BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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ARREST OF PASSENGER DURING SEARCH OF VEHICLE

People v.. Daverin,, 967 P.2d 629 (Cob. 1998).

A passenger of a truck was arrested after a traffic stop when it was discovered that he had an outstanding warrant. The court ruled that the discovery by the police of a pipe and substance that appeared to be marijuana following a search of the passenger compartment of the truck incident to the passenger's arrest following the stop provided probable cause to conduct a warrant-less search of the bed of the truck.

The court also said a police officer's subjective intent is not dispositive of the validity of a search. It said the searches were not pretextual even though the police officer was alleged to have a subjective belief that the defendant-driver of the truck was transporting illegal drugs.

Daverin [driven complains that the search incident to Ertz's [passenger] arrest was merely a pretext, and that Demers' [officer] search of the truck was a response to Nowlin's [another officerj advisement that Daverin's vehicle might be involved in the transport of drugs. This court has held, however, that an officer's subjective intent is not dispositive of the validity of a search. What is determinative is whether the purpose of the intrusion was objectively reasonable in light of the circumstances confronting the officer at the time of the search.' *People v. Alt-ma,,,* 938 P.2d 142, 146 (Col. 1997). Demar's search was reasonable because he had an objective basis for the search, consistent with the purposes of a search incident to arrest, which are to protect law enforcement and to preserve evidence. . . Any subjective belief Demars may have harbored prior to the arrest and search that Daverin was transporting illegal drugs does not render the stop pretextual given the objective facts supporting his actions...."

ADMINISTRATIVE SEARCH TRUCKERS LOGBOOKS

Commonwealth v. Petrol, 738 A.2d *993* (Pa. 1999).

A state statute which provided that a police officer who has a reasonable and articulable suspicion of a motor vehicle code violation could stop a vehicle for the purpose of "checking" specifically enumerated documents or "to secure" other information that he believed would be reasonably necessary to enforce the motor vehicle code, did not give a police officer, who was investigating a commercial driver for vehicular homicide, which might have been caused by speeding, the right to conduct a warrantless search of the driver's logbooks or other documents, which were kept to detail hours and expenses of operation. The search did not further the statutory scheme and could not be justified as a regulatory search.

"The closely regulated business exception to the probable cause and warrant requirements is not applicable in criminal cases. The police cannot conduct a warrant-less administrative search to advance a criminal investigation under the pretext of addressing a specific, compelling governmental interest advanced by a statutory scheme *Burger v. New York v*., 482 VS. 691 (1987) (administrative search of a closely regulated business)] 482 U.S. at 717 n. 27, 107 S.Ct. at 2651 n. 27 (finding no evidence that administrative search was pretext to locate evidence of crime).

"Because the searches and seizure of the logbook and two bags were not necessary to further a statutory scheme established by the Commonwealth or federal law we hold that the closely regulated business exception to the warrant requirement does not apply to the facts in this case. The trial court erred by not suppressing that evidence."

ADMINISTRATIVE SEARCH – PRIVACY INTERESTS

United States v. Bulacan, 156 F.3d 963 (9th Cir. 1998).

A federal procedure for warrantless administrative searches of people entering government buildings, under which bags carried into the buildings were searched not only for the primary purpose of detecting weapons and explosives, but also to detect materials violating regulations prohibiting the possession of drugs, alcohol, or gambling materials on federal property, was considered to have an impermissible secondary purpose which rendered the otherwise proper administrative search invalid under the Fourth Amendment. The court said the government's interest in searching for the presence of narcotics or other materials on federal property did not outweigh the privacy interests of the individuals involved.

The court concluded that the presence of drugs, alcohol and gambling materials would not present an immediate threat to the safety of the occupants of the buildings.

'Searches conducted as part of a general regulatory scheme must further an administrative purpose, rather than further a criminal investigation. *See Davis [United States v.* **,** 182 F.2d 893 (9th Cir. 1973)], 482 F.2d at 908. While administrative regulations prohibit the possession and use of drugs, alcohol, and gambling materials in the Federal Building, the Government has not shown that its interest in searching for these items outweighs the public's interest in privacy. Accordingly, the district court held that 'an administrative search of the belongings of visitors to the Social Security Office looking for drugs, alcohol and gambling materials is not reasonable under the Fourth Amendment.'

"We affirm the district court's holding that the secondary purpose for the search was improper. This Court has repeatedly warned against the potential dangers of administrative searches, and noted that courts must guard against the danger that a permissible administrative search will be subverted into a general search for evidence of crime.' *Davis,* 482 F.2d at 909. Here, the intrusion on the public is great. The search subjects everyone accessing the Federal Building to a search of his or her persona! belongings. Further, the Federal Building is *far* removed from any international border, so that the requirements of the Fourth Amendment have not been weakened. In contrast with weapons and explosives, the presence of narcotics on federal property does not present an immediate threat to the occupants.

AERIAL OVERFLIGHTS – RIGHT TO PRIVACY

State v. Wilson,, 988 P.2d 4(~3 (Wash.App. 1999).

Observations made by the police without binoculars or other sensory enhancement devices of a suspected marijuana growing site from a fixed wing aircraft flying 500 feet above ground level in an uncongested area, which was the Federal Aviation Administration (FAA) legal minimum for fixed wing aircraft in uncongested areas, did not constitute an illegal search in violation of a state constitutional provision on the right to privacy.

"Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude. . . . but aerial surveillance may be intrusive and require a warrant if the vantage point is unlawful or the method of viewing is intrusive. Const. art. I. § 7;. .. So the question here is whether aerial surveillance without binoculars from a fixed wing aircraft operating 500 feet above ground level is intrusive.

"For us. adoption of the FAA limitations in this case makes the most sense because they are most consistent with current Washington law. . . . FAA regulations permit fixed wing aircraft to operate at an altitude of 500 feet above the ground in other than congested areas. 14 C.F.R. § 91.119 (1999); *Florida* ,'. *Riley.* 488 U.S. 445*,* 451 n. 3, 109 S.Ct. 693. 102 L.Ed.2d 835 (1989). Mr. Wilson's property is located on a county road, not in a congested area. . . . Five hundred feet above the ground is then a lawful vantage point because fixed wing aircraft can legally operate at that altitude. And the vantage point is therefore no more intrusive than police standing on a public street corner, or other legal vantage point

ANONYMOUS TIP ABOUT A PERSON WITH A GUN

Florida v. J.L. 120 S.Ct. , 2000 WL 309131, No. 98-1993 (2000).

The police received an anonymous tip that one of three young African-American males standing at a bus stop in front of a pawnshop at a specific and public location was carrying a concealed firearm. The tipster described the appearance of each of the young males and said that the individual with the gun was wearing a "plaid-looking) king" shirt. Two officers responded within six minutes after receiving the tip. They immediately verified the accuracy of all the appearance and location information provided by the tipster. Defendant, a juvenile, was standing by the bus stop with two other young African-American males and he was wearing a plaid shirt. A police officer with fourteen years experience approached defendant, asked him to put his hands above his head, and conducted a pat down of his outer garments. She then seized a gun that she saw protruding from the defendant's left pocket. Defendant was taken into custody and charged with unlawfully carrying a concealed firearm and possession of a firearm by a minor under eighteen years of age.

The Supreme Court of Florida ruled that the officer lacked reasonable suspicion for her conduct under *Terry v. Ohio,* 392 U.S.. 1 (.1968), in view of the tip's failure either to allege a suspicious activity that the police could verify or to accurately predict some future behavior of the subject. It approved suppression of the handgun, in spite of the fact that the officer had actually verified all the details of the tip. 727 So.2d 204.
On appeal to the United States Supreme Court. the Court affirmed in a unanimous decision and an opinion written by Justice Ginsburg. The Court ruled that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. While the Court reaffirmed the holding of *Terry* that an officer, for the protection of himself and others, may conduct a carefully limited search for weapons in the outer clothing of persons engaged in unusual conduct where, *inter alia,* the officer reasonably concludes in light of his experience that criminal activity may he afoot and that the persons in question may be armed and presently dangerous, in this case the officers' suspicion that defendant was carrying a weapon arose not from their own observations hut solely from a call made from an unknown location by an unknown caller. The tip did not carry sufficient reliability to provide a reasonable suspicion to make an investigative stop under *Tern'.* There was no predictive information and therefore the police had no way to test the informant's knowledge or credibility.

The Court rejected Florida's argument that the tip was reliable because it accurately described defendant's visible attributes. This argument, the Court said, misapprehends the reliability needed for a tip to justify a *Terry* stop. The reasonable suspicion in this case required that the tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. The Court declined to adopt a rule that the standard *Terry* analysis should he modified to create a "firearm exception," under which a tip alleging an illegal gun would justify a stop and frisk even if the accusation would not satisfy the standard reliability test.

Justice Ginsburg did suggest, however, that the need for reliability might be relaxed in cases where "great danger" was alleged, such as a report that someone was carrying a bomb, or in places such as schools or airports, where the reasonable expectation of Fourth Amendment privacy is diminished."

Justice Kennedy filed a concurring opinion, joined by the Chief Justice. They noted that while "the Court says all that is necessary to resolve this case," it would have more to say in future cases about the ways in which anonymous tips might be tested for reliability.

ANTICIPATORY SEARCH WARRANT

United States v. Loy, **191** F.3d 360 (3rd Cir. 1999).

As a matter of first impression the Third Circuit Court of Appeals ruled that "anticipatory warrants," which become **effec**tive upon the happening of a future event. are not per se unconstitutional, as long as such warrants meet the Fourth Amendment probable cause requirement and specifically identify in them the triggering event. The court said that, as with all search warrants, there must be a sufficient nexus between the contraband to be seized and the place to be searched, before an anticipatory warrant can he issued.
In order to satisfy the nexus requirement for the issuance of an anticipatory search warrant, the court also said it is not enough that an anticipatory warrant be conditioned on the contraband arriving at the designated place, since the warrant must be supported by probable cause at the time it is issued, *as well as when the search is conducted.*
Therefore, when presented with an application for an anticipatory search warrant, a magistrate should not rely on police assurances that the search will not be conducted until probable cause exists, but, instead, must find, based on the facts existing when the warrant is issued, that there is probable cause to believe the contraband, which is not yet at the place to be searched, will be there when the warrant is executed.

The court went on to hold that an anticipatory search warrant for a defendant's home was *not* supported by probable cause to believe that he would bring a videotape of child pornography home with him after picking **it** up at a post office box. A postal inspector's conclusory statement that people who collect child pornography commonly keep it in their homes was insufficient to provide the necessary nexus between the contraband and defendant's own assertion that he kept it in a storage facility, and there was insufficient evidence in the affidavit from which the issuing magistrate could infer that the defendant would bring the videotape home to view rather than take it to some other location to view it.

ARREST FOR POSSESSION OF "VALIUM" – OFFICER UNCERTAIN

State v. Collins, 721 So.2d 503 (La.App. 1998).

Defendant threw away some pills after seeing police officers in a high crime area and admitted that he did not have a prescription for the pills. This was held to be probable cause to arrest defendant for possession of Valium, even though the police officers lacked definitive proof that the pills defendant discarded were Valium.

A contemporaneous seizure of a syringe from defendant's pants pocket was also ruled a proper search incident to the lawful arrest.

"The next inquiry is whether Officer Veit had probable cause to arrest defendant for possession of Valium. While Officer Veit had no definitive proof that the pills were Valium, his belief that they were Valium was reasonable under the circumstances. Defendant was informed of his rights and indicated that he understood those rights. Officer Veit asked defendant if he had a prescription bottle for the pills or a prescription for the pills. Defendant answered 'No'. This fact, coupled with the fact that defendant discarded the pills in a known high crime area upon seeing the officers, forms the basis for the probable cause to arrest defendant for possession of what the officers believed to be a controlled dangerous substance. The search subsequently conducted by Agent Hutton was a search incident to arrest of defendant. The syringe that was seized from the defendant's pant's pocket was legally seized. Therefore, defendant's arrest for possession of cocaine was legal.

ARREST WARRANTS USE OF PRESIGNED FORMS

Gibson v. McMurray, 159 F.3d 230 (6th Cir. 1998).

Where there was no false statement of a material fact, a police department's use of an arrest warrant request form which had been presigned by a prosecutor did not violate the Fourth Amendment. The court rejected defendant's argument that the use of presigned forms would automatically mislead a judge into thinking that the prosecutor had reviewed the allegations in the application and approved the request for a warrant.

The court took the position that the Fourth Amendment does not require prosecutorial review for a warrant to issue, and a state statute requiring the prosecuting attorney to sign a warrant request form was simply an additional safeguard in the arrest process under state law without federal constitutional significance. The court also rejected a contention that the state procedure created a property interest protected by federal due process.

In the instant case there is no basis for the assumption that the judicial officer simply 'rubber stamped' the warrant application. By allowing the use of presigned applications, the police chief has not committed a Fourth Amendment violation. To hold otherwise would make all warrants issued after prosecutorial authorization invalid—both those that were presigned and those that were reviewed and signed by the prosecutor and then 'rubber stamped' by the judicial officer. In the absence of any false statement of material fact, the issuance of such a warrant does not violate the warrant requirement or due process.

In addition to the Fourth Amendment violation found by the district court, plaintiff also contends that the use of presigned warrants is a violation of a state-created procedural right that supports a 1983 claim under the Fourteenth Amendment. The district court correctly rejected this argument.

"Here, plaintiffs procedural right rests on M.C.L. 764.1(2). The language is explicitly mandatory in stating that a 'warrant shall not issue' until the prosecuting attorney signs the warrant. The statute does not provide any specific outcome, however, so plaintiffs procedural due process claim must fail. . . . Accordingly, plaintiff has no due process right to have the city attorney review and sign the request form before presenting the form to the court.'

ARREST – WHAT CONSTITUTES DRAWN GUN

United States v. Campbell, 178 F.3d *345* (5th Cir. 1999).

A *Terry* stop (reasonable suspicion) of a defendant for 10 to 25 minutes, during which time the police officer drew his weapon, ordered defendant to lie on the ground, handcuffed and frisked him, was not equivalent to a full blown arrest requiring probable cause for Fourth Amendment purposes The defendant matched the description of an armed bank robber and lie was approaching an automobile that matched the detailed description of a getaway vehicle and bore the same license plate. During the course of the stop, the officers investigated a passenger's alibi and matched bills found in defendant's pocket against a list of "bait bills" given to the bank robber.

"...Campbell argues that the totality of the officers' conduct constituted an arrest, rather than an investigatory stop, and was unsupported by probable cause. . . [But]

drawn guns and handcuffs do not necessarily convert a detention into an arrest. Nor did it convert the detention into an arrest to leave Billy Campbell handcuffed during the time it took to investigate Michael Campbell's [passenger] alibi and the serial numbers on the $20 hills here were substantial reasons to suspect Billy Campbell had been the hank robber, and he was detained for no longer than necessary to conduct a cursory check that could provide more conclusory evidence. The entire detention took between 10 and 25 minutes—not an unreasonable amount of time under the circumstances.

"The facts of this case demonstrate neither an arrest nor unreasonably excessive steps for an investigatory detention."

CONSENT AFTER SEARCH DUTY TO ADVISE SEARCH IS OVER

People v. Leon, 723 N.E.2d 1206 (Ill.App. 2000).

The issue in this case was whether police officers had a duty to notify defendant and his wife that a search of their apartment pursuant to a warrant had concluded before seeking consent for a further search. The court said "no." The police officers, after allegedly examining locks in an apartment to ascertain that a key found in defendants pocket did not fit any of them, had no duty to tell defendant's wife that a search of the apartment was completed before asking her about the identity of the key and asking for her permission to extend the search beyond the scope of the warrant to include an apartment storage locker. The consent was voluntary.

CONSENT SCOPE DIMANTLING AUTOMOBILE

State v. Johnson. 993 P.2d 44 (Nev. 2000).

A defendant's consent to a search of his car did not include a consent to a police officer's removal of screws from a panel below a glove box. The court said a reasonable person in defendant's situation would not have understood his general consent to a search of his car for drugs, alcohol or weapons. to include the officer dismantling the vehicle.

"The district court examined the scope of the consent and concluded the consent to search did not include the right to dismantle the car. . . . If Jessie did voluntarily consent to a search, would he have consented to the dismantling of his automobile? Innocent citizens must not he stopped on the pretext of a traffic violation and have their automobiles dismantled when a police officer has nothing more than a hunch that contraband may be present. Should we allow law enforcement to treat the Fourth Amendment as an obstacle to overcome rather than recognizing the rights of our citizens to be free from unreasonable searches and seizures?

"There was no clear and convincing evidence Jessie consented to the dismantling of the car or that he voluntarily gave up his constitutional right. Instead, he merely submitted to authority."

CONSENT – SCOPE - NERVOUS USER

State v. Tierney, 584 N.W.2d 4~1 (Neb.App. 1998).

A defendant's consent to a search of his vehicle did not extend to a search of his person, and therefore a police officer's search of his person was not conducted pursuant to a lawful consent. Drugs found on defendant were suppressed.

On a related issue the court ruled that nervousness alone is not sufficient to justify a further detention after a traffic stop. Only if nervousness is combined with other suspicious circumstances may it contribute to a finding of reasonable suspicion under *Terry v. Ohio.*

"Hattan testified that he patted Tierney down as part of standard procedure and because he would not be able to watch Tierney while he searched Tierney's vehicle. Hattan's only proffered reason which was specific to Tierney was that he was 'acting very nervous.' As noted by the court in *(U.S. v. McRae.* 81 F.3d 1528 (10th Cir. 1996), nervousness alone is not sufficient to justify further detention; only in combination with other suspicious circumstances may it contribute to a finding of reasonable, articulable suspicion. As a result, Hattan did not have reasonable suspicion that Tierney was armed and dangerous justifying a pat-down search. The facts that Tierney thrust his hand into his pocket once the pat-down search began is irrelevant, as the search was already unconstitutional. Thus, evidence of the methamphetamine must be suppressed."

