the detention, no probable cause for arrest appears, such person shall be released.

If, in the course of the detention, further information comes to the knowledge of

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

Non-Search Examination

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

This rule was applied in State v. Herbert Wright, 104 Nev. 521 (1988).

Temporary Seizure of Items

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

An officer's removal of a suitcase from a baggage area conveyor belt, squeezing the bag and then sniffing the bag was neither a search **nor a seizure**. **U.S. v. Garcia**, 42 F.3d 604 (10th Cir. 1994) "The temporary moving of unattended luggage from one area of a bus to another to facilitate a dog sniff is not a seizure." **U.S. v. Graham**, 982 F.2d 273 (8th Cir. 1992) "The defendant's only interest was that the airline would place his luggage on the next airplane. The police process of taking the luggage from a cart to an office and having the dog sniff it was completed prior to the time the luggage would have been placed on the airline. There was no seizure of the luggage until after the dog alerted." **U.S. v. Furukawa**, 99 F.3d 1147 (9th Cir.1996) Same result in **U.S. v. Ward**, 144 F.3d 1044 (7th Cir. 1998).

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

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

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

A 39-minute detention of 2 sexual assault suspects, including transportation to a hospital to be viewed by the victim, was valid where based on R/S. At least 25 minutes of the detention was due to completion of the victim's treatment at the hospital before viewing the suspects. Police were acting diligently to pursue a means of investigation, namely, display of the defendants to the victim while her memory was still fresh, which was likely to confirm or dispel their suspicion quickly, and this means of investigation

obviously required the reasonable detention of the defendants." State v. Mitchell, 507 A.2d 1017, Conn.1986).

(8) USE OF WEAPONS OR HANDCUFFS IN DETENTION

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

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

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

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

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

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

In **U.S. v. Navarrete-Baron**, 192 F.3d 786 (8th Cir. 1999) the Court held that

police officers did not exceed scope of Terry stop when they handcuffed occupants of automobile and placed them in separate patrol cars while officers searched automobile; there were two suspects and only two officers at scene, detention did not last for unreasonably long time, and in light of dangerous nature of suspected crime of drug trafficking and good possibility that driver or passenger had weapon, their confinement with handcuffs in back of patrol cars during search was reasonably necessary to maintain status quo, protect officers, and allow them to conduct search immediately and without interference.

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

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

See same case in "protective sweep" section immediately following

(9) EXTENDING THE FRISK TO A RESIDENCE

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

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

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

The Court ruled that the protective sweep exception to the requirement of a search warrant to enter a residence may apply if the arrest occurs outside. "This is not surprising because the distinction is logically unsound. If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect

the reasonableness of the officer's conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room."

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

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

While it is true that the officers could not be certain that a threat existed inside the apartment, this does not impugn the reasonableness of their taking protective action. It is enough that they "have a reasonable basis for believing that their search will reduce the danger of harm...."

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

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

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

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

Other cases also upheld protective sweeps

U. S. v. Richards, 937 F.2d 1287, 1291 (7th Cir.1991) (noting that an "ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings").

U. S. v. James, 40 F.3d 850 (7th Cir.1994) (finding no 4th Amendment violation where officer quickly searched bedroom closet and jacket located therein. Officers had encountered multiple individuals in the dwelling, arrested one suspect just outside the bedroom, and had found a semiautomatic rifle in the bedroom.)

U. S. v. Barker, 27 F.3d 1287 (7th Cir.1994) Held officer had reasonable belief that area swept harbored dangerous individuals because a second officer's prior dealings with defendant indicated that firearms and multiple individuals could be present.

U. S. v. Mendoza-Burciaga, 981 F.2d 192 (5th Cir.1992) noting that officers, who had arrested two narcotics coconspirators in high-speed chase and two more just outside a house, "would be in great danger" if additional armed individuals remained inside the home, and finding that officers' warrantless entry and protective sweep constituted "minimally necessary steps to secure the house" for purposes of ensuring safety and safeguarding evidence.

U. S. v. Kimmons, 965 F.2d 1001(11th Cir.1992) Ok'd sweep in case involving bank robbery conspiracy where two participants were arrested away from the premises and had ordered defendant out of his house and arrested him, but were unsure of the whereabouts of a fourth coconspirator.

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

1. In **Hayes v. Florida**, 470 U.S. 811 (1985) the U.S. Supreme Court said that although there is no "bright line rule" to answer this question, at some point in the investigation police procedures can become so qualitatively and quantitatively intrusive regarding a suspect's freedom of movement and privacy that an "arrest" occurs. The Court said this occurs when the police, without P/C or a warrant, forcibly require a person to go to a police station where he is detained even briefly for investigation.

2. "There is no bright line rule ... therefore whether an arrest has occurred depends on all the circumstances. Pointing a weapon, ordering him to lie on the ground, handcuffing and placing in a police vehicle for a brief period of time either singly or in combination does not always convert a (Terry) stop into an arrest requiring P/C ... police need not use the least intrusive means of responding to an exigent situation ... as long as their actions are reasonable." **Allen v. City of Los Angeles,** 66 F.3d 1052 (9th Cir. 1995). Same rationale in **U.S. v. Torres- Sanchez**, 83 F.3d 1123 (9th Cir. 1996) and **U.S. v. Blackman**, 66 F.3d 1572 (11th Cir. 1995).

3. In **Washington v. Lambert**, 98 F.3d 1181 (9th Cir. 1996) Two black

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

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

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

F. ARREST: THE HIGHEST LEVEL OF CONTACT

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

1. STATUTORY DEFINITION

NRS 171.124 says you can arrest for felony or gross misdemeanor with or without a warrant, day or night, if "reasonable cause" to believe subject has committed a felony or gross misdemeanor.

2. THE U.S. SUPREME COURT CASE LAW

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

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

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

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

3. NEVADA CASES

Probable cause to make a warrantless arrest exists if the facts and circumstances known to the officers at the moment of the arrest would warrant a prudent

man in believing that a felony had been committed by the person arrested. Thomas v. Sheriff, 85 Nev. 551 (1969).

The "probable cause" test is based on the totality of the circumstances known to the officer. Minor v. State, 91 Nev. 456 (1975).

4. STANDARD FOR PROBABLE CAUSE

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

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

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

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

In **Greene v. Reeves**, 830 F.3d 1101 (6th Cir. 1996) police arrested the parents for promoting sexual performances by a minor based on their sending of a postcard with a photograph of the genital area of their unclothed minor daughter. The Court upheld the arrest stating that, " the P/C standard does not mean that the (evidence of the suspected criminal act) is more likely than not."

In **U.S. v. Mathnay**, 895 F.2d 1418 (9th Cir. 1990) "The test for probable cause is whether the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime." A court may consider both the experience and collective knowledge of all officers involved in the investigation and their respective levels of expertise.. A court may also consider any reasonable inferences drawn from the officers' collective knowledge.

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

Note: In Terry v. Ohio, 392 U.S. 1 (1968) the police detective with more than 20 years experience saw Terry and his partners walk from a street corner to look in the front window of a jewelry store without entering to shop about a dozen times in twelve minutes. Even though this action was (superficially) innocent, the Supreme Court agreed that under all the circumstances there was R/S that they were casing the store for an armed robbery.

Although **Terry** involved R/S, **Ocampo** and numerous other cases hold that "obvious criminal" behavior (pointing a gun at a victim)is **not required** for P/C.

5. SOURCES OF PROBABLE CAUSE

Reliable Confidential Informant

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

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

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

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

Defendants always want to know the identity of an informant for obvious reasons

such as threats to make the informant change his story or to lie about information given to police, and sometimes more drastic means. The following cases explain the view of federal courts on the issue of informant disclosure.

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

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

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

Through disclosure of the informer's identity to the trial judge, and such subsequent inquiries by the judge as may be necessary, the Government can be protected from any significant, unnecessary impairment of secrecy, yet the defendant can be saved from what could be serious police misconduct.

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

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

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

In **U.S. v. Hickman**, 151 F.3d 446 (5th Cir. 1998) (Reversed on other grounds in 179 F.3d 230 (5th Cir. 1998), the court held that it was not necessary to disclose the identity of an informant.”This circuit has crafted a three-part test to determine whether disclosure of a (C/I’s) identity is necessary. We examine: 1) the informant's degree of involvement in the crime; 2) the helpfulness of the disclosure to the defense; and 3) the Government's interest in non disclosure. As to the first prong, we have held that mere "tipsters" are not so closely related to a crime as to require the disclosure of their identity.

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

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

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

U.S. v. Fields, 113 F.3d 313 (2d Cir. 1997) Government is not generally required to disclose the identity of (C/I's). Its interest in protecting anonymity of (C/I's) who furnish information regarding violations of law is strong-- withholding a (C/I's) identity improves the chances that the person will continue providing information and encourages potential (C/I's) to aid the government.

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

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

U.S. v. Kime, 99 F.3d 870 (8th Cir. 1996). Kime argues that the disclosure of CI's identity was necessary to test the veracity of his or her information and the quantum of probable cause behind the affidavit offered in support of the application for the interception of wire and oral communications. But Kime offers no basis other than bald speculation for his assertion that such a disclosure and an opportunity to interview CI-1 would allow him to impeach CI-1's affidavit testimony. The movant's burden "requires more than mere speculation that the testimony of the informant might prove to be helpful to the defense."

Information from Victim or Witness

Gates, held that citizen-informant is presumed reliable unlike a criminal CI

In **Easton v. City of Boulder Colorado**, 776 F.2d 1441(10th Cir. 1985)
The Court held that "when examining informant evidence used to support claim of

probable cause for warrant for arrest, or warrantless arrest, skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from criminal milieu, is appropriately relaxed if informant is identified victim or ordinary citizen witness.

Because citizen witnesses are presumptively reliable, the officers in this situation had no duty to examine further the basis of the witness' knowledge or talk with any other witnesses. The proposition that private citizen witnesses or crime victims are presumed reliable does not "dispense with the requirement that the informant ... furnish underlying facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator." (Just as police need to state facts learned by them to justify R/S or P/C)

U.S. v. Butler, 74 F.3d 916 (9th Cir.1996) Court held "you look at the totality of the circumstances to determine P/C. "P/C can be based on hearsay ... or on information relayed through official police channels ... and through the collective knowledge of police officers involved in an investigation even if some of this information was not known by the arresting officer (and) if an unquestionably honest citizen comes forward with a report of criminal activity which if fabricated would subject him to criminal liability we have found rigorous scrutiny of the basis of knowledge unnecessary."

Tangwall v. Stuckey, 135 F.3d 510 (7th Cir. 1998) Court held that "When an officer received his information from some person--normally the putative victim or eye witness--who it seems reasonable to believe is telling the truth,' he has(P/C)." No deep-seated logic or rationale underlies this principle. (P/C) is a common sense determination, measured under a reasonableness standard.

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

Official Channels

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

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

extends the "fellow officer" rule to its fullest.

Personal Observations by police

This is the most common ingredient of probable cause - what you see, hear, smell, feel or taste may give probable cause by itself or as corroboration of information received from informant.

Discrepancy between information received and suspect confronted

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

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

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

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

6. NO NEED TO "PRESERVE" PROBABLE CAUSE

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

"An arrest may be perfectly reasonable even if the police officer ultimately does not charge the suspect with the offense giving rise to the officer's probable cause determination.

7. WHEN WARRANT NEEDED IN ARREST SITUATION

The Supreme Court said in U. S. v. Watson, 423 U.S. 411 (1976), that you don't need an arrest warrant for a lawful arrest in a public place --probable cause is enough, even if you had time to get an arrest warrant. Same ruling in **Florida v. White,** 526 U.S. 559 (1999), **U.S. v. Levine**, 80 F.3d 129 (1996), **U.S. v. Snow**, 82 F.3d 935 (10th Cir.1996), and numerous other cases.

"The Supreme Court has refused to attach significance to the fact that the police had ample time to get an arrest warrant but declined to do so. For an arrest in a public place ... the only requirement is probable cause." **U.S. v. DeMasi**, 40 F.3d 1306 (1st Cir.1994).

There are two situations where a warrant must be obtained in arrest situations (unless police can prove an emergency or consent exception exists) both involving entry into premises to arrest. These are the "**PAYTON RULE**" and the "**STEAGALD RULE**."

(a) DISCUSSION ON PAYTON RULE

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

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

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

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

(1) If police are otherwise lawfully in a person's home, for example, with a search warrant, and probable cause to arrest appears it is OK to arrest without arrest warrant. Mahlberg v. Mentzer, 968 F.2d 772 (8th Cir. 1992), Jones v. City of Denver, 854 F.2d 1206 (10th Cir. 1988).

(2) In People v. White, 512 N.E.2d 677 (Ill. 1987),the court held that whether a

place is "home" depends on things like length of stay, regular use, relationship to other occupants, storing possessions there and payment of rent.

(3) The **Payton** rule can be violated even if police don't physically enter the home, so held in Walters v. State, 106 Nev. 45 (1990). Walters became a suspect in a murder case. The next morning, without obtaining a warrant, police used a helicopter and bullhorn and ordered him out of his home. He complied, was arrested, and was given Miranda warnings and gave an incriminating statement during the 100 mile drive to the police station. The Court held the statement should be suppressed since Walters was technically arrested in his home (by surrounding it with police and ordering him out) without a warrant and the confession was the "fruit" of an illegal warrantless arrest. (Note: This was overruled after the U.S. Supreme Court decision in New York v. Harris, 110 S.Ct. 1640 (1990) holding that even after Payton violation police giving Miranda away from residence or at police station OK's interrogation).

Other courts have ruled the same in "surround" or"bullhorn" cases. U. S. v. Azzawy, 784 F.2d 890 (9th Cir. 1985), U. S. v. Maez, 872 F.2d 1444 (10th Cir. 1989), U. S. v. Morgan, 744 F.2d 1215 (6th Cir. 1984).

(4) The Payton rule applies to the suspect's place of business as well as his home.

(5) Most courts hold in addition to the warrant requirement police also need **"reasonable belief" (not probable cause)** to believe a particular premises is that of the suspect and that the suspect is "home" at the time of police entry. **U.S. v. Risse**, 83 F.2d 212 (8th Cir. 1996)"officers executing an arrest warrant must have a 'reasonable belief that the suspect resides at the place to be entered ... and have reason to believe that the suspect is present' at the time the warrant is executed. The suspect's home means he has common authority or some other significant relationship to the premises even if the premises is owned by a 3rd person" "Reasonable belief" ruling followed in **U.S. v. Lauter**, 57 F.3d 212 (2d Cir.1995) **U.S. v. Magluta**, 44 F.3d 1530(11th Cir.1995)**U.S. v.** Route, 104 F.3d 59(5th Cir.1996).

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

In **United States v. Albrektsen**, 151 F.3d 951 (9th Cir.1998) the court recently cited with approval both **Route** and **Risse** for the proposition that officers executing an arrest warrant must have "some reason to believe that the defendant might live at and be present within the premises" entered, making no mention of any higher standard of knowledge.

(6) No need to have warrant in hand. Whenever possible officers should have a copy of the arrest warrant, but as long as a fellow officer confirms that the written signed

warrant is in existence this is sufficient. **U.S. v. Munoz**, 150 F.3d 401 (5th Cir. 1998).

(7) Misdemeanor warrants. Whenever possible officers should not make a forced home entry to serve a misdemeanor arrest warrant. However, NRS 171.138 appears to contemplate a house entry to make arrest on a misdemeanor warrant. See also, Jones v. State, 513 So. 2d 8 (Ala. 1986), Lyons v. State, 787 P.2d 460 (Okla. 1989). The Nevada Supreme Court implied in Hatley v. State, 100 Nev. 214 (1984), that police could make an in home arrest on a misdemeanor warrant as long as it was not a pretext to gain evidence reference an unrelated felony investigation.

(8) Use of Ruse. NOTE: You cannot use a ruse to gain entry into a premises to avoid the Payton warrant requirement. However, the majority of cases on this issue hold that you can use a ruse to get the subject whom you wish to arrest (without a warrant) to exit the residence.

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

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

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

In **U.S. v. Vasiliavitch**, 919 F. Supp. 1113 (ND Illinois, 1996) The Court held that " courts have found no constitutional violation when police officers use tactics of misinformation to solve crimes. Most prominent is the Supreme Court's 1969 decision in **Frazier v. Cupp**, 394 U.S. 731 (1969) in which Justice Marshall held that an officer's lie to the defendant that his co-conspirator had confessed was insufficient to make an otherwise voluntary confession inadmissible. The ruse at issue in Frazier was substantially more serious in its scope and its consequence than the ruse here. The defendant in Frazier was tricked into making a full confession."

In this case, the officer's use of trickery only obtained Vasiliavitchious' arrest, an inevitable consequence since the officers had probable cause. Unsurprisingly the courts have upheld the use of subterfuge to trick a defendant into leaving his home on many occasions under circumstances very similar to the ones here. **People v. Witherspoon**, 576 N.E.2d 1030, (Illinois, 1991) ("The use of deception to lure a defendant from his home in order to effectuate an arrest without a warrant has been held not to violate fundamental fairness.")

(b) DISCUSSION OF STEAGALD RULE

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

(1) The search warrant will require not only a showing of probable cause that the suspect is inside the third person's residence, but a showing of why it is reasonable to seek the search warrant and make the entry to arrest as opposed to waiting for suspect to depart and arrest elsewhere.

(2) The Steagald rule also applies to business offices and other areas where there is a high reasonable and legitimate expectation of privacy.

Civil Liability

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

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

The U. S. Supreme Court Held: The DA was implementing "official policy." In this case, the DA had the final authority in such matters, therefore, the municipality "officially" sanctioned the unconstitutional and tortious conduct. Therefore, the County is liable. (Important note: County and police policy usually resulted in District Attorney making these decisions and a state law granted the District Attorney the authority to give such legal instructions.)

G. PRETEXT ARREST

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

Since the United States Supreme Court in **Whren v. U.S.**, 166 S.Ct. 1769 (1996) and the Nevada Supreme Court in **Gama v. State**, 920 P.2d 1010 (1996) have adopted the "no such thing as pretext" rule for stops, the status of the rule for arrests is unclear. The Court's decisions say that a police officer's motive or subjective thoughts are irrelevant if the officer has a legal basis **for the stop**.

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

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

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

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

In **U. S. v. Willis**, 61 F.3d 526 (7th Cir. 1995) the court said that if an arrest is used merely as a pretext to search for evidence, there is a 4th Amendment violation.

In **Terrell v. Petrie**, 763 F. Supp. 1342 (ED Virginia, 1991)The Court held that, "It is clearly established that an arrest effected as a pretext for an otherwise unlawful search is constitutionally defective."

The arrest was ostensibly based upon a state-issued warrant for failure to pay $60 in court costs in 1982. Plaintiff, who works for the IRS claims the arrest was a pretext to search for illegal drugs. IRS employees who conducted the search or were supervisors, conceded that they suspected Terrell of drug activity. This court finds the arrest to be

pretextual in violation of the 4th Amendment.

In **Hatley v. State**, 100 Nev. 214 (1984) the defendant was arrested on a misdemeanor bench warrant. He claimed that the police were nevertheless using it as an impermissible "pretext" to arrest appellant on the burglary charge. " This contention, if true, would at least arguably entitle appellant to relief." See **Taglavore v. U.S.**, 291 F.2d 262, 265 (9th Cir.1961) (where police officers use misdemeanor warrant as a pretext to arrest a defendant for a felony narcotics offense and to search the defendant for narcotics, both the arrest and the ensuing search are illegal).

In **U.S. v. Hudson**, 100 F.3d 1409 (9th Cir. 1996) the Court stated: An arrest may not be used as a pretext to search for evidence without a search warrant which would ordinarily be required by the 4th amendment, but went on to uphold a felony arrest with an arrest warrant at a residence where the federal police thought that the arrestee might have contraband. In making the arrest, federal police did a search incident to arrest, found some methamphetamine and a gun, got a search warrant and obtained more contraband and evidence.

This case is an example of the confusion that presently exists concerning pretext arrests.

In **United States v. Causey**, 834 F.2d 1179 (5th Cir. 1987) police suspected Causey in a bank robbery but had no P/C to arrest and question him on that case. Police did have a bench warrant for his FTA on a petit larceny charge and arrested him on that. He was Mirandized and confessed to the robbery.

The Court said that decisions of the U.S. Supreme Court make it clear that the officer's subjective intent or motivation is irrelevant. What counts is whether there was an objective basis for the officer's actions.

In **United States v. Trigg**, 878 F.2d 1037 (7th Cir.1989), the Court concluded. "We believe that the reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is reasonable under the Fourth Amendment. In other words: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional. Same ruling in **U.S. v. Kordosky**, 878 F.2d 991 (7th Cir. 1991)

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

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

V

OTHER FOURTH AMENDMENT INTRUSIONS (SEARCH & ENTRIES)

A. SEARCH INCIDENT TO ARREST "SITA"

(1) In General

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

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

In **United States v. Robinson**, 414 U.S. 218 (1979) The Court said all custodial arrests from murder to traffic violations are equal in justifying SITA.

(2) Scope of SITA

Since the SITA is automatic with a lawful custodial arrest, the legal issues in this area all involve the scope of the SITA. How soon must it occur? How far can it go in terms of area and intrusion? The following cases provide some guidelines but officers should realize that the more (1) time goes by and (2) the further away from the exact place of the arrest and (3) the harder it would be for the arrestee to get into the area searched, the less likely it will be a valid SITA.

(a) Time

The general rule is that the SITA must be "contemporaneous" with the arrest. It is axiomatic that a SITA cannot precede an arrest in providing the justification for the arrest, but if the justification exists already (ie - police had P/C before the SITA) then the fact that the formal arrest immediately followed the SITA made no difference. **Rawlings v. Kentucky**, 448 U.S. 98 (1980).

Although the search must be contemporaneous, courts provide police a brief cushion of time until they have gained complete control of the situation. **U.S. v. $639,558 in U.S. Currency**, 955 F.2d 712 (D.C. Cir. 1992) There is no prohibition against a reasonable delay between the elimination of danger and the search. **U.S. v. Han**, 74 F.3d 537(4th Cir. 1996) A search incident to arrest must be contemporaneous but not necessarily immediate. **U.S. v. Willis**, 37 F.3d 313 (7th Cir. 1994).(Different

person from U.S. v. Willis in pretext arrest).

In **U.S. v. Johnson**, 114 F.3d 435 (4th Cir. 1997)Applying **Han** to the facts at hand, no doubt exists that the car was within Johnson's immediate control at the beginning of his encounter with the officers; the search was conducted at the scene of the arrest, after the officers moved the car to the front of the shopping center mall into a better lighted area; and the delay between the elimination of the danger--Johnson-- and the search was not unreasonable.

(b) Place searched

In **Chimel v. California**, 395 U.S. 752(1969) the U.S. Supreme Court held that police could not search areas inside a house outside the immediate control of the suspect at the time of the lawful arrest. Police are not allowed to simulate circumstances justifying a SITA merely by bringing the item they wish to search into the area near the person arrested or vice versa. **U.S. v. Perea**, 986 F.2d 633 (2d Cir. 1993) However, if the suspect voluntarily asks to move about his premises (to get a coat or other clothes, etc.), the officer can monitor the arrestee's movements and SITA may be valid at another location. **Washington v. Chrisman**, 455 U.S. 1 (1982).

Items "immediately associated with the person" can be searched incident to the arrest of the person including a woman's shoulder bag regardless of whether on her shoulder or on the ground a few feet away. U.S. v. Nelson, 102 F.3d 1344 (4th Cir. 1996) In **U.S. v. Cotnam**, 88 F.3d 487 (7th Cir. 1996) OK to search arrestee's jacket laying a few feet away at arrest. **U.S. v. Ortiz**, 84 F.3d 977 (7th Cir. 1996) OK to push button on pager found on defendant at time of arrest revealing numeric messages.

Some courts allow a SITA of a locked area or container, **U.S. v. Gonzales**, 71 F.3d 819 (11th Cir.1996) and **Clemons** v. **U.S.**, 72 F.3d 128 (4th Cir. 1995). However, if the arrestee is handcuffed and in police custody and has no chance of unlocking and opening the container, it seems that searches of locked containers require a search warrant or other exception.(such as inventory search or consent).

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

(c) Arrestee Handcuffed

Every case decided in SITA law says that it makes no difference that the person was in handcuffs at the time of the SITA as long as the other SITA requirements are met. **Chimel v. California**, **United States v. Helmsetter**, 56 F. 3d 21 (5th Cir.1995) (See cases above).

(d) Automobiles:

See section on automobile stops and searches in this manual

B. INVENTORY SEARCH

(1) In General

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

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

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

Illinois v. Lafayette, 103 S.Ct. 2605 (1983), suspect arrested and in station house search, drugs found in bag he was carrying at time of arrest. Court ruled search OK. Even though the police could use less intrusive means - i.e. - put the whole bag in inventory without checking contents, police don't have to do so and have legitimate reasons to do thorough inventory search.

In **U.S. v. Jenkins**, 876 F.2d 1985 (2nd Cir. 1989) It is true, assuming that the government could have taken custody of Jenkins' suitcase and transported it to FBI headquarters, that an inventory search, conducted by government agents pursuant to FBI policy, may have been permissible. It is also true that, before an inventory search is permissible, the government must have legitimate custody of the property to be inventoried, either as a result of lawful arrest, or by some other method. Here the government has not yet shown any legitimate custody.

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

In **U.S. v. McCroy**, 102 F.3d 239 (6th Cir. 1996) Although defendant's wallet was originally examined when the suspect was arrested, the pawn shop tickets that led to the stolen rifle were uncovered during an inventory search at the police station. The rationale justifying an inventory search differs somewhat from a search incident to arrest, but it too falls outside the warrant requirement:

It is not unheard of for persons employed in police activities to steal property taken from arrested persons; also arrested persons sometimes make false claims regarding what was taken from their possession at the station house....

Examining all items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure.

Even though he was never "jailed"but was issued a citation and released. It was by no means certain that defendant would be released with a citation.

(2) Standard Police Policy Required

Colorado v. Bertine, 207 S.Ct. 738 (1987), police arrested suspect for DUI and impounded car. Searched car for inventory including closed backpack where they found drugs. Held: opening of closed container OK as part of automobile inventory search. This decision presupposed the existence of an established police "SOP."

Florida v. Wells, 110 S.Ct. 1632 (1990), Florida State Trooper stopped person for speeding then arrested for DUI. Car towed and impounded. Locked suitcase in trunk was forced open and found to contain large amount of marijuana. Held: evidence suppressed. Police department must have a standard policy regarding opening of containers and conducting an inventory search. This is because an inventory search must not be a ruse for general search for evidence. If the police agency does not have a standard policy (the Florida Highway Patrol did not), the officer has too much discretion and the 4th Amendment is violated.

In **State v. Filkin**, 494 N.W.2d 544 (Neb. 1993) Filkin was lawfully arrested by police. She had her purse with her when transported to the jail. The standard operating procedure at the Hall County jail was to inventory property "to see that there are no contraband objects, and, also, for an accurate record for when that prisoner is released, so that the prisoner gets everything back that they brought in with them." The drugs found in her purse are admissible. Same ruling in **U.S. v. Akins**, 995 F. Supp. 797 (MD Tenn. 1998).

C. CONSENT SEARCH

(1) In General

A legal consent search occurs when a person **who has or shares an expectation of privacy** in a place, vehicle, container or other location **freely and voluntarily** allows someone else (police) to intrude into that place. Police do not need P/C or R/S to initiate a request for consent, but the person consenting does have to be told what the object of the search is. The consent does not have to be in writing. Since a consent search is warrantless, the burden is on the police and DA to show that it is valid

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

(2) Freely and Voluntarily Given

Although in most 4th Amendment situations, an "objective" test is used to determine the legality of police actions, in consent searches the test has both "objective" and "subjective" factors. The U.S. Supreme Court has said that whether consent is voluntary depends on the "totality of the circumstances" of the police-citizen encounter in which consent is given. **Schneckloth v. Bustamonte**, 412 U.S. 218 (1973). The "totality" involves things the police do (objective factors) and things about the person consenting (subjective factors.).

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

U.S. v. Torrez-Sanchez, 83 F.3d 1123 (9th Cir. 1996) "The factors to be considered are (1) whether he was in custody, (2) whether the officer had his gun drawn, (3) whether Miranda warnings were given, (4) whether he was told he had a right not to consent and (5) whether he was told a search warrant could be obtained.

U.S. v. Tompkins, 130 F.3d 117 (5th Cir. 1997)Voluntariness of consent to search is determined from totality of circumstances surrounding search; relevant, though not dispositive, factors include (1) The degree of defendant's custodial status, (2) presence of coercive police procedures,(3) extent and level of cooperation with police,(4) awareness of his right to refuse to consent, (5) education and intelligence,

U.S. v. Crowder, 62 F.3d 782 (6th Cir. 1995)"Circumstances include (1) evidence of minimal schooling, (2) low intelligence, (3) whether he was warned of his rights, (4) his age, (5) length of detention, (6) whether there was repeated and prolonged questioning and (7) notification that the results of the search could be used against him. His knowledge to refuse consent is only one factor and not dispositive."Same ruling in **U.S. v. Navarro**, 90 F.3d 1245(7th Cir.1996).

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

In **U.S. v. Dukes**, 139 F.3d 469 (5th Cir. 1998) The court held that Dukes was able to consent, but said that " In order to give valid consent, the person consenting to the recording of his conversations must be mentally competent to understand the nature of his act. Also, the act of consent must be a consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions." Same ruling in **U.S. v. Gipp**, 147 F.3d 680 (8th Cir. 1998)(moderate use of drugs and intoxication not enough to invalidate consent).

U.S. v. McIntyre, 997 F.2d 687(10th Cir.1993) Def's consent to search airplane

carry-on bag was voluntary , despite fact that (1) he was not told that he needed to consent to search and (2) that he claimed to have below average intelligence; not being told that he need not consent was only one factor Not clear that police knew or should have known about alleged mental deficiencies. Circumstances indicated to the contrary since he was capable of giving and traveling under assumed name and was capable of running large drug operation.

(3) Specific Factors Concerning Voluntariness

(a) Police do not need P/C or R/S to initiate consent request

This was the holding of the following cases: **McIntosh v. State**, 753 S.W. 2d 273 (Ark. 1988), **State v. Allen**, 603 A.2d 71 (1992), **State v. Everson**, 474 N.W. 2d 695 (N.D. 1991), **State v. Abreau**, 608 A.2d 986 (N.J. 1992), **State v. Dreps**, 558 N.W.2d 339 (South Dak. 1996) and most importantly, the Nevada Supreme Court so held in **State v. Burkholder**, 112 Nev. 535 (1996).

(b) Police don't have to tell person he can refuse consent.

This was the direct holding of the U.S. Supreme Court in **Schneckloth** and also of the Nevada Supreme Court in **State v. Burkholder** and Stevenson v. State, 114 Nev. 674, 961 P.2d 137 (1998).

(c) Mention of "search warrant" may weigh slightly against consent but is not fatal unless there is no P/C to justify the possibility of S/W.

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

(1)If police don't have or are unsure of P/C, police should never mention S/W to the consent giver. If the consent giver brings up the S/W question and there is no P/C (or the police are unsure of P/C) don't say that if the person doesn't consent, the police will get a search warrant. If there is not previously documented P/C the consent will be held invalid. Police can say that they may "ask," "seek" or "request a judge" for a S/W." **State v. Cuellar**, 96 Nev. 68 (1980), **U.S. v. White**, 979 F.2d 539 (7th Cir. 1992) and **U.S. v. Iglesias**, 881 F.2d 1519 (9th Cir. 1989).

(2)If there actually was independent P/C which would have supported a S/W, the vast majority of courts hold that police telling the consent giver that a S/W can be obtained does not negate consent (as long as the other police conduct and statements are non-coercive).

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

In **U.S. v. Sheets**, 188 F.3d 829 (7th Cir. 1999) As we made clear "when the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission, it does not vitiate consent." In the present case, agent Brown not only expressed a genuine intent to obtain a warrant to Sheets, he actually made the necessary arrangements and had to cancel these arrangements after Sheets consented to the search.

U. S. v. Talkington, 843 F.2d 1041 (7th Cir.1988)) The agent notifying a person that a warrant can be obtained does not render consent involuntary unless the threat to obtain a warrant is baseless. **U. S. v. Dennis**, 625 F.2d 782 (8th Cir.1980); **U. S. v. Vasquez**, 638 F.2d 507 (2d Cir.1980).

U. S. v. Kaplan, 895 F.2d 618 (9th Cir.1990)("consent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant **if the officer had probable cause upon which a warrant could issue**").

In **U.S. v. Evans**, 27 F.3d 1219 (7th Cir. 1994)The consent is not tainted because the agents informed Glenn that they would obtain a search warrant if Glenn would not consent to a search. Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but when the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission, it does not vitiate consent. When the agents informed Evans that they could get a search warrant, they had sufficient facts to obtain a S/W.

In **U.S. v. Salvo**, 133 F.3d 1943 (6th Cir. 1998) The court held that as long as police have P/C to obtain a S/W, the fact that they tell a consent giver that they can obtain a S/W does not invalidate the consent..Same ruling **U. S. v. Hummer**, 916 F.2d 186 (4th Cir.1990), **U. S. v. Vasquez**, 638 F.2d 507(2nd Cir.1980) **U. S. v. Dennis**, 625 F.2d 782 (8th Cir.1980).

(d) Mere submission to police does not equal consent

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

United States v. Gonzales, 71 F.3d 819 (11th Cir.1996) "For consent to be voluntary it must be the product of free and unrestrained choice. Consent does not exist simply because a person (a) knows police will make a privacy intrusion if he does a certain thing and then (b) proceeds to do that thing. Failure to object to a search does not equal consent. Courts are hesitant to find implied consent by silence especially in entry into the home." Same ruling in **U.S. v. Jaras**, 86 F.3d 383(5th Cir. 1996)

U.S. v. Shaibu, 895 F.2d 1291 (9th Cir. 1990) "Police went to defendant's apartment to arrest him. They knocked on the door and when defendant opened the door he stepped out in the hallway where the officers identified themselves ... then he walked back into his apartment, leaving the door open, without saying a word. While it is sometimes possible to infer consent from a cooperative attitude ... there was no consent here because police did not request to enter and defendant did not (expressly) consent.

In **Howe v. State**, 112 Nev. 458 (1996) police suspected Howe of possession of marijuana and knocked on his door. Howe opened the door and was very nervous when officers identified themselves and told him why they were there. He said, "I'm not a

dope dealer and don't do dope." Police smelled burning marijuana and asked for permission to enter. Howe said, " No, no," and stepped aside in the doorway. The Nevada Supreme Court said there was no consent to enter, stating that even if Howe had not said "no" that stepping away from the doorway, without more, does not demonstrate consent. (Note: see the **Howe** case in the Emergency section. No emergency entry.).

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

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

A person who is in custody can give valid consent, and although no single factor is dispositive, Miranda warnings have some significance in determining voluntariness in a custodial setting.

It is important to note that no Federal Court has held that **Miranda warnings to a person in arrest level custody are required to make the arrestee's consent valid. U.S. v. Forbes**, 181 F.3d 1 (1st Cir. 1999) **U.S. v. Oguns**, 921 F.2d 442 (2d Cir. 1990)**, U.S. v. Blakeney**, 942 F.2d 1001 (6th Cir. 1991), **U.S. v. Valencia**, 913 F.2d 378 (7th Cir. 1990), **U.S. v. Knight**, 58 F.3d 397 (8th Cir. 1995).

Also, if a person has been arrested and given Miranda warnings and asked for a lawyer (or chose to remain silent) this does not preclude the police from asking the arrestee for consent to search. Although a few states (Oklahoma & New York) reached a different view which misunderstands the difference between interrogation and asking for consent to search, all Federal Circuit Courts and the majority of state courts agree that police asking for consent to search is not interrogation.

U.S. v. Henley, 984 F.2d 1040 (9th Cir. 1993) Court held that "While he was not advised of his rights before consenting to the search, a valid consent to search need not be preceded by Miranda warnings. The mere act of consenting to a search--"Yes, you may search my car"-- does not incriminate a defendant, even though the derivative evidence uncovered may itself be highly incriminating." Therefore, we have held that "a consent to a search is not the type of incriminating statement toward which the Fifth Amendment is directed. It is not in itself 'evidence of a testimonial or communicative nature.

U.S. v. Shlater, 85 F.3d 1251 (7th Cir. 1996) The defendant was arrested, given Miranda warnings, and requested a lawyer. Police then asked him for, and received, consent to search his residence. The Court ruled " we have held that a consent to search is not a self-incriminating statement nor an interrogation within the meaning of Miranda." This view comports with the view taken by every court of appeals to have addressed the issue. Thus we hold that the consent to search was not a custodial interrogation triggering the previously invoked Miranda right to counsel. Same ruling **U.S. v. McClellan**, 165 F.3d 535 (7th Cir. 1999), **U.S. v. Gonzalez**, 151 F.3d 1030 (4th Cir. 1998) and **U.S. v. Hidalgo**, 7 F.3d 1566 (11th Cir. 1993)

(f) Use of tricks or deceit usually eliminates consent

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

Deceit as to identity usually has no effect on the validity of consent. This was the specific holding of the U.S. Supreme Court in **Lewis v. U.S.**, 385 U.S. 206 (1966) where

the defendant invited an undercover police officer into his residence to sell the officer drugs. The Court stressed that the defendant voluntarily admitted the officer and the officer acted within the scope of the invitation."

U.S. v. Bramble, 103 F.3d 1475 (9th Cir. 1996)Court rejected defendant's claim that in inviting strangers into his home to engage in illegal activity, he may condition his consent to entry on them not being law enforcement officers. Adoption of such a rule would mean the end of undercover work. The agents did not misrepresent the "scope, nature or purpose of the investigation," or conduct a search that went beyond the scope of the consent to entry. They stayed in the area where Bramble had invited them. After identifying themselves, they did not leave that area or conduct any search until Bramble had given his consent for them to do so.

The warrantless entry of the uniformed officers did not invalidate his later consent to search. Where an undercover agent is invited into a home, establishes the existence of(P/C) to arrest or search, and immediately summons help from other officers, entry of the other officers does not violate the 4th Amendment

(Same ruling: **U.S. v. Akinsanya**, 53 F.3d 852 (7th Cir. 1995)

When entering pursuant to the suspect's "consent once removed,(meaning that the U/C officer can allow police to enter to assist)"the additional backup officers are restricted to the scope of the consent originally given. Our holding does not authorize police to go beyond those areas consented to or to conduct general searches without first satisfying the ordinary requirements of consent, a warrant, or exigent circumstances which excuse the failure to obtain a warrant.

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

Undercover police entered and were escorted around a fraternity house falsely claiming an interest in joining and saw contraband in plain view. Court said no consent. **State v. Pi Kappa Alpha Fraternity**, 491 N.E.2d 1129 (Ohio 1986)

Where an undercover officer used a ruse of car trouble and request to use a phone and then was invited in and saw drugs in plain view, the court held no consent in **State v. Ahart**, 324 N.W.2d 317 (Iowa, 1982). Same ruling in **People v. Catania**, 366 N.W.2d 38 (Mich. 1985) and **State v. McCrorey**, 851 P.2d 1234 (Wash. 1993)

Same result occurred when police got consent to search for guns but really wanted to search for drugs in **State v. Schweich**, 414 N.W.2d 528 (Minn. 1987) In **State v. Hickson**, 590 N.E.2d 779 (Ohio 1990) police misrepresented to occupant why they wanted to enter his residence to look out a window.

(4) Quick Checklist for Consent

THINGS THAT HELP CONSENT WORK

1. Telling person they don't have to allow search.
2. Telling person what you are searching for
3. Fewer officers
4. Plain clothes
5. No weapons displayed
6. No trickery such as hinting "no prosecution."

7. Relatively short contact before consent given
8. Friendly tone of voice, not threatening or commanding.
9. Giving Miranda warnings (especially if person in custody)
10. All factors about person giving consent such as: age, experience with the police, physical and mental condition, fluency in English.

THINGS THAT HURT CONSENT

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

(5) "Third Party" Consent

(a) In General

Consent to search may be given by a third party who actually (or reasonably appears to police to) shares access, control, use and authority over the area or item to be searched. The basic U.S. Supreme Court case which says this is **U.S. v. Matlock** , 415 U.S. 164 (1974) where the wife gave police consent to search the house where she resided with her husband. It is crucial to understand that "legal property rights" such as ownership in most cases have little or nothing to do with whether a third party can give consent. The U.S. Supreme Court said so in **Stoner v. Calif.**, 376 U.S. 483 (1964) where police got consent from hotel management to search a guest's room (ruled invalid) and in **Chapman v. U.S.**, 365 U.S. 610 (1961) involving a landlord's consent to search a tenant's room. **The third party giving consent must share the expectation of privacy on which police want to intrude.**

In **U.S. v. Brown**, 961 F.2d 1039 (2d Cir. 1992), the officer concluded that because the landlord Davis was authorized to enter Brown's apartment when necessary to turn off electrical appliances or lights, she could consent to a search of his apartment. Although the facts presented to the officer were true, there was a misapprehension of the applicable rule of law. Nor are we aware of any legal basis for the conclusion that Davis could authorize "a limited entry for the purpose of retrieving a firearm, although not "a thorough search." We conclude that the motion to suppress the Uzi found should have been granted.

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

police (either actual or apparent) permission to search it.

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

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

(b) Factors used to determine ability of 3rd party to give consent

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

"A third party has actual authority when he has mutual use and joint access or control for most purposes." **U.S. v. Dearing**, 9 F.3d 1428 (9th Cir. 1993)

A parent can consent to a search of a child's room, not just because of the adult parent-minor child relationship but if the parent has regular access to that room. **State v. Summers**, 764 P.2d 250 (Wash. 1988).

Contrary to common mythology, a child (of sufficient age) can give consent to enter the parent's house, but police held to higher standard (see "Things that help consent" in this outline.) **Pesterfield v. Comm.**, 399 N.W.2d 605 (Minn. 1987) and **U.S. v. Clutter**, 914 F.2d 775 (6th Cir. 1990) involving consent by 12 and 14 year old children.

In **U.S. v. Guiterrez-Hermosillo**, 142 F.3d 1225 (10th Cir. 1998) The Court held that a 14 year old minor who shared expectation of privacy in a motel room could consent police to search. Same result in **Lenz v. Winburn**, 51 F.3d 1540(11th Cir.1995) held that minors do have the capacity to give consent because: the "compromise of the expectation of privacy is no less the case for a minor co-occupant than for an adult."

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

In **State v. Taylor**, 114 Nev. 1071 (1998), the court ruled that actual authority does not require an ownership interest in the property by a 3rd party and does not require the owner's presence at the time of the consent search. Taylor's traveling companion had

actual authority to consent to the police search of his suitcase even though she told police the suitcase belonged to him and it had his name on the tag. He entrusted the suitcase to her under circumstances where he understood a high risk that police might ask her for consent to search. Whether a person has apparent authority to consent is based upon an objective standard: Would facts known to the officer at that moment OK a person of reasonable caution to believe that the consenting party had authority over the property.

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

The U. S. Supreme Court has not specifically decided this issue but the large majority of courts say that consent can be given by one person with joint expectation of privacy even if the other says "No" (or remains silent).

U.S. v. Mourning, 64 F.3d 531 (9th Cir. 1995) "The primary factor is the defendant's reasonable expectation of privacy under the circumstances. Those expectations must include the risk that the co-occupant will allow someone to enter, even if the defendant does not approve the entry. A defendant cannot expect sole exclusionary authority unless he lives alone or has a special and private place within the residence. Same ruling in **U.S. v. Flores**, 172 F.3d 695, (9th Cir. 1999), **Lenz v. Winburn**, 51 F.3d 1540 (11th Cir.1995), **U. S. v. Donlin**, 982 F.2d 31 (1st Cir.1992), **U. S. v. Bradley**, 869 F.2d 417 (8th Cir.1989) and **U.S. v. Rith**, 164 F.3d 1323 (10th Cir. 1999).

U.S. v Duran, 957 F.2d 499 (7th Cir. 1992) Testimony by defendant's wife that she did not have access to farmhouse on property but that she could have gone into it, although she never wanted to, demonstrated that she was not denied access to the farmhouse and thus had authority to consent to its search.

(d) "Apparent authority"

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

"The existence of apparent authority has a three-part analysis. (1) did the officer believe some untrue fact that was used to assess the consent giver's use, access and control, (2) was it objectively reasonable for the officer to believe that it was true and (3) if it was true would the consent giver have had actual authority." **U.S. v. Dearing**, 9 F.3d 428 (9th Cir. 1993).

An essential part of any "apparent authority" case is that the police officers ask enough questions prior to obtaining consent so that they have enough information to support their "reasonable belief." If officers rely on assumptions instead of asking questions, a court is unlikely to find "apparent authority." **U.S. v. Whitfield**, 939 F.2d 1071 (D.C. Cir. 1991) and **U.S. v. Rosario**, 962 F.2d 733 (7th Cir. 1992) See also the dissent in **State v. Miller**, 110 Nev. (1994)which would likely be the majority view in a future case.

(6) Scope of the Consent

Florida v. Jimino, 500 U.S. 248 (1991). If the nature of the items searched for is disclosed by police and the consenting party does not expressly limit the area of the search, then the officers can search any part of the premises, car or place consented to which a reasonable person would think could contain the object of the search. **U.S. v. Cannon**, 29 F.3d 472 (9th Cir. 1994) "The standard for measuring the scope of consent is that of objective reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect."

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

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

In **U.S. v. Maldonado,** 38 F.3d 936 (7th Cir. 1994) DEA agents did a consensual contact with defendant at a train station and told him they were looking for narcotics. He consented. Inside the luggage DEA found some boxes closed with tape which they opened and found drugs. The Court upheld the consent search. Consent to search luggage validates the search both of the luggage and of containers within the luggage. Other circuits have since addressed this issue in light of Jimeno. **U. S. v. Kim**, 27 F.3d 947 (3rd Cir.1994) (holding that suspect's general consent to search his luggage covered the search of sealed can of vegetable protein found inside his luggage); **U. S v. Springs**, 936 F.2d 1330 (D.C. Cir.1991) (holding that suspect's consent to the search of her tote bag extended to the search of a closed baby powder container found within the bag).

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

(7) Burden of Proof

"The burden of proving consent rests with the state. Clear and persuasive evidence is required... A court must distinguish between peaceful submission to the authority of a law enforcement officer and an intentional waiver of a constitutional right." **Alejandre v. State**, 111 Nev. 1235 (1995) (Overruled on other grounds by **Gama**). "The

state bears the burden of proving consent by clear and persuasive evidence." **Howe v. State**, 112 Nev. 458 (1996).

D. PLAIN VIEW

Any item is in "plain view" at the time it is seized, so when does the "plain view" rule allow seizure of an item without having a warrant? The answer is that "plain view" is a legal doctrine that allows warrantless **seizures** of items, not warrantless searches.

Three Requirements for plain-view seizure

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

(1) Officer Legally Positioned

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

It is important to remember that the 4th Amendment **prohibits general curiosity satisfying ("let's see what we have here")** types of searches. Therefore, while "plain view" seizures of evidence are recognized as an exception to the basic search warrant requirement, **any item is in "plain view" at the time police seize it**. Let's examine what makes up a lawful "plain view" seizure.

(2) Immediately Apparent

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

The U.S. Supreme Court took a narrow view of this requirement in the case of **Arizona v. Hicks**, 480 U.S. 321 (1987). A bullet was fired through the floor of an apartment, hitting a person in the apartment below. Police arrived and lawfully entered the suspect apartment without a warrant due to the emergency. Police were looking for the shooter, weapons and other victims. Police found and seized some firearms. While

there, police noticed two sets of very expensive stereo components which seemed out of place in the squalid slum apartment. The officers lifted, turned and examined the stereo items and obtained the serial numbers, then called them in and learned that they were stolen. Court held that the distinction between "looking" at a suspicious object and "moving it even a few inches" to examine it constituted an additional and unlawful "search" under the 4th Amendment **because this action was not related to the scope of the initial "lawful" search**. A plain view seizure required that **probable cause**, not just reasonable suspicion, and must appear immediately. "Immediately" means "not involving an additional search."

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

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

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

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

U. S. v. Del Vizo, 918 F.2d 821 (9th Cir.1990) ("plastic bags with packages inside" were sufficient to suspect cocaine); **U. S.v. Oswald**, 441 F.2d 44(9th

Cir.1971) ("a package wrapped in red and blue paper" was sufficient to suspect a kilo brick of marijuana); **U.S. V. Yoon**, 751 F.Supp. 161 (D.Haw.1989) (folded and taped white business envelope sufficient to suspect PCP).

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

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

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

(3) No Substantial Additional Intrusion on Privacy

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

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

For example, if a S/W allows search for stolen video equipment, plain view does not apply if an officer opens a small jewelry box and finds drugs. Same ruling in consent to search . . . search limited by the size of the object(s) of the consent.

In the case of **Horton v. California**, 110 S.Ct. 2301 (1990) police got a S/W to search Horton's home for proceeds of an armed robbery. Although the S/W affidavit

talked about the weapons and other instruments of the crime, the S/W did not authorize seizure of those items. While executing the S/W, police saw and seized an Uzi, a .38 revolver, handcuff key, stun gun and clothing matching that worn by one of the suspects. The U.S. Supreme Court said that this seizure was lawful under plain view. The major holding of this case was that **a valid plain view seizure does not need to be inadvertent.** ("Gosh, I never expected to find that here.")

The Court went on to say that a S/W that specifically describes the place to be searched and items to be seized adequately limits the area and duration of the intrusion by police. In the Horton case, the scope of the search (looking for jewelry and other small items) was not enlarged by police (i.e.,: they could look anywhere in the house for these items) and therefor no additional intrusion on privacy occurred when the instrumentalities were observed and seized.

"It no longer matters after **Horton** that the invited-along officer was looking for what he found which was not described in the warrant. What matters is whether officers looked in places or ways not permitted by the warrant. That the officer invited along has special expertise which makes it immediately apparent to him that objects in plain view are evidence of a crime does not establish that the search went beyond the scope of the warrant." **U.S. v. Ewain**, 78 F.3d 466 (9th Cir. 1996)

(4) Related Matters

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

(5) Nevada Cases

In **Koza v. State**, 100 Nev. 256 (1984) police entered a motel room under emergency circumstances having probable cause to believe that two or more armed robbers/murderers were inside. After arresting the occupants, one detective saw a piece of chrome metal sticking out between the mattress and bed. He was aware that the arrested persons had been armed and that no guns were found in the search incident to arrest. The chrome he could see looked like part of a gun. The court said, "plain view seizure OK." The officer did not have to know for sure that it was a gun and all the facts here showed P/C that it was and the officer could seize it.

In **Bennett v. State**, 106 Nev. 1015 (1990) police were searching a murder suspect's house authorized by consent of a co-occupant and also by a search warrant. Police were looking for clothing and in the suspect's bedroom they saw papers containing poetry dealing with death and killing. The Court upheld the seizure of the writings under the plain view doctrine.

E. ADMINISTRATIVE SEARCHES

Inspections which are carried out by governmental agencies for purposes other than investigation of crimes can be called"administrative searches" and sometimes do not

require a search warrant. The general rule is that such searches require a warrant, but the P/C requirement is less than in criminal cases. Also, courts will not allow administrative searches, either with or without a warrant, to be police instigated or controlled searches in order to sidestep the general search and seizure rules.

(1) Warrantless searches

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

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

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

(2) Searches with warrant

"For purposes of an administrative search, probable cause in the criminal law sense is not required....(P/C) for an administrative search may be based not only on a showing of an existing violation but also on a showing that reasonable legislative or administrative standards justify the search." **Marshall v. Barlow's Inc.**, 436 U.S. 307 (1967).