CONSENT TO ONE OFFICER GOOD FOR ANOTHER

State v. Kimberlin, 977 P.2d 276 (Kan. App. 1999).

It has been held that when two or more police officers are present at a home responding to a call from a resident of the home and there is evidence of violent behavior in the home, a consent given to one officer to enter the home necessarily, as a matter of law, provides consent for adequate backup officers to also enter the home for the safety of the first officer.

"Our concern in this case is officer safety. Melanie [resident] did not hesitate to call for police help in the early hours of the morning when defendant was committing acts of violence, and she did not hesitate to accept that help. In fact, she left the dwelling with the police officers, who took her to a safe haven where she would be protected from further violence. Despite the fact that she requested the presence of the police officers and despite the fact that she invited Officer Tilton into the house, we are asked to conclude that Officer Eubank [backup] had no right to be in the house. We believe that he did. Once Melanie invited Officer Tilton into the house, she also impliedly invited such backup officers as might he necessary to protect the safety of Officer Tilton.

"To accept defendant's reasoning means that an officer might be required to enter a dangerous situation alone and without backup. A person whose behavior set in motion the involvement of the police will not he permitted to deny entrance of backup officers after having invited one officer into the home."

CONSENT MOTEL ROOM PLAIN VIEW DOCTRINE

People v. Dale, 703 N.E.2d 927 (Ill.App. 1998)

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State. Defendant's consent to the request of police officers to "step in and speak with him" about a motel manager's desire that he leave his motel room was limited by the circumstances of that request. and did not constitute a consent for the officers to remain in the room to watch defendant pack after he told them he did not want them to search his room, even though defendant did not tell the officers they had to leave while he packed. The court said the consent did not give the officers a legal right to be in the room while defendant packed, for purposes of a claim that the plain view doctrine applied to the officers' seizure and testing of a bag of cocaine which appeared at their feet while defendant was packing.

"We do not *view* the officers' words and conduct as the opening of a dialog on the subject of whether they should stay in the motel room. Instead, their words and conduct constituted a *directive.* Thus, defendant then had three choices. He could either (1) argue with the police; *(2)* forcibly attempt to remove the police from the room; or (3) accede to the officers' assertion of authority. That defendant chose the third of these three options hardly constitutes consent.

"The State's contrary position is untenable. Adopting such a position would require suspects, when faced with a clear assertion of police authority, to resist. Not only would public safety not be enhanced by adopting such a rule, it would be diminished. A person faced with a show of police authority should always feel secure obeying the commands of a police officer; the failure to obey can result in criminal liability.

"Accordingly, we conclude that the State may not rely on defendant's previous consent for the officers to enter his motel room—for the limited purpose of talking to him—to justify their presence there when the small plastic bag appeared on the floor."

CONSENT SEARCH AFTER INITIAL DUI HAS DISSIPATED

United States v. Erwin, I SS F.3d 818 (6th Cir.1998).

Police officers were entitled to detain defendant as a possible drug dealer even after their initial suspicion that he was driving while intoxicated proved to be unwarranted, based on the facts that he (1) Was nervous: (2) Seemed to he avoiding questioning by attempting to leave; (3) Seemed to have used or was preparing to use a pay telephone to make a call when a cellular telephone was available; (4) Seemed to have drug paraphernalia in his vehicle; (5) Had a large amount of cash on him; (6) Had no registration or proof of insurance; (7) Had a criminal record of drug violations; and (8) Had a backseat cushion in his vehicle that seemed to be out-of-place.

The court said these observations raised reasonable and articulable suspicion that criminal activity was involved and they were entitled to ask defendant for permission to search his vehicle.

"Moreover, irrespective of whether the deputies were justified in detaining Erwin after he showed no signs of intoxication, and even if they had not, after approaching Erwin. observed conditions raising reasonable and articulable suspicion that criminal activity was 'afoot,' they were entitled to ask Erwin for permission to search his vehicle. A law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a *crime* has been committed, and asking him whether he is willing to answer some questions. *Florida* **t'.** *Royer. 460* U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). This includes a request for consent to search the individuals vehicle. *United States v. Dunson,* 940 F.2d 989, 994 (6th Cir.1991). And, this consent is not vitiated merely because the valid suspicion of wrongdoing for which an individual has been stopped proves to he unfounded or does not result in prosecution and the individual is free to go before being asked. *See Ohio v. Robinette, 5*19 U.S. 33, —, 11 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996). Of course, when a law enforcement officer no longer has any reasonable suspicion o criminal activity, the detained individual is constitutionally free to leave, and if the officer rejects the individual's indication that he would like to leave, valid consent can no longer be obtained. The fruits of a search conducted under these circumstances would have to be suppressed." The chief judge and three judges dissented.

CONSENT FANNY PACK WITHIN VEHICLE

United States v. Patrick. 8 F.Supp.2d 979 (E.D. Mich. 1998).

A general consent given by a defendant for officers to search his van included a consent to search the contents of a fanny pack found under the seat of the van, where defendant consented to a pat down for weapons prior to the search of the vehicle, the officers never indicated a specific object of the search of the van, and defendant never objected to the opening of the pack at the time of the search. The court said defendant should have expected that a readily-opened, closed container, like a fanny pack, would be opened and examined pursuant to a general consent to search.

Viewing the totality of the circumstances in this case, this court is persuaded that defendant effectively consented to a search of the fanny pack found within the vehicle. In this case, the officers asked defendant if he had any weapons, and then asked for, and received, permission to pat defendant down for weapons. After this exchange, Officer Green asked, without limitation, whether he could search defendant's vehicle. Defendant indicated that Officer Green could 'go ahead.' . . . [Though the officers did execute a routine pat-down for weapons prior to asking for consent to search the van, the officers never indicated the specific object of the search of the van. Under these circumstances, this court does not find that it would have been apparent to a reasonable person viewing the scene that the officers were limiting themselves to a search of the van only for weapons. Given that the purpose of the search was not readily apparent. this court holds that the defendant should have expected that readily-opened, closed containers, like the fanny pack, would be opened and examined. Accordingly, this court finds that defendant's general consent to a search of the van included his consent to a search of the contents of the fanny pack.

"This court also finds probative the fact that defendant never objected to the opening of the fanny pack at the time the search was conducted. Officer Green pulled the fanny pack from under the seat, and then asked defendant what was contained in the pack. The defendant answered that it was his 'money.' Then Officer Green opened the pack in front of defendant. At no time during this exchange did defendant object to Officer Green opening the pack.

CONSENT - SCOPE

People v. Dumas, 955 P.2d 60 (Col. 1998).

In view of a verbal exchange between police officers and defendant in which the defendant voluntarily consented to a search of her motel room for drugs, contraband or weapons, it was objectively reasonable to conclude that a checkbook found in the room could contain drugs. Therefore a search of the checkbook did not exceed the scope of the defendant's general consent. The court took note of the fact that many drugs are small enough to be hidden in a checkbook.

"The scope of consent is determined by 'objective reasonableness'—what a reasonable person would have understood by the exchange between the officer and the suspect. . . . In this case, Officers Revelle and Saupe asked defendant if they could search her motel room for drugs. contraband, and weapons. She agreed. Given this simple exchange, it is objectively reasonable to conclude that the scope of consent included all items likely to contain drugs. weapons, or contraband. Clearly, the checkbook was such an item. As the trial court observed, many drugs are small enough to he hidden in a checkbook. Moreover, we have previously noted that 'drug evidence can readily he concealed in small containers.' *People v. Moore,* 900 P.2d 66, 71 (Colo.1995) (drug evidence concealed in a folded dollar bill); *People* ***v.*** *Casias,* 193 Colo. 66, 70, 563 P.2d 926, 929 (1977) (drug evidence concealed in a 'small tin-foil package'). Because it was objectively reasonable to believe that the checkbook could contain drugs. we hold that the search of the checkbook was within the scope of defendant's consent."

CONSENT THIRD PARTY VOLUNTARINESS

State v. Martinez, 718 A.2d 22 (Conn. App. 1998).

The issue in this case was whether defendant's wife voluntarily consented to a search of their home, even if the officer told the wife that if she did not want to sign a consent form, "a search warrant would he applied for." The court found the consent to be voluntary and therefore also valid with respect to evidence linked to the defendant. The court noted that the officer's statement was not inherently coercive. He did not imply that a search warrant would or could automatically issue or that the wife's refusal to consent to a search would he futile. Further, the two officers specifically informed the wife that she had the right to refuse consent, and the consent form itself, which was read and signed by the wife also informed her of her right to refuse consent.

CONSENT VOLUNTARINESS TWO OFFICERS SURROUND CAR

State v. Stankus. 582 N.W.2d 468 (Wis.App. 1998).

Two police officers approached opposite sides of defendant's car just prior to asking him for a consent to search the vehicle. The court ruled this maneuver did not create a per se coercive environment designed to secure his consent.

The court noted that the vehicle stop was legally valid and not unreasonably long, the officers did not draw their weapons, and made no promises or threats and used no deception to gain defendants consent. Their approach was to ask the defendant whether he had "any guns, drugs, or anything illegal in the vehicle," and if they could "take a look through the vehicle." Defendant's consent was ruled voluntary.

"The mere fact that two officers, rather than one, confronted Stankus does not create a situation which is per se coercive. The number of officers, by itself, does not conclusively show coercion. . . . It is but a factor. Stankus must show other factors in addition.
"In the present case, we hold that under the totality of the circumstances, the State carried its burden of proving that Stankus voluntarily consented to the search. The stop was legally valid and not unreasonably long—only five to ten minutes elapsed from the time Stankus was stopped to the time he was asked for consent to search the car. Moreover, we are not convinced that the chiefs action of approaching the passenger side of the car just prior to the sergeant asking for permission to search created a coercive atmosphere, thereby poisoning Stankus' consent. Neither officer had his weapon drawn. They did not make any promises or threats or use deception in order to gain Stankus' consent. Nor did they raise their voices. Stankus was not the subject of repeated intimidating questioning by the officers. The sergeant asked Stankus two simple questions: Whether 'he had any guns, drugs, or anything illegal in the vehicle,' and if he 'could go ahead and take a look through the vehicle.' Nothing in the record indicates that the tone or phrasing of the officer's questions conveyed a message that compliance with the request was mandatory. Stankus' consent to the sergeant's request cannot be characterized as equivocal. His unequivocal reply to the officer's query was, Sure. Go ahead."
One judge concurred.

DUI WARRANTLESS ENTRY TO ARREST

Norris v. *State,* 993 S.W.2d 918 (Ark. 1999).

In a case that was a virtual replay of the United States Supreme Court decision in *Welsh* v. *Wisconsin,* 466 U.S. ‘40 (1984), it was held that a warrantless entry into a defendant’s home to effect a warrantless arrest for DUI, first offense, was unreasonable, even if a valid exigent circumstance were presented by the fact that his blood-alcohol concentration might have dissipated if the police had first obtained a warrant. The instant court said that although the offense in question was serious, it was classified as a misdemeanor, and defendant was no longer a threat to public safety, since he was no longer in his car, but rather, he had arrived home and was in his bed. “There is no doubt that driving while intoxicated is serious. However, when compared to other criminal offenses involving violence, or threats of violence which endanger life or security, for instance, DWI, first offense, becomes relatively minor in the Fourth Amendment analysis. Although DWI is a serious offense, the Arkansas legislature has chosen to classify l)WT, first offense, as a misdemeanor. The offense of DWI does not become a felony in this State until the fourth offense has been committed.

“Therefore, because the penalties imposed for DWI, first offense, in this State are similar to those attaching to the non-jailable traffic offense involved in *Welsh* . . . we hold that the minor difference in penalty is not sufficient to support a result different from that reached in *Welsh.*

. . . a warrantless home arrest cannot be upheld simply because evidence of the offender’s blood-alcohol level might have dissipated while the police obtained a warrant.”

ILLEGAL ENTRY SEARCH WARRANT INDEPENDENT BASIS

State v. Chaney, 723 A.2d 132 (NJ .App. *1999).*

State. An initial illegal police entry into a motel room, on the mistaken belief that defendant was a person named in outstanding arrest warrants for a fugitive with the same name, was ruled not such flagrant police misconduct that evidence obtained pursuant to a subsequently and validly issued search warrant had to he suppressed to deter similar future violations of constitutional rights by the police.

The court said the information obtained by the police when they saw items in plain view during the illegal entry into the motel room did not invalidate a warrant which was subsequently issued on the basis of an affidavit including the illegally obtained information, since the affidavit set forth other, lawfully obtained facts, tying the room to a person caught pawning jewelry taken in a series of home burglaries, which were independently sufficient to establish probable cause to justify a search.

"We note that this is not a case where the police deliberately conducted an unlawful search for the purpose of confirming the presence of contraband before applying for a warrant. Rather, the information received by the police concerning the arrest warrants for a person with the same name as defendant, whose last known address was the motel in which defendant was registered, provided the police with objectively reasonable grounds for believing that they were authorized to enter the motel room to execute the warrants. Consequently, there is no basis for arguing that the initial entry into the motel room constituted such flagrant police misconduct that the evidence subsequently obtained pursuant to the warrant should be suppressed to deter similar future violations of constitutional rights. Therefore, this case is not 'an example of a "search First. warrant later [police] mentality. "'Murray supra*',* 487 U.S. at ~ to n.2, 108 S.Ct. at 2535, 101 L.Ed.2d at 482."

FORFEITURE OF CAR PENDING APPEAL

Florida v. White, No. 98-223 (1998), 1998 WL 467370*,* appeal from 710 So. 2d 949 (Fla. 1998).

The Supreme Court of Florida had held that probable cause to believe that a vehicle is subject to forfeiture under Florida's Contraband Forfeiture Act was not enough, by itself, to justify a warrantless seizure of a vehicle, and that absent exigent circumstances, such a seizure violates the Fourth Amendment and its state constitutional counterpart.

This decision potentially conflicts with the decisions of the U.S. Supreme Court in C*arroll v. United States,* 267 U.S. 132 (1925), *Calero-Toledo v. Pearson Yacht Leasing Co.,* 116 U.S. 663 (1974), and *Cooper v. California,* 386 U.S. 58 (1967), as well as that of the Eleventh Circuit in United States v. *Valdes,* 876 F.2d 1554 (1989), and the majority of state courts addressing this issue. The High Court's decision is expected to have a major impact on criminal forfeiture procedures of law enforcement agencies

INVENTORY SEARCH – ENGINE COMPARTMENT

United States v. Lumpkin, 159 F.3d 983 (6th Cir. 1998).

In a case of first impression for it**,** the Sixth Circuit Court of Appeals ruled that an inventory search of a vehicle should be treated as a purely administrative procedure and should not be conducted for purposes of criminal investigation. Such a search, the court said, should also be conducted according to standard police procedures. However, the mere fact that an officer suspects that contraband may he found in such a search does not defeat an otherwise proper inventory search.

It ruled that a valid inventory search of a truck previously driven by a drug trafficking suspect could include the truck's engine compartment, where the search was conducted in good faith according to the department's standard operating procedures, even though such procedures were not in writing (something which prosecutors should urge law enforcement agencies to do).

"Lumpkin principally objects to the scope of the search and argues that the search of the truck's engine compartment exceeded the scope of a valid inventory search. Officer Burrow**,** who conducted the search, testified that in every inventory search of a vehicle which he had performed, he raised the hood of the vehicle to check for missing parts, and that a complete inventory of a vehicle's contents was standard procedure for the Metropolitan Police Department. Generally, "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment." *United States v. Richardson,* 121 F.3d 1051, 1055 (7th Cir. 1997) (quoting *Bertine [Colorado v. 479 U.S.* . 367 (1987)], 479 I'S. at 374, 107 S.Ct. 738. Illinois's policy for inventory searches, quoted in part by the Seventh Circuit in *Richardson,* provides that the examination and inventory of the contents of all vehicles or boats held by department authority 'would normally include front and rear seat areas, glove compartment, map case, sun visors, and trunk *and engine compartments.' Id.* at 1055 (emphasis added). No such written inventory policy for the Metropolitan Police Department is found in the record of this case, but the undisputed testimony of officer Burrow is sufficient to establish that the search of the pick-up truck was conducted in good faith according to standard operating procedure.

'We.. . hold that a valid inventory search conducted by law enforcement officers according to standard procedure may include the engine compartment of a vehicle. Accordingly, the district court did not err in denying the motion to suppress evidence obtained from the warrantless search of the pickup truck."

ARREST – WHAT CONSTITUTES DRAWN GUN

United States v. Campbell, 178 F.3d *345* (5th Cir. 1999).

A *Terry* stop (reasonable suspicion) of a defendant for 10 to 25 minutes, during which time the police officer drew his weapon, ordered defendant to lie on the ground, handcuffed and frisked him, was not equivalent to a full blown arrest requiring probable cause for Fourth Amendment purposes The defendant matched the description of an armed bank robber and lie was approaching an automobile that matched the detailed description of a getaway vehicle and bore the same license plate. During the course of the stop, the officers investigated a passenger's alibi and matched bills found in defendant's pocket against a list of "bait bills" given to the bank robber.

"...Campbell argues that the totality of the officers' conduct constituted an arrest, rather than an investigatory stop, and was unsupported by probable cause. . . [But]

drawn guns and handcuffs do not necessarily convert a detention into an arrest. Nor did it convert the detention into an arrest to leave Billy Campbell handcuffed during the time it took to investigate Michael Campbell's [passenger] alibi and the serial numbers on the $20 hills here were substantial reasons to suspect Billy Campbell had been the hank robber, and he was detained for no longer than necessary to conduct a cursory check that could provide more conclusory evidence. The entire detention took between 10 and 25 minutes—not an unreasonable amount of time under the circumstances.

"The facts of this case demonstrate neither an arrest nor unreasonably excessive steps for an investigatory detention."

SEIZURE – WHAT CONSTITUTES CHASING DEFENDANT

People v. Archuleta, 980 P.2d 509 (Cob. 1999).

Overruling prior case law, the Supreme Court of Colorado has ruled that a police officer's mere chasing of a fleeing suspect is not a "seizure" under the Fourth Amendment. Therefore, the officer did not need to have reasonable suspicion under *Terry* **v.** *Ohio* in order to chase the suspect.

"In *People v. Thomas,* 660 P.2d 1272 (Cob. 1983), we held that in a chase case, reasonable suspicion had to be evaluated at the point at which a suspect begins to run. If the officer did not then have a reasonable suspicion of criminal conduct, the chase was unwarranted. Accordingly, we concluded that '[flacts uncovered after a chase begins do not enter into the constitutional equation for reasonable suspicion.'

"Since we issued that opinion, however, the United States Supreme Court has further developed Fourth Amendment jurisprudence in a manner inconsistent with that position.

"In *California v. Hodari D., 499 U.*.S. 621 (1991)], the Court held that a police officer's chase of a suspect does not trigger the protections of the Fourth Amendment because it is not a seizure. Applying that conclusion to the facts of *Hodari D.*. the Court found that evidence discarded by a suspect as he was running from the police should not have been suppressed as the fruit of an unlawful seizure because no seizure of the suspect had taken place. *See Hodari D.,* 499 U.S. at 629, 111 S.Ct. 1547.

"The Court's conclusion in *Hodari D.* conflicts with part of our decision in *Thomas.* We therefore overrule *Thomas* to the extent that it is inconsistent with the Supreme Court's position in *Hodari D."*

One justice dissented on the issue of whether there was reasonable suspicion for an investigative stop.

SEARCH WARRANT P.C. UNNAMED INFORMANT

State v. Wesson, 516 S.E.2d 826 (Ga.App. 1999).

The statement of an unnamed seller that he sold drugs to defendant was not enough to establish probable cause for the issuance of a search warrant for defendant's home. The police officer who prepared the affidavit in support of the warrant testified at a suppression hearing that the seller was not known to be reliable, and the fact that the seller's statement was against his interest did not make his statement reliable.

The court ruled that the "statement against interest" rule applies only to named informants, *i.e.,* those informants whose identities have been disclosed to the issuing magistrate.

SEARCH WARRANT – STALENESS THREE MONTHS OLD

United States ***v***. *Feliz,* 182 F.3d 82 (1st Cir. 1999).

Drug transactions described in a search warrant affidavit took place approximately three months prior to the issuance of the warrant. This did not render them "stale" for purposes of establishing probable cause, where the informant stated that he had been purchasing drugs from the defendant for approximately 12 years. The court ruled the police could reasonably have believed that defendant's drug trafficking was of a continuous and ongoing nature and that the information was still credible and reliable when the warrant was applied for.

"Feliz argues that because the drug transactions described in the affidavit took place approximately three months prior to issuance of the warrant they were 'stale.' But courts have upheld determinations of probable cause in trafficking cases involving similar or even longer periods. *See e.g., (United States v.*. *Greany,* 929 F.2d 523, 525 (9th Cir. 1991) (two year-old information relating to marijuana operation not stale); *Rivera v. United States,* 928 F.2d 592, 602 (2d Cir. 1991) (noting that in drug trafficking cases, information may be months old). Based upon Cl's two controlled purchases of cocaine in September, and Cl's statement that he had been purchasing drugs from Feliz for approximately twelve years, the agents could reasonably have believed that Feliz's drug trafficking was of a continuous and ongoing nature."

SEARCH WARRANT – NO KNOCK RUSE TO GAIN ENTRY

Coleman v. United States, 728 A.2d 1230 (D.C. 1999).

Does entry of a dwelling obtained by means of a ruse constitute a "breaking" within the meaning of knock-and-announce statutes? This court answered "no" and ruled that entry into a defendant's house by officers with a valid search warrant, by use of a ruse about a burglary call on defendant's elderly, invalid mother, was reasonable under the Fourth Amendment.

The court noted that the potential for violence was greatly reduced by the type of ruse employed, the ruse reduced the possibility of danger of harm to defendant's mother that might have resulted if entry had been denied and the police found it necessary to break down the door, and the effectiveness of the ruse forestalled any destruction of property that might otherwise have resulted. Additionally, the court noted that the privacy of occupants of the dwelling was maintained because the officers at the door knocked and waited to get permission to enter from the mother.

INVESTIGATIVE STOP – PROFILING

United States v. Stone, 73 F.Supp.2d **iii** (S.D.N.Y. 1999).

While racial profiling or stereo-typing is clearly improper as a basis for making investigative stops, a federal district court ruled that although an initial approach to defendant by police may have been based on racial stereotyping, that fact alone did not render a subsequent *Terry* stop unreasonable. The Court focused on the events following the initial approach, including defendants flight and clutching of this front pants pocket where officers believed a weapon was concealed. This supported reasonable suspicion for a *Terry* stop, the court said, independent of any racial stereotyping that may have occurred.

. . . even assuming that the defendant was singled out for closer inspection on the basis of his race in concert with the time and the location in which he walked. I am satisfied that the officer's subsequent actions fully comply with the Fourth Amendment's guarantee against unreasonable searches and seizures. Although I am troubled by the consideration that may have initially triggered police interest in the defendant, Stone's actions, when considered in their totality, created sufficient suspicion to justify his detention and the officers' subsequent seizure of his weapon. This suspicion, based upon an aggregate of objective, articulable factors, is not tainted by the biases that may have motivated the officers' decision to initiate a consensual encounter with the defendant."

PLAIN FEEL DOCTRINE STOP AND FRISK

Commonwealth v. EM, 735 A.2d 654 (Pa. 1999).

A roll of cash in the pocket of a suspect who was subjected to a *Terry* frisk for weapons was not, in and of itself, *per se* contraband under the plain feel doctrine of *Minnesota v. Dickerson,* 508 U.S. 366 *(1993).* (police may seize immediately indentifiable contraband in a frisk).

"Moreover, even assuming that Corporal Meyers recognized the bulge in LM's pocket as a large amount of cash, a large amount of cash is not, in and of itself, 'per se contraband.' See Mesa Commonwealth v. 683 A.2d 643 (Pa.App. 1996)1. 683 A.2d at 648 (stating that large amount of cash is not 'per se contraband' and noting doubt that roll of cash could have contour or mass that would make it immediately recognizable as a controlled substance); . .

Two justices dissented.

PLAIN FEEL IMMEDIATELY APPARENT

Commonwealth v. Stevenson, 744 A.2d 12d (Pa. 2000).

The "immediately apparent" requirement of the plain feel doctrine articulated in Minnesota v. *Dickerson,* 508 U.S. 366 (1993), was not met in a case where an officer conducting a *Terry* frisk for weapons felt three hard packages of folded paper or cardboard in the change pocket of defendants jeans. Although the officer testified that he had previously seen cocaine packaged in cardboard and that he knew the packages contained cocaine by the feel of the bulge and the package, the officer did not explain what it was about the mass or contour of the particular package he felt that led him to the conclusion that it contained cocaine.

. . . we find that Officer Birney did not have probable cause under the plain feel doctrine to seize the drugs from Appellant Reuben Stevenson's pants pocket. At Stevenson's suppression hearing, Officer Birney testified that during the frisk of Stevenson, he felt three hard packages of folded paper or cardboard in the change pocket of Stevenson's jeans. Although the officer testified that he had previously seen cocaine packaged in cardboard and that he 'knew' the packages contained cocaine 'by the feel of the bulge and the package,' . . . he did not explain what it was about the mass or contour of the particular package felt that led him to this conclusion. In fact, while the officer testified that he did not believe that the packages were gum or candy, he also conceded that he did not know if non-contraband items would feel similar to the cardboard that he felt during the frisk of Stevenson

One justice dissented and another filed a concurring and dissenting opinion.

RIGHT TO PRIVACY HOTEL ROOM – PC TO ARREST

State v. Perkins, 588 N.W.2d 491 (Minn. 1999).

Where a defendant persisted in running a loud and disruptive party in his hotel room during the early morning hours, despite repeated warnings from the hotel management that if loud noise continued he and his guests would be asked to leave, he lost any reasonable expectation of privacy he may have had in the hotel room. Therefore a warrantless search of the room by police officers after they had been summoned by the management to assist in removing defendant did not violate the Fourth Amendment.

The court ruled that the police had sufficient probable cause to arrest defendant, based upon crack cocaine found inside the sweatband of a baseball cap found by the officers during the search of defendant's hotel room, where defendant was known by police to own a cap identical to that found in the room, and defendant was the only male person in the room not wearing a baseball cap at the time the officers entered and conducted their search.

WARRANTLESS SEARCH SCOPE SMELL OF MARIJUNANA AUTOMOBILE

State v. Wriqht, 977 P.2d 505 (Utah App. *1999).*

The strong smell of raw marijuana emanating from a defendant's vehicle at the time of a stop for a possible traffic violation, as opposed to the mere odor of burnt marijuana, gave a police officer probable cause to search the vehicle's trunk. The court followed a distinction between the odor of burnt marijuana and the smell of raw marijuana for the scope of a search.

See United States v. Downs, 151 F.3d 1301, 1303 (10th Cir. 1998).

In *Downs,* the court recognized 'a common sense distinction between the smells of burnt and raw marijuana based on the imperative that the scope of a warrantless search "is defined by the object of the search and the places in which there is probable cause to believe that it may he found." *Id.* (quoting *Ross [United* States v. , 456 U.S. 798 (19g2)1, 456 U.S. at 824, 102 S.Ct. at 2172). In further explanation, the court stated that the smell of burnt marijuana is generally consistent with personal use *of* marijuana in the passenger compartment of an automobile. In such a case, therefore, there is no fair probability that the trunk of the car contains marijuana and an officer must limit the search to the compartment absent corroborating evidence of contraband. When, on the other hand, an officer encounters, as was the case here, the overpowering smell of raw marijuana, there is a fair probability that the car is being used to transport large quantities of marijuana and that the marijuana has been secreted in places other than the passenger compartment. Accordingly, in such circumstances, a search **of** the trunk **is** appropriate.

Id. (citations omitted).

We agree with the Tenth Circuit's rationale and apply it here. In this case, Wright does not dispute the trial courts finding that Sergeant Mangelson smelled the odor of marijuana coming from his car. The only testimony on this issue at the hearing was that the odor was that of raw marijuana. An odor of raw marijuana strong enough to be smelled from outside a car would lead a person of ordinary caution' to believe that marijuana in bulk may be stored in the car trunk. *Id.* The trial court thus correctly determined that Sergeant Mangelson had probable cause to search the trunk."

ROAD BLOCK DRUG INTERDICTION

Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999).

Drug interdiction roadblocks during which police officers demanded driver's licenses and registrations, looked into the windows of cars and led a drug-sniffing dog around the cars, violated the Fourth Amendment. The court was not persuaded by arrest rates of 5% for drugs and 9% overall, where the city conceded its purpose was to catch drug offenders in the hope of incapacitating them and deterring others, and did not claim to be concerned with such things as protecting highway safety against drivers high on drugs or excluding a harmful substance or dangerous persons.

"It is true that in the course of looking for drugs in vehicles stopped at its drug roadblocks, the Indianapolis police often discover violations of the traffic laws. If the purpose of the roadblock program were to discover such violations, and if a program having such a purpose could be justified under the cases that allow searches and seizures without individualized suspicion of wrongdoing, then the seizure, in the course of such searches, of drugs that were in plain view would be lawful.

Leading a drug-sniffing dog around a car cannot be justified by reference to a desire to detect traffic violations, and so the use of the dog at the City's roadblocks shows—what is anyway not contested—that the purpose of the roadblocks is to catch drug offenders. We are not asked to decide whether, if the primary purpose were to detect drunken drivers, the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible, or at least would not violate the Fourth Amendment.

ROADBLOCKS ROVING PATROLS TAXI CABS

In re Muhammad F., 700 N.Y.S.2d 77 (Ct.App. 1999).

The New York Court of Appeals invalidated on Fourth Amendment grounds a procedure whereby officers in unmarked police cars stopped a predetermined percentage of taxicabs, during a roving nighttime patrol of an area with a high incidence of taxi robberies, and routinely requested that passengers step out of the cabs while officers searched the cabs. The court said that while the police had a strong interest in protecting taxi drivers, the effectiveness of the procedure employed in advancing that interest was not clear, the stops were unjustifiably intrusive, and there was no showing that the police officers' discretion was sufficiently constrained.

. . . . . the records in these cases contain no showing that the Task Force had attempted to mitigate the constitutional infirmity of 'standardless and unconstrained discretion' of 'the official in the field' *(Delaware v. Prouse, supra,* at 661, 99 S.Ct. 139fl other than the vague and purely conclusory testimony that the officers had verbal instructions to stop taxis 'in a set basis and not just arbitrarily.' For example, had the Police Department produced evidence of particularized guidelines with 'listed criteria' that 'established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle; [and] location of screening areas' *(People v. Scott, supra,* at 522-523, i83 N.Y.S.2d 649, .i73 N,E.2d 1), then we would have some assurance that the stops were 'being maintained in accordance with a uniform procedure which afforded little discretion to operating personnel' (id., at *526,* 483 N.Y.S.2d 649. *473* N.E.2d 1; see, *Delaware v. Prouse, supra,* at 650, 99 S.Ct. 1391; *cf, Michigan Dept. of State Police v. Sitz, supra,* at *444,* ~-153, 110 S.Ct. 2i~1:

Since the officers here were not even required to make a written record of stops that had taken place, in conducting our 'post-stop judicial review' United States v. Martinez-*Fuerte, supra,* at 559, 96 SQ. 3074), we are relegated to the self-verifying evidence from the officers whose conduct is being challenged to determine whether they were using uniform and non-discriminatory procedures.

"On the scanty proof adduced in these cases, there was a failure either to establish the reasonableness of the patrol stops. . . or to satisfy the constitutional requirement that the stops were 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' (Id., at 51, 99 S.Ct. 263~): . . Thus, the evidence was properly suppressed . . . . .

SEARCH OF BUSES DRUG DOGS

State v. Lee, "15 So.2d 582 (La.App. 1998).

A sweep by a drug detection dog of the cargo/baggage hold of a bus, particularly the luggage, was neither a 'search' nor a *Terry v. Ohio* stop for investigation. The bus driver had consented to allow a police officer to "work" his dog in the aisle and cargo/baggage hold, and the passengers on the bus were free to leave prior to the dog working the bus.

The court ruled that the officer had reasonable suspicion to make an investigatory stop of the defendant-bus passenger when the narcotics dog alerted to a piece of luggage in the cargo/baggage hold of the bus and the bus driver identified defendant as the person to whom the piece belonged, defendant appeared nervous when asked for his identification and ticket, and no other passengers on the bus answered to the name on the piece of luggage.

In the case *sub judice,* the bus made its regular stop at the bus station and people were not *seized* because they were free to leave the bus prior to the narcotics dog 'working' the bus. The canine sniff in this case was not a search. In light of the evidence adduced, Defendant had no reasonable expectation of privacy that his luggage in the baggage compartment would not be subjected to a narcotics dog it law enforcement gained permission from the bus line for that purpose. Therefore, we find that Trooper Ledet properly checked the luggage in the cargo/baggage hold with the narcotics dog.

. . . in this case, when the narcotics dog alerted on baggage in the cargo/baggage hold. Trooper Ledet obtained the name Mike Jones' from the tag on the suspect baggage. He then checked with the bus driver, who checked his passenger and ticket information and identified Defendant as the person to whom the baggage belonged. Only after this did Trooper Ledet approach Defendant and begin questioning him. At this point, Trooper Ledet had reasonable suspicion that criminal activity was afoot and that Defendant was the person who was engaged in the criminal activity."

CONSENT SEARCH AFTER INITIAL DUI HAS DISSIPATED

United States v. Erwin, I SS F.3d 818 (6th Cir.1998).

Police officers were entitled to detain defendant as a possible drug dealer even after their initial suspicion that he was driving while intoxicated proved to be unwarranted, based on the facts that he (1) Was nervous: (2) Seemed to he avoiding questioning by attempting to leave; (3) Seemed to have used or was preparing to use a pay telephone to make a call when a cellular telephone was available; (4) Seemed to have drug paraphernalia in his vehicle; (5) Had a large amount of cash on him; (6) Had no registration or proof of insurance; (7) Had a criminal record of drug violations; and (8) Had a backseat cushion in his vehicle that seemed to be out-of-place.

The court said these observations raised reasonable and articulable suspicion that criminal activity was involved and they were entitled to ask defendant for permission to search his vehicle.

"Moreover, irrespective of whether the deputies were justified in detaining Erwin after he showed no signs of intoxication, and even if they had not, after approaching Erwin. observed conditions raising reasonable and articulable suspicion that criminal activity was 'afoot,' they were entitled to ask Erwin for permission to search his vehicle. A law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a *crime* has been committed, and asking him whether he is willing to answer some questions. *Florida* **t'.** *Royer. 460* U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). This includes a request for consent to search the individuals vehicle. *United States v. Dunson,* 940 F.2d 989, 994 (6th Cir.1991). And, this consent is not vitiated merely because the valid suspicion of wrongdoing for which an individual has been stopped proves to he unfounded or does not result in prosecution and the individual is free to go before being asked. *See Ohio v. Robinette, 5*19 U.S. 33, —, 11 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996). Of course, when a law enforcement officer no longer has any reasonable suspicion o criminal activity, the detained individual is constitutionally free to leave, and if the officer rejects the individual's indication that he would like to leave, valid consent can no longer be obtained. The fruits of a search conducted under these circumstances would have to be suppressed." The chief judge and three judges dissented.