"A regulatory search does not require probable cause as traditionally defined by the courts. It is satisfied if a state's interest in ensuring that a class of regulated persons is obeying the law outweighs the intrusiveness of a program of searches and seizures." **U.S. v. Seslar**, 996 F.2d 1098 (10th Cir. 1993).

(3) Mixed administrative-criminal searches

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

"If the primary purpose is to determine cause and origin of a recent fire, an administrative warrant will suffice. If the primary object is to obtain evidence of criminal activity, a criminal search warrant may be obtained only by showing P/C that evidence will be found in the place to be searched. If evidence of criminal activity is uncovered

during a valid administrative search, it may be seized under the plain view doctrine." Same ruling in **U.S. v. Mitchell**, 85 F.3d 800 (1st Cir. 1996).

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

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

(4) Searches of government employees by employers

In **O'Conner v. Ortega**, 480 U.S. 709 (1987) Search and seizure of government employee by employer in parts of office wide open to fellow employees has no expectation of privacy. Search & seizure of places where there is an expectation of privacy (desks and file cabinets) depends on the context in which the search takes place and balances employees need for privacy against the employer's need for supervision, control and efficient operation. The search is OK if done without P/C if it is done for work related purposes (not criminal prosecution). Both the inception and the scope of the search must be reasonable. Same ruling in **Gossmeyer v. McDonald**, 128 F.3d 481 (7th Cir. 1997), **Camacho v. Rivera**, 699 F. Supp. 1020 (DC Puerto Rico. 1988), **U.S. v. Taketa**, 923 F.2d 665 (9th Cir. 1991) although part of the evidence was suppressed. Contra ruling, **U.S. v. Mancini**, 8 F.3d 104 (1st Cir. 1993).

F. BORDER SEARCH

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

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

"Congress has conferred broad authority on customs officers to search all persons coming into the United States from foreign countries ... A traveler crossing an international boundary may reasonably be required to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." **U.S. v. Gonzalez-Rincon**, 36 F.3d 859 (9th Cir. 1994).

In **Almeida-Sanchez v. U.S.**, 413 U.S. 266 (1973) the U.S. Supreme Court said that when border patrol agents wanted to use roving patrols to stop vehicles away from the border they needed R/S to stop and inquire briefly as to residential status and P/C to search.

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

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

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

G. PROBATION OFFICER

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

In Seim v. State, 95 Nev. 89 (1979) the court held that a warrantless search under such a clause was OK as long as the probation officer has reasonable and good faith grounds to think that a probation violation has occurred. Although the **Seim** case held that neither probable cause nor reasonable suspicion was necessary, the United States Supreme Court held in Griffin v. Wisconsin, 107 S.Ct. 3164 (1987), that "R/S" by the probation department was required. The suspect's probation officer was not available and the search was made by three other probation officers who were assisted by three police detectives. The court held that this was valid. All states must now abide by this "R/S" standard.

If the probation officer is not present and the search is done by police the warrantless search OK if(1) authorized by probation officer and (2)related to suspect's probationary status. **U.S. v. Richardson**, 849 F.2d 439 (9th Cir. 1988).

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

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

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

H. HOT PURSUIT AND EMERGENCY

(1) Hot Pursuit

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

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

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

In Welsh v. Wisconsin, 466 U.S. 740 (1984), police entered a home after finding a car in a ditch, a citizen told officers the driver appeared drunk and officers arrived at Welch's home about 10 minutes later and had probable cause that he was inside. Held - no entry under hot pursuit. The court's decision did not really discuss the "time lapse" issue, but focused on minor nature of the crime (misdemeanor DUI) stating that it would be hard to ever justify warrantless police entry into home unless a **serious** crime was involved.

(2) Emergency in General

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

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

(a) Entry to prevent destruction of evidence

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

1. The degree of urgency involved and amount of time necessary to get a warrant

2. Reasonable belief the contraband is about to be removed
3. The possibility of danger to police guarding the site while a warrant is obtained
4. Information that the possessors of the contraband are aware the police are on their trai
5. The ready destructibility of the contraband

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

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

(b) Entry to make a warrantless arrest

The Nevada Supreme Court uses the test approved in **Dorman v. U.S.**, 453 F.2d 385 (D.C. Cir.1970). This test is more rigid than entry to make a warrantless search. The test balances the following factors:

1. Gravity of the offense, particularly a crime of violence
2. Whether the suspect is reasonably believed to be armed
3. The P/C that the suspect committed a crime is clear (more than enough for a warrant)
4. Strong reason to believe the suspect is inside the premises
5. Likelihood that the suspect will escape if not quickly apprehended
6. Entry is made peacefully although not consented to

(3) An emergency entry is limited in time

In Mincey v. Arizona, 98 S.Ct. 2408 (1978), police officers entered an apartment where a narcotics sale had been set up. The suspect shot and killed one of the officers and was wounded by the other officers. About ten minutes later, homicide detectives

arrived and searched the apartment for four days. The court held that this warrantless search was illegal and not based on an emergency. Probably a short immediate investigation would have been OK but after that police had time to get a warrant.

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

Subsequent cases make it clear that police can make a warrantless entry into premises where they reasonably think a dead body will be found State v. Siqueiros, 591 P.2d 557 (Ariz. 1978), or to render aid to a person in need of medical assistance Ortega v. State, 669 P.2d 935 (Wyoming 1983). Items in plain view can be seized People v. Reynolds, 672 P.2d 529 (Colo. l983), and a prompt warrantless search can be made limited to looking for other victims or the presence of the killer People v. Roark, 643 P.2d 756 (Colo. 1982). Tamborino v. Superior Court, 719 P.2d 242 (Cal. 1986).

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

(4) Other Nevada Cases Defining Emergency

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

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

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

Banks v. State, 94 Nev. 90 (1975), involved a warrantless entry into a motel room

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

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

Edwards v. State, 107 Nev. 150 (1991), Suppressed evidence found in defendant's motel room when police entered without a warrant to arrest defendant for indecent exposure even though there was strong probable cause. Court said no emergency because no serious crime occurring, citing **Welsh v. Wisconsin**.

(5) Police Can't Create Emergency

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

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

In Phillips v. State, 106 Nev. 763 (1990), police saw persons leave a "wet T shirt" contest at a bar and go to a motel room. Police went to the room to interview the persons about the contest. When the door was opened one suspect inside the room had his hands concealed and refused police order to put hands in view. Police heard "metallic sound" like slide on pistol and entered fearing for safety.(Turned out to be crushing of soda can) Drugs seen in plain view. Held: drugs suppressed -no emergency or indication persons in room were dangerous or suspected of a crime.

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

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

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

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

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

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

(7) Emergency Seizures Of Blood

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

Almond v. State, 105 Nev. 904 (1989) Police had P/C to arrest the suspect where he admitted to drinking seven or eight beers and was obviously intoxicated and his passenger had fallen off the hood of the truck which the suspect was driving sustaining

serious injuries. Warrantless blood draw justified given the rapid, inevitable destruction of the evidence sought (blood alcohol percentage).

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

I. AUTOMOBILE STOPS AND SEARCHES

(1) INTRODUCTION

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

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

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

(2) STOPS ("PRETEXT")

The dictionary defines pretext as a sham or false reason for doing something. In Search & Seizure Law, the "Pretext" claim was raised by the defense when an officer stops a person for a reason "A" when reason "B" is the real or primary basis for the stop.

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

person or vehicle for the minor offense, absent the officer's desire to investigate the more serious offense.

Now the United States Supreme Court and the Nevada Supreme Court have clearly adopted the "could you" test.

The United States Supreme Court's decision was in the case of **Whren v. United States**, 116 S.Ct.176 (1996). The Court ruled that the internal thoughts of the officer were irrelevant for a 4th Amendment inquiry as long as the officer had a truthful objective reason for making the stop. The U.S. Supreme Court did note that the selective enforcement of traffic laws based solely on race or ethnicity would violate the Equal Protection Clause of the 14th Amendment.

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

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

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

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

(3) ORDERING OCCUPANTS OUT OF A CAR

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

In **Maryland v. Wilson**, 519 U.S. 408 (1997), the Court held that the same legal authority on routine stops extends to the passengers of an automobile. The Court said that because the passengers are already stopped with the driver and the car, the additional

intrusion by ordering them out was minimal when compared to officers' safety. **Note: Although police can require a license from the driver, unless there is R/S or P/C police cannot require passengers to ID.**

(4) DURATION OF THE STOP

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

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

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

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

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

(5) CITATION OR CUSTODIAL ARREST

In **U.S. v. Robinson**, 414 U.S. 218 (1979) Justice Stewart, in a concurring opinion, stated (in dicta) that he regarded a custodial arrest for a routine minor traffic infraction to be in violation of the 4th Amendment. However, there are no U.S. Supreme Court cases which specifically rule on this issue.

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

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

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

NRS 484.795 states:

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

1. When the person does not furnish satisfactory evidence of identity or when the peace officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court;
2. When the person is charged with a violation of NRS 484.701, relating to the refusal of a driver to submit the vehicle to an inspection and test;
3. When the person is charged with a violation of NRS 484.755, relating to the failure of a driver to submit the vehicle and load to a weighing or to remove excess weight therefrom; or
4. When the person is charged with a violation of NRS 484.379 (driving under influence of alcohol or drugs), unless he is incapacitated and is being treated for injuries at the time the peace officer would otherwise be taking him before the magistrate.

In **Collins v. State**, 113 Nev. 1177 (1997) the defendant was custodially arrested for an unstated misdemeanor traffic offense. The Court held that the arrest was valid under NRS 484.795 (1) because Collins acted with hostility toward the trooper, initially refused to provide his license, registration and proof of insurance, and crumpled the citation that the trooper gave him, thereby making it reasonable and probable for the trooper to believe that he would disregard a written promise to appear in court.

Although the Nevada Supreme Court did not rule on the previous language in the statute involving discretion, it appears from the decision of the 9th Circuit in the **Ramos** case that, if the State Statute allows this, an officer has unfettered discretion as to whether to arrest or give a citation for traffic offenses. (Please note the U.S. Supreme Court's decision in the **Whren** case which states that "pretext" stops cannot be made on a racial

or ethnic basis.)

Despite the rulings on custodial arrests rather than citations on traffic stops, officers should note that Federal Courts have held that it is unconstitutional to arrest a person because they refuse consent to search or to make an "out of the ordinary" arrest to justify a search or impound. Also, there are not enough cases yet known on this subject to be sure that custodial arrests on routine traffic stops are valid unless there are additional objective circumstances (such as police records show several failures to appear on traffic citations or there is an outstanding warrant for any offense of the driver).

(6) THE "FRISK" OF A VEHICLE

Michigan v. Long, 463 U.S. 1032 (1983), Police saw car swerve into ditch late at night in remote area. Suspect got out of car and met police. When asked for license and registration, he started back toward car - police saw large hunting knife on floor. Suspect frisked and police entered the car to make a quick search for weapons and found marijuana in a pouch under armrest. This was a lawful search. Protective search (Terry v. Ohio) is justified when there is reasonable belief that suspect poses a danger to police - can briefly search the car limited to places where suspect might retrieve a weapon if he broke away from police or area that suspect would return to if cited and released.

In **U. S. v. Stanfield**, 109 F.3d 976 (4th Cir. 1997) A car was illegally parked in an area of high crime and drug activity. The driver's window was down, but the passenger window was raised, tinted so dark that the officer on that side couldn't see into the car. Police on the driver's side could see little of the car's interior so an officer opened the passenger side door to see if the occupant was armed or had access to weapons and he saw from the outside a clear plastic bag of cocaine.

The Court upheld the police action stating: Even if the interiors of cars are fully visible, "roadside encounters between police and suspects are especially hazardous," with as many as "30% of police shootings occurring when a police officer approaches a suspect seated in an automobile," The Supreme Court noted recently in Maryland v, Wilson that in 1994, 5,762 assaults on police occurred during the course of traffic pursuits or stops. Thus, "it is too plain for argument that the governmental interest in officer safety during traffic stops is substantial."

When, during already dangerous traffic stops, officers must approach vehicles whose occupants and interiors are blocked from view by tinted windows, the potential harm to which the officers are exposed increases to the point of unconscionability. We can conceive of almost nothing more dangerous to an officer in the context of a traffic stop than approaching an automobile whose passenger compartment is entirely hidden from the officer's view by darkly tinted windows and someone inside might be aiming a gun at the officer.

In **U.S. v. Christian**, 187 F.3d 663 (DC Cir. 1999) Officers were in an area of Washington, D.C., "notorious for drug selling and stolen property." From the squad car they observed a man holding two objects in his hand standing next to an empty car with a woman who was holding a white plastic bag. Upon seeing the police , he threw the two objects through the car's front window.

The officers approached to investigate. Through the car's partially open window, an officer noticed a dagger with a six-inch blade wedged next to the driver's seat. The man said the car was his and gave police the keys. Then, without his consent to search, the officer entered the car to secure the dagger.

While retrieving the dagger, the officer noticed a bag lying on the front passenger's seat next to the dagger. He picked up the bag, felt what he thought was a weapon inside, and opened it to find a loaded, .45 caliber handgun. Court upheld Christian's conviction as an ex felon in possession of a firearm.

In **State v. Wilkins**, 692 A.2d 1233 (Conn. 1997) The Court Ok'd police conduct when an officer observed a car careen around a truck in the oncoming lane, cross a double yellow line and nearly hit his cruiser head-on. He made a U- turn and followed the vehicle into a parking lot behind an apartment building.

As the officer approached the vehicle, he saw its two occupants "scrunching down" in the front seat of the car, as if trying to avoid detection. Concerned for his safety, he drew his weapon as he approached shouted to the occupants to sit up and raise their hands into his line of sight. Both occupants sat up, but the defendant disobeyed the repeated instructions to keep his hands in sight, twice dropping them down out of the officer's line of vision.

The officer believed the defendant may have been reaching down for a weapon. He ordered both persons out of the car and called for backup which arrived within a few minutes. Then the officer checked the front passenger section and found a loaded pistol under the seat

Numerous cases follow **Long** where the officer has R/S that the vehicle's passenger compartment contains a weapon. **U.S. v. Gleason**, 25 F.3d 605 (8th Cir. 1994), **U.S. v. Burrows**, 48 F.3d 1011 (7th Cir. 1995) The "frisk" can include accessible closed containers, **U.S. v. Cervantes**, 19 F.3d 1151 (7th Cir. 1994) Applied in State v. Wright, 104 Nev. 521 (1988). See **U.S. v. Baker**, 47 F.3d 691(5th Cir.1995),**U.S. v. Mancillas**, 183 F.3d 682(7th Cir. 1999).

(7) AUTOMOBILE SEARCH INCIDENT TO ARREST

(a) The general rule

New York v. Belton, 453 U.S. 454 (1981), policeman stopped suspect and others in a car for traffic violation. Smelled marijuana and saw some marijuana in car. Arrested all occupants for possession. Got occupants out of car and separated them. Searched interior of car - found jacket - opened pocket and found cocaine. Court: When police made custodial arrest of occupant of a car, police may, incident to that arrest, search the passenger compartment of the car, and any unlocked container (clothing and glove compartment) inside the car.

The **"Belton" Rule** is what the U.S. Supreme Court calls a **"bright line rule"** because it is (or should be) easy to follow. Under **Belton**, if a person is arrested out of a car, then the entire passenger compartment and unlocked containers can be searched as long as the search is "contemporaneous." Every court **(except for the Nevada Supreme**

Court) that has construed this rule has followed it and said that even if the arrestee is handcuffed and removed some distance from the car, a SITA is still lawful. **U.S. v. Doward**, 41 F.3d 789 (1st. Cir. 1994), **U.S. v. Milton**, 52 F.3d 78 (4th Cir. 1995), **U.S. v. Hudgins**, 52 F.3d 115 (6th Cir. 1995), "The fact that the defendant had been handcuffed and placed in the police car before the search did not invalidate the SITA." **U.S. v. Mitchell**, 82 F.3d 146 (7th Cir.1996) **U.S. v. Moorehead**, 57 F.3d 875 (9th Cir. 1995) U. S. v. Pino, 855 F.2d 357 (6th Cir. 1988), applied the Belton rule to the rear section of a station wagon.

(b) Nevada Rule

In State v. Greenwald, 109 Nev. 808 (1993), the court declined to follow the **Belton** rule. An NHP trooper lawfully arrested Greenwald for reckless driving, handcuffed him, searched his person and then locked him in the police car. Then the trooper went back to the motorcycle and searched the entire bike, including looking inside the gas and oil tanks and taking apart a flashlight. In a saddlebag, the trooper found a gun and some LSD.

The court held: dope suppressed. Search incident to arrest is based on the policy that allows an officer, even without individualized cause or suspicion in any given case, to search to disarm and prevent possible destruction of evidence. No need to do this with Greenwald handcuffed and locked in police car.

All five Justices in **Greenwald** agreed that, in theory, the search could be justified on another legal basis, if one existed, even though the officer was not thinking of that legal basis when he searched. (The Court recognized the "objective test" for police conduct). In Greenwald, "inventory" was a possible alternative basis, but the Court also rejected that theory on the case's facts.

In **Rice v. State**, 113 Nev. 425(1997) Rice was lawfully stopped for a traffic violation while driving a bicycle and was arrested for carrying a concealed weapon after an officer saw a pocket bulge during a pat-down search. His knapsack was removed from him and placed on the ground, then he was handcuffed and put in a police car. A search of the knapsack minutes later was unlawful under the **Greenwald** rule. Court noted that the police officers did not perform and record an inventory of the knapsack.

(8) INVENTORY SEARCHES

(a) The Impoundment Must Be Valid

Please note that the LVMPD manual provides that the SOP of that department is to pursue the "park and lock" option or allowing a non arrested adult passenger to drive the car away when the driver of a motor vehicle is arrested. Park and lock does not have to be followed in every case depending on such factors as remote area, high crime area, hazard to traffic and other factors. Also, a vehicle which is used in a felony crime is subject to impound and forfeiture and a vehicle (in an accident, for example) may be impounded as evidence. The key is that the reason to impound must be a legitimate one. If the Court thinks that it was done simply to allow a general rummaging under the automatic inventory rule, any evidence or contraband will be suppressed.

In **Florida v. White**, 119 S.Ct. 1555 (1999) the Court held that the 4th Amendment does not require a warrant to seize a car for forfeiture from a public place where there is P/C to justify the forfeiture.

In **U.S. v. Duguay**, 93 F.3d 346 (7th Cir. 1996) The court held that rationales for impoundment are distinct from permissible reasons for conducting routine inventory of contents of impounded vehicle, which are to protect owner's property while it is in custody of police, to insure against claims of lost, stolen, or vandalized property, and to guard police from danger.

Impoundments by police may be in furtherance of public safety or community caretaking functions, such as removing disabled or damaged vehicles, and removing automobiles that violate parking ordinances and thereby jeopardize both public safety and efficient movement of vehicular traffic.

Impoundment of defendant's vehicle following his arrest was unreasonable, and violated the 4th Amendment, when defendant's girlfriend, who had driven car and had possession of keys, was prepared to remove car from street. Among criteria regulating inventory searches of vehicles that must be standardized, for 4th Amendment purposes, are circumstances in which car may be impounded.

Numerous cases uphold impounds even where it wasn't "absolutely necessary." **U. S. v. Martin**, 982 F.2d 1236 (8th Cir.1993), **Sammons v. Taylor**, 967 F.2d 1533 (11th Cir. 1992), **U.S. v. Rodriguez-Morales**, 929 F.2d 780 (1st Cir.1991), **U.S. v. Kornegay**, 885 F.2d 713 (10th Cir. 1989), **U.S. v. Hood**, 183 F.3d 744 (8th Cir. 1999) and **Smyth v. City of Lakewood**, 83 F.3d 433 (10th Cir. 1996).

(b) A Standard Inventory Policy is Required

This is the ruling of **Florida v. Wells**, 110 S.Ct. 1632 (1990)

NOTE: Since May 1990, LVMPD has a standard written policy requiring inventory of <u>all</u> vehicles and containers inside them upon impounding the vehicle. In **U.S. v. Como**, 53 F.3d 87 (5th Cir. 1995) held that the police department's policy requiring inventory of vehicles and any containers therein was deemed to cover an inventory of locked trunks.

(c) An Investigative Purpose Does Not Invalidate an Otherwise Valid Search

The starting point is that an inventory search can't be a ruse for a "general rummaging"; otherwise any court will find it unlawful. But, if police are conducting an otherwise valid impound/inventory search, there is no rule that says the police must have "no idea at all" that contraband may be found. **U.S. v. Lomeli**, 76 F.3d 146 (7th Cir.1996) and **U.S. v. Lewis**, 3 F.3d 252 (8th Cir. 1993) The key requirement here is a clear showing that the police would have done the inventory anyway.

In **U.S. v. Wallace**, 102 F.3d 346 (8th Cir. 1996) Police policy is that if a driver is arrested an officer might release a vehicle to a passenger, if the passenger was a licensed driver and was not arrested. In this case, the car crashed at over 100 mph in a police chase

and was totally wrecked. Wallace was arrested. His wife was a passenger and was licensed. The court held that the car was subject to impoundment pursuant to the police policy because not only was it a traffic hazard, but was also the primary physical evidence of the crime of reckless driving.

Police are not precluded from conducting inventory searches when they lawfully impound vehicle of individual that they also happen to suspect is involved in illegal activity; as long as impoundment pursuant to community caretaking or public safety function is not mere subterfuge for investigation, coexistence of investigatory and caretaking or public safety motives will not invalidate search.

. Inventory search of locked trunk of impounded automobile was reasonable, despite fact that written police policy did not expressly provide that officers should inventory locked trunks, where officer testified that officer would have had to open trunk to make sure that car was safe to transport, and police department policy requiring inventory of contents of vehicle and any containers therein covered inventory of locked trunks.

(d) Nevada Cases

In **Greenwald** (see SITA cases) the Nevada Supreme Court upheld the majority rule that an inventory search cannot be a pretext or ruse for "general rummaging." Some of the factors include places searched (in Greenwald the officer searched the gas tank and took apart a flashlight) and whether the officer made an actual inventory listing all valuable items.

In **Weintraub v. State**, 110 Nev. 287 (1994) police lawfully impounded the defendant's car but listed only 8 out of 100 items, many of which were valuable, and the court held that there was no actual inventory and suppressed drugs found in the search.

In **Collins v. State**, 113 Nev. 1177 (1997) the defendant was arrested and his car was in an unsecured parking lot and no evidence existed that the car or its valuables would remain safe and the car was in an aisle way, not a parking space. The Court held that the impound was valid because it was reasonable and did not turn on the existence of alternative means. The car was taken to a more secure location before the inventory search.

The Court ruled that police have a duty to inventory the contents of a car to protect against claims of theft. As the trooper conducted the inventory he found items that he suspected were indicative of criminal activity and requested an officer from another department to examine the items to see if they were incriminating. The Court held that this did not violate the 4th Amendment. The Court also held that the police did not exceed the scope of a proper inventory when they read the contents of a spiral notebook and listened to an unmarked tape which was proper so that the tape could be documented on the inventory sheet.

(9) ROADBLOCK CASES

These are also "policy justified" searches in the sense that no individualized R/S or P/C is required to initiate such a stop. However, the intrusion in such cases is brief and

slight.

Courts, including the U.S. Supreme Court, have dealt with roadblock cases in a manner consistent with their other "seizure of the persons" cases. The basic legal concept is that the courts want to avoid "unfettered discretion" by police in contacts with citizens. In the area of "stop" and "arrest" the courts do this by requiring R/S or P/C. In roadblock cases it is done by (a) limiting the time and extent of the police intrusion and (b) taking away discretion by requiring a pre-set plan and (c) **as long as there is a valid reason for the roadblock** The following cases serve as examples.

Generally, the roadblock, according to numerous federal cases, should (1) be at a location selected for its safety and visibility, (2) have adequate signs (lighted at night) to inform motorists of the police roadblock, (3) uniformed officers and marked vehicles and (4) a predetermination by the administrative officers of the location, time and neutral procedures to be followed.

However, all of these requirements are not applicable in cases involving the apprehension of persons who have just committed a serious crime where a roadblock has to be established quickly and courts have held such roadblocks to be reasonable under the 4th Amendment.

In **Delaware v. Prouse**, 440 U.S. 648 (1979) the U. S. Supreme Court struck down a practice by Delaware police whereby officers on roving patrol stopped cars to check for license and registration without either P/C or R/S.

In **Michigan v. Sitz**, 496 U.S. 444 (1990) the U.S. Supreme Court upheld "DUI checkpoints" at fixed locations without R/S as long as (1) the intrusion is slight, (2) the program limited officers' discretion (ie: stop all cars or stop every other car, etc) and (3) the program was aimed at "the very serious drunken driving problem."

Dog sniff is constitutionally valid at drivers' license checkpoint. Decision upheld in **U.S. v. Ramirez- Gonzales,** 87 F.3d 712 (5th Cir. 1996) and **Merrett v. Moore,** 58 F.3d 1547 (11th Cir. 1995).

However, an opposite decision was made in a license and registration roadblock with a drug dog present in United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992), **U.S. v. Huguenin,** 154 F.3d 547 (6th Cir. 1998) and in **Edmond v. Goldsmith**, 183 F.3d 659 (7th Cir. 1999) ruled that the drivers' license checkpoint was a pretext for general law enforcement (discovery of presence of narcotics) and was therefore in violation of the 4th Amendment.

Other cases upholding a brief stop under the **Michigan v. Sitz** theory are a driver's license checkpoint in **U.S. v. Trevino**, 60 F.3d 333 (7th Cir. 1995) and **U.S. v. Lopez,** 777 F.2d 543 (10th Cir. 1985) and a roadblock stop and search of a vehicle on a road where the only destination was a state prison in **Spear v. Sowders**, 71 F.3d 626 (6th Cir. 1995) A sniff by a drug detecting dog of a car and the occupants was Ok'd in **Romo**

v. Champion, 46 F.3d 1013 (10th Cir. 1995) where the roadblock was set up on a road which led only to the state prison, not on other public roads.

In **Maxwell v. City of New York**, 102 F.3d 664 (2d Cir. 1996) the Court dealt with a situation where within an approximate 6 block area there had been numerous drive by shootings within a few weeks. The police set up roadblocks two or three days a week and stopped every car entering the area and requested proof from the driver that he or she lived in the area and if not, police told the driver to park the car and walk into the area or else turn around and leave. The police did not search the car. The Court ruled that this roadblock was valid.

In **Scott v. State**, 629 So. 2d 238 (Fla. 1993) two perpetrators fled into a nearby housing complex and police established a perimeter and temporarily stopped all persons leaving the area. This was upheld as reasonable by the Court.

In **United States v. Harper**, 617 F.2d 35 (4th Cir. 1980) authorities intercepted a ship on the high seas, searched and found it to be loaded with drugs. With police aboard, it proceeded to its intended destination. Agents moved in but learned that several people awaiting narcotics delivery had fled and established a roadblock on the only paved road leading from that area. All cars were stopped and occupants briefly questioned which resulted in Harper's arrest. The Court upheld the roadblock stating that it was OK to discover suspects for a known serious crime and the route roadblocked was reasonably expected to be used for their escape.

In **State v. Silvernail**, 605 P.2d 1279 (Wash. 1980) in an armed robbery on an island, the victim heard one suspect say to the other, "We only have 5 minutes." Since the next ferry left then, police had P/C to believe the suspects were on the ferry and could establish a roadblock when the ferry arrived at its destination.

In **U.S. v. O'Mara**, 963 F.2d 1288 (9th Cir. 1992) a roadblock at the only exit from a campground where shots were reported was valid because police had reason to believe that one of the cars exiting the park contained occupants who committed the crime.

In **State v. Gascon**, 812 P.2d 239 (Idaho, 1991) a roadblock at "the quickest route to the interstate highway" was reasonable because the police reasonably believed that the robber would try to flee the community after a bank robbery.

(10) PROBABLE CAUSE SEARCH

This is a search which has the greatest scope and level of intrusion. The rule established by the U.S. Supreme Court is that if police have probable cause to believe that an automobile has contraband or evidence inside it, police can, **without a search warrant**, search anywhere in that car where the object of the search might be found. The scope and intensity of the search is only limited by the size of the item sought. Police can force open locked containers within the vehicle and it makes no difference whether the P/C runs to the car as a whole or to specific containers within the car. **This is not the**

present rule in Nevada.

A brief legal history of the U. S. Supreme Court's rulings is as follows:

In **Carrol v. U.S.**, 267 U.S. 132 (1925) the Court for the first time said police could search a car with P/C and without a warrant. The original reason for "no warrant" was that a car was a "fleeting target" easily mobile and that caused a sort of "exigent circumstance." In **U.S. v. Ross**, 456 U.S. 798 (1982) the Court upheld two warrantless P/C searches of the car, one at the location of arrest and another some time later after police had removed the car to a police station. In **Michigan v. Thomas**, 102 S.Ct. 3079 (1982) the Court said that when police have P/C they can conduct a warrantless search of the car even after it has been impounded and is in police custody. The Court said the same thing in **Florida v. Meyers**, 466 U.S. 380 (1984). In **California v. Carney**, 105 S.Ct. 2066 (1985) a warrantless P/C search of a motor home located in a public parking lot, and a second search at the police station were upheld. In this case the Court explained that "mobility exigency" wasn't the only legal basis for a warrantless P/C search and that the diminished expectation of privacy in a motor vehicle was a separate legal basis. In **California v. Acevedo**, 111 S.Ct. 1982 (1991) the Court said that it made no difference whether the P/C ran to the car as a whole or to specific containers n the car.

All federal courts in the U.S. now follow this rule. Surprisingly, a few state Supreme Courts failed to understand the clear rule of the U.S. Supreme Court that vehicle plus probable cause equals search without warrant. In **Pennsylvania v. Labron**, 116 S.Ct. 2485 (1996) the Supreme Court of Pennsylvania said that a warrantless auto search needed P/C and exigent circumstances. The U.S. Supreme Court said, "This was incorrect." Same ruling in **Maryland v. Dyson**, 119 S.Ct. 2013 (1999).

In **U.S. v. Ornelas**, 116 S.Ct. 1657 (1996) (See section on R/S for basic facts about stop and consent to search), the Court upheld P/C for the search: An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable. He noticed that a panel above the right rear passenger armrest felt somewhat loose and a screw in the door jam adjacent to the loose panel was rusty, which to him meant that the screw had been removed at some time. To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedk with years of experience, it suggested that drugs may be secreted inside the panel.

In **State v. Harnisch**, 113 Nev. 214 (1997), police had a search warrant for Harnisch's apartment and were searching it when Harnisch showed up and was arrested. Police found his car in an apartment parking space and searched it and found evidence which proved he committed felony theft crimes. The trial court suppressed the items from the car and the Supreme Court upheld it, stating "police need P/C and a search warrant unless there are "exigent circumstances."

The State filed a motion for reconsideration and in **State v. Harnisch (II)**, 954 P.2d 1180 (1998) the Court modified its prior decision. The Court held that unless there are exigent circumstances, police need a warrant to search a car where the vehicle is

"parked, immobile and unoccupied when police first encounter the vehicle in connection with the investigation of a crime." What does "mobile" mean? In **Chambers v. Maroney**, 399 U.S. 42 (1970), cited with approval by the Nevada Supreme Court in Harnisch I and II was a case where police stopped a car on P/C that it was occupied by persons in a robbery. The persons were arrested and the car was taken to the police station and searched. The U.S. Supreme Court upheld the search. Therefore, if the car is occupied and mobile, ie: driveable, when first encountered, it can be searched without a warrant if there is P/C that the car contains contraband or evidence even if the occupants are lawfully arrested before the search.

In **U.S. v. Hatley**, 999 F.2d 392 (9th Cir. 1993) held that apparent mobility is sufficient to conduct a search without a warrant based on P/C. "It would be unduly burdensome to require the police to establish that every car that appeared to be mobile was indeed mobile before making the search."

In **Fletcher v. State**,115 Nev. ____ , 990 P.2d 192 (Dec. 1999), the Court upheld the warrantless search of a car containing drugs when police had P/C and the car was occupied when police stopped it. It appears from this decision that unless the vehicle was "parked, immobile and unoccupied" that a P/C search without a S/W is valid.

(11) CARETAKING IMPOUNDMENT/SEARCH

In Cady v. Dombrowski, 413 U.S. 433 (1973) police arrested an out of state police officer for DUI. Police believed that Chicago officers were required to carry a gun when off duty, and no gun was found on the arrested officer. Police lawfully had already lawfully impounded the car. The owner was not present but the officer had "reasonable suspicion" that a weapon was in the car. The U.S. Supreme Court ruled that it was proper to search the car to obtain the weapon because of safety of the general public if an intruder entered the car and stole the gun. This is not an inventory search.

In **U.S. v. Prescott**, 599 F.2d 103 (5th Cir. 1979) the Court held that police could search an unoccupied car on R/S that a weapon was in the car because of public safety (not an impound search).

In **U.S. v. Feldman**, 788 F.2d 544 (9th Cir. 1986) the Court held that "In Prescott, the Fifth Circuit considered irrelevant the local police inventory procedure and whether the officer acted in conformity with that procedure, given the potential existence of a gun in the vehicle. As Prescott sensibly concluded, swift and effective action by an officer to secure a gun which he or she reasonably believes to be in an empty impounded car should be recognized as "standard police procedure."

In **U.S. v. Wilson**, 2 F.3d 226 (7th Cir. 1993), an officer approached Wilson's car in the alley immediately after Wilson fled because a passenger remained in it. At this point he saw the weapons in plain view through the open door and took possession of them. The firearms could have been properly removed from the car, as a public safety measure, to prevent intruders from making off with them if the car were to be secured and left in the alley. (Citing Cady v. Dombrowski).

(12) CONSENT CAR SEARCH

Please refer to this manuals section on "Consent."

Remember that the consent-giver can limit the scope of the search and can withdraw consent. Any factors or items discovered during a consent search can be used for P/C if consent is withdrawn after search starts.

(a) In order to request consent to search if the officer has no R/S or P/C, the officer must have a level of contact "consensual" with no detention of the driver of the vehicle, because if a court holds that there was a detention without R/S or P/C, the consent would be the "fruit of a poisonous tree."

U. S. v. Chan-Jimenez, 125 F.3d 1324 (9th Cir.1997) in this case police saw a truck which was stopped lawfully by the roadside. The officer pulled over behind the truck and got license and registration from the driver and then, after not returning these items to the driver and with his hand on his pistol, the officer asked for consent. The driver consented and the officer found a large bag of marijuana. Held: level raised to investigative stop with no (R/S) , so search was fruit of illegal detention. Also, the

consent was not voluntary.

In **Ohio v. Robinette**, 117 S.Ct.417 (1996) the Court held that after a "stop" of a person for a traffic citation, the officer did not have to specifically tell the person that, "you are free to go" in order to lower the level to a consensual encounter but an officer has to be low key in objective words and actions in order to make this valid and acceptable in court.

U.S. v. Erwin, 155 F.3d 818 (6th Cir. 1998) Police made a routine traffic stop then asked for consent to search. The court held, "A law enforcement officer does not violate the 4th Amendment merely by approaching an individual, even when there is no R/S that a crime has been committed, and asking whether he is willing to answer some questions including a request for consent to search the individual's vehicle. Absent any R/S of criminal activity, the individual is constitutionally free to leave (after the time routinely used for a traffic stop), and (although the officer doesn't have to say "you can leave") if the officer rejects the individual's indication that he would like to leave, valid consent can no longer be obtained. Same ruling in **U.S. v. Little**, 178 F.3d 1297 (8th Cir. 1999)

U. S. v. Lattimore, 87 F.3d 647, 650 (4th Cir.1996) Another car stop for traffic violation where the officer got oral consent from the driver who then refused written consent, and the officer (**after the refusal**) said he would get a drug sniffing dog. Court ruled: Consent to search is not irrevocable, and if a person effectively revokes consent prior to the time the search is completed, the police may not thereafter search based upon the earlier consent. Once consent is withdrawn or its limits exceeded, continued search by the officials is violative of the 4th Amendment. Refusal to execute a written consent form after a voluntary oral consent does not act as an effective withdrawal of the prior oral consent. **U. S. v. Castillo**, 866 F.2d 1071 (9th Cir.1988) (same ruling).

We conclude that the search was proper.

(b) The Scope of the Search

In **U.S. v. Orrego-Fernandez**, 78 F.3d 1497 (10th Cir.1996) "The scope of a search is generally defined by its expressed object." The officer's search of the vehicle did not exceed the scope of consent. He informed the person that he wanted to search for guns and drugs.

In **U.S. v. Torres**, 32 F.3d 225 (7th Cir. 1994) Police stopped a truck and trailer for speeding and got written consent from the owner to search "a truck and trailer, including any part, compartment, or trunk of the vehicle and the contents of any object or container found therein." In the trailer the officer saw a wooden box-like compartment near the front of the trailer with six shiny new screws. After releasing the screws and removing the compartment's cover, he discovered approximately 450 pounds of marijuana. We conclude that a reasonable person would have understood that the defendant agreed to allow the police to search the wooden container in which the marijuana was discovered.

The consent allowed the police to unscrew the compartment in order to gain

access to its contents. General permission to search does not include permission to inflict intentional damage to the places or things to be searched." The container or the trailer were not damaged by the act of removing the six screws. (The Torres court cited Jiminez. The U.S. Supreme Court denied cert. in Torres.).

In **U.S. v. Santurio**, 29 F.3d 550 (10th Cir. 1994) An officer stopped a van for speeding and received consent to search for drugs. He also found signs of a false compartment in the van. Defendant contends that the officer's effort in searching the interior of the van was so invasive and destructive that it went beyond the scope of the search, but the evidence shows that the officer merely removed a few screws from the strip holding down the carpet which covered the metal compartment containing the packages of cocaine. His search was not so invasive as to exceed the scope of defendant's consent to the search.

In **U.S. v. Zapata**, 180 F.3d 1237 (11th Cir. 1999) Police stopped a van for a traffic offense, talked to the driver, got license and other papers and gave a warning after returning papers to driver. After bidding Zapata a good night, Phillips asked him if he could search the minivan for drugs. Zapata said yes.

As he began searching , he noticed that the plastic trim around the interior door handle of the sliding door was not fitted properly to the handle and that the interior panel was not fitted properly to the sheet metal portion of the door. The minivan was relatively new and he found the misfitting parts unusual and pried back the panel with his fingers. Two of the plastic snaps holding the panel to the door popped loose. Between the interior panel and the sheet metal portion of the door, Phillips discovered packages appearing to contain cocaine.

"We must consider what the parties knew to be the object of the search. A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items. The search was within the scope of his consent as long as the area behind the interior door panel might reasonably have contained drugs or money."

Numerous cases in our sister circuits demonstrate that money and drugs are frequently stored behind interior panels in an automobile. **U. S. v. Flores**, 63 F.3d 1342 (5th Cir.1995) (large sum of cash behind vents in interior panels of car) **U. S. v. Pena**, 920 F.2d 1509 (10th Cir.1990) (cocaine in area between interior door panel and exterior door panel) In **Flores** and **Pena** police used a screwdriver to open interior parts of the car.

In **U.S. v. Wacker**, 72 F.3d 1453 (10th Cir. 1995). A police officer stopped a car for a traffic offense, gave a warning, then asked if he could search the car for drugs. In Jimeno, the Court held that a suspect's consent to search his car for drugs included consent to search an unlocked container in the car that might reasonably hold drugs. The Court noted that the suspect had given the police officer a general consent to search the car, and had placed no explicit limitation on the scope of the search. Where a suspect does not limit the scope of a search, nor objects when search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.

In **State v. Johnson**, 116 Nev. ____ , 993 P2.d 44 (January 2000), Highway

Patrol officers stopped a car for a traffic offense. They requested and received permission to search for drugs. One officer pulled the rear seat out and then noticed three screws near the dashboard which appeared different from regular and ordinary screws in a passenger compartment. The officer removed the screws and found drugs inside. The Supreme Court ruled 4-3 that removing the screws "disabled" the car and exceeded the scope of the consent search. A rehearing has been requested by the state.

(13) VIN SEARCH (Vehicle Identification Number)

This is a very limited search. In **New York v. Class**, 106 S.Ct. 960 (1986) police lawfully stopped a car for traffic violations. One officer opened the car door to look for the VIN. When he didn't see it he reached into the car to remove some items from the dashboard where the VIN is also sometimes found. In doing so, the officer saw the handle of a gun protruding from under the seat and seized it. The U.S. Supreme Court said that there is a valid federal law which requires that the VIN be visible from outside the car and the officer was justified in making a minimal intrusion just to locate the VIN and in doing so, the gun was in plain view and subject to seizure. The Court also noted that police could not enter a car under this theory when the VIN was visible from the outside.

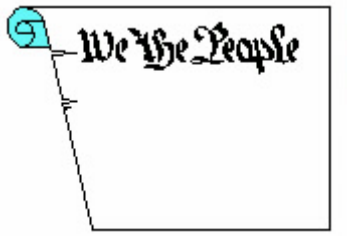
Westlaw computer search shows that all Federal Courts and many state courts uphold the decision in **Class**.

VI

SEARCH WARRANT PREPARATION AND EXECUTION

INTRODUCTION

The Fourth Amendment



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

The following materials examine the area of search warrants from both a practical and technical viewpoint.

The starting point is a discussion of the Gates and Leon cases decided by the United States Supreme Court in the 1980's. These cases revolutionized the way all courts are instructed to evaluate search warrants under the 4th Amendment.

Next, we examine the investigatory phase and the sources of probable cause. An understanding of the ingredients of P/C is essential to the proper formation of a S/W.

Following this, we turn to the actual preparation of a S/W. We examine the paperwork and format involved. The importance of clear, well-organized and literal expression of facts which show P/C is demonstrated. A S/W preparation checklist is included.

After the S/W is obtained, it must be properly executed. The next section deals with all aspects of the execution including knock and announce, plain view, detention of persons and scope of search. This section also has a S/W execution checklist and directions on how to file and complete all necessary paperwork.

After getting a search warrant, suppression of the items seized is rare since the U.S. Supreme Court has repeatedly stated:

1. When police seize evidence without a warrant, the police action is presumed to be illegal under the 4th Amendment and the burden is on police and DA to show that a

valid exception existed and that the scope of the exception was not exceeded.

2. When police seize evidence under a search warrant, the police action is presumed to be legal, and the burden is on the defendant to prove the existence of a major flaw in the warrant.

In addition to the normal S/W procedure, there are two types of special circumstances situations involving anticipatory S/W and a "premises freeze." These situations are examined in detail.

A sample search warrant and affidavit are included with these materials so that you can relate the legal principles to a practical application..

A. MODERN SEARCH WARRANT LAW

Two cases decided by the U.S. Supreme Court in the mid 1980's created a highly favorable legal climate for the use of search warrants. These cases were:

Illinois v. Gates (103 S. Ct. 2317 (1983)) which:

(1) Abandoned the "two-pronged" test of reliability/veracity and basis of knowledge and substituted the "totality of the circumstances" test.

(2) Defined probable cause as only a "fair probability."

(3) Reminds reviewing judges that search warrants are supposed to be entitled to great deference.

(4) Demonstrates that even "innocent" actions can, in some cases, form a basis for probable cause.

Massachusetts v. Sheppard, 468 U.S. 981 (1984) the U.S. Supreme Court upheld evidence seized by police pursuant to a search warrant that had sufficient P/C but which was defective on its face. The affidavit justified a search for a gun used in a murder but the S/W on its face authorized only a search for drugs. The court held that the affidavit overcame the error in the S/W.

United States v. Leon , 468 U.S. 897 (1984) held that once an issuing judge had signed a warrant, there should be no suppression of evidence unless:

(1) The issuing judge was ***not impartial***.

(2) The ***items to be seized or place to be searched*** are not adequately described.

(3) There are ***material intentional misrepresentations*** of fact in the affidavit.

(4) The affidavit is ***so lacking in probable cause*** that no reasonable police office(or judge) could think that there was "p/c."

In **U.S. v. McKneely**, 6 F.3d 1447 (10th Cir. 1993) The Court held "However, when reviewing an officer's reliance upon a warrant, we must determine whether the underlying documents are "devoid of factual support, not merely whether the facts they contain are legally sufficient." Thus, "it is only when an officer's reliance was wholly unwarranted that good faith is absent." Same ruling, **U.S. v. Rowland**, 145 F.3d 1194 (10th Cir.1998) and **U.S. v. Wood**, 6 F. Supp.2d 1213(D. Kan. 1998).

Although not specifically mentioned in **Leon,** there are three other ways that a search warrant can still fail:

(5) The "p/c" was illegally obtained (fruit of the poisoned tree).

(6) Violation of the "Knock and Announce" rule which is now founded in the 4th Amendment itself under the decision in **Wilson v. Arkansas**, 514 U.S. 927 (1995), **Richards v. Wisconsin**, 520 U.S. 385 (1997) and **U.S. v. Ramirez**, 118 S. Ct. 992 (1998) as well as in Nevada state law.

(7) Some other aspect of State law was violated ("day/night).

MORE ABOUT THE Gates CASE

This is a truly remarkable case. Anyone who is going to be heavily involved in search warrant preparation should read this case because here the U.S. Supreme Court lays out all of the "do's and don'ts" of this field. There are numerous citations to other cases showing approved methods of establishing the reliability of informants, using literal instead of conclusory terms and other matters. Despite the fact that the P/C picture was fairly slender and that the anonymous informant was incorrect about the prediction of whether Susan Gates would fly or drive back with Lance, the Court still found probable cause to exist.

FACTS: On May 3, 1978, the Bloomingdale Police Department received an anonymous letter which stated that:

"You have a couple in your town who make their living selling drugs. They are Sue and Lance Gates who live on Greenway in the condominiums. Most of their buys are done in Florida. Sue drives the car to Florida where she leaves it to be loaded with drugs. Sue flies back after she drops off the car. Then Lance flies down and drives it back. May 3 she is driving down there and Lance will be flying down in a few days to drive it back. At the time he drives it back he has the trunk loaded with drugs. Presently they have over $100,000 in drugs in their basement. They are friends with some big drug dealers who visit their house often."

A police detective confirmed through DMV that a Lance Gates had a driver's license at a certain address. A check with O'Hare airport disclosed that "L. Gates" had

made an airline reservation from Chicago to West Palm Beach on May 5. The D.E.A. observed Lance Gates as he boarded the flight in Chicago and got off in Florida. Lance went to a motel room registered to Susan Gates. The next morning, Lance Gates and the woman got into a Mercury bearing Illinois plates registered to a Hornet owned by Gates and headed northbound on an interstate toward Illinois.

All of this information was put into an affidavit supporting a search warrant. When the Gates' got home, the police searched the car and home and found large quantities of drugs in both places.

The Illinois Supreme Court ruled that the search warrant was no good because there was no showing of the reliability or basis of knowledge of the informant. (Police couldn't have done this because the letter was anonymous.)

LEGAL ISSUE: Was the S/W supported by Probable Cause?
RULING: Yes.

RATIONALE:

1. An affidavit which is wholly conclusory cannot support P/C. An example was the affidavit in **Aguilar v. Texas,** 378 U.S. 108 (1964) which was not sufficient merely by stating that the officer " has received reliable information from a credible person and does believe that heroin is stored in a certain home."

The reason for this is that the action of the issuing judge can't be a mere ratification of the bare conclusions of the police. The affidavit must contain enough facts so that the issuing judge can make up his own mind.

2. Reliability and basis of knowledge are still highly important factors in showing P/C. **(When an officer is able to demonstrate these things in the affidavit the officer should always do so.)** However, if either or both of these things cannot be shown**, the totality of the circumstances** can still show P/C.

3. The detail of a tip can allow the issuing judge to infer that the tipster had a strong basis of knowledge. Quote from **Gates**: "Because an informant **is right about some things, he is more probably right about other facts.**" In this case, the letter had a range of details relating **not just to easily obtained facts** but also as to **future actions of third parties not ordinarily easy to predict.**

4. The police corroboration of the information in the letter, along with all the other circumstances (Florida known as source area)(brevity of Lance Gates' trip) was enough to establish probable cause even though only innocent activity was observed. (Cited **Draper v. United States**, 79 S. Ct. 329 (1959)).

The upshot of the decisions in **Gates** and **Leon** is that the use of search warrants by police is encouraged because an everyday common sense approach is used to determine probable cause and once a judge has issued a search warrant it is much harder for the defendant to get the evidence suppressed. However, suppression can still result if there is significant non-compliance with the procedures set forth in this S/W preparation and execution manual.

B. BURDEN OF PROOF

(1) The defendant has the burden of proving by a preponderance of evidence that a search warrant is invalid **U.S. v. Richardson**, 943 F.2d 547 (5th Cir. 1991) and **U.S. v. Wapnick**, 60 F.3d 948 (2d Cir. 1995).

Franks v. Delaware, 438 U.S. 154 (1970) "If there was an intentional misrepresentation of fact and the affiant knew it was false or would have known except for reckless disregard of the truth, then that fact can be removed from the affidavit. The defendant is not entitled to an evidentiary hearing simply by asking for one, but must prove by affidavits or other proof that there is a substantial preliminary showing that there were intentional or reckless falsehoods in the affidavits. A mere showing of ordinary negligence is not enough."

In **Lyons v. State**, 106 Nev. 438 (1990) the defendant claimed that police lied about one of the facts alleged. The Court ruled: "A Franks hearing is not required if the alleged falsehood in an affidavit supporting a search warrant is not necessary to the finding of probable cause." See 2 LaFave Search and Seizure, supra, S 4.4(c) We conclude that the surveillance observations prior to the arrest were sufficient to establish probable cause, independent of the alleged smell coming from the truck.

In **U.S. v. Owens**, 167 F.3d 739 (1st Cir. 1999) the defendant claimed that there were falsehoods in the police affidavit. The Court ruled that Owens' claims failed because he could not establish that these misstatements were either knowingly false or reckless. At most, officer's errors resulted from negligence, and "allegations of negligence or innocent mistake are insufficient. (Also) "If any of the misstatements were knowingly false or reckless, we do not see how they were material."

In **Simmons v. Poe**, 47 F.3d 1370 (4th Cir. 1995) the Court ruled: Thus, unless the tainted information is so important that "probable cause did not exist without it," the warrant will be deemed valid.

(2) A misrepresentation can be by omission as well as commission if the fact was known, or reasonably should have been known to the affiant officer **and** the omitted fact would make P/C **less likely**, the S/W may be successfully attacked

In **U.S. v. Hall**, 113 F.3d 157 (9th Cir. 1997) Court found that the officer "either intentionally or recklessly" withheld information bearing on C/I's credibility, several of his criminal convictions and "most significantly, matters that went to the heart of credibility; a probation violation involving death threats to a wounded police officer, and the 1990 conviction for the offense of falsely reporting a crime." Evidence was suppressed due to withholding information of the C/I's credibility which was "absolutely critical,"(main source of P/C) the judge would probably not have issued a search warrant had he known the truth. Same ruling **Golino v. City of New Haven**, 950 F.2d 864 (2d Cir. 1991) where police omitted fact that eyewitnesses had given serious different

descriptions of the suspect, one picked out another person from a photo lineup and fingerprints that police believed belonged to the perpetrator did not match Golino's.

The majority of courts hold that minor omissions do not always default P/C. **U.S. v. Strifler**, 851 F.2d 1197 (9th Cir. 1988), and **State v. Bergin**, 574 A.2d 164 (Conn. 1990)**, Mays v. City of Dayton**, 134 F.3d 809 (6th Cir. 1998) "omitted facts OK since with them included, the S/W had other ample P/C", **U.S. v. McNeeese**, 901 F.2d 585 (7th Cir. 1990)**, U.S. v. Rumney**, 867 F.2d 714 (1st Cir. 1989) part of the P/C was a statement by an accomplice who initially claimed no knowledge of crime but were made before he was confronted with evidence linking him to the robbery. The Court ruled that the omission of his initial claims of no knowledge did not delete the finding of P/C.