SEARCH INCIDENT TO ARREST AUTOMOBILE

State v. Homolka, 953 P.2d 612 (Idaho 1998).

The question raised by this case is whether a gearshift hoot which was accessible to an occupant of a car and not attached to the car, was within the permissible scope of a search incident to arrest of the driver under the rule of New York v. Belton, 453 U.S.454~ (1981). The court said it was.

The gearshift boot could move freely and no dismantling or damage to the car was necessary to move the boot. There was a protruding plastic hag and rubber hand attached to the gearshift not in the officer's plain view, and it a reasonable to move the gearshift boot to determine whether there were objects that posed a threat to the officer or were potential evidence.

"Homolka argues that the gearshift boot was not part of the passenger compartment and consequently the search was outside the scope of the *Belton* rule. In *Belton,* the U.S. Supreme Court established a bright-tine rule that it is constitutionally reasonable for a police officer to conduct a warrantless search of the passenger compartment and any containers found within it. *id. Belton* defines 'container as:

Any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

> *Id.* at 460 n. 4, 101 S.Ct. at 2864 n. 4. The stated justifications for allowing a search incident to arrest are the need to prevent physical harm to the arresting officer and the need to prevent the concealment or destruction of evidence. *Id.* at 457, 101 SO. at 2862-63.

"The State contends that under the expansive definition of 'container' in *Belton* and its specific inclusion of the console as a container, the gear shift boot should he deemed either a container or an integral part of the passenger compartment, especially because it was not attached to the floor of the vehicle.

In this case, the gearshift boot was not attached to the car. The officer explained that 'it could move freely.' Furthermore, the officer noticed both the protruding plastic bag and the rubber hand that was attached to the gear shift knob. With both of those items in his plain view, it was reasonable to move the gearshift hoot to determine whether the objects posed a threat to the officer or were potential evidence. No dismantling or damage to the vehicle was necessary to move the boot, In view of the gearshift boot's accessibility to the occupant of the vehicle and the fact that it was not attached. the officer did not exceed the permissible scope of a search incident to arrest."

SEARCH INCIDENT TO ARREST FOUR HOURS LATER

United States v. Patrick, 3 F.Supp.2d 95 (D.Mass. 1998).

A warrantless search of a vehicle which a defendant had been operating at the time of his arrest, which was performed four hours after his arrest was made and after the vehicle had been transported to an armors, was not sufficiently contemporaneous with the arrest, and thus did not come within the exception to the warrant requirement of searches incident to arrest as articulated by New Y*ork v. Belton,* 453 U.S. 454 (1981). Under *Belton* a warrantless search of a vehicle incident to the arrest of its operator may be conducted even if the operator is under physical restraint some distance away from the vehicle, but it must be reasonably contemporaneous to the arrest.

"The search of Samuel Patrick's vehicle conducted four hours later, was not contemporaneous with the arrest. This time delay eliminated any grounds of concern for officer safety or destruction of evidence. I conclude that the search of Samuel Patrick's vehicle was not contemporaneous and the search was not a lawful search incident to arrest under Belton.*"*

SEARCH INCIDENT TO ARREST MISDO SUMMONS

Lovelace v. Commonwealth, 522 S.E.2d 856 (Va. 1999).

Defendant's search after he was detained by a police officer for apparently drinking an alcoholic beverage in public, which revealed a bag of drugs, was unlawful and the drugs were suppressed. Under state law the officer could only have issued a defendant a summons for an alcohol-related offense, defendant had not failed or refused to discontinue the suspected unlawful activity so as to warrant a full custodial arrest, the officer felt no threat to his safety, and he felt nothing similar to a weapon or to evidence relating to defendant's drinking an alcoholic beverage in public when he conducted a *Terry* pat-down of defendant. The court relied upon the reasoning of the decision in *Knowles v. Iowa, 525* U.S. 119 (1995, in which the United States Supreme Court rejected a search incident theory in a situation involving the simple issuance of a traffic citation.

We conclude that *Knowles* is applicable. The encounter between Lovelace and the officer, while not involving a traffic offense, was nonetheless similar in nature and duration to a routine traffic stop. We reach this conclusion primarily because the initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of a summons was authorized under Code S 19.2-74(AH *2).* Only if Lovelace had failed or refused to discontinue the unlawful act could the officer have effected a custodial arrest and taken the defendant before a magistrate. Code 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed Womack to search him. After *Knowles* an 'arrest' that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.

SEARCH INCIDENT TO ARREST GLASS PIPE

Snider v. State, 958 P.2d 1114 (Alaska App. 1998).

A police officer had probable cause for a warrantless seizure and search of the contents of a plastic box containing crack cocaine, which he found on defendant's person during a search incident to arrest for the possession of a firearm while intoxicated. The officer's observations of defendant's erratic behavior while possessing the firearm provided probable cause for him to believe that defendant was high on drugs and thus to search defendant's person for cocaine.

The officer first found a glass pipe on defendant that he knew from prior experience was commonly used to smoke cocaine and that people who smoke cocaine and possess this type of pipe usually carry cocaine. This gave him probable cause to arrest defendant for unlawful possession of drugs as well as probable cause to search the contents of the plastic box for cocaine.

"[We are led] to the conclusion that Trooper Hahn's warrantless search of the contents of the black plastic box found on Snider's person should be upheld on two separate bases. First, Trooper Hahn's discovery of the glass pipe, his knowledge that such pipes are commonly used to smoke cocaine, and that people who smoke cocaine and possess a cocaine pipe on their person commonly carry the drug on their person, objectively furnished probable cause for the arrest of Snider for unlawful possession of drugs as well as probable cause for a search of the contents of the plastic box for evidence of drug possession. The mere fact that Trooper Hahn stated he arrested Snider for possessing a weapon while intoxicated does not negate the existence of sufficient objective evidence furnishing probable cause to arrest Snider for unlawful possession of drugs and to thereafter conduct a warrantless search for evidence of unlawful drug possession.

"Additionally. [a statute] proscribes possession of a firearm where a person's 'physical or mental condition is impaired as a result of. . . intoxicating liquor or a controlled substance. The facts outlined above, and Trooper

Hahn's observations of Snider's erratic behavior while possessing a firearm, objectively provided probable cause for the officer to believe that Snider was high on cocaine and thus to search Snider's person for evidence of cocaine possession. Snider had been arrested for possession of a weapon while intoxicated. Since intoxication includes being under the influence of drugs, the facts known to Trooper Hahn objectively justified the search of Snider's person for drugs."

SEARCH PASSENGER LUGGAGE SQUEEZE RIGHT TO PRIVACY

BOND V. UNITED STATES, 120 S.Ct. 1462, 2000 WL 381264, No. 98-9349 (2000).

A federal border patrol agent boarded a bus near the Texas-Mexican border to check the immigration status of the passengers. As he was leaving the bus he squeezed the soft luggage which passengers had placed in the overhead storage space. When he squeezed a canvas bag belonging to the defendant he noticed that it contained a "brick-like" object.

Defendant consented to a search of the bag and the agent discovered a "brick" of methamphetamine, possession of which defendant was charged and convicted. The Fifth Circuit Court of Appeals ruled that the agent's manipulation of the bag was not a "search" under the Fourth Amendment. 167 F.3d *225.*

On appeal the Supreme Court reversed in a 7-2 decision and an opinion written by the Chief Justice. The Court held that the agent's physical manipulation of defendant's bag violated the Fourth Amendment's proscription against unreasonable searches. Personal luggage, the Court said, is clearly an "effect" protected by the Amendment and it was undisputed that defendant had a privacy interest in his bag. The Court rejected the government's argument that by exposing his bag to the public, defendant gave up a reasonable expectation that his bag would not he physically manipulated.

The Court recognized that defendant sought to preserve his right to privacy in the bag by using an opaque bag and placing it directly above his seat. His expectation of privacy was reasonable because although a bus passenger clearly expects that other passengers or bus employees may handle his bag, he does not expect that they will feel the bag in an exploratory manner, as the agent did in this case.

The Court concluded that the manipulation of the bag was a "search." defendant had exhibited an actual expectation of privacy (subjective), his expectation was reasonable (objective, *i.e.*. "one that society is prepared to recognize as reasonable"), and his right to privacy was violated.

Justice Breyer dissented in a separate opinion, joined by Justice Scalia. Justice Breyer complained that at best, this decision will lead to a constitutional jurisprudence of 'squeezes,' thereby complicating further already complex Fourth Amendment law." He warned that people who want to safeguard the privacy of carry-on luggage "should plan to pack those contents in a suitcase with hard sides, irrespective of the court's decision today."

SEARCH - PC FOR AUTOMOBILE – MAY SEARCH PURSE

Wyoming *v. Houghton,* 119 S.Ct. 1297, 1999 WL 181177, No. 98-184 (1999).

After making a routine traffic stop, a highway patrol officer noticed a hypodermic syringe in the driver's shirt pocket. The driver admitted using the syringe to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what defendant, a passenger in the car, said was her purse. She was arrested for possession of drug paraphernalia found in her purse.

The Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search, except that if the officer knows or should know that a container belongs to a passenger who is not suspected of committing a crime, the passenger's container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection. The court found a Fourth Amendment violation and reversed the passenger's conviction (956 P.2d 363).

In a 6-3 decision and an opinion written by Justice Sea ha, the United States Supreme Court reversed the Supreme Court of Wyoming. It held that police officers with probable cause to search a car may inspect the belongings of passengers found in the car that are capable of concealing the object of the search. The Court said the balancing of the relative interests involved weighs decidedly in favor of searching a passenger's belongings. Passengers, no less that drivers, possess a reduced expectation of privacy with regard to the property they transport in cars.

Balancing the passenger's reduced privacy expectations, the Court said the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since an automobile's mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained. It noted that a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver, and a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car.

It also thought that a rule protecting only a passenger's property would make less sense than a rule that a package may be searched, whether or not its owner is present as a passenger or otherwise. In either case, such a package might contain the object of the search. Justice Breyer filed a concurring opinion and Justices Stevens, Souter and Ginsburg dissented. In his dissenting opinion Justice Stevens complained that under the Court's ruling the police could search a passenger's briefcase if" . . . there is probable cause to believe [a] taxi driver had a syringe somewhere in his vehicle."

SEARCH OF DEFENSE ATTORNEY/GRAND JURY WITNESS

Conn v. Gabbert, 119 S.Ct. 1292, 1999 WL 181181, No. 97-1802 (1999).

The issue in this case was whether prosecutors violated the due process rights of a defense attorney in having him held and searched pursuant to a warrant in a separate room at a courthouse while his client was appearing before a grand jury as a witness. The prosecutors believed that the defense attorney had a letter from a defendant instructing his client-witness to testify falsely at a prior trial. The attorney was prevented from conferring with his client during the grand jury proceedings because of the detention and search.

He filed a civil rights action under 42 U.S.C. ~ 1983 against the prosecutors, claiming that he was denied due process by them in not being able to practice his profession by consulting with his client during the grand jury proceedings. The timing and motivation for the search were alleged to have been for this purpose. The Ninth Circuit Court of Appeals agreed with the plaintiff and denied the prosecutors qualified immunity (131 F.3d 793).

In a unanimous decision and an opinion written by the Chief Justice, the Court reversed. It held that a prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the attorney's client is testifying before a grand jury. There was no precedent in the Court's jurisprudence for the conclusion that the prosecutors' actions in this case deprived the plaintiff of a liberty interest in practicing law. At most, there was only a brief interruption as a result of the legal process which occurred, not a complete prohibition to engage in an occupation such as might constitute a violation of due process. Thus the prosecutors were entitled to good faith immunity for the performance of a discretionary function.

The Court also noted that a grand jury witness has no constitutional right to have counsel present during the proceeding, and none of its prior decisions has held that such a witness has a right to have his or her attorney present outside the grand jury room. The Court declined to decide whether such a right exists, because the plaintiff lacked standing to raise the alleged infringement of his client's rights. The plaintiff would have standing to complain of the allegedly unreasonable timing of the search warrant's execution to prevent him from advising his client, but challenges to the reasonableness of the execution of a search warrant must he assessed under the Fourth Amendment, not the Fourteenth Amendment, and the plaintiff had rested his case on the Fourteenth Amendment Due Process Clause, not the Fourth Amendment Reasonableness Clause.
Justice Stevens filed an opinion concurring in the judgment.

SEARCH – WHAT CONSTITUTES – KNOCKING ON APARTMENT DOOR

People v. Holmes, 981 P.2d 168 (Cob. 1999).

State. A police officer's knocking on defendant's apartment door and observation of a marijuana bong in the apartment while investigating a complaint of a disturbance was not a warrantless search of defendant's apartment for Fourth Amendment purposes. The officer did not intend to open the door by knocking and the door opened due to a faulty door latch.

Even if Holmes had a subjective expectation that no one would knock hard enough on his unlatched door to cause it to open, under these circumstances, such an expectation would not he one 'that society is prepared to recognize as reasonable.' *People v. Shorty,* 731 P.2d 679, (Colo.1987) (holding that police officer who discovered drugs under a doormat outside the entrance to defendants apartment had not conducted a search).

"Because Officer O'Bannon's action in knocking and causing the door to open did not constitute a search, this conduct did not violate the Fourth Amendment.

A remand of the case was necessary, however, to determine whether the police officer's decision to enter the apartment and arrest defendant for possession of cocaine without a warrant was justified by probable cause and exigent circumstances.

SEARCH WARRANT "ALL PERSONS ON PREMISES"

State v. Kinney, 698 N.E. 2d 49 (Ohio 1998).

A search warrant authorizing the search of all persons" on particular premises did not violate the particularity requirement of the Fourth Amendment in this case under strict guidelines adopted and applied by the court. An application for such a warrant must carefully delineate the character of the premises, for example, its location, size, particular area to he searched, means of access, neighborhood, its public or private character and any other relevant facts. It must also specifically describe the nature of the illegal activity believed to he conducted at the location, as well as the number and behavior of persons observed to have been present during the times of day or night when the warrant is sought to be executed.

In adopting. . . guidelines ... we do not intend to make the process of determining the sufficiency of an affidavit a hypertechnical one. When an 'all persons' warrant is requested, determination of probable cause will still require practical, common-sense decision making by magistrates.

"What makes the existence of probable cause in this case such a close question is the absence of any language in the affidavit indicating 'whether any person apparently unconnected with the illegal activity has been seen at the premises. Nieves*,* 36 N.Y.2d at 405, 369 N.Y.S.2d at 60, 330 N.E.2d at 34.

Different jurisdictions have reached contrary judgments upon relatively similar facts, depending largely on how courts viewed the evidence touching on this factor.

"Some express indication in the affidavit of whether police had evidence of innocent activity occurring in the apartment would have made a determination of probable cause significantly easier in this case. Evidence, for example, that the apartment provided a residence for children would likely preclude a finding of probable cause as to all persons on the premises nevertheless, even where there is no express indication that innocent people would not likely be on the searched premises, magistrates ought to he permitted to make common-sense inferences supported by other evidence in the affidavits.

"In the instant case, given the evidence in the affidavit that (1) the premises was small and private, (2) despite a search and seizure of cocaine and other contraband and an arrest five days earlier, crack cocaine sales were ongoing, and (3) the search was going to be conducted at night, the magistrate could have logically concluded that there was no significant possibility that innocent people would he present in the apartment at the time of the search. Thus, there was a substantial basis for the magistrate's determination of probable cause. Because a reviewing court should give deference to the probable cause determination of the issuing magistrate . . . .we find that the warrant in this case and the search conducted under its authority did not violate the Fourth Amendment."
The chief justice and five justices concurred.

SEARCH WARRANT – CETIFICATION OF DRUG DOG

Commonwealth v. Watson, 430) Mass. 725, 7*23* N.E.2d 501 (Mass. 2000).

The official certification of a drug detection dog in a search warrant affidavit for suitcases taken from drug defendants was not necessary to establish probable cause for a search warrant. The court noted that a motion judge had found that the information in the affidavit, including the fact that a trooper was an experienced K-9 officer, and that the dog was certified, had conducted more than 200 searches, and had reacted positively to both suitcases at issue, was sufficient to establish probable cause for the search warrant.

Certification of the dog was not necessary to establish probable cause for a search warrant. See *Commonwealth v. Welch,* 42() Mass. 646, 655, 651 N.E.2d 392 (1995) (probable cause despite failure to attach drug detection dog's official certification).

"Here the motion judge found that the information that Trooper Harding provided in the affidavit, including the fact Trooper Rideout was an experienced K-9 officer, and that the dog was certified, had conducted more than 200 searches, and had reacted positively to both suitcases at issue, was sufficient to establish probable cause."

PRIVACY CURTILAGE WOODED AREA SURROUNDING HOUSE

State v. Martwick, 60.i N.W.2d *552* (Wis. 2000). State. Marijuana plants were found between a defendant's house and ginseng sheds. The location was ruled to be outside the "curtilage" **of** the residence, and therefore the police could enter that part of the property and seize a leaf slip from one of the plants during an initial warrantless search. The court considered that the entire property was only 1.52 acres and the plants were between *50* and 75 feet from the house, the property was not a farm so as to warrant extending the curtilage to out-buildings such as sheds, no fence or other enclosure surrounded the property, and the plants were not inside a low cut area surrounding the residence, but in an area of dense trees over which defendant had not exercised dominion.
The court concluded that the curtilage of the house ended where the dense trees began, which was about 20 feet from the house.
The chief justice dissented.

SEARCH WARRANT – ENTRY BY RUSE

Adcock v. Commonwealth, 967 S.W.2d 6 (.Ky. 1998).

A police officer's entry of a residence after defendant opened the door in response to the officer's ruse that he was a pizza delivery person did not constitute a breaking or forceful entry triggering the constitutional knock and announce rule. The ruse successfully enticed defendant to voluntarily open the door and the officers gained peaceful entry through the open door without having to use any force.