In **U.S. v. Colkley/Johnson**, 899 F.2d 297 (4th Cir. 1990) the FBI agent who applied for the warrants intentionally omitted the information in the warrant application that none of the six eye witnesses identified Johnson. Neither the omitted information nor the allegedly skewed composite height description was material to the probable cause determination. A Franks hearing was not required.

The district court believed that the affiant's omission was material because it "may have affected the outcome" of the probable cause determination. However, to be material under Franks, an omission must do more than potentially affect the probable cause determination: it must be "necessary to the finding of probable cause." For an omission to serve as the basis for a hearing under Franks, it must be such that its inclusion in the affidavit would defeat P/C.

In **U.S. v. Buchanan**, 167 F.3d 1207 (8th Cir. 1999) To prevail on his Franks challenge to the search warrant, he must establish (1) that "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit," and (2) that, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." The same analysis applies to material omissions of facts. (1) that the officer omitted facts "with the intent to make, or in reckless disregard of whether they thereby make, the affidavit misleading," and (2) "that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause."

Officers should not fail to include and explain facts that tend to substantially reduce P/C. See the sample search warrant attached to this outline by officer Todd Fasulo. The suspect was on probation **with a search clause** meaning that, in theory, his P/O could drop by his home at any time and search for drugs. Ask yourself: Does this fact make it more **or less likely** that he would have drugs in his house? Note how Officer Fasulo **includes** this fact, but then gives additional information to explain why the existence of the search clause, as applied to this particular suspect, does not make it less likely that drugs are at his house.

C. THE INVESTIGATION PHASE AND SOURCES OF PROBABLE CAUSE

(1) Investigation

Most successful search warrants are the result of patient and careful police investigation. As the Court pointed out in **Gates**, P/C is really nothing more than common sense. In some cases, P/C can be shown by a single piece of direct evidence such as an observation by an undercover police officer that drugs are in a certain house at a certain time.

However, in many cases, the P/C picture derives from circumstantial evidence which the law says is just as valid as direct evidence. In cases of circumstantial evidence, the investigation should be directed at showing how and why the occurrence of different facts and events are related to one another and why they constitute proof (of P/C) as opposed to mere coincidence, i.e.,: why these bits & pieces of fact all point to the same place.

There are so many variables in the P/C equation that, as the Court noted in **Gates**, one determination will seldom be useful precedent for another. Paul Simon sang, "There must be fifty ways to leave your lover." There are countless ways to make a showing of probable cause.

(2) Linkage or nexus

You have to show what the courts call **"linkage"** or **"nexus"** between the evidence you want to seize with the warrant and the place you want to search. Like most things in S/W preparation, this can be done by direct proof (C/I saw the item there), circumstantial proof (Drug dealer stops at certain house every time before selling drugs) or by inference (supplies & ingredients for "home made bomb" are likely to be at "home").

In **U.S. v. Feliz**, 182 F.3d 82 (1st Cir. 1999) "The nexus between the objects to be seized and the premises searched need not rest on direct observation, but rather can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide evidence of a crime."

It is extremely important to remember **the rule** that **search warrants are directed at places and not per se at people (suspects)**. In other words, even though you develop P/C to show that X and Y are engaged in criminal activity, except in certain cases (drugs and a few others), this is **not enough all by itself** to get a search warrant for a place (house, storage vault, deposit box, office, etc.) which is controlled by X or Y. In **U. S. v. Pitts**, 6 F.3d 1366 (9th Cir.1993) the Court ruled " We have previously recognized that magistrates may infer that in the case of drug dealers, evidence is likely to be found where the dealers live."

(3) Staleness

In assessing P/C, be aware of staleness problems as well. You have to show that the items will probably be there at the time you execute the S/W. Common sense prevails. For example, if the informant saw growing marijuana plants in X's house 30 days ago there is a reasonable inference that they will still be there. Sometimes specialized police knowledge (that pedophiles keep child pornography at their homes for a long time) can overcome a staleness issue.

Two recent Nevada cases have a good discussion of staleness and upheld a search warrant despite the defendant's claim, **Wright v. State**, 112 Nev. 391 (1996) and **Garrettson v. State**, 114 Nev. 1064 (1998).

See also **U.S. v. Spikes**, 158 F.3d 913 (6th Cir. 1998) Instead of measuring staleness solely by counting the days on a calendar, courts must also concern themselves with the following variables: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?), etc. "

In **U.S. v. Formaro**, 152 F.2d 768 (8th Cir. 1998)"Time factors must be examined in the context of a specific case and the nature of the crime under investigation. " In addition, "where continuing criminal activity is suspected, the passage of time is less significant." In this case, given that "continuing criminal activity was suspected," the two and one-half weeks lapse did not negate the existence of probable cause. Indeed, "in investigations of ongoing narcotics operations, intervals of weeks or months between the last described act and the application for a warrant did not necessarily make the information stale. " **United States v. Ortiz**, 143 F.3d 728 (2d Cir.1998)

In **U.S. v. Feliz**, 182 F.3d 82 (1st Cir. 1999) The drug transactions described in the affidavit took place approximately three months prior to issuance of the warrant." But courts have upheld determinations of probable cause in trafficking cases involving similar or even longer periods. **U. S. v. Greany**, 929 F.2d 523 (9th Cir.1991) (2 year- old information relating to marijuana operation not stale) Based upon CI's two controlled purchases of cocaine in September, and CI's statement that he had been purchasing drugs from Feliz for approximately twelve years, the agents could reasonably have believed that his drug trafficking was of a continuous and ongoing nature.

In **State v. Gogg**, 561 N.W. 2d 360 (Iowa, 1997) the court ruled, "But where the information presented to the issuing judge shows ongoing drug-related activities, the passage of time is less problematic because it is more likely that these activities will continue for some time into the future."

(4) Ingredients (Sources) of Probable Cause

1. ***The observations of the affiant (officer)***. What you see, smell, feel and hear. All police officers are presumed reliable. **People v. Hill**, 12 Cal. 3d 731 (1974) It is possible to get enough P/C entirely from the direct observations of the affiant officer.

U.S. v. Mueller, 902 F.2d 336 (5th Cir. 1990) The officer's years of experience, training and knowledge of the smell of methamphetamine was enough for the magistrate to conclude P/C.

2. ***Similar information received from a "fellow officer."*** It is the **collective knowledge** of all officers who are joined together in an investigation which is considered in determining P/C. This was the holding in **Doleman v. State**, 107 Nev. 409 (1991). In addition, the U.S. Supreme Court has held that one officer can rely solely and entirely on the input of another officer (if the "source officer" knows facts for P/C or R/S) to justify actions under the 4th Amendment. **U.S. v. Hensley**, 105 S.Ct. 675 (1975)).

3. ***A suspect's reputation*** (arrests or convictions) for a certain type of criminal activity. The U.S. Supreme Court said in **United States** v. **Harris,** 91 S. Ct. 2075 (1971) that although a person's prior conduct is not usually admissible at trial, nevertheless, a policeman's knowledge of a suspect's reputation is a practical consideration of everyday life that can add to P/C.

4. ***A police officer's knowledge of modus operandi***. The Court said in **Gates** (p.2328) that the information showing P/C should be weighed not in terms of library analysis but as understood by those versed in the field of law enforcement The Court also noted that police knowledge of patterns of criminal activity are a factor in assessing P/C. **U.S. v. Cortez**, 449 U.S. 1 (1981)

5. ***Information received from informants***. In writing S/W you must distinguish between and among three classes of informants (citizen informants, anonymous informants and "confidential informants." The term "confidential informant (C/I)" is really a term of art in that it essentially refers to a person who is someone other than a typical honest citizen.

Gates says that you don't **have to** show the informant's reliability and/or basis of knowledge, but points out that **whenever you can show one or both it is highly important to do so** because these things boost the strength of P/C.

(a) An anonymous informant cannot be shown to be reliable by usual means. Therefore you must use the Gates approach to show reliability by **corroboration** of detail, **especially predictions** of future conduct of the suspect.

(b) A "citizen informant" is presumed to be reliable. (**Gates**, p. 2329) but you must state that the person is a citizen who is giving information to the police for good citizen reasons under circumstances where a false report would subject the honest citizen to criminal liability. (False info. to P.O.)

(c) A "C/I" can be shown to be reliable by a number of means. **If you have more than one of these means, use every one.**

(1) ***Previous reliability***. (Gates, p. 2329) **U.S. v. Reddrick, 90 F.3d 1276 (7th Cir. 1996) "officer's statement that the informant provided reliable information in the**

past ... is unsupportable and does not provide P/C." Same ruling in numerous state cases. Instead, give the judge some specific facts and times in generalized (but not minute) detail. For example:

> *During the past six months, this same C/I has provided information to me concerning the identity of persons involved in selling cocaine. This information has been proven to be accurate through independent police investigation. During this same time period, accurate information from this C/I has been included in 3 search warrants for premises here in Las Vegas. In all 3 cases quantities of cocaine were found at the places stated by the C/I. In addition, I have spoken to Det. Joe Forti of the NLVPD who told me that the same C/I has given accurate information about the whereabouts of narcotics on several occasions in the past two years.*

(2) ***Statements against penal interest*** (**Gates**, p. 2329 and **Jones v. U.S**., 80 S.Ct. 725 (1960). If the C/I admits to a police officer that the C/I has committed crimes this helps make for reliability. In **U.S. v. Harris**, 378 U.S. 108 (1964) an informant told federal agents that a suspect was selling moonshine and further admitted to the agents that the informant had been buying the moonshine in the recent past, this statement tended to make all the informant's information more reliable because he admitted criminal wrongdoing to the police.

(3) ***Self verifying detail***, especially predictions of future conduct. Even details (another term for "corroboration.") of "innocent" factors are important. The importance and power of this factor was recognized by the Nevada Supreme Court in the case of **Keesee v. State**, 110 Nev. 997 (1994).

(4) ***Demonstration of the informant's motive***. The case of **Massachusetts v. Upton**, 104 S.Ct. 2085 (1985) says that this can help to show reliability. Sometimes, promises or inducements made to an arrestee or accomplice can help to make that person reliable (this should be after Miranda warnings and voluntary waiver of Miranda). **U.S. v. Davis**, 617 F. 2d 677 (D.C. Cir. 1979) and **U.S. v Reivich**, 793 F. 2d 957 (8th Cir. 1986**).**

For example in case of a confidential informant:

> *"This informant had admitted breaking into the above described residence for the purpose of stealing. The informant is cooperating with this department in an effort to demonstrate his good faith in gaining a recommendation of leniency in pending criminal charges, conditional upon his giving truthful information. The informant understands that no recommendation of leniency will be made unless the information is accurate and truthful."*

(5) ***Cases approving use of informants***

Reliability: **U.S. v. Schaefer**, 87 F.3d 562 (1st Cir. 1996)(apprehension of another drug felon); **Comm. v. Jones**, 668 A.2d 114 (Pa. 1995) (information led to 3 prior arrests) **State v. Gogg**, 561 N.W.2d 360 (Iowa, 1997)(C/I had supplied information in the past on eight occasions and had not given false information on these occasions.).

. Statements against penal interest: **U.S. v. Leidner**, 99 F.3d 1423 (7th Cir. 1996) "P/C helped where officer knew informant who made statements against his penal interest." Same ruling in **Comm. v. Alvarez**, 661 N.E. 2d 1293 (Mass. 1996) and many other cases.

Informant's reporting of details: **Houser v. State**, 678 N.E.2d 95 (Ind. 1997)"open door at murder scene"; **U.S. v. Lightbourne**, 104 F.3d 1172 (9th Cir. 1997) "controlled buy"; **Jackson v. State**, 689 So.2d 760 (Miss. 1997) "Police observed as C/I predicted event that 3 cars would travel in tandem on a certain highway at a certain time and place where C/I said the 3rd car contained drugs"

Motive: **U.S. v. LaMorie**, 100 F.3d 547 (8th Cir. 1996) "statements by a person involved in a crime about her colleagues could have helped her obtain more lenient treatment from prosecutors."

(5) Will the Informant's Identity be Disclosed in Court?

In **McCray v. Illinois**, 386 U.S. 300 (1967) under the U.S. Constitution, the identity of the C/I does not have to be disclosed if the C/I only gives information which is used for P/C. The Nevada Supreme Court has made the same ruling in construing the NRS on informant disclosure that the C/I's identity must be disclosed if the C/I is a percipient (eyeball) witness to the crime charged (**Routhier v. Sheriff,** 93 Nev. 149 (1977) **and Sheriff v. Vasile**, 96 Nev. 5 (1980) cases) but does not need to be disclosed if the C/I gives P/C information only (**Twigg v. Sheriff,** 95 Nev. 112 (1979) **State v. Stiglitz**, 94 Nev. 158 (1978), **Miller v. State**, 86 Nev. 503 (1970) cases).

In **U.S. v. Valerio**, 48 F.3d 58 (1st Cir. 1995) Court ruled: It is settled that 'a district court need not conduct an in camera hearing whenever the identity of an informant is requested.' It is entirely within the discretion of the judge presented with the request to decide whether the disclosure is necessary in order to determine the believability of the testifying officer. There is a presumption of validity with respect to the affidavit supporting the search warrant. . Here, we can perceive no abuse of discretion in the trial judge's refusal to hold the requested in camera hearing. At the conclusion of the Franks hearing, the judge credited the testimony of the officer and discredited that of Baez and that there was no basis for concluding that the affidavits were false.

In **U.S. v. Fairchild**, 122 F.3d 605 (8th Cir. 1997) "The defendant bears the burden of demonstrating the need for disclosure, ... the court must weigh the right to information against the government's privilege to withhold the identity of its confidential informants." This privilege may be superseded, however, if disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, ..." Mere speculation fails to meet this burden. After an in-camera hearing, concluding that, despite slight discrepancies between statements of some informants, the government did not need to disclose their identities, the court noted "there is significant risk to the health and safety of the informants if their identity is disclosed. Also, their testimony would not be particularly significant on the issue of suppression." The government and representatives of the district court were the only parties present at the hearing.

Appellants argue that because the informants were participants or percipient witnesses to the crime charged (rather than mere tipsters) that disclosure is almost always required. The district court considered this factor, however, and determined that the concern for the informants' safety was more compelling. Indeed, the district court correctly weighed the crime charged, potential defenses, the possible significance of the informers' testimony, and other relevant factors.

See also confidential informant cases in this manual section on Sources of Probable Cause

(6) In order for a fact to be used for probable cause, the item does not have to be admissible in evidence.

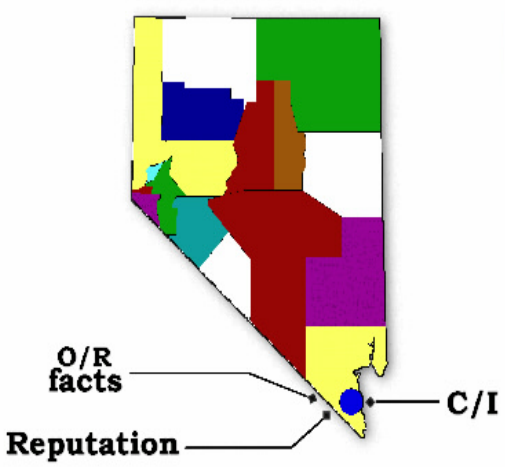
So held in **Brinegar v. U.S.**, 338 U.S. 160 (1949) Other things such as the results

of a polygraph exam can be used in a search warrant affidavit according to **State v. Coffey**, 788 P.2d 424 (Oregon, 1990) and **Bennett v. City of Grand Prarie**, 883 F.2d 400(5th Cir. 1989)

D. PREPARATION OF THE SEARCH WARRANT

Try to organize a written draft of your S/W affidavit by putting pieces of information together with like pieces of information. Group your facts by the type of source they come from (police, citizen, records etc.)

Think of the preceding section on ingredients of P/C as "source of information lines" which point to a certain time and place. Technically, it doesn't make a difference if the S/W affidavit is a hodge-podge of disorganized facts but a well organized affidavit is easier for the issuing judge to understand and easier to defend in court. Think of the "source lines" as support for the S/W. You want to make these lines as thick (rich with different facts) as you can. The map is the State of Nevada and the circle is the place you want to search.



1. The S/W must be supported by as much P/C as you can possibly put together. Take time to check out and corroborate information to show that it is reliable.

2. Things that you know that point to P/C at the time of writing the S/W but don't put down in writing in the affidavit cannot be added later to show P/C or explain ambiguities in the affidavit even in sworn testimony in court. This was the rule set down in **Whitley** v. **Warden**, 91 S.Ct. 1031 (1971). Also, **oral statements** made to the issuing magistrate to support P/C **cannot be shown later**. If the judge has questions, write the answers down in the affidavit and have the judge initial them.

3. Things you know that point away from P/C and are left out of the affidavit **can** be proven in court later by the defense to support their claim of material mis-representation by omission. (See section on S/W "Burden of Proof")

4. In showing probable cause, it is perfectly OK to use hearsay (*the affiant officer heard fact A from the C/I, facts B and C from fellow narcotics detective Stoner and facts D and E from the power and phone companies)* but be sure to indicate how, when and from whom you learned the facts. **Jones v. U.S.**, 362 U.S. 257 (1960).

5. You must be **literal** when you choose how to phrase your affidavit. Literal means that when someone reads what you have written, there will only be **one possible interpretation** of what you mean. In other words every factoid in your affidavit must show:

WHAT DO I KNOW - WHEN DID IT HAPPEN?
HOW DID I LEARN THAT IT HAPPENED?
IF SOMEONE ELSE TOLD ME - HOW DID THEY LEARN IT?
WHY DO I BELIEVE THAT IT IS TRUE? (INFORMANTS)
WHAT DOES IT MEAN? (specialized knowledge as a police officer.)

For example: A poorly written S/W affidavit might say

> *"Police investigation disclosed that early Sunday morning the suspect, Eddie Coyle, was seen approaching the gas station on East Bonanza."*

A well written S/W affidavit would read:

> *"Yesterday, December l5, l994, Samuel Connors, the manager of the McDonald's fast food restaurant on the corner of Eastern and East Bonanza, told me that on December 2, l994 he (Connors) looked out the window of his restaurant at the Rebel gas station across the street at about 3:30 AM and saw a white male adult about 50 years old with a patch over his left eye approach the Rebel gas station where the murder occurred. Today, Detective Brown who is working on this case with me witnessed Mr. Connors pick Eddie Coyle's photo from a mug book and state to Detective Brown that this was the man he had seen approaching the Rebel station on December 2 just prior to the murder."*

6. Use the technique of "**incorporation by reference**" to save time. This is legally valid, **United States v. Berisford**, 750 F.2d 57 (10th Cir. 1984). If you want to include information from other lists, documents, charts, photos or the like, do it this way-

> *"Attached to this affidavit is a six page police report authored by LVMPD Officer Smith under event # 950215-1234 which is designated as Exhibit #1 and is incorporated by this reference as though fully set forth herein."*

E. DESCRIPTION OF ITEMS TO BE SEIZED

1. Remember, the very words of the 4th Amendment ... the affidavit **must *particularly* describe the place to be searched *and* the person or things to be seized**. Be as limited as possible in describing the items to be searched for. One of the basic principles of the 4th Amendment is that "general warrants" are not allowed. Do not make the mistake of thinking that just because you have P/C that the suspect's "house is yours."

2. The purpose of the specificity rule, according to the U.S. Supreme Court is to prevent general searches where police have too much discretion as to what to seize. **Berger v. State of NY**, 388 U.S. 41 (1967) or to put it another way, "the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty."

3. Don't use "boiler plate" lists from a computer because if too many of the items on the list don't apply to your search, the warrant may be invalidated as being a "general" warrant. **People v. Frank**, 38 Cal. 3d 711 (Cal, 1985).

4. The U.S. Supreme Court has recently decided a case in this area that should encourage police to use a **narrow** list of items to be seized. The case is **Horton v. California**, 110 S.Ct. 2301 (1990) which held that a discovery of evidence during the execution of a S/W did not have to be inadvertent. Police searched a suspect's home looking for proceeds of a jewelry robbery and also thought that weapons and other instrumentalities used might be there but didn't ask in the S/W to look for such items. The U.S. Supreme Court said that the weapons found in the search would **not** be suppressed as long as there was P/C in the S/W to look for the items that were named and the scope of the search did not exceed what would be reasonable to find the items named in the S/W.

The Horton case also ruled that when police search for specific items, the search must be stopped immediately once the items are found. This, of course, does not apply to drugs and some similar items.

5**.** Therefore, **make your "items to be seized" list skinny and take away a possible means of attack when the case gets to court**. Be sure, however, that there is a bona fide basis to look for the items named in your S/W. The Nevada Supreme Court implied in the case of **Rowbottom v. State**, 105 Nev. 472 (1989) that a search warrant could be held to be **pretextual** and could therefore result in suppression of items found but not named.

6. Don't go overboard with "plain view" seizures. If you are executing a valid search warrant for narcotics, and find evidence of child pornography, the **safest course** is to obtain a "**piggyback warrant**" to justify seizures of evidence that go far beyond the scope of the original warrant.

A new warrant (the "piggyback warrant") can be quickly obtained simply by attaching as an exhibit the entire original search warrant and affidavit, then doing a short supplemental affidavit to get a new S/W expanding your authority. For example:

"*myself and fellow officers were executing a search warrant for the premises at X, a copy of which along with a 6 page affidavit supporting the S/W sworn to by Officer Brown is attached to this (new) affidavit and incorporated by reference herein when I saw ...(describe your plain view observations which give you P/C as to the new crime) ... and therefore we now want to search for ...(list items to be seized reference the new crime*)...

Then do a new search warrant listing the same premises and new items. The lesson is that if you take too many items under "plain view" you give the defense an argument that 1. the original S/W was a pretext or 2. that the original S/W was over broad or 3. that the S/W was over-broadly executed. (Note; the judge is supposed to tell you fairly specifically what items you can look for and seize.)

7. **As to each and every item that you want to search for and seize, the affidavit must show why you are entitled to do so...it is contraband, or it is evidence and why.**

8. You can attach a photograph or list of certain items sought, as an exhibit to the S/W.

9. If necessary, you can ask permission in the affidavit to use an expert to assist in identifying items during a search. **People v. Moore**, 104 C.A. 3d 1001 (Cal. 1980), **People v. Noble**, 635 P.2d 203 (Colo. 1981), or a private person (crime victim) to do the same, **U.S. v. Robertson**, 21 F.3d 1030 (10th Cir. 1994) and **Bills v. Azeltine**, 958 F.2d 697 (6th Cir. 1992) or a drug-trained dog when searching for dope **United States v. Lambert**, 771 F.2d 83 (6th Cir. 1985).

10. In **U.S. v. Somers**, 950 F.2d 1279 (7th Cir. 1991) Defendant claimed that the warrant is fatally overbroad in that it authorized police to search for and seize "dangerous drugs and narcotics, evidence of cocaine, materials used for the packaging and distribution of cocaine, and marijuana, such as scales, plastic bags, cutting agents, ledgers of narcotics transactions and ...currency."

The fourth amendment requires that a search warrant describe the objects of the search with reasonable specificity, but it need not be elaborately detailed. Here, there is little question that the warrant's description of narcotics material was sufficiently detailed to enable the police to distinguish contraband from legitimate items. Nor was it inappropriate that the warrant authorized the seizure of United States currency; this court has previously upheld a search warrant authorizing, among other things, the seizure of gems, narcotics and currency.

Principles Concerning Specificity

1. If police show that they have worked as hard as possible to get all the descriptive facts that a reasonable investigation of the type of crime involved could be

expected to uncover, a court will allow more latitude on description. **U.S. v. Storage Spaces**, 777 F.2d 1361 (9th Cir. 1985).

2. A more general description is OK where the nature of the object is such that it doesn't have specific characteristics. Warrant for "white string and brown paper" OK. **U. S. v. Davis**, 589 F.2d 904 (5th Cir. 1979). Also OK "42 sheets of plywood." **State v. Salsman**, 290 A.2d 618 (N.H. 1972),"weapons" **U.S. v. Beck**, 122 F.3d 676 (8th Cir. 1997),

3. Less precise description of contraband "controlled substances" held OK because a reasonably well trained officer could recognize different types. (But it's better to specify the type of dope if you can) **State v. Quintana**, 534 P.2d 1126 (N.M. 1975).

4. Commingled goods. Where the S/W gave police a means of ascertaining which cars were stolen, but at the premises searched, stolen cars were intermingled with non-stolen cars, it was OK for the S/W to authorize police to **examine** (search) all the cars but only to seize the stolen ones. **United States v. Hillyard**, 677 F.2d 1336 (9th Cir. 1982).

5. An error in the description is not fatal if, from all the circumstances, the officer can determine what item is to be seized. For example, slight error in serial numbers still made numbers approximately right and therefore seizure OK. **United States v. Rytman**, 475 F.2d 192 (5th Cir. 1973), **Hagler v. State**, 726 P.2d 1181 (Okla. 1986).

6. Greater care is necessary when the type of property sought is generally in lawful use in substantial quantities. Warrants for "stolen jewelry" or "stereo tapes and players" were held to be too broad, **Namen v. State,** 665 P.2d 557 (Alaska, 1983), **In Re 1969 Plymouth**, 455 S.W. 2d 466 (Mo. 1970) and **United States v. Spilotro**, 800 F.2d 959 (9th Cir. 1986).

7. Most care is required in the area of books or films because these are protected by the First Amendment. In **Heller v. United States**, 418 U.S. 483 (1973) the Supreme Court upheld seizure of such items with a search warrant provided that an adversary hearing was conducted immediately afterward to determine if the materials were obscene.

8. If you are going to search **a location which has private files** not subject to seizure such as a lawyer's office, a doctor's office or similar place, it is strongly suggested that in the S/W affidavit, you **ask the issuing judge to appoint an impartial observer** (doctor or lawyer) to go along when the S/W is executed. This not only protects the privacy rights of clients or patients that have nothing to do with your investigation, but it protects the police officers from potential civil or criminal liability. **People v. Blasquez**, 165 C.A. 3d 408 (Cal. 1985).

Some Examples of Descriptions

1. "Stolen women's clothing" was not specific enough. **United States v.**

Faccillo, 808 F.2d 173 (1st Cir. 1987).

2. "Videotapes showing children under the age of 18 years engaged in sex" was specific enough. **United states v. Weigand**, 812 F.2d 1239 (9th Cir. 1987).

3. "Articles tending to establish the wealth and financial status" of the suspect was not specific enough. **United States v. Washington**, 797 F.2d 1461 (9th Cir. 1986).

4. "Articles of personal property tending to establish the identity of persons in control of the premises including, but not limited to utility company receipts, rent receipts, canceled mail, envelopes and keys" was OK. Police are not required to guess in advance what items of ID will be there. **People v. Rogers**, 232 Cal. Rptr. 294 (1986), **United States v. Whitten**, 706 F.2d 1000 (9th Cir. 1983). "Any indicia of ownership and control" held OK in **United States v. Crozier**, 777 F.2d 1376 (9th. Cir. 1985).

5. "Notes, documents and papers and other (written) evidence of a conspiracy to distribute (drugs) was OK in **United States v. Young**, 745 F.2d 733 (2d Cir. 1984) and **United States v. Vanichromanee**, 742 F.2d 340 (7th Cir. 1984) **U. S. v. Hargus**, 128 F.3d 1358 (1997) holding that "receipts and other records" described in the search warrant would be found at defendant's house and that "there need not be direct evidence or personal knowledge" that the items sought are located at the place to be searched.

Principles Regarding Destruction in Search Warrants

In **Liston v. Riverside**, 120 F.3d 965 (9th Cir.1997) Liston claims that the officers ransacked their home, dumping out garbage and removing items from drawers and closets, without cleaning up after themselves. They also contend that officers destroyed a backyard fence and dug up the backyard. As an initial matter, it is not clear that these actions rise to the level of a constitutional violation, as officers executing a search warrant occasionally "must damage property in order to perform their duty." Although this court has not addressed the matter, other circuits have held that only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment.

In **U.S. v. Weinbender**, 109 F.3d 1327 (8th Cir. 1997). The manner in which a warrant is executed is always subject to judicial review to ensure that it does not traverse the general Fourth Amendment proscription against unreasonableness." In this case, the search warrant authorized officers to search the entirety of Weinbender's home for the specified items. Moreover, the officers had been informed that "hiding places," including under the basement stairs, were utilized by Weinbender. The space along the I-beam was sufficiently large to permit any of the listed items to be stored there. Furthermore, the evidence does not support Weinbender's argument that Officer Schmit engaged in the unnecessary destruction of property.

F. DESCRIPTION OF PLACE TO BE SEARCHED

You can get a search warrant to search a place which is controlled by innocent parties in order to recover contraband or evidence of a crime as long as you can show P/C that the item or items are there. In the case of **Zurcher v. Stanford Daily**, 436 U.S. 547 (1978) the Court upheld the search of a campus newspaper office to find photographs of students injuring other students and police officers during a campus riot. The newspaper refused to release the photos voluntarily **and even though this was not a crime**, the Court held that a search warrant was a proper procedure under the 4th Amendment.

1. Be sure to describe the place to be searched in addition to the address so that there is only one place which fits the description. An easy test is to ask yourself whether an officer who doesn't know where the place is could find it based on your description. Also ask yourself, "Are there any other places nearby that fit the same description?"

If place is hard to describe, use a map, sketch or photo attached to the S/W.

2. Buildings in the same area, for example where one person is in control of an entire compound, or if several buildings in the same location are occupied in common by suspects as to whom there is P/C, this is OK. In **U.S. v. Vaandering**, 50 F.3d 696 (9th Cir. 1995) Warrant covered the entire curtilage of the residence by giving street number.

In **Keesee v. State**, 110 Nev. 997 (1994) holding that " Where deputies had obtained information that drug activity was being conducted at suspects' residence, and in addition, the suspects were in control of out-buildings within the curtilage of the residence, the search warrant was not overbroad even if the police only had probable cause to search a portion of the premises. Moreover, the deputies could have searched any building within the curtilage of the residence even if the search warrant did not specify buildings.

Although the photos evidently showed marijuana (P/C) only in the shed, the search warrant properly permitted search of the residence as well. **Wright v. State**, 112 Nev. 391(1996).Same ruling in **Garrettson v. State**, 114 Nev. 1064 (1998) The words in the S/W must say "entire premises" as place to be searched.

3. Two or more buildings occupied by the same person, but not located near each other can be searched under a single S/W as long as there is P/C as to both places. **Williams v. State**, 240 P. 2d 1132 (Ok., 1952), **People v. Easley**, 671 P.2d 813 (Cal. 1983). Same rule even if different persons occupy the premises which are widely separated. (**Leon v. U.S.**).

4. The description is sufficient if the officer with the S/W can, with reasonable effort, ascertain and identify the place to be searched. **Steele v. United States**, 267 U.S. 498 (1925). In urban areas, a street address including city and state is enough. **State** v. **McClelland**, 523 P.2d 357 (Kan., 1974). In rural areas, a description of a farm by name of the owner and directions for reaching the farm was OK. **Luster v. State**, 433 So.2d 481 (Ala., 1983).

5. Where a complete description of the premises was given in the S/W, but upon arrival, police notice a discrepancy (for example, street numbers are transposed), if the description is detailed enough so that there is no doubt that it is the correct place, search OK. **Robinson v. Comm**., 248 S.E.2d 786 (Va., 1978), **State v. Madsen**, 609 P.2d 1046 (Ariz., 1980), **U.S. v. Valentine**, 984 F.2d 906 (8th Cir. 1993), **U.S. v. Garza**, 980 F.2d 546 (9th Cir. 1992).

G. INTRUSIONS INTO THE BODY

1. In **Winston v. Lee**, 470 U.S. 753 (1985) the Supreme Court analyzed the circumstances under which a S/W could be used to order surgery to remove physical evidence from the body (in that case it was a bullet from a victim's firearm). The Court said that whether this could be done should be decided on a case by case basis by balancing the following factors:

a) seriousness of the surgery
b) probability that it will produce evidence, and
c) how important or crucial the evidence is considering all the other facts of the case.

2. In **Schmerber v. California**, 384 U.S. 757 (1966), the Supreme Court held that, if police can establish P/C that a person is driving under the influence of alcohol, a blood or urine sample can be taken without a search warrant because the evidence (percentage of alcohol in the system) would rapidly change and there is no time to get a warrant. The Court stated that the sample must be obtained in a humane and medically accepted manner.

3. In **State v. Jones**, 111 Nev. (1995), the State Supreme Court held that a S/W **was necessary** to obtain a blood sample in a case where there was P/C to believe that the suspect was "under the influence of a controlled substance." This decision is not in conflict with the **Schmerber** case because scientific evidence shows that drugs can be detected in the system for a relatively long time (many hours or days) and since, unlike alcohol, the exact percentage is not an element of the crime, a S/W must be used.

H. THE FORM OF THE SEARCH WARRANT

A sample search warrant, affidavit supporting the search warrant and return is attached to this outline. We will discuss these in more detail, but first let's look at some basic principles under Nevada law concerning search warrants. The Nevada Statutes are NRS 179.015 through NRS 179.115.

1. Who may apply? No express provision for this. The affiant is usually a police officer but any credible person could be the affiant.

2. Who may issue the S/W? Any District Court Judge, Justice of the Peace,

or Municipal Court Judge.

3. Who may execute the S/W? Per NRS 179.045 the warrant must be directed to a peace officer in the county where the S/W is to be executed.

4. What items can be searched for? Any property which is:

A. Stolen or embezzled or
B. Designed or intended for use or which is or has been used as the means of committing a crime or
C. Constitutes evidence to show a crime has been committed or that a particular person has committed a crime.

The Search Warrant Itself:

This is a single page (sometimes 2 pages) signed by the Judge which makes it lawful for the police to carry out the search. Note that as required by the 4th Amendment it is specific as to the place to be searched and items to be seized.

The S/W incorporates the affidavit by reference. This means that legally speaking they are as one document.

The Affidavit:

Note that the first pages are mostly a repeat of the S/W but that it also includes the identity and experience of the affiant officer.

The affidavit states why the items are subject to seizure. In drug cases, this may be obvious but it may need explanation in a homicide, fraud or pandering case. (For example, it is not a crime to have a gun, suitcase and many other items).

The next part of the affidavit states the P/C in a common sense way.

The next part is the "prayer" or request to do the search. In Nevada, all searches must be done between 7 am and 7 pm unless the Judge authorizes a nighttime search. This can be for any common sense reason and you don't have to show that nighttime is the only time you could search. See **Sanchez v. State**, 103 Nev. 166 (1987) (C/I's money and drugs at apartment could dissipate and experienced officer stated to judge that drug dealers sell day and night).

The Return:

Nevada law requires you to leave an inventory at the place searched and report (return) the same information (what you seized) to the issuing Judge (or Clerk of that Court).

Use of a "Sealing Order":

NRS 179.045 3. Upon a showing of good cause, the magistrate may order an affidavit or a recording of an oral statement given pursuant to this section to be sealed. Upon a showing of good cause, a court may cause the affidavit or recording to be unsealed.

Even though it appears that a S/W affidavit can be sealed, the question as to when it will be unsealed is wide open under Nevada law. It would appear likely that at least at some point the affidavit would have to be unsealed. Otherwise, the affidavit could consist of anything or next to nothing and the defense could argue (probably successfully) that they could not even subject it to a post-Leon and Gates challenge.

Therefore, until some firm rules are established through statutes and/or Nevada case law, officers should regard the sealing order as a short term protection. If there is a major crime and the suspect is in custody with a speedy preliminary hearing, this could be as short as a few weeks.

In **Certain Individuals v. Pulitzer Pub. Co.**, 895 F.2d 460 (8th Cir. 1990) the Court denied access by media to sealed affidavit until case prosecuted "the government's investigation tips the balance in favor of privacy and against disclosure at this time." Same ruling in **Times Mirror v. U.S.**, 873 F.2d 1210 (9th Cir. 1989**).**

In **Matter of Eye Care Physicians**, 100 F.3d 514 (7th Cir. 1996) the Court held that where no person affiliated with the eye care business was arrested or charged with any crime, Eye Care's common law right was outweighed by the governments need for privacy (in the S/W). "The ID of unnamed suspects not yet charged would be revealed and privacy of innocent people would be threatened."

In **Lawmaster v. U. S.**, 993 F.2d 773 (10th Cir.1993) (involving plaintiff's appeal of denial of petition to unseal affidavit used to obtain search warrant).
" We noted in that a district court has various options available to it in unsealing all or portions of affidavits or other documents. These include: in camera hearings, findings under seal, and redacted versions of the document."

In **People v. Hobbs**, 873 P.2d 1246 (Cal. 1994) "Courts have sanctioned procedures where portions of S/W affidavits if revealed would effectively show ID of C/I. That part can be redacted and the remainder of the affidavit given to defense attorney but if affidavit as a whole would show ID of C/I the court should have an in camera hearing without the defense attorney and may question the C/I or other person."

Although most portions of the sealed S/W can be revealed to the defense, a portion which contains information from the C/I may be kept sealed at least in part. See **Hobbs** (supra) and the cases in the P/C for arrest section of this manual. Also note: In 1990, the Nevada State Attorney General issued a written opinion (which does not have the same force as a Nevada Supreme Court decision) in which the AG stated that in cases where the affidavit includes information from a C/I whose identity might be learned from

reading the affidavit, the affidavit can be sealed under Nevada law (NRS 49.335 et. seq. protecting the identity of an informer).

Thus, if the judge, after an in camera hearing, wants to release some parts of the C/I, try to ask the judge to keep sealed things that would let the defendant deduce the C/I's identity such as "**when** the C/I saw or learned of the contraband" or "the **relationship** of the C/I and defendant."

I. SEARCH WARRANT PREPARATION CHECKLIST

"Success has the uncanny knack of favoring those who have paid the price of careful preparation." "Luck is what happens when preparation meets opportunity"

1. Give the name of the officer who will be the affiant.

2. Describe the place to be searched and items to be seized.

3. Name the crime(s) connected to the items to be seized.

4. Note whether it is a regular S/W or anticipatory S/W.

5. Complete affidavit, warrant and seal (if necessary).

6. If using pre-formatted computer, **be sure that all the standard language (courts call this "boilerplate" language) actually applies to this particular S/W.**

7. If nighttime clause needed be sure it is prayed for and justified. If the S/W is signed at night, ask the issuing judge to put the time as well as the date on the S/W.

8. Have the proposed S/W and affidavit reviewed by supervisor.

9. Contact dispatch for phone numbers of on call DA's. Have S/W reviewed telephonically by the DA. Insert the DA's name on the last page of the affidavit under "Approved by" or note the DA's name in your report.

10. Contact the Judge (District Court or J.P.) Get phone # from dispatch. You will need several copies of the S/W and affidavit (one for premises, original to be filed, copy for police records etc.) and so you have two choices:

A. Since a copy can be served at the premises, take the original S/W and affidavit to the judge for signature then Xerox copies, or

B. Make several copies of S/W and affidavit before going to judge and be sure that the judge signs multiple copies.

11. **You must swear to and sign the affidavit in front of the judge.**

12. Contact dispatch and get separate event # for the S/W execution.

13. Ensure that S/W kit is fully stocked (Return of Service, evidence bags, gloves, etc.)

J. EXECUTION OF THE SEARCH WARRANT

General Information:

Two recent U.S. Supreme Court cases have rulings on execution of S/W.

In **Wilson v. Layne**, 119 S.Ct. 1692 (1999) the court noted that police could use the presence of a 3rd party (need to put request in writing in the S/W affidavit and S/W) to do things like identify stolen property, but police cannot bring media persons into the premises where the S/W is executed.

In **City of West Covina v. Perkins**, 119 S.Ct. 678 (1999) the court ruled that when police seize property (lawfully) there is no requirement that police provide the owner with state law remedies to try to get the property suppressed or returned.

The S/W can be executed by any Nevada peace officers in the County where the search takes place. The law requires you to show the S/W to the person having control over the premises searched. However, in **U.S. v. Davis**, 76 F.3d 311 (9th Cir. 1996) the Court ruled that police don't have to have the S/W in hand when the search is begun **as long as the S/W was issued before the search began**. Same ruling in **U.S. v. Hepporle**, 810 F.2d 836 (8th Cir. 1987) and **U.S. v. Bonner**, 808 F.2d 864 (1st Cir. 1986)The law also requires that you leave a copy of the S/W and the affidavit at the premises searched unless you have gotten an order sealing the affidavit from the Judge who issued the S/W.

You are also required to knock and announce before entry. This means to announce that you are the police and that you have a search warrant. If you are "refused entrance" you can break doors or windows and force entry. Refusal doesn't have to be an explicit statement ("You can't come in. Go away.") but you must wait a "reasonable" period of time before silence from inside - refusal.

You must leave an inventory of the items seized either given to the person in control of the premises or left at the premises. The same information must be reported to the issuing Judge (this is done by filing the paper in the office of the Clerk of Courts for the issuing Judge (District or Justice). In Clark County, this is accomplished by using a multi-layered and colored self-copying paper called "Return." The bottom copy is left at the premises, the white (top) copy is filed with the court clerk and the other copy is used for police records.

Scope, Intensity and Duration:

Once entry is made and premises secured, the search can begin. OK to search the entire curtilage (building, other structures)on the same land. **Keesee v. State**, 110 Nev. 997, 879 P.2d 63 (1994), **U. S. v. Frazin**, 780 F.2d 1461 (5th Cir. 1986).

If police execute the S/W and forget to seize some items, two cases hold that police can return to the premises and search for and seize the items within **a few hours**. **U.S. v. Kaplan**, 895 F.2d 618 (9th Cir. 1990) and **U.S. v. Carter**, 854 F.2d 1102 (8th Cir. 1988).

The scope or intrusiveness of the search is limited only by the size and nature of the items sought. You can search anywhere in the premises where the item may be found. **U.S. v. Buckley**, 4 F.3d 552 (7th Cir. 1993)

In **U.S. v. Bater**, 830 F. Supp. 28 (D. Mass. 1993) "Once police have discovered everything enumerated in warrant, anything seized thereafter must be suppressed. However, there are no bright line rules governing how and how often officers must communicate with one another while conducting search, or when they must stop and inventory items in view before continuing to look."

Common sense is the key. If looking for a single item ,a gun for example, once you find it, the search is over. **U. S.v. Issacs**, 708 F.2d 1365 (9th Cir. 1983) But if you are searching for dope or stolen credit cards or similar items, even though you find some, you don't have to stop searching until you find out whether you have found it all. Although most searches won't take more than a few hours, courts have upheld lengthy searches in certain circumstances. (Three day S/W execution for "bloodstained items" using benzidine test - OK. **State v. Swain**, 269 N.W. 2d 707 (Minn.1978).

You can search personal effects if they might contain the items searched for. **United States v. Williams**, 687 F.2d 290 (9th Cir. 1982) If police don't know at the time of search who the containers (suitcases) belong to then OK to search inside them. Police can assume they are part of the premises. **Carman v. State**, 602 P.2d 1255 (Alaska, 1979) and **People v. McCabe**, 144 CA. 3d 827 (Cal. 1983) Also, if visitor makes his belongings accessible to the occupant of the premises and the occupant had the opportunity to stash the contraband there, OK to search. **Comm. v. Wheatley**, 402 A.2d 1047 (Penn. 1979).

In **U.S. v. Lucas**, 932 F.2d 1210 (8th Cir. 1991) "in a S/W for records of drug transactions allowed playing the tape on a telephone answering machine." In **U.S. v. Peters**, 92 F.3d 768 (8th Cir. 1996) "warrant for records associated with drug distribution authorized playing unmarked audio cassette tape." In **U.S. v. Gallo**, 659 F.2d 110 (9th Cir. 1981) "answering phone in S/W at bookmaker's residence valid because phone is likely accessory to the crime." Same ruling applied in a drug S/W in **U.S. v. Stiver**, 9 F.3d 298 (3rd Cir. 1993) and **U.S. v. Ordonez**, 737 F.2d 793 (9th Cir. 1984).

Automobiles on the premises can be searched as part of the "premises" even though not specifically named as long as they are owned by or under the control of the person in control of the premises. **United States v. Asselin**, 775 F.2d 445 (1st Cir. 1985), but recent cases also hold : In **U.S. v. Evans**, 92 F.3d 540 (7th Cir. 1996) Police can search a car in the garage of a house with a S/W for the house even if the car (like any other container) is not mentioned in the S/W and even if the car belongs to a person

who did not own the property.

Time of Execution:

How soon? NRS 179.075 says that the warrant is to be executed and returned within 10 days. The word "forthwith" is used in the warrant. In **Smithart v. State**, 86 Nev. 925 (1970) the Court says that you have up to 10 days to execute and return the S/W but it should be served as soon as possible otherwise it may become "stale." A delay in execution is OK under the 4th Amendment only where the P/C in the affidavit continues until the time of the execution. **United States v. Nepstead**, 424 F.2d 269 (9th Cir. 1970).

As previously stated, all S/W must be executed in the daytime (7am to 7pm) unless the issuing judge gives a nighttime clause. As long as there is P/C that the property will be there at night the S/W can OK night search. **Gooding v. United States**, 416 U.S. 430 (1974). In **Sanchez v. State** (Nev. 1987) our Court said that the fact that narcotics could dissipate, the buy money be lost and drugs were often sold at night was abundant justification.

Other courts have held that where the safety of the officers or occupants of a premises would not be disturbed, a nighttime justification can be found. This would include circumstances like searches of permanently lit places, airport baggage areas, and closed containers already in police custody. **State v. Brock**, 653 P.2d 543 (Oregon, 1982)

The antipathy to night searches stems from the greater intrusiveness of police suddenly rousing people from their sleep which may be fraught with conflict or violence where there is no citizen to confront, these problems disappear**. State v. Lacey**, 694 P.2d 795 (Ariz. 1984).

Detention and Search of Persons:

If a particular person as well as a place is named in the search warrant - no problem. **United States v. Ward**, 682 F.2d 876 (10th Cir. 1982).

If a person is arrested at the place of search on probable cause - no problem - but the P/C for the arrest must be based on more than mere fact that the person is present at the place searched. Drugs in plain view are in the "constructive" possession of all occupants and gives P/C to arrest all occupants. **Maskaly v. State**, 85 Nev. 111 (1969) Arrival of a person who appeared to be under the influence of drugs was enough P/C to arrest. **State v. LeClair**, 304 A.2d 385 (Maine, 1973) Once a person is arrested on P/C, police can search that person "incident to arrest."

In a place open to the public the general rule is that police cannot automatically search persons who are present at the time and place of execution of a search warrant. In **Ybarra v. Illinois**, 444 U.S. 85 (1979), the S/W was executed in a bar open to the public and it was unlawful for police to even pat down patrons without individualized suspicion that they were armed.

With regard to detention and search of persons (other than occupants) in a private premises when police have a S/W, if Terry type reasonable suspicion exists as to a person present during execution of a S/W, that person can be detained. **U.S. v. Fountain**, 2 F.3d 656 (6th Cir. 1993) and **Baker v. Monroe**, 50 F.3d 1186 (3rd Cir. 1995). In **U.S. v. McEaddy**, 780 F.Supp. 464 (D. Mich. 1991) the Court held that anyone inside the (non public) premises was an "occupant." A person who enters house during execution of search warrant cannot be subjected to detention or frisk **merely because** he came to the house where the S/W was being executed-**need other factors. Lippert v. State**, 664 S.W. 2d 712 (Texas, 1984)**, U.S. v. Moreno**, 891 F.2d 247 (9th Cir. 1989) where person was about to enter house and tried to leave when seeing police. Court held OK to detain.

Sometimes a search warrant can authorize the search of "any person" present at the place and time of the execution of the S/W. This is far more likely to be legal when the place searched has limited access (residence) and the police have P/C to believe that criminal activity is openly and notoriously taking place there. **U.S. v. Graham**, 563 F. Supp. 149 (N.Y. 1983)Same ruling in **Marks v. Clarke**, 102 F.3d 1012 (9th Cir. 1996)" all occupants OK when reason to believe all involved in criminal activity (must be in S/W) but not applicable in S/W where innocent family members or friends may be present."

NRS 179.055 (3) provides that in the execution of a search warrant, police may reasonably detain and search any person in the place at the time in order to protect the police from attack or to prevent destruction, disposal or concealment of any instruments, articles or things particularly described in the warrant. This statute must be interpreted in light of the Supreme Court's decision in **Ybarra** because it is axiomatic that a state statute cannot overrule the Supreme Court's interpretation of the U.S. Constitution.

In **Michigan v. Summers**, 452 U.S. 692 (1981) police had a S/W for Summers' residence. As police arrived to execute the S/W, Summers was leaving and police detained him and brought him back inside the house while the S/W was executed. Drugs found at the house and he was arrested. More drugs found in his pocket. Court said the initial detention and later arrest were OK.

The rule seems to be that police can "detain" persons found at premises named in S/W if the people are "occupants" and it is a private premises.

Knock and Announce:

Nevada law requires "knock and announce." (NRS 179.055) Recently, the U.S. Supreme Court held that "knock and announce" was also an integral requirement of the 4th Amendment itself in the case of **Wilson v. Arkansas**, 514 U.S. 927 (1995). The Supreme Court had previously held that notice was ordinarily required before entry by force. **Miller v. United States,** 357 U.S. 301 (1958) The same rule applies to entry with a passkey. **Munoz v. United States**, 325 F.2d 23 (9th Cir. 1963), or through unlocked door. **Sabbath v. U.S**., 391 U.S. 585 (1968).

In **U.S. v. Fike**, 82 F.3d 1315 (5th Cir. 1996) The rule requiring an officer to knock and announce serves several fundamental interests, including "(1) protecting law enforcement officers and household occupants from potential violence; (2) preventing the unnecessary destruction of private property; and (3) protecting people from unnecessary intrusion into their private activities."

In **Richards v. Wisconsin**, 520 U.S. 385 (1997) The Court ruled that the State Court's decision that no knock S/W entries are valid in all drug cases was wrong and there are no "blanket exceptions" to the finding in Wilson v. Arkansas that the 4th Amendment requires knock and announce. The US Supreme Court did hold that police can make a no knock entry if there is **reasonable suspicion (not P/C)** that knock and announce would be dangerous or futile or would inhibit the investigation of the crime.

An officer with a S/W dressed as a maintenance man and knocked on the door. Richards asked who is it and the reply was maintenance man. He opened the door, and when he saw a police officer standing nearby, slammed the door. After waiting 2 to 3 seconds, police kicked down the door identifying themselves as police, entered, found him trying to leave by a window, then found cocaine.

The Court held that the entry was lawful without knocking since Richards knew, after opening the door, that police were there and when he closed the door, police had R/S to believe that he might destroy the drugs.

In **U.S. v. Ramirez**, 118 S.Ct. 992 (1998) No knock federal S/W to look for drugs, guns and to arrest an escaped prisoner upheld based on information from reliable informant that the occupant of the premises had drugs and guns and a person named Shelby with a prior record for violent crimes and who had made threats to kill witnesses and police officers who was wanted for escape was residing in Ramirez's house.

The notice requirement means that you have to say **"police" and "search warrant."** If entry not refused, you must wait a **reasonable** time.

In **U.S. v. Spikes**, 158 F.3d 913 (6th Cir. 1998) The Court ruled: The focus of the rule "is not what 'magic words' are spoken by the police," or whether the police rang the doorbell, "but rather on how these words and other actions of the police will be perceived by the occupant." The point, therefore, is when those inside should have been alerted that the police wanted entry to execute a warrant. The purpose of the rule is that the occupant "know who is entering and why and ... be given a reasonable opportunity to surrender his privacy voluntarily."