The court said a ruse used by the police to gain entry for the purpose of executing a search warrant is constitutionally distinguishable from a no-knock entry. So long as such a ruse is accomplished without the use of *force,* it promotes the underlying purposes of the knock and announce rule and is constitutional and reasonable under the Fourth Amendment.

"A ruse is constitutionally distinguishable from a no-knock entry.

"In fact, notwithstanding the presence of exigent circumstances, federal and state courts in interpreting either knock and announce statutes or the common law knock and announce rule are in general agreement that there is no constitutional impediment to the use of subterfuge. Entry obtained through the use of deception, accomplished without force, is not a 'breaking' requiring officers to first announce their authority and purpose. The United States Supreme Court, while reiterating the knock and announce rule in the context of the Fourth Amendment [in *Richards v. Wisconsin 5*20 U.S. 385 (1997)], clearly has not foreclosed the use of police deception to gain entry into a residence for the purpose of executing a valid search warrant. Indeed, we agree with the decisions cited herein, that such a tactic, so long as it is accomplished without the use of force, promotes the underlying purpose of the knock and announce rule and is constitutional and reasonable under the Fourth Amendment."

One justice dissented in an opinion joined by the chief justice.

SEARCH WARRANT KNOCK AND ANNOUNCE VIOLATION

United States v. Dice, 200 F.3d 978 (6th Cir. 2000).

A police officer's violation of a knock-and-announce rule during the execution of a valid search warrant, by failing to wait a reasonable amount of time before forcing his way into the residence, warranted the suppression of the evidence seized in a search following the violation. The court said a knock-and-announce violation makes a subsequent search illegal due to the unlawful method in which it was executed, even if the search were legal in its purpose and authority, as demonstrated by a valid warrant.

The court also rejected an inevitable discovery argument because the government could not show that the evidence inevitably would have been obtained from lawful sources in the absence of the illegal discovery. Application of the doctrine would require the government to offer clear evidence of an independent, untainted investigation that inevitably would have uncovered the same evidence as that discovered through the illegal search, which it could not do in this case.

SEARCH WARRANT – KNOCK AND WAIT REQUIREMENT

State v. *Richards,* 962 P.2d 118 (Wash. 1998).

It was reasonable for police officers to enter defendant's apartment by opening a sliding screen door, without waiting for him to expressly grant or deny them entry. moments after one officer announced "Hey. Grant [defendant's first name]. Police. We have a search warrant." The court said this announcement was as good as a knock on the door because the officers had a clear and unobstructed view of defendant through the screen door, defendant made eye contact with the officers after the announcement, and the announcement of the search warrant was, in effect, an implicit demand for entry into the apartment.

"In this case, the detectives acted reasonably when they immediately entered Petitioner's apartment after announcing their identity and purpose. Shouting of Petitioner's name by Detective Erickson was equivalent to a knock because the detectives had a clear and unobstructed view of the apartment's occupants through the sliding screen door. Yelling 'Hey, Grant' to get Petitioner's attention was as good a notice as a knock on the door would have been. When Petitioner turned to face the detectives standing in full view at his open glass door and made eye contact with them, Detective Erickson immediately identified himself and the other detective as police officers and announced the purpose of their entry by stating, 'Police. We have a search warrant.' The announcement of a search warrant constituted an implicit demand for entry.

"Although the detectives did not wait for Petitioner to grant or deny them permission to enter the apartment before sliding open the screen door and entering the apartment, waiting would have served none of the purposes of the 'knock and wait' rule. An occupant, confronted with a valid search warrant, has no right to refuse admission to police officers because no interest served by the 'knock and wait' rule would he furthered by requiring the officers to stand at an open sliding glass doorway for a few seconds to determine whether the occupant would permit their entry."

SEARCH WARRANT PROBABLE CAUSE

State v.. *Weimer,* 988 P.2d 216 (Idaho App. 1999).

State. A police officer's oral affidavit averring that, while executing a search warrant for explosives in a defendant's motel room, he observed several non-professional-looking photographs depicting young teenage girls clad in lingerie, one of which showed a girl without pubic hair posing in a sexually explicit position, was probable cause to believe that child pornography and/or child sexual abuse offenses had occurred, and justified the issuance of a second search warrant authorizing the examination of other photographs and films, particularly since a "sexual desire test," children's toys, and adult videos and magazines were also found in the defendant's room.

The court said the officer did not violate the "special constraints" which the First Amendment imposes on searches of expressive material, since the officer believed not that the material was obscene but that it was evidence of child pornography and or child sexual abuse. This took the situation out of the First Amendment category of "expressive material."

"Officer Murphy did not seek to seize the material because he evaluated it to be allegedly obscene, hut because he observed it and determined that it was evidence of sexual abuse and/or child pornography. Additionally, officer Murphy sought a warrant from a neutral and detached magistrate—a procedure that provides a reliable safeguard against improper searches. *See Lo-Ji Sales. Inc. v. New York,* 442 ES. 319, 326, *99* S.Ct. 2319, 2324, 60 L.Ed.2d 920, 928 (PY'9). As we have previously stated, the magistrate issued [the second warrant] based on all the circumstances set before it in officer Murphy's oral affidavit, not merely on officer Murphy's conclusory assertion that the photographs were 'sexually explicit,' Thus, all Fourth Amendment requirements were satisfied in this case. "Moreover, . . . the seizure of the photographs in the case at bar implicates none of the constitutional concerns that require heightened procedural safeguards in the context of seizing 'expressive materials.' Here. there was no danger of prior restraint, because Weimer was not in the business of producing expressive materials, and the police sized only the photographs in Wiemer's private possession. . . . Additionally, the seizure of sexually exploitative material does not require police to make subjective judgments at the time of the seizure regarding whether the material is obscene. . . . Finally, because Idaho has chosen to criminalize possession of sexually exploitative material, the seized photographs achieve the status of prohibited material.

SEARCH WARRANT NO-KNOCK ENTRY JUSTIFICATION

State V. Wasson, 602 N.W.2d 247 (Minn.App. 1999).

State. A court found that what it called presumptive, generalized language" in an affidavit that "persons involved in narcotics trafficking and transactions carry firearms" and that "those involved with controlled substances often attempt to destroy those substances," was not, in itself, a sufficient, particularized reason that would justify a no-knock entry to serve a search warrant. However, the court went on to hold that a search warrant application stated sufficient justification for a no-knock, nighttime entry where the application stated that the property to be searched was a drug outlet and that firearms had recently been present on the premises.

"In this case, however, the search warrant application went beyond the boilerplate language and stated that officers had removed numerous weapons when they searched Meixner's home three months earlier. We conclude that when, in a felony drug investigation, an application for a search warrant covering a drug sales outlet *states* that firearms were recently present at the outlet, then the warrant has stated a sufficiently particularized reason to justify a no-knock entry. In our view, it is not critical that the weapons here were hunting rifles, not street weapons. Based on the facts in the current case, therefore, the no-knock provision of the search warrant was justified."

SEARCH WARRANT NO CRIME SCENE EXCEPTION

Flippo v. West Virginia, 120 S.Ct. 7, 1999 WL 824496, No. 98-8770 (1999).

The Supreme Court has made it clear that there is no "crime scene exception" to the Fourth Amendment warrant requirement. It reaffirmed the rule of *Mincey v. Arizona,* i.37 U.S. *385* (1978), which had rejected a "murder scene" exception to the warrant requirement.

In this case defendant called the police to the cabin where he and his wife were vacationing to report that they had been assaulted. The wife was found dead in the cabin and the police embarked on an hours long, warrantless search of the cabin which included a search of a brief case that contained photographs and negatives the state used as evidence at the defendant's murder trial. The Supreme Court of Appeals of West Virginia denied discretionary review.

In reversing defendant's conviction in a *per curiam* opinion, the Court ruled: "A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement, *Katz V. United* States. 389 1 ~.S. 347, *357* (1967), none of which the trial court invoked here. It simply found that after the homicide crime scene was secured for investigation, a search of 'anything and everything found within the crime scene area' was 'within the law.'

This position squarely conflicts with *Mincey v. Arizona,* [437 U.S. 35 (1978)] where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause of the Fourth Amendment. We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, *id.,* at 392 but we rejected any general 'murder scene exception' as 'inconsistent with the Fourth and Fourteenth Amendments—. . the warrant-less search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.' *Id.,* at 395; see also *Thompson v. Louisiana,* 469 U.S. 17, 21 (1981) *(per curium). , Mincey* controls here."

The Court also declined to address the issue of whether the warrantless search might be justified under a theory of consent or some other recognized exception to the warrant requirement that was not relied upon by the trial court.

"Although the trial court made no attempt to distinguish *Mincey,* the State contends that the trial court's ruling is supportable on the theory that the petitioner's direction of the police to the scene of the attack implied consent to search as they did. As in *Thompson v. Louisiana. supra,* at 23, however, we express no opinion on whether the search here might he justified as consensual, as the issue of consent is ordinarily a factual one unsuitable for our consideration in the first instance.' Nor, of course, do we take any position on the applicability of any other exception to the warrant rule, or the harmlessness vel non of any error in receiving this evidence. Any such matters, properly

raised, may be resolved on remand. 469 U.S., at 21; see also *United States v. Matlock,* 415 U.S. 164 (19~ 1).

"The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment of the West Virginia Supreme Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

It should be noted that while officers obtain a search warrant for the premises in these circumstances they would ordinarily be permitted to secure the premises until the search warrant arrives, to ensure that evidence is not disturbed while a warrant is being obtained.

SEARCH WARRANT P.C. UNNAMED INFORMANT

State v. Wesson, 516 S.E.2d 826 (Ga.App. 1999).

The statement of an unnamed seller that he sold drugs to defendant was not enough to establish probable cause for the issuance of a search warrant for defendant's home. The police officer who prepared the affidavit in support of the warrant testified at a suppression hearing that the seller was not known to be reliable, and the fact that the seller's statement was against his interest did not make his statement reliable.

The court ruled that the "statement against interest" rule applies only to named informants, *i.e.,* those informants whose identities have been disclosed to the issuing magistrate.

SEARCH WARRANT – STALENESS THREE MONTHS OLD

United States ***v***. *Feliz,* 182 F.3d 82 (1st Cir. 1999).

Drug transactions described in a search warrant affidavit took place approximately three months prior to the issuance of the warrant. This did not render them "stale" for purposes of establishing probable cause, where the informant stated that he had been purchasing drugs from the defendant for approximately 12 years. The court ruled the police could reasonably have believed that defendant's drug trafficking was of a continuous and ongoing nature and that the information was still credible and reliable when the warrant was applied for.

"Feliz argues that because the drug transactions described in the affidavit took place approximately three months prior to issuance of the warrant they were 'stale.' But courts have upheld determinations of probable cause in trafficking cases involving similar or even longer periods. *See e.g., (United States v.*. *Greany,* 929 F.2d 523, 525 (9th Cir. 1991) (two year-old information relating to marijuana operation not stale); *Rivera v. United States,* 928 F.2d 592, 602 (2d Cir. 1991) (noting that in drug trafficking cases, information may be months old). Based upon Cl's two controlled purchases of cocaine in September, and Cl's statement that he had been purchasing drugs from Feliz for approximately twelve years, the agents could reasonably have believed that Feliz's drug trafficking was of a continuous and ongoing nature."

SEARCH WARRANT RETURN OF SEIZED PROPERTY

West Covina v. Perkins, 119 S.Ct. 678, 1999 WL 9696, No. 97-1230 (1999).

Police officers of the City of West Covina. California, lawfully seized civil rights plaintiffs' personal property from their home pursuant to a search warrant. They left a notice form specifying the fact of the search, the date, the searching agency, the warrant's date, the issuing judge and court, and the persons to be contacted for information, plus an itemized list of the property seized.

The plaintiffs were unsuccessful in their attempt to obtain return of the seized property and ultimately filed a suit under *42* U.S.C. § 1983 for unlawful taking of their property in violation of due process of law. The Ninth Circuit Court of Appeals, 113 F.3d 1004 (1997), ruled that the Due Process Clause required that plaintiffs he given, in addition to the information set forth in the City's form, detailed notice of the state procedures for return of seized property and the information necessary for utilizing such procedures, including the search warrant number or a method for obtaining it (information that was not left at the scene of the search).

In an 8-1 decision and an opinion written by Justice Kennedy, the Supreme Court reversed. It held that when police seize property for a criminal investigation, due process does not require them to give the owner of the property notice of state-law remedies for the return of the property. The Court held that while individualized notice that the police have taken property is necessary in a case such as this because the owner has no other reasonable means of ascertaining who is responsible for his loss, due process does not require notice of state-law remedies which are established by published, and generally available state statutes and case law.

The Court noted that no state or the federal government has required the kind of notice argued for by the plaintiffs in the context of law enforcement practices that have existed for centuries. The Court also rejected plaintiffs' argument that the notice given them was inadequate because it did not provide the search warrant number. Plaintiffs failed to establish that they needed the number to file a motion for return of their property. Justice Thomas concurred in the judgment and Justice Scalia dissented.

SEARCH WARRANT STALENESS CONTINUING DRUG ACTIVITY

Breitweiser v. State, 704 N.E.2d 496 (Ind. App. 1999).

Marijuana fragments recovered from defendant's trash eight days prior to the issuance of a search warrant was not stale evidence that would preclude a finding of probable cause for the search warrant of defendants home. The investigation of drug activity at defendant's home started after receipt of information from an anonymous source, and plant-like fragments subsequently determined to be marijuana were taken from his trash 15 days before the warrant was issued.

"The trial court determined, . . . that 'Lilt is not unreasonable to conclude that, because marijuana was found on February 10 and February 17, 1997 that marijuana would also be present in the home at the time the warrant was issued on February 25, 1997.' . . . under the circumstances set forth in the probable cause hearing, we find that such reasoning by the trial court was a proper approach which a probable cause determination requires. The quantity and size of the fragments of marijuana plants and the repeated evidence of drug activity suggests habituating and continuing use of marijuana at the residence. This same evidence also suggests. . . ongoing marijuana cultivation at the residence. Both activities constitute crimes of a protracted and continuing nature. In keeping with our deference to a magistrate's or trial court's determination of probable cause, we conclude that there was a substantial basis for the trial court's determining that probable cause existed under the facts of this case."

Two judges concurred.

SEARCH WARRANT – NO KNOCK RUSE TO GAIN ENTRY

Coleman v. United States, 728 A.2d 1230 (D.C. 1999).

Does entry of a dwelling obtained by means of a ruse constitute a "breaking" within the meaning of knock-and-announce statutes? This court answered "no" and ruled that entry into a defendant's house by officers with a valid search warrant, by use of a ruse about a burglary call on defendant's elderly, invalid mother, was reasonable under the Fourth Amendment.

The court noted that the potential for violence was greatly reduced by the type of ruse employed, the ruse reduced the possibility of danger of harm to defendant's mother that might have resulted if entry had been denied and the police found it necessary to break down the door, and the effectiveness of the ruse forestalled any destruction of property that might otherwise have resulted. Additionally, the court noted that the privacy of occupants of the dwelling was maintained because the officers at the door knocked and waited to get permission to enter from the mother.

SEARCH WARRANT KNOCK AND ANNOUNCE SUFFICIENCY OF DELAY

United States v. Spikes, 158 F.3d 913 (6th Cir.1998).

A delay of 15 to 30 seconds from the time police officers used a bullhorn to announce their presence with a search warrant until they entered the home was a reasonable amount of time, and sufficient to comply with the "knock and announce" rule of the Fourth Amendment. The officers were searching for drugs and were aware that there were persons inside the home who might destroy the evidence. They had been warned that persons inside the home might have police scanning equipment, guns and armed guards, and they executed the warrant during the middle of the morning when most people are awake.

The court noted that the use of the bullhorn was so effective in alerting people inside the home, that the neighbors had already come out of *their* homes to observe the execution of the warrant before the police entered defendants' home. Obviously if the neighbors knew what was happening so did the defendants.

Although deeply rooted in the common law, the 'knock and announce' principle is a recent concept in Fourth Amendment jurisprudence. This court has not squarely addressed how long the Fourth Amendment requires officers to wait before entering a residence after they have announced their presence. In answering this question, the defendants would have us look solely to the case law concerning the federal 'knock and announce' statute, 18 U.S.C. § 3109, wherein a delay of five seconds or less after officers have knocked and announced their presence has been held to violate the statute. *See United States v. Nabors,* 901 F.2d 1351, 1355 (6th Cir. 1990) (forced entry only seconds after announcing the officer's authority and purpose must he 'carefully scrutinized'). Because the proper measuring stick in this case is that of 15 to 30 seconds, the defendants' reliance on the case law developed under § 3109 actually works to their detriment. Nonetheless, we decline their invitation to create a bright-line rule for every case, *i.e.,* that waiting less than five seconds is *per se* unreasonable while waiting more than five seconds is *per se* reasonable under the Fourth Amendment.

"The Fourth Amendment's 'knock and announce" principle, given its fact-sensitive nature, cannot be distilled into a constitutional stop-watch where a fraction of a second assumes controlling significance.

SEARCH WARRANT KNOCK AND ANNOUNCE APPARENT AUTHORITY

State v. Elkhill, 715 So,2d 327 (Fla.App. 1998).

A search warrant was not executed in violation of the Fourth Amendment knock and announce rule, even though officers did not wait a significant amount of time after they knocked and announced their identity and purpose before forcibly entering the defendant's residence, where (1) An officer testified that when he and other officers drove up to defendant's residence he saw a person through a glass panel on a door; (2) He saw the door open slightly, but slam shut when officers approached with their badges displayed and in raid gear: (3) The strobe lights in their police car were flashing; (4) The officers announced their presence and that they had a search warrant on their way to the door; and (5) The officers knocked several times before forcibly entering the residence.

The court—like the officers—concluded that a formal knock and announce ritual at the door was unnecessary under these circumstances.

Barfield [police officer] believed that their purpose was clear by the time they got to the building's door and that since the building was very small, there was no reason for a delay in opening the door or indicating that entry was allowed.

"These factors reveal that the officers could have forcibly entered Elkhill's residence without knocking and announcing. *See Benefield v. State,* 160 So.2d 706, 710 (Fla. 1964) (setting forth exceptions to knock and announce rule, one of which is that 'the person within already knows of the officer's authority and purpose')."

SEARCH WARRANT VEHICLE LOCATED WITH CURTILAGE

State v. *O'Brien,* 588 N.W.2d 8 (Wis. 1999).

A defendant's vehicle, which was parked next to an outbuilding on a farm stead, was located within the curtilage of his living quarters and was subject to a premises warrant authorizing a search of the upper flat of his premises to locate a pair of underwear and blue jeans, as well as other items described by a sexual assault victim. The court said there was no evidence suggesting that portions of the farmstead, except for a duplex, were specifically allocated to solely the defendant or his tenant.

A police detective searched a vehicle registered to defendant and parked next to one of the outbuildings approximately 200 feet from defendant's residence. The court said the vehicle was a plausible repository for the sexual assault victim's underwear and blue jeans specified in the search warrant. The vehicle was thus properly searched pursuant to the warrant.

"The premises warrant in this case authorized the search of the upper flat of the defendant's premises in order to locate a pair of underpants and blue jeans. as well as other items described by the victim. Those two items were not located in the residence, so the detectives extended the search to the buildings nearby. The vehicle was parked next to one of the buildings, approximately 200 feet from the home. The detectives knew that the vehicle was registered to the defendant, and that the items were small enough to fit inside of it. Because the vehicle was a plausible repository for the objects named in the search warrant, and because the vehicle was in close proximity to the home, we conclude that the detectives' search of the vehicle was reasonable.'

GUESTS EXPECTATION OF PRIVACY

Minnesota v. Carter, 119 S.Ct.,1998 WL 823045, No. 97-1147 (1998).

A police officer left a public sidewalk, walked across some grass, climbed over bushes, crouched down and placed his face 12 to 18 inches from a window to an apartment in order to observe illegal activities within the apartment. He saw the apartment lessee and two guests packaging cocaine. This was held by the Supreme Court of Minnesota in *State v. Carter,* 569 N.W .2d 169 (1997), as reported in the April 1998 issue of *CC&B* at p. 7, to be a Fourth Amendment search of the interior of the apartment whether or not the officer was outside the building's curtilage at the time he made the observations.

The Minnesota court said the two guests present in the apartment did not knowingly expose their activities to the public and had "standing" to raise their Fourth Amendment objections.

The United States Supreme Court has now reversed in an opinion written by the Chief Justice for a 6-3 Court, although on the guests privacy aspect, the Court split 5-4.

The Court ruled that the search did not violate the Fourth Amendment. It rejected the state courts' analysis of the defendant-guests' expectation of privacy under the 'standing" doctrine. To claim Fourth Amendment protection, the Court said, a defendant must simply demonstrate that he personally had an expectation of privacy in the place searched, and that his expectation was reasonable. The extent to which the Fourth Amendment protects people may depend upon where those people are. While an overnight guest may have a legitimate expectation of privacy in someone else's home, one who is merely present for a short rime with the consent of the householder may not.

Additionally, the Court ruled, an expectation of privacy in commercial property is different from, and less than, a similar expectation in a home. In this case the purely commercial nature of the transaction, the relatively short period of time that the guests were on the premises, and the lack of any previous connection between them and the lessee all led to the conclusion that their situation was closer to that of a person simply permitted on the premises. Any search which may have occurred did not violate their Fourth Amendment rights. Because the defendant-guests had no legitimate expectation of privacy, the Court said, it did not need to decide whether the officer's observation constituted a "search" under the Fourth Amendment.

The Supreme Court of Minnesota was reversed and the case was remanded for further proceedings.

Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice Kennedy filed a concurring opinion. Justice Breyer filed an opinion concurring in the judgment. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens and Souter joined, taking the position that the Court's ruling "undermines, not only the security of short-term guests but also the security of the home resident himself."

SEARCH WARRANT – FAILURE TO STATE OFFENSE

Lebedun v. Commonwealth 501 S.E.2d 127 (Va. App. 1998).

A defendant failed to show that a warrant to search his apartment did not recite the offense for which the search was to be made, even though a police officer testified during a suppression hearing that the search warrant (which did not state the offense) and the search warrant affidavit (which did state the offense) were attached when he left the apartment, hut did not testify as to whether the warrant and affidavit were attached when the search was actually conducted.

The defendant had the opportunity to elicit all this information during the officer's cross-examination, but failed to do so, and the court ruled as a matter of first impression for it that the defendant had the burden of proof on this point, rather than the prosecution.

. . . .the government bears the burden to justify a warrantless search as an exception to the warrant requirement. See Coolidge v. New Hampshire*,* 403 U.S. 443, 454-55 91 S.Ct. *2022. 2032.* 29 L.Ed.2d 564 (1971). However, a presumption of validity attaches when a search is conducted pursuant to a warrant issued by a neutral and detached magistrate or judicial office Therefore. where the police conduct a search pursuant to a judicially sanctioned warrant, the defendant must rebut the presumption of validity by proving that the warrant is illegal or invalid. *See id.; Willcutt 5*26 P.2d at 608-09; *see* also *Longmire.* 761 F.2d at 417. We adopt the well-reasoned rule applied by the federal courts and the majority of our sister states.

'Here, because the evidence was seized pursuant to a judicially issued search warrant, Lebedun had the burden of proving that the search warrant was invalid. In order to prove that the warrant was invalid and thereby necessitated suppression of the evidence. Lebedun had the burden of proving that the warrant and the affidavit were not attached when the warrant was executed. As noted, Lebedun failed to meet this burden.

SEARCH WARRANT PHOTOGRAPHING DEFENDANT'S GENITALIA

Jones v. State, 19 So.2d 249 (Ala.Crim.App. 1996); 719 So.2d 256 (Ala. 1998).

A search warrant that authorized the examination and photographing of defendant's genitalia was based on probable cause and lawfully issued to obtain evidence relating to a crime, even though the evidence was not needed to identify the offender or verify the existence of substances in his system. The examination was sought to corroborate the account of sexual abuse given by the minor victim who told investigators that there was a distinguishing mole on the underside of defendant's scrotum. The probability that the victim obtained this degree of familiarity with defendant's genitalia through innocent means was considered extremely low.

The court also ruled that photographs of defendants genitalia authorized by the search warrant did not rise to the level of an intrusion that would require an adversary hearing to balance the necessity of the search with the possible danger to the defendant.

"The distinguishing factor in the instant case is that the search would not have placed the appellant in danger. The photographs authorized by the search warrant do not rise to the level of intrusion. . . requiring an adversarial hearing to balance the necessity of the search with the possible danger to the defendant. M.C., the victim in this case, told investigators that there was a distinguishing mole on the underside of the appellant's scrotum, which she had observed during sexual abuse. We find that the presence or absence of such a mole was vital in determining the appellant's guilt or innocence. While the appellant attempts to suggest innocent ways M.C.. could have learned of the mole without actually seeing it, the detailed description of the characteristics and the exact location of the mole that M.C. provided in her interview with Investigator Jim Schassler strongly suggest that M.C. 's knowledge was firsthand."

On appeal, the Supreme Court of Alabama, *Ex Parte Jones,* 719 So.2d 256 (Ala. 1998), ruled that although the search warrant and use of the camera were authorized under state law, the better practice would have been for the officers to follow the rule governing post arrest physical inspections codified in the state's rules of criminal procedure.
Two judges concurred.

SEARCH WARRANT – STALENESS - ON-GOING CRIMINAL ACTIVITY

State v. Perez, 963 P.2d 881 (Wash.App. 1998**).**

Information in an application for a search warrant for defendant's home for drugs and other contraband supported an inference that criminal activity was occurring at the home where the warrant was issued, and the information was not stale, even though three days had elapsed between the last observation described in the affidavit and the issuance of the warrant. There was information from an informer and direct observations by police officers that suggested that a suspected drug dealer was making on-going use of defendant's home as a "safe-house" for storing drugs.

"Perez. . . argues that three or four days is too long to support an inference that there was still contraband on the premises. The facts and circumstances recited in the supporting affidavit must establish a reasonable probability that the criminal activity is occurring at or about the time the warrant is issued. But tabulation of the intervening number of days is not the final determination of probable cause: rather, it is just one factor which is considered along with all the other circumstances including the nature and scope of the suspected criminal activity. Staleness, in other words, involves not only duration but the probability that the items sought in connection with the suspected criminal activity will be on the premises at the time of the search.

"Here, the facts recited in the affidavit support an inference that criminal activity was occurring at 3021 SW Thistle at the time the warrant was issued. . . . here both the information provided by the informant and police observations suggested that Felix was a drug dealer and that his drug dealing activities were ongoing. As explained above, the facts also supported an inference that Felix used the Perez home as a safe house. Given the evidence that the suspected criminal activity was continuing, the three-day period that elapsed between the last observation described in the affidavit and the issuance of the warrant was not long enough to render the warrant invalid."

SEIZURE CASUAL ENCOUNTER PARKED CAR

Stokes v. State, 518 S.E.2d 447 (Ga.App. 1999).

A defendant was not "seized" when police officers approached his already-parked car to inquire about what he and his companion were doing and asked defendant to step out of the car. Therefore he was not entitled to suppress evidence of drugs found in his car, where defendant and his companion readily responded to the officers' inquiries, and the officer who requested that defendant step out of the car did so for his and his partner's safety, to which defendant responded that he didn't mind and immediately stepped out of the car.

"...The uncontradicted evidence shows that the officer requested rather that ordered that Stokes exit the car, and that Stokes 'said he didn't mind' and did so. The request and Stokes's response were part of a conversational and 'casual encounter,' and the record demonstrates 'the defendant had no objective reason to believe that he was not free to end the conversation . . and proceed on his way.' *Verboeff* supra at 504, 362 S.L2d 85. For this reason. Stokes's claim that he was 'seized' when the officer approached the car and made a simple inquiry followed by a request is not supported by the evidence in the record, and the trial court's ruling denying the motion to suppress was not clearly erroneous."

ARREST – WHAT CONSTITUTES DRAWN GUN

United States v. Campbell, 178 F.3d *345* (5th Cir. 1999).

A *Terry* stop (reasonable suspicion) of a defendant for 10 to 25 minutes, during which time the police officer drew his weapon, ordered defendant to lie on the ground, handcuffed and frisked him, was not equivalent to a full blown arrest requiring probable cause for Fourth Amendment purposes The defendant matched the description of an armed bank robber and lie was approaching an automobile that matched the detailed description of a getaway vehicle and bore the same license plate. During the course of the stop, the officers investigated a passenger's alibi and matched bills found in defendant's pocket against a list of "bait bills" given to the bank robber.

"...Campbell argues that the totality of the officers' conduct constituted an arrest, rather than an investigatory stop, and was unsupported by probable cause. . . [But] drawn guns and handcuffs do not necessarily convert a detention into an arrest. Nor did it convert the detention into an arrest to leave Billy Campbell handcuffed during the time it took to investigate Michael Campbell's [passenger] alibi and the serial numbers on the $20 hills here were substantial reasons to suspect Billy Campbell had been the hank robber, and he was detained for no longer than necessary to conduct a cursory check that could provide more conclusory evidence. The entire detention took between 10 and 25 minutes—not an unreasonable amount of time under the circumstances.

"The facts of this case demonstrate neither an arrest nor unreasonably excessive steps for an investigatory detention."

SEIZURE SUBJECTIVE FEELINGS OF AN AFRO-AMERICAN

Commonwealth v. Hart 45 Mass. App. 81, *695* N.E.2d 226 (Mass. App. 1998).

An African-American defendant was free to leave at the time a police officer made an initial request to speak with him for a moment, and thus was not "seized" for purposes of the Fourth Amendment as of the initial inquiry, that would require reasonable suspicion under *Tern v. Ohio.* The defendant had argued a special apprehension test for a Fourth Amendment seizure should be applied in such cases resulting from the historical treatment of African-Americans who do not automatically submit to a showing of police authority.

"On this evidence, the [trial] judge found and concluded that Hart, because he was of African-American descent, did not feel free to walk away from Fappiano and, therefore, had been seized within the constitutional sense from the moment Fappiano requested to speak with him. . . Citing various publications concerning the treatment of African-Americans in this country [Specifically, the judge cited Delgado, The Coming Race War? (New York University Press, 1996); Higginbotham, In the Matter of Color (Oxford University Press, 1978); Higginbotham. Shades of Freedom (Oxford University Press, (1978) and West, Race Matters (Vintage Books, 1994)**,** the judge stated that 'historically blacks who have walked, run or raced away from inquisitive Police officers have ended up beaten and battered and sometimes dead.' Without reference to any of the evidence of the circumstances surrounding the encounter between Fappiano and Hart, the trial judge relied upon the data reported in the publications that he had read and concluded that I tart had been illegally seized because a 'reasonable black American would not feel free to leave when stopped and questioned by police.' In our view, the judge created and applied an erroneous presumption of law rather than resolving the decisive issue, that is. whether the 'circumstances of the encounter are sufficiently intimidating that a reasonable person would believe he was not free to turn his hack on his interrogator and walk away.' *Commonwealth* **v.** *Fraser,* 410 Mass. 541 544 573 N.E.2d 979 (1991)."

The court also noted that the officer acted alone, was not in uniform, was at all times courteous, never displayed any weapons, and never used any language or a tone of voice indicating that compliance with his requests could not he refused.

SEIZURE PARK BENCH SUBJECTIVE PERCEPTION

People v. Terrell, 82 Cal.Rptr.2d 231 (Cal.App. 1999).

An encounter in which a police officer engaged defendant who was sitting on a park bench in a conversation, during which defendant handed over his driver's license when asked if he had any identification, was consensual, not a "detention" requiring reasonable suspicion of involvement in criminal activity under *Terry v. Ohio.* The defendant at no time asked the officer for his driver's license back, and during the entire three-minute encounter, neither the officer nor his partner indicated by words or conduct that defendant could not simply leave. The court said a police officer's uncommunicated state of mind and a citizen's subjective belief are irrelevant in assessing whether a "seizure' under the Fourth Amendment has taken place.

SEIZURE PARK SETTING NON-THREATENING POSITION

State v. Caron, 958 P.2d 845 (Or.App. 1998).

A police officer's questioning of a defendant concerning what he was doing at a park, whether he was carrying weapons or drugs, and whether he would consent to a search, which occurred while the officer's partner stood behind defendant, facing away, looking out over the park, was a "mere conversation," not a constitutional seizure requiring at least a reasonable suspicion under *Terry v. Ohio.*

The court ruled that there was no evidence that defendant had a subjective belief that his liberty or freedom of movement was significantly restricted, or that the officers acted in any offensive, physically threatening, or otherwise extraordinary manner towards him.

The only testimony was that the parties simply 'talked.' The officers apparently never touched defendant, raised their voices or drew their weapons. The trial court, in finding that a stop had occurred, focused on 'the position of the two officers, in front and in back of the defendant,' and found that their positioning made it objectively reasonable that defendant would believe he was not free to go. While we have no doubt that two police officers *could* physically bracket a lone defendant in such a way as to create a coercive atmosphere and physically seize him, that did not happen here. As previously noted, Nelson's unrebutted testimony was that his partner, while positioned behind defendant, was facing away, scanning the park area, and not paying attention to the encounter. His actions in so doing are not the kind of offensive, intimidating behavior that turns mere conversation into a stop.

"Nor did the personal nature of the questions that Nelson asked defendant make this encounter a stop. We previously have found encounters involving exactly those same questions to be mere conversation. . . . Generally speaking, 'the scope of the officer's inquiry is unrestricted,' and 'bit is the physical action of the officer that determines [the] result' *State v. Underhill* 120 Or.App. 584, 588-89. 853 P.2d 847, *rev. den.* 318 Or. 26, 862 P.2d 1306 (1993)."

SEIZURE "TAKE YOUR HANDS OUT OF YOUR POCKETS"

Baker v. Commonwealth, 5 S.W.3d 142 (Ky. 1999).

A police officer's initial request that defendant remove his hands from his pockets was not a Fourth Amendment "seizure" of his person, where the officer acknowledged that defendant was not under suspicion at that time, and the request was merely a safety precaution taken by the officer in light of defendant's presence in a high crime area and his "baggy" clothing, which the officer thought could have contained a weapon.

However, when the officer then gave a direct order to defendant to remove his hands from his pockets, which was prompted by defendant's failure to comply with the initial request, this was a Fourth Amendment seizure of defendant's person. The court said the officer's order was a show of direct authority, which would have compelled a reasonable person to believe he was not free to leave. Reasonable suspicion for the order was found.

"In this case, Officer Richmond's first request for Appellant to remove his hands from his pockets clearly was not a seizure. Officer Richmond acknowledged that Appellant was not under suspicion at that time, and the request was merely a safety precaution. Ironically, had Appellant removed his hands from his pockets, and had no illegal substances been forthcoming from that act, he would have been free to leave, having not exhibited any other criminal conduct. However, Officer Richmond's subsequent direct order for Appellant to remove his hands from his pockets must be interpreted as a show of authority which, we believe, would compel a reasonable person to believe he was not free to leave. . . . There can be no question then, that Officer Richmond 'seized' Appellant at that point in time.

"Having determined that a seizure occurred, this Court must now decide whether such was reasonable absent a warrant or exigent circumstances.