Thus, whether the officers in the present case waited a reasonable amount of time before entering the residence is to be measured from when they first announced over the police bullhorn "Sheriff's office, search warrant, sheriff's office, search warrant, come out of the house, open your door." It was at that point that any occupant should have understood that the police "want in, presumably to search and arrest, not census-taking." With that in mind, the critical question becomes whether 15 to 30 seconds (the time from the initial use of the police bullhorn until the officers entered the home) was a reasonable amount of time for the officers to wait before entering the residence. The officers entered 4 seconds after the bullhorn announcement. The Court held that this was Ok due to (1)

S/W was for drugs (2) S/W was executed during daytime, and (3) Neighbors saw the police after hearing the bullhorn.

No Knock Search Warrants:

There is no statutory authorization for this in Nevada. Where there is no statutory authorization, some courts say you can't get a "no knock" search warrant, **State v. Arce**, 730 P.2d 1260 (Ore.1986) and **State v. Bamber**, 630 So.2d 1048 (Fla. 1994), while other courts say police can get a "no knock" S/W without statutory authority. In Wisconsin, there is no statute authorizing a "no knock" S/W (the statute mirrors the NRS statute on knock and announce) but the police in Wisconsin often ask for and receive a no knock warrant from a judge. In **U.S. v. Spry**, 190 F.3d 829 (7th Cir. 1999) the Court upheld the validity of a no knock S/W issued by a Wisconsin judge stating, "The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time." (Citing 1997 U.S. Supreme Court **Richards**))

Based on the U.S. Supreme Court's decisions in **Richards** and **Ramirez**, it is clear that the Court feels that if police have R/S concerning danger to police and/or likely destruction of evidence, that police can make a no knock entry.

It is critical to note that there must be specific R/S concerning the place to be searched and **it is improper to use "blanket type statements" such as "drug dealers often have weapons, etc."** If police want a no knock S/W there must be specific, documentable R/S regarding the occupant(s) of the place to be searched.

The author of this manual cannot predict whether the Nevada Supreme Court will uphold a judge's authorization of "no knock" (assuming the S/W affidavit has strong and clear R/S to justify no knock) because the NRS doesn't say judges can or can't authorize this. However, if police have clear and strong R/S to justify no knock it seems reasonable that police can present this information to the judge signing the S/W because the US Supreme Court said in Richards "the practice of allowing judges to issue no knock S/W is reasonable if police provide sufficient cause."

Useless Gesture Exception:

When someone inside knows it is the police (looks out window, sees police, sound of running) or some citizen or accomplice on the outside shouts "police" the waiting time between announcement and forced entry is reduced to seconds.

Officers' Safety Exception:

There must be more than a generalized belief that the occupant is armed (for example, "many drug dealers have guns") is not enough to justify a no-knock entry on this basis. But, where police have reasonable belief that occupant is armed and may use weapon against police, entry without notice is OK. **U.S. v. Meshane,** 462 F.2d 5 (9th

Cir. 1972), **U.S. v. Whitney**, 633 F.2d 902 (9th Cir. 1980) and **U.S. v. Manfredi**, 722 F.2d 519 (9th Cir. 1983)

In **U.S. v. Stowe**, 100 F.3d 494 (7th Cir. 1996) where C/I observed defendant at apartment with large amount of crack cocaine and loaded firearms the court ruled:"while the presence of a gun alone is not enough (for no knock) drug dealing (with a gun) is a crime infused with violence."Same ruling **U.S. v. Moore**, 91 F.3d 96 (10th Cir. 1996), **U.S. v. Bates**, 84 F.2d 790 (6th Cir. 1996).

Where police have documented R/S that the occupant is violent, no knock is approved: **U.S. v. Murphy**, 69 F.3d 237 (8th Cir. 1995) (occupant on parole for murder and had firearm), **U.S. v. Perez**, 67 F.3d 1371 (occupant shot C/I and served time for murder). R/S that occupant was not only armed but dangerous, upheld in **U.S. v. VonWillie**, 59 F.3d 922 (9th Cir. 1995). Same ruling in **U.S. v. Kennedy**, 32 F.3d 876 (4th Cir. 1994). Police had R/S information that occupant might be violent and had carried a handgun during cocaine delivery, **U.S. v. Soria**, 965 F.2d 436 (7th Cir. 1992). No knock OK where suspect had a pit bull and record for violence, **U.S. v. Buckley**, 4 F.3d 552 (7th Cir. 1993)

Routine use of armored car battering rams has been held to be unreasonable, but the use of "flashbangs" which temporarily blind and confuse occupants has been OK'd where officers' safety reasonably requires it. **Langford v. Superior Court**, 729 P.2d 822 (Cal. 1987).

Use of Ruse to cause occupants to open door to place to be searched:

In **Richards v. Wisconsin**, an officer with a S/W posed as a maintenance man when knocking on the door. The U.S. Supreme Court did not criticize this.

However, after the U.S. Supreme Court's decision in **Wilson v. Arkansas**, even if a ruse is used to get the occupants to open the door, **before entering you must announce "police with search warrant."**

In **U.S. v. Phillips**, 149 F.3d 1026 (9th Cir. 1998) the Court ruled that the statutory knock rule does not apply to officers (with a S/W) who enter through an open door.

Ruse employed by police with S/W to get occupants to open door has been upheld by numerous courts: "Pop Warner" **Comm. v. Goggin**, 587 N.E. 2d 785 (Mass. 1992), "occupant's car was hit" **U.S. v. Harris**, 961 F.Supp. 1127 (SD Ohio. 1997) , "pizza delivery" **State v. Moss**, 492 N.W.2d 627 (Wisc. 1992)
"dressed as pizza delivery man" **Adcock v. Kentucky**, 967 S.W. 2d 6 (1998), and "DEA dressed as furniture delivery men" **U.S. v. Vargas**, 621 F.2d 54 (2d Cir. 1980) The following cases all upheld use of ruse:

In **U.S. v. Stevens**, 38 F.3d 157 (5th Cir. 1994) officers with S/W borrowed a flower delivery truck and came to the door carrying poinsettias. When the occupants opened the door, they advised that they were police and then entered.

In **Coleman v. U.S.**, 728 A.2d 1230 (DC, 1999) uniformed police arrived with S/W and through open screen door said they were there in response to a burglary alarm and were allowed to enter after they stated "S/W."

In **U.S. v. Syler**, 430 F.2d 68 (7th Cir. 1970) police with S/W knocked on door and when person inside said "who is it?" police said "gas man."

In **U.S. v. Salter**, 815 F.2d 1150 (7th Cir. 1987) police with S/W for motel room called occupant on phone and told her to go to the front desk to sign papers and when room door opened police said "police with S/W."

In **U.S. v. Contreras-Ceballos**, 999 F. 2d 432 (9th Cir. 1993) police with S/W knocked on door. Occupant said, "who is it?" Police said, "Federal Express." Door opened and police ID themselves and said "S/W."

Once the door is opened, you **must** proclaim "police-search warrant" as you rush the door. The great majority of cases decided on this issue have upheld such police action. **Lewis v. United States,** 385 U.S. 206 (1966), **People v. Rudin**, 77 C.A. 3d 139 (1978).

Finding Items Not Named in S/W (Plain view):

See section in this manual on Plain View

K. COMPUTER SEARCHES

(1) INTRODUCTION

This is a new area of the law regarding search and seizure with a number of federal and state cases on this issue. Some of the federal cases are unpublished meaning that they have minimal value as "precedents." There are also conflicts of opinions in state and federal decisions on computer searches. There are Federal Statutes which may have some influence on the lawfulness of computer searches: Electronic Communications Privacy Act (18 U.S.C. 2510) which includes rules on stored electronic com. and the Privacy Protection Act (42 U.S.C. 2000)

Due to these factors, an officer who wants this type of S/W should contact the District Attorney's Office in your county. The cases in this section are general guidelines to assist law enforcement in computer searches. Full text as to lawful police procedures in computer search would be more than 100 pages in length.

Because the law dealing with computer searches is new and in a state of flux, in the next few years supplemental information on computer searches will be made by prosecuting attorneys and disseminated to police departments.

(2) General Information

All cases agree that there is a 4th Amendment expectation of privacy in computers. Police must have a warrant to seize and search the contents of a computer unless one of two exceptions apply : emergency(rarely) or consent. Note the following section on consent search of computers.

There may be important and valuable evidence in a computer's hard drive, floppy, mini, CD discs and other electronic storage items. Some crimes are more likely to have information on computers such as child porn, counterfeit or altered documents, recipes for manufacturing drugs such as methamphetamine, PCP and records such as pay and owe sheets for narcotics sales and illegal bookmaking

Computer searches are somewhat like searches of a residence in the sense that police (with a warrant) are entitled to search for and seize **certain items** based on P/C. There may be electronic files in the computer where these items should be found without searching through everything in the computer and related discs. The US Supreme Court has repeatedly held that **general searches are unconstitutional, and having a lay person roam through all information stored on a computer is fraught with potential suppression and/or lawsuits.**

For this reason, it appears essential that police should seize a computer and related items with a warrant justifying the probable evidentiary contents of the computer **with help from a person who has expertise in retrieving information from a computer to search for specific types of evidentiary data.**

If an expert is contacted before the S/W and affidavit is completed, include in the

affidavit the background and abilities of the expert and information from the expert as to how that person intends to search the computer (and related items) to obtain the specific items that police are authorized (by the S/W) to seize.

If an expert is not available before the initial S/W is executed (but there is P/C to **seize** the computer, a second and more specific S/W should be completed before the **search** of the computer after gaining information from a person with expertise. Note that in this section, many cases uphold the police seizure and removal of an item such as a computer (with a warrant), which would be too difficult to search at the place from which it is seized.

(3) Consent Searches of Computers

Please review the section in this manual on consent searches, p.72

Note that the consent giver must have access and control over the place to be searched and that police must tell the consent giver what they want to search for so that consent will be valid. Two recent cases show how failure to specifically ask to search a **computer** for **particular items** resulted in suppression of evidence.

In **U.S. v. Carey**, 172 F.3d 1268 (10th Cir. 1999) defendant gave police consent to search his apartment for "names, phone records, ledgers and other documentary evidence pertaining to the sale of narcotics, and to remove from the premises any items which are essential in proving commission of any crime" Police seized two computers without a warrant, believing that they would contain information about drug activity and/or would be subject to forfeiture.

At the police station, police obtained a search warrant to search the computers for drug related (specified) evidence. The hard drive was opened and files inside were searched for drug related information using words like "drugs, records, etc." and none was found. The officer decided to search other files he was not familiar with and found some files which he couldn't open. He downloaded these files to a disc and then used another computer to open files many of which contained child porn. The Court held that (1) the consent did not validate the search of the computers (although it did allow the seizing of them) because the consent related to drug crimes and documentation, (ie: the right to take the computer does not necessarily include the right to search it) (2) that plain view did not apply to admit the child pornography because when the officer entered the first file showing child pornography he should have gotten an additional ("piggyback") warrant to search for and seize child porn files and (3) the extent of the search exceeded what was authorized by the drug related warrant. The Court also ruled that a search of a computer was **not the equivalent of a search of a filing cabinet.** (Making computer searches more complicated for police.

In **U.S. v. Turner**, 169 F.3d 84 (1st Cir. 1999) police entered Turner's residence and he signed a consent form to search the premises, his vehicle and personal property for evidence pertaining to the felony assault. Police began to suspect that Turner was the assailant. Police searched a computer room which contained several videotapes of explicit sexual material and noticed the computer screen "suddenly turned on" and saw a picture of a nude woman which was "similar" to the victim.

An officer then accessed the index and then opened several files of nude women involving sex or bondage. He called the DA's office for advice and then copied the adult porn files onto a floppy disc, searched the hard drive for other incriminating files, found some child pornography, closed down and seized the computer.

The Court ruled that the consent did not justify a search of the computer. "The standard for measuring the scope of a suspect's consent under the 4th Amendment is 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Aggravated assault is not akin to "paper trail" crimes like bank or mail fraud, nor to possession of child pornography, wherein the suspect might be expected to retain evidence of the offense itself among personal papers or in a computer hard drive.

In **U.S. v. Smith**, 27 F. Supp. 2d 1111 (D. Illinois. 1998) The Court upheld the consent search finding child porn in that: (1) housemate was not acting as agent of government in giving consent to search home and computer; (2) housemate had actual authority to consent to search of computer; and (3) even if she lacked actual authority, she had apparent authority to consent. Based on the facts and circumstances as they appeared to the officers it is clear that the officers reasonably believed that Ms. Ushman could consent to a search of the computer and area around the computer. She provided explicit directions to the computer. She lived in the house and used the bedroom. The computer was not closed off from the bedroom or locked away. The computer area was easily accessible to family members.

(4) Cases on using search warrants on computers

In **U.S. v. Upham**, 168 F.3d 532 (1st Cir. 1999)The Court upheld the search and seizure of child porn. Customs agents monitoring a "chat room" on the Internet, received a number of images depicting child porn. Records of the Internet provider showed that the computer from which the images had been sent was owned by Morrissey at an address in Maine. Acting pursuant to a warrant, the agents conducted a search of Morrissey's home. The first two items on the(warrant) list (pertinent here) were as follows: (1)Any and all computer software and hardware, computer disks, disk drives...and (2). Any and all visual depictions, in any format or media, of minors engaging in sexually explicit conduct [as defined by the statute].

The cases on "particularity" in a S/W involve at least two issues: one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take, and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized.

As a practical matter, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images. A sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs. We conclude, as did the 9th Circuit in U.S. v. Lacy, (cite om.)that the first paragraph was not unconstitutionally overbroad.

Of course, if the images themselves could have been easily obtained through an on-site inspection, there might have been no justification for allowing the seizure of all computer equipment, potentially including equipment that contained no images and no connection to the crime. But it is no easy task to search a well-laden hard drive by going through all of the information it contains, let alone to search through it and the disks for information that may have been "deleted." The record shows that the mechanics of the search for images later performed off site could not readily have been done on the spot.

The other argument is a challenge to the recovery of deleted material. The government recovered the images simply by using the undelete function of the computer. The hard disk had been reformatted by Upham a process that erases some of the indexing code that allows undeleting to be done quickly. But until the deleted information is actually overwritten by new information, the old information can often be recovered by a specialized utility program.

We reject the government's suggestion that, by deleting the images, Upham "abandoned" them and surrendered his right of privacy. Seizure of unlawful images is within the plain language of the warrant; their recovery, after attempted destruction, is no different than decoding a coded message lawfully seized or pasting together scraps of a torn-up ransom note. **Comm. v. Copenhefer**, 587 A.2d 1353 (1991) This warrant did not prescribe methods of recovery or tests to be performed, but warrants rarely do so.

In **Commonwealth v. Copenhefer**, 587 A.2d 1353 (Pa., 1991) police obtained an executed a search warrant for a computer believed to have been used in generating various notes and instructions connected with a kidnapping. After using the computer, the defendant employed the "delete" function to remove the incriminating documents. However, this did not actually remove the material from the computer's hard drive unless and until the hard drive storage space was overwritten to store new data from subsequent use of the computer. An FBI computer expert retrieved files from the hard drive that the suspect thought had been destroyed. The defendant claimed that the attempted deletion of documents created a different right of privacy which required a second warrant prior to conducting the delete search. The Court rejected that argument, analogizing the search to be like a diary recorded in private code. If police validly seized the diary with S/W there would be no requirement for a second warrant before deciphering the code and reading the diary.

In **Davis v. Gracey**, 111 F.3d 1472 (10th Cir. 1997) Police obtained a search warrant which authorized the officers to search for "equipment ... pertaining to the distribution or display of pornographic material in violation of state obscenity laws. The Court upheld the warrant stating that (1) the warrant told the officers how to separate the items subject to seizure from irrelevant items and (2) that the items seized were all within the category "equipment" described in the warrant and (3)the definition of equipment reasonably included computers. The Court also ruled that the computer was more than merely a container for files, it was an instrumentality of crime and could be legally seized.

The Court held the warrant was not overly broad. The description in the warrant was sufficient to provide a meaningful limitation on the search, and was far narrower than those we have found lacking sufficient particularity. We have invalidated warrants

for overbreadth where the language of the warrants authorized the seizure of "virtually every document that one might expect to find in a ... company's office," including those with no connection to the criminal activity providing the probable cause for the search. In this case, the executing officers consulted with an expert to confirm that the computer equipment was in fact used to distribute or display illegal pornographic material and that material fell within the scope of the warrant.

In **U.S. v. Simpson**, 152 F.3d 1241 (10th Cir. 1998) there was probable cause to believe that child pornography would be found on the defendant's computer, sufficient to support a search warrant; computers and files were not "closed containers," requiring an additional search warrant before they could be examined; evidence of child pornography on the defendant's computer, other than the materials he was alleged to have received, was admissible to show that he had not received the materials in question through error.

In **U.S. v. Lacy**, 119 F.3d 742 (9th Cir. 1997) Lacy argues the warrant was too general because it authorized the seizure of his entire computer system. He relies upon **U.S. v. Kow**, 58 F.3d 423 (9th Cir.1995), where we invalidated a warrant authorizing seizure of all the computer hardware and software, as well as "essentially all" of its "records ... files, ledgers, and invoices."

Unlike the affidavit in Kow, the affidavit in this case established probable cause to believe Lacy's entire computer system was "likely to evidence criminal activity." The warrant in Kow had “no limits on which documents within each category could be seized or suggested how they related to specific criminal activity," but the Lacy warrant had objective limits to help officers determine which items they could seize--only documents linked to BAMSE.

In this case no more specific description of the computer equipment sought was possible. The government knew Lacy had downloaded computerized visual depictions of child porn, but did not know whether the images were stored on the hard drive or on one or more of his many computer disks. In the affidavit supporting the search warrant , a Customs agent explained there was no way to specify what hardware and software had to be seized to retrieve the images accurately.

Lacy also claimed the (P/C) was stale."We evaluate staleness in light of the particular facts of the case and the nature of the criminal activity and property sought." The information offered in support of the search warrant is not stale if "there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." The affidavit in this case provided ample reason to believe the items sought were still in his apartment. Based on her training and experience as a Customs agent, the affiant explained that collectors and distributors of child pornography value their sexually explicit materials highly, "rarely if ever" dispose of such material, and store it "for long periods" in a secure place, typically in their homes. We are unwilling to assume that collectors of child pornography keep their materials indefinitely, but the nature of the crime, as set forth in this affidavit, provided "good reason" to believe the computerized visual depictions downloaded by Lacy would be present in his apartment when the search was conducted ten months later.

In **U. S.v. Mohrbacher**, 182 F.3d 1041 (9th Cir. 1999) Defendant was convicted

of transporting and receiving visual depictions of minors engaged in sexually explicit conduct Defendant appealed. The Court as a matter of first impression, held that:

(1) defendant could not be convicted of transporting visual depictions of (child porn) as result of downloading them from foreign computer bulletin board;

(2) those responsible for providing such (visual items) by making them available on a computer bulletin board or by sending them via electronic mail, are properly charged with and convicted of shipping or transporting such images;

(3) customer on receiving end who downloads (such) images is guilty of receiving or possessing such materials, but not of shipping or transporting them Danish police seized the business records of BAMSE, a computer bulletin board system based in Denmark that sold child pornography over the Internet. The records included information that Mohrbacher, who lived in Paradise, Calif. had recently downloaded two graphic interface format images from BAMSE

Within less than a year, police executed a search warrant at Mohrbacher's workplace and found, among other images, two files that had been downloaded from BAMSE, one of a nude girl and one of a girl engaged in a sex act with an adult; both girls were under twelve. The search warrant was validly based on P/C and the description of the items to be seized and the computer itself were specific and valid.

(5) Seizing Computers with search warrant and removing them from the premises to be searched later by an expert to avoid a "general search."

There are a number of cases which approve of police seizing items which contain large amounts of information, some of which can be searched and seized at the place searched and some of which cannot.

In **U. S. v. Johns**, 469 U.S. 478(1985), the Court refused to hold that police must immediately search all containers and packages discovered during a **warrantless vehicle** search. "This result would be of little benefit to the person whose property is searched, and where police officers are entitled to seize the container and continue to have probable cause to believe that it contains contraband, we do not think that delay in the execution of the warrantless search is necessarily unreasonable."

In **U.S. v. Beusch**, 596 F.2d 871 (9th Cir. 1979) police executed a search warrant authorizing search of an office for documentary evidence of transactions between two people. Police seized a ledger containing all records of sales and purchases for a 12 month period, a file containing all incoming cables for a year, and a ledger containing records on foreign customers. The Court held that the seizure was not unduly broad because there was no authority for the proposition that pages in a single volume of written material must be separated by searchers so that only the pages actually containing evidence may be seized.

"Such a rule would substantially increase the amount of time required to conduct a search, thereby aggravating the intrusiveness of the search. It would conceivably require the use of auditors, bookkeepers, and accountants in a document search such as the one in this case **to protect against inadvertent seizure of materials outside the presence of the warrant.**"

The Court used common sense to rule that it is less intrusive to take the entire group of items to another location and do the sorting there **and that sometimes the sorting out must occur elsewhere because that action requires a degree of expertise beyond that of the executing officers.**

Other courts have supported similar action by police. In **U.S. v. Santarelli**, 778 F.2d 609 (11th Cir. 1985), agents removed large quantities of documents (under a S/W) to another location for subsequent examination and the action was upheld by the court for brief examination which would have taken several days if done at the scene. In **U.S. v. Horn**, 187 F.3d 781 (10th Cir. 1999) police with S/W for child porn. on videotapes seized more than 300 video tapes and took them to a police location where the tapes could be examined for certain facts based on authorization in the S/W. The Court upheld the removal because the police could not practically view 300 video tapes at the place designated in the S/W. In **U.S. v. Blakney**, 942 F.2d 1001 (6th Cir. 1991) the Court upheld police acting pursuant to a S/W to seize a briefcase containing 150 different items so that a more thorough search authorized by the S/W could be done. In **State v. Jackson**, 632 A.2d 1285 (N.J. 1993) police with S/W authorizing search for drugs and related items found a locked safe which they took to the police station and opened. The court held that although the safe might contain drugs and related documents, it also might contain personal documents unrelated to the crime but upheld the seizure of the safe. In **U.S. v. Kimbrough**, 69 F.3d 723 (5th Cir. 1995) police had a S/W authorizing search and seizure of materials depicting minors in pornography. Police seized numerous records and every video and audio cassette tape found. The Court held that the police action was not invalid simply because the executing officers chose not to review each video and audio tape at the premises searched.

Police should get specific approval from the issuing magistrate to take a computer to a police location for examination and search by a person (police or civilian) with expertise in computers. Also, police should have the search conducted as soon as reasonably possible.

Ask the issuing judge in the S/W affidavit to allow police (expert) to copy specific and designated files from the computer and/or floppy, CD or other external items including deleted items.

If after the search, police believe that certain items (computer, etc.) should be forfeited then present a subsequent warrant affidavit to the issuing judge to allow this.

L. SPECIAL WARRANT TYPES

(1) ANTICIPATORY (CONDITIONAL) SEARCH WARRANTS

Sometimes in police investigations, officers will be aware of facts which show that at a particular premises, a certain kind of criminal activity is occurring. In some instances, these facts may be enough for probable cause, but officers don't want to execute a search warrant unless they know that the items will be there. For example, police would prefer that a drug dealer not be "dry" at the time the S/W is executed.

Other times, officers may have some facts tending to show P/C but they want more facts to make the P/C stronger. Police may want an informant to make a "controlled buy" to confirm that drugs are being sold from a premises. (Note: You would never simply state in the affidavit that you were going to do a controlled buy but you would explain what a controlled buy is.).

In either of these instances, an anticipatory search warrant can be most helpful. The majority of state Supreme Courts deciding this issue have held that a properly and narrowly drawn anticipatory S/W is valid. The Nevada Supreme Court specifically held this in the case of **State v. Parent**, 110 Nev. 114 (1994).

State v. Womack, 967 P.2d 536 (Utah, 1998) cited Parent along with numerous other state and federal cases authorizing anticipatory search warrants under the directions provided by the State Supreme Court in Parent.

The Court said: "when an anticipatory warrant is used, the magistrate should protect against its premature execution by listing in the warrant **conditions governing the execution which are explicit, clear and narrowly drawn** so as to avoid misunderstanding or manipulation by government agents."

An "anticipatory" S/W is the same as a "conditional" S/W because it anticipates the occurrence of a condition which will trigger P/C.

You cannot, however, use an anticipatory S/W which anticipates the place to be searched. If you have an ongoing investigation which results in P/C that contraband or evidence will be somewhere, but you don't know where, you will have to follow the investigation through until you find P/C as to where. If this happens suddenly, and the situation is urgent, see next section.

(2) PREMISES FREEZE

Suppose you are conducting an ongoing narcotics investigation where an undercover police officer (U/C) is buying increasingly large quantities of drugs from Suspect #1. Suspect #1 tells the U/C that his connection is Suspect #2. Police know Suspect #2 and have evidence tending toward, but not equaling, P/C as to him. Also, police don't know where Suspect #2 is keeping his drugs.

Suspect #1 tells the U/C that his "connect" will bring ten kilos into town the next day and that Suspect #1 will get 5 kilos and sell them to the U/C. The next day, police observed both #1 and #2 and see #2 leave his residence and meet #1 and hand him a package, then #1 is observed to a location where he meets the U/C and sells him the package which contains 5 kilos. A "buy-bust" occurs..

The purchase price for the 5 kilos is close to $90,000 and police are concerned that if #1 doesn't return quickly to #2 with the money that #2 will destroy the other contraband. A "premises freeze" may be in order.

The U.S. Supreme Court approved of the "premises freeze" theory in two cases decided in the 1980's. **Segura v. U.S.**, 468 U.S. 796 (1984) and **Murray v. U.S.**, 108 S.Ct. 2529 (1988). In both cases, the Court said that even though warrantless entries are presumed to be illegal under the 4th Amendment, in cases where the legal basis for the search and seizure is a search warrant **based entirely on facts known to police before the premises entry**, the evidence will not be suppressed regardless of whether the entry was lawful or not.