Given the facts available to Officer Richmond on the night in question, namely that it was late in a high crime area, and Appellant was in the company of a known prostitute, was wearing clothing that could conceal a weapon, and refused to comply with Officer's Richmond's initial request, this Court concludes that there existed specific and articulable reasons to believe that criminal conduct may have occurred or was occurring at the time Appellant was ordered to remove his hands from his pockets."

Evidence obtained after defendant was ordered to remove his hands from his pockets was admissible.

STANDING EMPLOYEES PRIVATE PROPERTY

United States Anderson, 154 F.3d 122S (10th Cir. 1998).

A defendant had standing to challenge a warrantless search of a vacant room with in his office building and the seizure of videotapes, as well as statements he made in relation to the search, when he entered the locked building during a holiday weekend with the tapes. The tapes were his personal possessions, he shut the door and covered a window to the room to maintain privacy, and he maintained control over the tapes until they were seized by the police.

. . . in determining whether an employee has standing to challenge seizure of an item from the workplace, we do not limit our analysis to the 'business nexus test. Rather, we will consider all of the relevant circumstances, including (1) the employee's relationship to the item seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item.

"Anderson entered the locked office building on a Saturday, during a holiday weekend, with the videotapes. These tapes were not ATD property but were Anderson's personal possessions. He took the tapes into Room 222, shut the door behind him, and covered the sidelight window. He clearly took these actions to maintain his privacy. Anderson maintained control over the videotapes and did not abandon the tapes or even try to store the tapes in the room. In fact, he was still in possession of the tapes when the agents searched Room 222 and seized them. Under these circumstances, we conclude Anderson's subjective expectation of privacy was an expectation that society would recognize as reasonable. We hold Anderson has standing to challenge the government's search and seizure of items from Room 222*,* as well as the statements Anderson made in relation to that search."
A circuit judge dissented.

STOP AND FRISK FORCING DEFENDANT TO OPEN HIS FIST

Upshur v. United States, 716 A.2d 981 (D.C. 1998).

Police officers exceeded the scope of a permissible stop and frisk under *Terry v. Ohio* by grabbing defendant and conducting a search of his closed fist and attempting to force his fist open to see what he held, even though the officers had observed what they believed to be a drug transaction involving the defendant on the street. The court found no evidence that defendant was armed and posed a danger, or that the officer who forced defendants fist open suspected that he carried a weapon in the fist.

"After the initial stop, the officers immediately grabbed appellant and conducted a search of his closed fist, attempting to force his fist open to see what he held without specific and articulable facts from which it could be inferred reasonably that appellant was armed and presently dangerous. *See Terry, supra* 392 U.S. at 27, 88 S.Ct. at 1883. Even assuming the validity of the initial stop, the search and seizure violated the Fourth Amendment's proscription against unreasonable searches and seizures."
A judge dissented.

STOP AND FRISK ANONYMOUS TIP FLIGHT TOTALITY OF CIRCUMSTANCES

State in Interest of C.B., 315 N.J.Super. *567,* 719 A.2d 206 (NJ.App. 1998).

Where the police had anonymous information concerning a man with a gun at a certain intersection, a juvenile fled from that intersection at the approach of the police, and the juvenile thrust his hands into his pockets as the police approached, there was reasonable suspicion that the juvenile was armed and dangerous. The court ruled that a limited intrusion involved in the police officers' pulling the juvenile's hands out of his pockets was not an unconstitutional search or seizure, using the totality of the circumstances test (objective reasonableness).

. . . .the police officers had the right—indeed arguably a duty—to travel to the location where an anonymous informant told them they would find a man with a gun, even though this information [alone] did not provide the individualized reasonable suspicion required for a *Terry* stop. . . . Moreover, when one of those persons, who turned out to be the juvenile, fled at the sight of the police, the police officers properly exercised their law enforcement responsibilities by following him to determine whether he might he engaged in unlawful activity. . . . It was only after the juvenile responded to this police action by stopping his bicycle and thrusting his hands into his pockets that the police grabbed his hands. We are satisfied that under the totality of the circumstances known at that time, which included the anonymous information concerning a man with a gun at the intersection of 9th and Pearl Streets. The juvenile's flight from that intersection, and the juvenile's thrusting of his hands into his pockets as the police approached, there was an objectively reasonable basis for suspicion that he was armed and dangerous. Therefore, the limited intrusion involved in the police officers pulling the juvenile's hands out of his pockets did not constitute an unconstitutional search or seizure."

STOP AND FRISK – JUVENILE AMONG MIRJUANA SMOKERS

In Interest of SJ., 713 A.2d 45 (Pa. 1998).

A Terry stop for investigation of a juvenile who was part of a group of males standing on a Street corner in a high crime area smoking marijuana was justified, even if the officer making the stop was unable to specifically identify the juvenile as one of the individuals he saw smoking marijuana. Even though the officer could not state with certainty whether the juvenile was smoking marijuana, his observance of illegal activity among the juvenile's companions, combined with the juvenile's suspicious behavior in attempting to hide among other members of the group and the officer's knowledge that the location was a high crime area known for drug activity, was ample reasonable suspicion for the investigative stop.

However, a pat down of the juvenile was not justified. The court said on these facts there was no evidence indicating that the officer had reason to believe the juvenile was armed and dangerous.

"The record herein is devoid of any evidence indicating that Officer Kelly had reason to believe Appellant was armed and dangerous. There was no testimony that Appellant's clothing had any unusual bulges or any testimony that Appellant made any furtive movements giving rise to Officer Kelly's suspicions that Appellant was armed and dangerous. The Officer's statement that he patted Appellant down for his own safety does not rise to the level of particularized or reasonable suspicion that the Appellant was armed and dangerous. The absence of any specific, articulable facts establishing that Appellant was armed and dangerous renders the frisk unlawful."
Two judges dissented and one judge filed a concurring and dissenting opinion.

STOP AND FRISK PLAIN FEEL SUSPICION VS. CERTAINTY

Parker v. State. 697 N.E.2d 1265 (Ind.App. 1998).

A police officer's seizure of cocaine exceeded the scope of a lawful pat-down search under *Terry v. Ohio* where the officer testified that when he felt an object in defendant's pocket, he "merely suspected' the object to be narcotics. Under the "plain feel" doctrine articulated by the United States Supreme Court in Minnesota v. Dickerson, 508 U.S. 375-76 (1993). when an officer feels "non-threatening contraband" in a *Terry* pat-down its contraband nature must be "immediately apparent" before its seizure.

Here, at the suppression hearing, Wallace testified that he immediately determined the presence of the cocaine: on interlocutory review, we determined that this was sufficient for the trial court to conclude that the requirements of the 'plain feel' doctrine had been satisfied. However, Wallace's testimony at trial was that he 'merely suspected' the object to be narcotics. . . . The 'plain feel' doctrine requires that the identity of the object be immediately apparent or instantaneously ascertainable. Merely suspecting the nature of an object is insufficient. Here, Wallace had only a suspicion regarding the nature of the substance. The requirement of the 'plain feel' doctrine was not satisfied. The seizure of the evidence violated Parker's Fourth Amendment rights, and the admission of the evidence, over Parker's objection, was a reversible error."

STOP AND FRISK REASONABLE SUSPICION LOITERING

Jennings v. State, 10 S.W.3d 105 (Ark.App. 2000).

A police officer did not have reasonable suspicion to detain defendant and conduct a *Terry* pat-down, although defendant and a person known to the officer were standing near a sign prohibiting loitering in a neighborhood known as a drug area. The facts indicated that the officer did not know defendant, and there was no evidence that defendant was committing, had committed, or was about to commit a felony or misdemeanor involving the danger of forcible injury to persons or appropriation of or damage to property.

The court rejected an argument that the frisk was permissible under a rule allowing an officer to request a person to furnish information or cooperate in an investigation or prevention of crime, since there was no evidence that the officer was investigating or preventing crime when she encountered defendant.

An encounter under this rule is permissible only if such information or cooperation is being sought in the investigation or prevention of a particular crime. . . . Here, there was no testimony that the officer was investigating or preventing a crime when she encountered appellant and Fitzgerald."

Two justices dissented.

STOP AND FRISK REASONABLE SUSPICION FLIGHT

State v. Poche, 733 So.2d 730 (La.App. 1999).

It has been held that the reputation of an area is an articulable fact upon which a police officer may rely and which is relevant in the determination of reasonable suspicion to justify an investigatory stop under *Terry* v. *Ohio.* The court also said that flight, nervousness, or a startled look at the sight of a police officer may be one of the factors leading to a finding of reasonable suspicion to stop and inquire.

STOP AND FRISK REASONABLE SUSPICION HIGH CRIME AREA

State V. Dillon, 719 So.2d 1064 (La.App. 1998).

State. Police officers were justified in ordering a driver and passengers out of a car and searching the car for weapons for their safety incidental to an investigatory stop based on a traffic violation. The car had been speeding through a housing project, and after a short high speed chase, the driver stopped suddenly and leaned toward the middle of the seats as if to conceal something. An additional factor was that the investigatory stop took place in a high crime area.

The court said that flight, nervousness, or a startled look at the sight of a police officer may be among the factors leading to a finding of reasonable suspicion to justify an investigatory stop. Also, the reputation of an area is a proper articulable fact upon which an officer can rely and which is relevant in determining reasonable suspicion to justify an investigatory stop.

"The test for determining whether one has a reasonable expectation of privacy is not only whether the person had an actual or subjective expectation of privacy, but, rather whether that expectation is of a type which society at large is prepared to recognize as being reasonable. . . . Deference should be given to the experience of the policemen who were present at the time of the incident. A certain look or gesture may not mean anything to the ordinary person; however, a policeman has sound judgment based on long experience to interpret these acts. An officer should react for his safety under the conditions and events as they occur. . . ."

One judge dissented

STOP AND FRISK REASONABLE SUSPICION HIGH CRIME AREA

People v. Wardlow, 701 N.E.2d 454 (Ill. 1998).

State. In a case of first impression for it the Supreme Court of Illinois held that a person's sudden flight upon seeing the police in a high-crime area does not, by itself, justify an investigatory stop under *Terry v. Ohio.*

It ruled that the defendant's presence in an area with a high incidence of narcotics trafficking and his flight upon the approach of a police vehicle patrolling the area did not justify his investigatory stop, where the police were not responding to a report of suspicious activity in the area, and defendant gave no outward indication of involvement in illegal activity prior to the approach of the police car.

"A majority of jurisdictions addressing this issue have held that flight alone is insufficient to justify a *Terry* stop. *[citing* cases from New Jersey, Nebraska, Michigan, California, Colorado and Maryland].

"Although no Illinois court has specifically considered whether sudden flight from police in a high-crime area justifies a stop, we agree with the appellate court that 'Fun Illinois, neither a person's mere presence in an area where drugs are sold . . . nor sudden flight. . . alone will justify a *Terry* stop.'. Moreover, this court has recently emphasized the importance of protecting the freedom to engage in such harmless activities as 'loafing, loitering, and night walking' and other personal liberties of citizens, including the right to travel, to locomotion, to freedom of movement, and to associate with others. *City of Chicago v. Morales,* 177 Ill.2d 440, 459-60. 227 Ill. Dec. 130, 687 N.E.2d *53* (1997), *cert. granted,* — U.S. —, 118 S.Ct. 1510. 110 L.Ed.2d 664. [decision to be reported in *CC&B1...*

"Where, as here, the police stop is not based upon objective criteria pointing to a reasonable suspicion of criminal activity 'the risk of arbitrary and abusive police practices exceeds tolerable limits,' *Brown v. Texas, 443* U.S. at S2. 99 S.Ct. at 2641, 61 L.Ed.2d at 363.

"Therefore, because Officer Nolan was not able to point to specific facts corroborating the inference of guilt gleaned from defendant's flight, his stop and subsequent arrest of defendant were constitutionally infirm.

STOP AND FRISK TEMPORARY LICENSE PLATE

United States v. Davis, 200 F.3d 1053 (7th Cir, 2000).

Police officers had reasonable suspicion that an automobile was stolen, and therefore could make an investigatory stop, where the car was the same color and make as a car reported stolen, the driver was of the same race and appeared to be of the same age as the alleged perpetrator of the theft, and a sticker affixed to the windshield in lieu of a license plate was held in place by masking tape. The court said the use of the masking tape suggested the sticker was taken from another vehicle, and this was an important element of reasonable suspicion.

"Suppose residents of Springfield owned about a hundred gold Saturns in May 1998, when this stop occurred. Any given gold Saturn driven by a young man thus was more likely than not to have been in the hands of its owner (or an authorized driver) But this gold Saturn stuck out: its driver was the same race and from a distance appeared to be the same age as the thief, and the lack of a license plate, plus the temporary sticker with signs of tampering and the furtive conduct, would have prompted suspicion in the mind of a reasonable officer. No more is necessary to stop a car in order to verify that it has not been stolen, and the events after the stop led directly to the discovery of the evidence.

STOP AND FRISK CONFRONTATION WITH PASSENGER

Rogala v. District of Columbia, 161 F.3d 44 (D.C.Cir. 1998). –

Detaining a passenger of a car during a traffic stop, while the police officer conducted field sobriety tests on the driver was not an unlawful seizure under the Fourth Amendment of the passenger, where the passenger did not seek to leave the scene and the officer merely required her to remain in the car, rather than in the street or on the sidewalk. The officer expressed concerns about his safety, the passengers creation of a traffic hazard, and interference with the field sobriety test by the passenger.

Additionally, the officer could arrest the passenger for refusing to get back into the car on his order to do so after she interfered with the field sobriety test of the driver. Her conduct constituted a violation of a statute pertaining to interference with a police officer in the lawful performance of his duties.

"The Supreme Court recently clarified that passengers in cars that are legitimately stopped may he subject to some control by the police officer conducting the stop. *See Maryland v. Wilson,* 519 U.S. 408. 117 S.Ct. 882, 137 L.Ed.2d 41(1997). In *Wilson,* the Court held that a police officer conducting a valid traffic stop may constitutionally order a passenger *out* of the car, even where the police officer has no suspicion that the passenger has committed a crime. *Id.* 117 S.Ct. at 886. The court in *Wilson* expressly reserved the question of whether an officer may forcibly detain a passenger for the duration of the stop.

"in this case, Officer Williams ordered Ms. Rogala back into the car because she was blocking traffic and interfering with the field sobriety test that he was conducting of Mr. Kinberg. Both former Chief Wilson and Mr. Klotz testified that it is reasonable and appropriate police procedure to take steps to control the movements of individuals during a traffic stop if the officer reasonably believes that a threat is posed, and former Chief Wilson specifically testified that it is good police practice to direct passengers to stay *in* the vehicle during a traffic stop. This Court concludes that in the circumstances presented, it follows from *Maryland v. Wilson* that a police officer has the power to reasonably control the situation by requiring a passenger to remain *in* a vehicle during a traffic stop, particularly where, as here, the officer is alone and feels threatened.

"Officer Williams arrested Ms. Rogala for disobeying his order to return to the car after she had interfered with the field sobriety test that he was conducting. Ms. Rogala's interference and refusal to obey Officer William's orders provided grounds for her warrantless arrest

STOP AND FRISK ODERING PASSENGER TO REMAIN AT SCENE

People v. Gonzalez, 704 N.E.2d *375* (Ill. 1998).

State. The issue presented in this appeal to the Supreme Court of Illinois was whether, upon legally stopping a vehicle for a traffic violation, it was reasonable for a police officer to immediately instruct a passenger to remain at the stopped car when that passenger, of his own volition, exited the vehicle at the outset of the stop. The court also considered whether it was appropriate for the officer to conduct a pat-clown search of the passenger when he indicated that he had a weapon on his person. With one justice dissenting, the appellate court had affirmed the circuit court denial of defendant's motion to suppress. 294 Ill.App.3d 205. The Supreme Court affirmed the judgment of the appellate court.

"In *Maryland v. Wilson,* 519 U.S. 408 137 L.Ed.2d ~l, 117 S.Ct. 882 (1997), the Court extended the per se rule of *Mimms [Pennsylvania v.,* 434 U.S. 106 (1977)] to passengers, holding that a police officer conducting a valid traffic stop may, as a matter of course, order a passenger out of the car, even where the officer has no suspicion that the passenger has been involved in a crime. In *Wilson,* the officer stopped a vehicle for speeding and failure to display a license tag, and noticed that both the driver and passenger appeared extremely nervous. The officer ordered the passenger out of the vehicle; as he exited, a bag containing crack cocaine fell to the ground and he was arrested. *Wilson,* 519 U.S. at 410-11, 137 L.Ed.2d at 45, 11' S.Ct. at 884. The passenger moved to suppress the evidence, arguing that the officers command to exit the vehicle was an unreasonable seizure in violation of the fourth amendment. *Wilson, 5*19 U.S. at 411, 137 L.Ed.2d at 45-46, 117 S.Ct. at 884.

"It is clear under the rationale of *Mimms* and *Wilson* that the movements of occupants of a vehicle which is legitimately stopped may be subject to control by the police officer conducting the stop, even though the officer has no suspicion that the individuals have been involved in criminal behavior. This rule is dictated by the public's strong interest in officer safety during potentially dangerous traffic stops when balanced against the minimal intrusion on the privacy interests of the driver and passengers.

"Thus, consistent with the rationale of *Mimms* and *Wilson,* we conclude in the cause at bar that, because the public interest in officer safety outweighs the potential intrusion to the passenger's liberty interests, it is reasonable for a police officer to immediately instruct a passenger to remain at the car, when that passenger, of his own volition, exits the lawfully stopped vehicle at the outset of the stop. We find that because the same risk of harm to officers discussed in Mimms and Wilson is present where a passenger unexpectedly exits a lawfully stopped vehicle, the officers need to exercise "unquestioned command of the situation is likewise present. See Wilson*,* 519 U.S. at 414**,** 137 L.Ed.2d at i8, 117 S.Ct. at 886, quoting *Michigan v. Summers,* 452 U.S. 692, 702-03, 69 L.Ed.2d 340, 350, 101 S.Ct. 2587, 2594 (1981).