"There are two elements that must be satisfied for independent source admission of evidence. 1. The warrant must be supported by P/C derived from sources separate from the police entry and 2. The decision to seek the warrant must not be prompted by information gained by the (presumably illegal) entry." **U.S. v. Johnson**, 994 F. 2d 980 (2d Cir. 1993) and **Murray v. U.S.**

It is important for police officers to know that **this is a rule which may help avoid suppression of evidence, but it will not protect officers from civil or criminal prosecution for illegal warrantless entry (if someone is harmed).** Therefore, this type of entry should never be made unless there is strong P/C **and** an emergency situation where lives are in danger or important evidence is likely to be destroyed. The benefit of this entry is that if a S/W is obtained after entry and before search and seizure of items, there is **no suppression due to the independent legal source of authority to search and seize.**

NOTE DIFFERENCES IN SITUATIONS CONCERNING WARRANTLESS ENTRIES FOLLOWED BY A SEARCH WARRANT

SITUATION #1.

You investigate Don Doper and learn the following facts for P/C.

(1) That he lives at a certain address. (2) His scope and NCIC shows a prior conviction for possession with intent to sell 4 years ago. (3) A citizen in the neighborhood tells you that for the past month he has seen ten to fifteen people come and go from Don's place almost every night and that they always stay less than ten minutes. (4) A previously reliable C/I tells you that he bought dope from Don at that residence 3 days ago. (5) A fellow officer tells you that he has seen Don several times in the past month with known drug dealers. You and other officers start a surveillance but Don recognizes you and runs into his house. You immediately force entry and catch Don running for the bathroom with a large bag of rock cocaine. You grab Don and the dope.

(a) Should you get a search warrant?

(b) Should you include in S/W affidavit the fact that after you entered you saw Don holding the drugs?

(c) If Don says, "Aw, you got me. You don't need a warrant. I'll give you consent to search," should you get a warrant anyway?

Answers: (a) Yes. (b) No. (c) Yes.

SITUATION #2.

You are called to a house with a reported 417 battery. Upon arrival, a neighbor tells you that he has heard loud voices, crashes and screaming which just stopped 5 minutes before you got there. You knock on the door and a man opens the door and says that everything is OK and there must be a mistake. You hear a woman's voice moaning and sobbing quietly from inside. You push the man aside, enter and move quickly to a back bedroom where the sobs originate. There you find a badly beaten female. While assisting her, you also see a scale with white powder residue and numerous small plastic baggies. The woman is hysterical and is taken from the scene by ambulance. You want to search for drugs.

(a) Should you get a warrant?

(b) Should you include in the S/W affidavit the drug related items you saw inside the bedroom?

Answers: (a) Yes. (b) Yes.

Why the difference?

In Situation #1, you already had P/C to justify a S/W ***before you entered*** whereas in Situation #2 ***you did not***. In Situation #2, the only way you have P/C is by including in the affidavit what you saw after entering. Hopefully, a court will conclude that the manner of entry and observation of the P/C materials was lawful, but whether a court agrees or not, you have no choice because you need the facts learned after entry for P/C.

In Situation #1, you don't need the facts learned after entry to show P/C. If you put the "after entry facts" into the S/W you run this risk ... if the judge concludes the entry was illegal, then inclusion of these facts in the S/W affidavit may "poison the tree." Why take this chance when you don't have to? The same is true of the suspect's consent. If a court concludes that the entry was illegal, the consent might be the "fruit of the poisoned tree" of the entry.

The "premises freeze" is called the INDEPENDENT SOURCE DOCTRINE by the U.S. Supreme Court, and now you know why. The Court said that a person doesn't have a constitutional right to destroy evidence or escape police and, if the authority for the seizure is a S/W based entirely on P/C learned before the entry, then the evidence won't be suppressed even if a court later holds the entry violative of the 4th amendment.

"A search pursuant to a warrant is not an independent search if the decision to seek the warrant was prompted by what agents saw upon entry or if information obtained

during the entry was presented to the magistrate and affected his decision to issue the warrant." **U.S. v. Walton**, 56 F.3d 551 (4th Cir.1995) Same ruling in **U.S. v. Ruhe**, 191 F.3d 376 (4th Cir. 1999)(The facts obtained from an illegal search do not become sacred and inaccessible under the "fruit of the poisonous tree" doctrine; if knowledge of them is gained from an independent source they may be proved like any others.)

In **U.S. v. David**, 943 F. Supp. 1403 (D.Va. 1996) The court finds that the evidence of the illegally discovered firearm did not prompt the agents to conduct the subsequent investigation of David nor did it prompt them to obtain the search warrant. Thus, the alleged illegal search had no effect in the procurement of the warrant, and the seizure of the firearms was based on evidence obtained from a source genuinely independent of the alleged illegal search.

M. TERMINATION OF THE SEARCH

The search must be terminated when all the listed items have been found or when it is clear that they are not on the premises.

1. Leave a reasonably detailed inventory of items seized.
2. Leave a copy of the S/W and affidavit (unless sealing order was obtained, in which case leave a copy of the S/W and the sealing order).
3. Verify that no police items are accidentally left behind.
4. Secure (by locking, etc.) the premises or leave it in care of a responsible person.
5. Prepare reports while events still fresh. (Rough sketch or diagram most helpful)
6. File warrant and return within statutory time. (10 days from issuance)
7. Arrange for scientific analysis. Don't allow deterioration or contamination.

N. TELEPHONIC SEARCH WARRANTS

NRS 179.045 authorizes telephonic search warrants. In the case of **Sanchez v. State**, 103 Nev. 166 (1987) our Supreme Court approved the recording being made by the Deputy DA who was in a 3 way conversation with the officer and the judge while all parties knew they were being recorded. There is no reason to believe that the result would be different if the police did the recording of the conversation to obtain the search warrant.

SUGGESTED PROCEDURE FOR PREPARATION & ISSUANCE OF THE TELEPHONIC SEARCH WARRANT

1. The officer should have a copy of a blank duplicate original s/w and **notes as to P/C in hand**. The term "duplicate original" just means the "original" search warrant in a telephonic situation.

2. If your department requires DA approval for a search warrant, or if you personally

want a DA to give an opinion as to whether the P/C and other aspects of the warrant are OK, call your department's dispatch and request that they get the on call DA on the phone. Explain the P/C to the Deputy DA & get approval.

Note: This initial part does not have to be recorded. It is not necessary and there is no legal requirement that the Deputy DA be on the line with you when you call the judge. If, for some reason, the Deputy DA does get on the line in a 3 way conversation, remember that the DA can only answer legal questions by the judge **and the DA cannot give factual information to the judge because the DA does not have the same degree of immunity as a police officer.**

3. Before beginning the recording, contact a judge by phone, advise the judge that you wish to seek a telephonic search warrant, and that the process will take approximately (however many minutes you estimate. Most cases... P/C in 15 minutes or less) and that if the judge will be available, you will get the recording equipment "on line" and either re-start your conversation when you are ready to record or call the judge back in a few minutes. If the judge is unavailable or otherwise occupied, thank the judge and call until you find a judge who is available.

4. Using your department's dispatch recording system arrange a **recorded** phone call with officer and the judge. (Or use alternative recording method such as hand held recorder with suction cup or other attachment).

5. Now that you are "on line" with the recording going, tell the judge that he or she is being called to make application for a telephonic search warrant (and that the DA is also on the line if true although in most cases it is not necessary for the DA to be on the line) **and the conversation is being recorded pursuant to NRS 179.045.**

"This is **Officer** _____ of the **(name your police agency)** and I am making application for a telephonic S/W. (If appropriate, say "also on the line is Deputy DA _____.) I am talking to Judge _____ **(State Judge's name)** and the date is _____ and the time of this call is _____."

6. **Be sure that the Judge places the officer under oath**. This can be done at the end or beginning of the process but it is better to do it at the beginning so that no one forgets the oath. A search warrant without an oath is invalid.

Judge: " Officer _____, do you swear that the information you are about to provide to me is the truth to the best of your knowledge, information and belief ?"

Officer: "I do."

7. Give the Judge the **description of the place to be searched**. This could be:

a) a residence
b) a person's body (in case of a blood draw)
c) a vehicle, this should include make, model, color, license and location)

Then designate **what you want to search for**. This could be:

a) contraband or evidence of a crime or a person to be arrested
b) blood or other evidence from a person
c) contraband or items concealed in a car

Remember: You must be specific as to the items to be seized.

Then give the Judge the facts showing probable cause including the basis for the stop if there was a stop in the case of a person as to blood draw for UICS.

8. If the Judge verbally approves issuance of the S/W, fill in the blanks on the duplicate original in the officer's possession and read the S/W to the Judge and request permission to sign the Judge's name on the duplicate original S/W.

9. Since a copy of the search warrant **has to be given to the person in possession of the premises, person or vehicle searched (or left at the place searched)** you must also ask the Judge for permission to fill in and sign the Judge's name to a second duplicate original search warrant which will eventually (within 10 days) be returned to the court. (Not necessary if you make a copy before you serve the search warrant because a photocopy of the search warrant can be legally left at the search site but the original must be returned to the court).

10. State on the recording,

"For the record, the Judge's name has been placed on the duplicate original S/W and a witness has also signed the S/W and the correct date and time has been noted on the warrant. (The witness is not legally required but it is a good idea to have extra proof if the S/W is attacked in court. The witness does not have to hear the judge as long as the witness hears the affiant officer's as it is said to the judge).

Note: The telephonic S/W has a place at the bottom for the judge to sign at a later date. This is not filled in the field during the S/W application by phone. It is signed later by the judge when he or she is given the package described below in "Filing the Electronic S/W."

11. Thank the Judge for his/her time and then get the name and/or ID number of the operator at your police agency who is recording the call. Ask that operator to immediately prepare a cassette copy of the entire S/W application process and put it in an envelope with the event # on both the cassette and outside of the envelope. Personally pick this up or have it sent to you through normal channels. (You have to get the tape and the type written copy of the tape's conversation to the judge within 10 days of the recording).

12. Serve the S/W and make an inventory/return.

FILING THE TELEPHONIC S/W

1. While the law allows 10 days to complete the filing and return process you should complete this ASAP.

2. Get a police department secretary to type a transcription of the recorded conversation. The transcript should include the name of the secretary, date and time of the transcription, and a statement that the transcription is true and accurate (signed by the secretary) and a Certification for the Judge to sign to the effect that

" Having read the transcription of the telephonic S/W issued by this Court on (date) under event # with Officer _____ as affiant and having reviewed the recording of the application it appears that the transcription is accurate." _____ /s/ Judge

This transcription, once it is typed and signed by the judge becomes the same thing as the affidavit supporting the S/W in an ordinary, non-telephonic S/W. (Note: The judge also needs to sign the S/W itself as well as the affidavit).

3. Make a copy of the cassette recording in case the original gets lost or damaged.

4. Place the cassette, duplicate S/W, return and transcription in an envelope and on the outside of the envelope state:

1. Name of defendant.
2. Property (place) searched (including description of vehicle if applicable).
3. Date and time of the authorization of the search warrant.
4. Name of Police Officer (Affiant).
5. Name of Judge
6. Law enforcement event number.

5. Seal the envelope and cause it to be brought to the judge (or the judge's secretary). Advise the Judge (or Judge's secretary) that the Judge needs to review and sign the duplicate original S/W and the certificate on the transcription of the affidavit. **You may wish to have a Deputy DA assist with this process** and if so, deliver the above mentioned package to a Deputy DA who agrees to get the judge to read, listen to and sign the S/W and affidavit.

6. After this has been completed, the package with the cassette should be re-sealed and filed with the clerk of court (Justice or District). The transcribed affidavit and Search Warrant should not be sealed and should be filed with the court clerk. If the judge has authorized a sealing order, prepare such an order to give to the judge along with the other items mentioned and the order will be filed with the other papers (S/W and affidavit).

6. Of course, an officer may (and probably should) make additional copies of any of these items (including cassette) for police purposes at any time after the search warrant has been authorized.

ALTERNATE MEANS OF ELECTRONIC RECORDATION

1. Because of your department's policy or due to practical reasons, the dispatch-communications system may not be available in a particular case. If this occurs, you may use a hand held or other type of recording device attached to the phone line by a suction cup or hard wire. This is a less desirable procedure because of the increased chance of "glitches" in the recording process. However, if the alternate means is used, please note the following:

2. Substitute the alternate means for #4 in this procedure.

3. The officer will do the impounding designated in #12 of this procedure.

4. Follow all other directions stated in this procedure.

DUPLICATE ORIGINAL SEARCH WARRANT
NRS 179.045

STATE OF NEVADA]
] ss.
COUNTY OF CLARK]

The State of Nevada, to any Peace Officer in the County of Clark. Proof having been made before me by Officer _____ by sworn under oath telephonic statement incorporated by reference herein, that there is probable cause to believe that certain evidence, to wit:

(Describe items to be seized)

is presently located at:

(Describe place to be searched)

and as I am satisfied that there is probable cause to believe that said evidence is located as set forth above and based upon the sworn telephonic statement of Officer _____ there are sufficient grounds for the issuance of the Search Warrant,

You are hereby commanded to search said location for said property, serving this warrant (At any hour of the day or night) or (between 7 am and 7 pm) and if the property is there to seize it and leave a written inventory and make a return before me within 10 days.

Dated this _____ day of _____, 19____, at _____o'clock _____m.

(Write Judge's name)_____

Signed by Officer _____ acting upon oral authorization of (judge's name.)

Witnessed by Officer _____.

ENDORSED this _____ day of _____, 19____.

_____ (Judge) ***(The endorsement is done after the judge receives***

the transcript and recording done by police personnel)

VII

ELECTRONIC SURVEILLANCE

A. INTRODUCTION

Technological advances in the past few years have opened new horizons in the area of electronic surveillance, allowing police to search for and seize incriminating conversations and sometimes physical items. Phone and radio transmissions can be intercepted. Tiny electronic bugs can be worn on a person, installed in a building or car, or placed inside of containers in order to record conversations or follow people or objects around. The law in this area is fairly complicated but this section will give some general guideline information.

It is important to remember some general principles of search and seizure law and constitutional law in general in studying this area.

First - decisions by courts, including the U.S. Supreme Court, stating what the U.S. Constitution requires concerning police procedures, are meant to impose a floor or minimum standard below which we cannot fall.

Second - higher standards (than those required by the United States Supreme Court's interpretation of the United States Constitution) and limitations are often placed on police conduct by either (1) state or federal legislation or (2) state court decisions based on state law and state constitutions.

An example of this is the 60 minute limit on investigatory detention which is the state law, by statute, in Nevada, even though, as a matter of United States Constitution Fourth Amendment law as interpreted by the United States Supreme Court, a longer detention might be upheld.

There is extensive federal and Nevada legislation in the area of electronic surveillance in addition to much case law. Before acting in this area it is wise for a police officer, when possible, to seek counsel from a lawyer in the District Attorney's Office who is knowledgeable in this area.

B. RECORDING OR TRANSMITTING BUGS

(1) "**Body bugs**" - It is lawful for a person, whether a police officer, informant, or anyone, to wear a body bug or wire in order to transmit or record conversations that

person has with other persons in each others presence. No warrant or even p/c is required. The U.S. Supreme Court held this procedure to be constitutional under Fourth Amendment principles in On Lee v. U. S. (343 U.S. 747 (1952)); and U. S. v. White (401 U.S. 745 (1971)). (See also State v. Bonds (92 Nev. 307 1976 and Summers v. State, 102 Nev. 195 (1986)). This procedure is OK in Nevada as long as the person wearing the "bug" or wire (1) consents that this be done and (2) is physically present during the conversation being electronically observed.

(2) **Bugs or recorders in police cars or station** - In most states, leaving a mini-recorder or bug in a police car or police station interview room in order to eavesdrop on suspect's communications would be legal since the suspects have no reasonable and legitimate expectation of privacy. (See Brown v. Florida, 349 S.2d 1196 (1977), and People v. Crowson, 660 P.2d 389 (Calif. 1983). "A defendant has no reasonable expectation of privacy in a police car." **U.S. v. Clark**, 22 F.3d 799 (8th Cir. 1994).

Two Nevada Statutes apply to this type of recording:

NRS 179.440 "Oral Communication" defined.

"Oral communication" means any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation.

NRS 200.650 Unauthorized, surreptitious intrusion of privacy by listening device prohibi

Except as otherwise provided in NRS 179.140 to 179.515, inclusive, and 704.195, a person shall not intrude upon the **privacy** of other persons by surreptitiously listening to or monitoring or recording ... by means of any mechanical, electronic or other listening device, any **private conversation** engaged in by the other persons ... unless authorized to do so by one of the persons engaging in the conversation.

Relevant cases indicate that neither of these Nevada Statutes prohibit police from placing a hidden tape recorder in a police car containing two or more persons who were lawfully placed in the police car.

In **State v. Morgan**, 929 S.W. 2d 380 (Tenn. 1996) the court ruled that a surreptitious tape recording of arrested persons in a police car was lawful. The Court cited Tenn. Code S 39-14-411 and S 65-21-110 and 18 USC S 2510(2) and S 2511 which provide recording an oral communication without consent **"uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying such expectation. "** The Court cited U.S. v. McKinnon (infra) which held that the US Code did not prevent police from lawfully secretly recording a conversation among arrested persons in a police car. The Court also held that the "expectation of **privacy**" had to be reasonable and legitimate and that did not apply in a conversation **inside a police car**. Same rationale and ruling in **People v. Palmer**, 888 P.2d 348 (Colo. 1995) ("while the defendant had a subjective expectation of privacy, such expectation was not objectively justified.")

In **U.S. v. McKinnon**, 985 F.2d 525 (11th Cir. 1993) The Court ruled specifically that a secret recording by police of persons in a police car was valid. The Court ruled that 18 USC S 2510 did not apply because there was no "justifiable or legitimate expectation of privacy." Same rationale and ruling in **U.S. v. Clark**, 22 F.3d 799 (8th Cir. 1994).

Other cases with the same holding include: **People v. Champion**, 891 P.2d 93 (Cal. 1995), **State v. Smith**, 641 So.2d 849 (Fla. 1994), **State v. Hussey**, 469 So. 2d 346 (La. 1985), **People v. Marland**, 355 N.W.2d 378 (1984) "detainees, not under formal arrest, had no reasonable expectation of privacy in the back seat of a police car" and **State v. Timley**, 975 P.2d 264 (Kan. 1999) "we do not find it significant that the appellants were not under arrest at the time of the recorded conversation (citing McKinnon)"

C. BEEPERS

(1) Placing "beepers" on cars, etc. to track location This is also a lawful practice and needs no warrant and probably needs no justification in terms of p/c. This was the rationale of the case of U. S. v. Knotts, 103 S.Ct. 1081 (1983). In Knotts, police had reason to believe that the suspect was manufacturing narcotics and arranged with a merchant who sold a container of chemicals to the suspect to put a beeper in the container. The police used the beeper signals to track the car to an isolated mountain area where the suspect had a cabin. After this, police visually looked at the cabin for a few days and ultimately got a search warrant. The court held that this use of a beeper was OK because a person going in an automobile on public roads has no reasonable expectation of privacy in his movement from one place to another. Even though the police used the beeper instead of visual following, the court said it amounted to the same thing, because visual following could have been used.

(2) Using beeper to find an article in a suspect's home. In U.S. v. Karo, 104 S.Ct. 3296 (1984), the court decided a case which seems a lot like the Knott case but which came to a different conclusion. Police had information that a suspect was manufacturing illegal drugs and would obtain ether from an informant. With the informant's consent, police put a beeper in one container, knowing the informant would transfer it to the suspect. Using the beeper, police tracked the containers around to several places and finally got beeper signals coming from a certain house.

Using this information along with other facts, the police got a search warrant for the house. The court upheld the search warrant on the basis that there was enough p/c for the warrant, leaving out the information learned from the beeper, but held that use of the beeper to learn what was inside the house was an illegal search under the Fourth Amendment. Even though there was p/c for the monitoring of the beeper in the house, police should have gotten a search warrant to allow this monitoring. In Karo, unlike Knott, the beeper allowed police to gain information they could not have gotten by visual surveillance.

(3) Beepers in "bait" money. In U.S.s v. Bishop, 530 F.2d 1156 (5th Cir. 1976), court held use of tracking equipment to locate a beeper in bait money stolen in a bank robbery was legal. In Bishop, the packet with the beeper was in the suspect's car and could be seized immediately. In cases where the tracking equipment leads to an apartment or residence, entry should be made to "freeze" the location and then a prompt application should be made for a search warrant to remove the evidence.

D. PEN REGISTERS AND PHONE TRAP

1. Use of dialed number recorder - This instrument which is also known as a "pen register" is one which, when connected to a phone line, keeps track of the phone numbers dialed from that phone. It also keeps track of the frequency of incoming calls but does not record the "calling" number. The pen register keeps this running log and also shows the date and time of the call. Since this instrument does not intercept any of the contents of any call, the United States Supreme Court has held that its use does not constitute a "search and seizure" protected by the Fourth Amendment Smith v. Maryland, 442 U.S. 735 (1979). Therefore, no warrant or p/c is required to install a pen register.
The use of this instrument does not require a wiretap order since "intercept" is defined in **NRS 179.430** as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device or of any sending or receiving equipment and the pen register/tap doesn't acquire the contents."
Under Nevada Law a court order must be obtained before connecting a pen register (NRS 179.530). This order can be obtained upon slight information amounting to reasonable suspicion that recording the numbers will assist a legitimate ongoing police investigation.

2. NRS 179.530 also provides for use of a "phone trap" which works just the opposite of a pen register. A phone trap attached to a phone records the phone numbers of the phones calling into the phone being "trapped".

E. WIRETAPS

Both state and federal law regulate the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment."

This regulates both (1) third party interceptions - i.e. - where police "tap" defendant's phone and listen to conversations between defendant and others where neither defendant nor the other party to the call know they are being eavesdropped upon and (2) so called single party consent recordings.

(1). Third party intercepting of phone conversations

This practice is what we commonly call "wiretapping". The interception of such conversations requires a court order pursuant to Chapter 179.410 through 179.525, or in the case of federal police, pursuant to 18 U.S.C. 2510 to 2520. These orders, unlike search warrants, are extremely complicated and hard to obtain and are expensive to carry out. Among other things the police need to demonstrate to the court that there is no other way to obtain the information sought to be seized than by use of a wiretap (Lewis v. State, 100 Nev. 456 (1984)). Also, you can only get a wiretap authorization for certain crimes (NRS 179.460).

(2) Single party consent recordings

Note that federal police, even in Nevada, have the power to do a "single party consent" wiretap, while Nevada State authorities are prohibited from doing this. If federal police do this and obtain evidence that is helpful to state authorities, the federal authorities can disclose this information to state authorities. However, the "Feds" can't be acting as "agents" of the state in doing this - they must be doing it for their own purposes.

(3) Exceptions to court-ordered wiretap requirement

(1) NRS 200.620 sets forth certain exceptions to the requirement for a court order for wire intercepts. The most common of these are (1) if an emergency exists and you have single party consent, you can wiretap as long as you get ratification order from a court within 72 hours and (2) calls made to a police or fire fighting agency can be recorded period and responding calls back to the calling party can be recorded if police notify the other party the call is being recorded.

(2) Listening on an extension phone - In Reyes v. State ,107 Nev. 191 (1991) the court Ok'd police listening to but not recording a C/I's phone call to a drug dealer. Police listened on an extension phone and the C/I placed the call from a "police telephone."

The court also said that listening in at the earpiece with the caller was OK under any circumstances.

F. OTHER SPECIAL CASES

(1) Cellular phones - these are considered the same as regular phones for purposes of state and federal law.

(2) Paging devices

In **Brown v. Waddell**, 50 F.3d 285 (4th Cir. 1995) the Court held that a state court judge had no power to authorize the use of a "clone or duplicate" digital display pager to **intercept** electronic communications as a pager was not a pen register and state judge was limited to pen registers and phone traps (without the proper justification for a "wiretap") citing Federal Statutes (Electronic Comm. Privacy Act) Same ruling **U.S. v. Barrios**, 994 F.Supp. 1257 (D. Colo. 1998).

However, there is a difference between **intercepting** (listening while the pager is in use) and **searching (incident to arrest)** the contents of a pager.. This was the holding in **U.S. v. Reyes**, 922 F.Supp. 818 (SD NY. 1996), **U.S. v. Chan**, 830 F.Supp. 531 (ND Cal. 1993) and **U.S. v. Ortiz**, 84 F.3d 977 (7th Cir. 1996)

(3) Radio portion of cordless telephones - Before 1994, police were not required to obtain judicial approval to intercept the radio portion of a communication over a hand

held cordless phone. This is different from cellular phones. 18 U.S.C. 2510. This was the holding of **In Re Askin**, 53 F.3d 100 (4th Cir. 1995)

However, Congress has modified the federal statutes to include cordless phones in the (no intercept without wiretap order) and **now in McKamey v. Roach**, 55 F.3d 1256 (6th Cir. 1995) the decision in Askin was overruled.

G. USE OF VIDEO EQUIPMENT

(1) OK without court order in area where person has no reasonable expectation of privacy - also OK where one person who is (and remains) present consents to the videotaping - same as wearing a body bug.

(2) This section refers to video surveillance without capturing (recording) sound, but in an area where an expectation of privacy exists. If sound is recorded, Federal and State wiretap laws must be complied with. The United States Supreme Court has not specifically decided what kind of authorization police need for "video only" eavesdropping - but most Federal courts have held that a "hybrid" search warrant/wiretap is required (more than a regular search warrant, but less than full wiretap order.) (See United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992). A video surveillance order requires:

(a) probable cause;
(b) showing that other traditional means would probably fail or be too dangerous;
(c) particular description of activity to be videotaped;
(d) a time frame no longer than necessary; and
(e) attempt at minimization (not tape lawful activities).

In **U.S. v. Bailey**, 13 F.3d 407 (10th Cir. 1993, unpublished) the Court held that police use of a videotape of an open field marijuana patch was lawful because there was no expectation of privacy.