'We find that, based upon the facts available to Officer Gulley at the tune of the search, it was not unreasonable for him to inquire of defendant whether he was carrying any guns,

needles or knives, and upon receiving an affirmative response, frisking defendant to uncover such weapon. . . .“

Justices Heiple. Harrison and Nickels dissented.

Note: ***cc&B*** readers should compare this decision to *Rogala v. District of Columbia. supra.* The definite trend in the courts is to interpret *Wilson* broadly.

STOP AND FRISK PLAIN FEEL IMMEDIATE RECOGNITION

Matter of L.R., 975 S.W. 2d 656 (Tex.App. 1998).

A police officer testified that while conducting a *Terry* frisk, based on his experience, he immediately recognized the feel of a cellophane baggie as drug packaging, and that he only pinched or squeezed it as he retrieved it from the suspect's pocket. This was a valid "plain feel" seizure since the contraband nature of the object was readily apparent to the officer before he seized it.

The record supports the conclusion that Martinez immediately recognized the incriminating nature of the cellophane baggie when he patted down L.R.'s pockets. Martinez testified that based upon his training and experience, he knew that illicit substances were commonly wrapped in cellophane packaging. Further, the cross-examination testimony from trial could also support the trial court's conclusion that identity of the contraband was ascertained before Martinez further manipulated the object. . . . Here, the trial court was free to believe that Martinez initially recognized the object as a drug packaging and only pinched or squeezed it as he was retrieving it from L.R.'s pocket. Accordingly, we find that the trial court did not abuse its discretion in denying L.R. 's motion to suppress."

STOP AND FRISK REASONABLE SUSPICION – LENGTH OF DETENTION

Kenner v. State, 703 N.E.2d 1122 (Ind.App. 1999).

A police officer's detection of the odor of marijuana coming from an automobile he had stopped for speeding provided reasonable suspicion of criminal activity, which justified the detention of the car for further investigation after the officer gave the driver a warning ticket and questioned him about his activities, The court said the odor of marijuana can satisfy the reasonable suspicion requirement of *Terry* ***v.*** *Ohio* justifying an investigatory stop.On a related argument of the defendant, the court ruled that the detention of the motorist for approximately ~5 minutes after detecting the odor of marijuana during the traffic stop did not exceed the permissible hounds of an investigatory stop under the Fourth Amendment.

"In this case the record shows there was some initial difficulty in obtaining a canine unit. Apparently the units assigned to the Indianapolis Police Department were unavailable requiring the assistance of another Department. Eventually a unit was dispatched from the Greenwood Police Department. Having a reasonable suspicion that drugs may have been present in Kenner's vehicle, Officer McDonald acted diligently in obtaining a dog in order to confirm or dispel his suspicion. Obviously there will be inevitable delay in obtaining a dog to sniff luggage or packages transported on interstate highways. Kenner's forty-five minute detention in this case did not exceed the permissible bounds of an investigatory stop and thus did not violate the Fourth Amendment. The trial court did not err in denying Kenner's motion to suppress evidence."

One judge concurred and one dissented on the reasonable suspicion issue and on the issue of the length of the detention.

STOP AND FRISK REASONABLE SUSPICION PC FOR ARREST

Oliver v. Woods, 21 F.Supp.2d 1325 (D.Utah 1998).

There was no reasonable suspicion of unlawful activity to conduct a *Terry* stop of a person who had merely parked his vehicle at a repair shop, before business hours, that was suspected of illegally dumping oil. The officer who made the stop testified that he saw nothing particularly suspicious as he approached the person's car, and that parking a car in the lot at the repair shop was not itself unlawful. The officer also testified that he knew that the alarm placed by police at the repair shop was often tripped by innocent people.

On another point the court ruled that because the police officer did not have reasonable suspicion to believe that a crime might have occurred, he had no right to insist that the person identify himself. The person's refusal to do so therefore did not create probable cause for his arrest. The case was decided in the context of a civil rights action brought under 42 U.S.C. S 1983.

"Because Officer Woods did not have reasonable suspicion to believe that a crime might have occurred, he had no right to insist that Oliver identify himself and Oliver's refusal to do so could not have created probable cause for his arrest. *See Royer [Florida v., 4*60 U.S. 491 (1983)], 460 U.S. at 498, 103 S.Ct. at 1324. In doing so, Officer Woods violated Oliver's constitutional right to be free from unlawful searches and seizures."

STOP AND FRISK – SOBRIETY CHECK POINT

State v. Winn, 974 S.W.2d 700 (Tenn.Crim.App. *1998).*

At a sobriety checkpoint a police officer lacked reasonable suspicion that defendant was armed and dangerous as required under *Terry v. Ohio* to justify a protective frisk for weapons, where the officer did not suspect defendant of possessing a weapon, he observed no suspicious bulges, had no prior knowledge of defendant or a basis for any suspicion of prior violence or history of being armed.

The court said that drunk driving does not necessarily imply the use of a weapon.

The defendant had been cooperative, provided a valid driver's license and offered a plausible explanation for the blood-shot appearance of his eyes and his destination. . . the trial court concluded that the frisk was reasonable because there was a basis to suspect criminal activity; it did not, however, articulate a factual basis for any inference that the defendant might be armed and dangerous. . . . Officer Hurst offered no proof that he had observed a weapon or even suspected the defendant of possessing a weapon. He observed no suspicious bulges and acknowledged that the defendant did not act defensively until he attempted to search his pockets. Officer Hurst had no prior knowledge of this defendant and no basis for any suspicion of prior violence or any history of going armed. The crime of driving under the influence does not necessarily imply the use of a weapon. Although the hour was late, the proof offered by the state was that the defendant was cooperative; that he provided a valid drivers license; and that he had offered plausible explanations for the appearance of his eyes and destination. The defendant carried luggage which was plainly visible in the back seat of his car. These factors tend to negate suspicion of the defendant rather than enhance it. Although a detention for sobriety tests may have been warranted, Officer Hurst had no articulate basis to frisk the defendant for weapons. His suspicion that the defendant was under the influence turned out to he unfounded.

Two judges concurred.

TERRY STOP – SIX MINUTE DURATION OKAY

Valdez v. City of East Hartford, 26 F.Supp.2d 376 (D.Conn. 1998).

Police officers had reasonable suspicion to justify a stop of a black Puerto Rican motorist during the course of a search for a known black robbery suspect, where the motorist's hot pink upgraded car was distinctly similar to the car owned by the suspect in the robbery. Additionally, the suspect had recently been observed in the area where the motorist was stopped.

On a second, pivotal issue, the court ruled that a six-minute duration of the detention did not convert it into a "de facto arrest" requiring probable cause. The time was used to check out the motorist's story and other facts known to the police. The court utilized a flexible standard for determining when a *Terry* stop becomes a full-blown arrest, using a totality of the circumstances approach.

"This Court is also satisfied that the duration of plaintiffs detention did not convert it into a *defacto* arrest requiring probable cause. 'The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow . . . a criminal to escape. *Adams v. Williams,* 407 U.S. 1i3, 145-46, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (multiple citations omitted). 'A brief stop of a suspicious individual . . . to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.' *Id.* (multiple citations omitted)."

TRAFFIC STOP CONTINUED DETENTION CONSENT

Ferris v. *State,* 735 A.2d 491 (Md. 1999).

State.Maryland's highest court has ruled that once an underlying basis for an initial traffic stop has ended, continuation of the police-driver contact is constitutionally permissible only if either: (1) The driver consents to the continuing intrusion, or (2) The officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot.

The court ruled that once a state trooper seized defendant following the completion of the traffic stop for speeding on a rural highway, by requesting him to exit the car for questioning, the reasonableness of any intrusion would be measured against an objective standard applied at that point, i.e. whether a reasonably prudent person in the officer's position would have been warranted in believing that defendant was involved in criminal activity that was transpiring at that time.

Accordingly, we hold that Trooper Smith, having lawfully detained Ferris pursuant to a valid traffic stop, seized him within the meaning of the Fourth Amendment when, immediately after completing the traffic stop, he asked Ferris to get out of his car and began to question him about possible criminal activity unrelated to that which gave rise to the initial, completed traffic stop. In short, the Petitioner was seized, for a second time, when he was asked to exit his car.

"Because Trooper Smith's further detention of Ferris exceeded the scope of the traffic stop's underlying justification and constituted a second seizure, in order to be lawful, the continued detention—or second stop—must be supported by reasonable, articulable suspicion."

"The facts in this case, however, suggest that the police used Section 4704 or 6308(h) of the Motor Vehicle Code as a pretext to conduct a search to advance their criminal investigation of Appellant.

TRAFFIC STOP - USE OF DRUG DOGS

United States v. $404,905.00 in US. Currency, 182 F.3d 643 (8th Cir. 1999).

A 30 second to two minutes period of time that it took for a drug detection dog to walk around a truck and trailer that had been stopped for speeding and give an alert on the trailer was not an unreasonable detention that spoiled a subsequent seizure of drug-tainted currency found in the trailer. It made no difference that the traffic stop was complete when the officer told the driver that his documents would be returned after a dog sniff and the sniff was thereafter performed without reasonable suspicion to believe that the trailer contained drugs.

The court said the driver subjected himself and his vehicle to the detention when he violated a traffic law. The sniff was considered a de minimis intrusion on the driver's personal liberty.

We conclude that Officer Wards conduct on the whole was not constitutionally unreasonable. Alexander violated a traffic law and thereby subjected himself and his vehicle to a period of official detention that might have substantially exceeded the five to eight minutes it took Officer Ward to complete the traffic stop. Viewed in this context, a two-minute canine sniff was a *de minimis* intrusion on Alexander's personal liberty, like routinely ordering a lawfully stopped motorist out of his vehicle to protect officer safety. . . . The government has a strong interest in interdicting the flow of illegal drugs along the nation's highways. . . . When applied to the exterior of vehicles, the canine sniff is an investigative procedure uniquely suited to this purpose—it is so unintrusive as not to be a search, it takes very little time, and it 'discloses only the presence or absence of narcotics, a contraband item.' *Place [United States v.,* 462 U.S. 696 (1983)], 462 U.S. at 707, 103 S.Ct. 2637. For these reasons, when a police officer makes a traffic stop and has at his immediate disposal the canine resources to employ this uniquely limited investigative procedure, it does not violate the Fourth Amendment to require that the offending motorist's detention be momentarily extended for a canine sniff of the vehicle's exterior."

TRAFFIC STOP – HOLDING DRIVER – REASONABLE SUSPICION

State v. Woolfolk, 3 S.W.3c1 823 (Mo.App. 1999).

This court ruled that once a police officer making a traffic stop had completed the steps of asking for the driver's license and registration, requested that the driver sit in the patrol car, and asked the driver about his or her destination and purpose, and the officer had checked the driver's record, the officer should have allowed the driver to go on his way without further questioning unless he had specific, articulated facts creating an objectively reasonable suspicion that the person was involved in criminal activity un-related to the reasons for the traffic stop.

The court ruled that the driver's nervousness after the routine traffic stop was over when he was asked questions about prior arrests, and his failure to reveal to the officer that he was previously arrested on marijuana charges that were later dismissed, did not constitute reasonable suspicion that would justify further detention and search of his car.
It said the driver was under no legal obligation to answer truthfully in a voluntary, rather that "official," conversation with the officer.

WARRANTLESS ARREST – ANONYMOUS TIP – HOTLINE

People v. Brannon, 20 N.E.2d 348 (Ill.App. 1999).

The court ruled out harmless error because there was a reasonable probability that the improper argument might have contributed to the jury's guilty verdict.

Where an anonymous tipster on a Crimestoppers' hotline indicated an interest in a monetary reward, if one were available, this had no bearing on the tipster's reliability and did not taint his tip into the hotline that defendant possessed drugs and weapons.

The court ruled that a police officer's corroboration of all "innocent details" provided in a tip left on a Crimestoppers' hotline, including a description of defendant, a detailed description of his car, his address, and his place *of* employment, together with a specific description that defendant would have approximately one-half pound of cannabis and a gun in the trunk of his car, and defendant's history involving the same conduct as alleged by the tipster, constituted probable cause to arrest defendant.

Tips given in exchange for payment have heretofore been considered less reliable than tips provided by citizen informants because we presume that citizen informants act out of an interest in aiding law enforcement efforts, not for personal gain. A tip called into a Crimestoppers' line is more likely than not provided by a citizen informant. The quintessential paid informant, whose motives are presumably suspect, does not call a tip into the Crimestoppers' line but arranges to receive payment up front. Although awards are available to Crimestoppers' tipsters under certain conditions (payment is likely awarded for tips that lead to arrests and/or convictions or tips that otherwise further an ongoing investigation), the tipster may not know what those conditions are when calling in a tip, and a tipster would therefore not likely assume that an award would he made for a baseless tip. The Crimestoppers' system seems designed to encourage reliable tips and discourage fraudulent ones. Thus, the tipster's indicating an interest in an award, should one be available, has no bearing on the tipster's reliability and does not taint the tip.

WARRENTLESS ARREST – INFORMANT RELIABILITY

In Interest of O.A., 717 A.2d 490 (Pa. 1998).

A confidential informer's tip about two individuals selling drugs in an abandoned garage and about his seeing a juvenile with drugs for sale did not establish probable cause to make a warrantless arrest, in the absence of objective facts substantiating the officer's assertion of the informer's reliability. The court said that although the officer claimed that the informer provided tips leading to 50 arrests in the past, there was no record of how many arrests resulted in convictions and no record of the identities of such prior arrestees. The court concluded that the tip did not disclose a sufficient basis of knowledge to support a belief that a crime had been or was being committed at the time the officers entered the garage.

"Based on the above, the informant's tip did not provide the police officers with sufficient facts and circumstances to warrant the inference that an offense had been or was being committed at the time of the warrantless arrest. The dissent interprets our inquiry into reliability of the confidential informant as questioning the reliability of police officers. Such an interpretation is inaccurate. We are merely asserting that the reliability of an informant should he established by some objective facts that would enable any court to conclude that the informant was reliable. Where the reliability of the informant is not established, then the facts and circumstances surrounding the tip must provide sufficient indicia of reliability to support a finding of probable cause.

We believe that the instant case provides a situation where the police needed to 'further investigate' before arresting the Appellant, as the tip lacked indicia of reliability. Since the totality of circumstances test is not met by the informant's tip, standing alone, we will give the Commonwealth every opportunity to establish probable cause and examine whether the police did anything more to increase the reliability of the tip."

Two justices concurred with the opinion on this point and one justice concurred in the result. The court went on to find no corroboration of the informer's tip by personal observations by the police.

WARRANTLESS ARREST OBJECTIVE EVIDENCE VS.SUBJECTIVE BELIEF

Stevens v. *State,* 701 N.E.2d 277 (Ind.App. 1998).

A defendant, who was handcuffed in the back of a police squad car, was under arrest for DUI when a search took place, even if the police officer believed defendant was not under arrest and even though the officer did not tell defendant she was under arrest. The court focused on the facts constituting probable cause for DUI and that the defendant's freedom and liberty of movement were restrained, thus permitting also a search incident to arrest.

The court said the mere fact that a police officer does not tell the defendant she is under arrest prior to a search does not invalidate a search incident to an arrest if there is objective probable cause to make an arrest, even if the police officer did not have a subjective belief that probable cause existed at the time of the search, Stevens was under arrest by the definitions found in statute and case law. Although Officer Morlan testified that Stevens was not under arrest, he also stated that she was not free to go...."

WARRENTLESS ARREST PRIOR TO SEARCH WITH A WARRANT

United States. v. Winchenbach, 197 F.3d 548 (1st Cit. 1999).

As a matter of first impression the First Circuit Court of Appeals ruled that if the police gained lawful entry to an individual's home based on a valid search warrant, they may arrest the individual before commencing the search, provided that they have probable cause to do so before the search takes place. It noted that when an arrest is made without an arrest warrant immediately after officers gain lawful entry to residential premises, the evidence acquired during the ensuing search may not be used to justify the arrest retrospectively. But when probable cause exists, the timing of an arrest a matter that the federal constitution almost invariably leaves to police discretion.

"We believe it follows that, once the police gain lawful entry to residential premises (as by a search warrant), an immediate arrest is permissible without a separate arrest warrant as long as evidence known to the officers before the search supplies probable cause for the arrest. . . . [f.n. Of course. when the arrest occurs immediately, evidence acquired during the ensuing search may not he used to justify it retrospectively.

While the matter apparently is one that has received little attention in the federal appellate courts, a number of respected state courts, applying federal constitutional principles, have reached this conclusion. [Citing cases from Nebraska, Illinois, Washington, Connecticut and California].

"The appellant, who cites no case (federal or state) that holds to the contrary, resists this view, complaining that it diminishes the stature of arrest warrants and renders them virtually obsolete. There is a kernel of truth in this lament, but warrantless felony arrests outside of the home routinely have survived constitutional attack as long as probable cause exists. . . . From a Fourth Amendment standpoint, there is no valid reason why the same principle should not apply to arrests within a suspect's residence so long as the police are there lawfully. In that event, 'a warrantless arrest there is no more objection-able than a warrantless arrest on the Street.'
Lafave, *supra* 6.1(b), at 236 n. *56.*

WARRENTLESS ARREST WHILE EXECUTING SEARCH WARRANT NO-NO

United States v. Winchenbach, 26 F.Supp.2d 188 (D.Me. 1998).

If a defendant is arrested in his home, while officers are legally on the premises pursuant to a search warrant and with probable cause, is there a requirement that there be a separate arrest warrant? Although noting that there are few precedents on the subject, the court said a separate arrest warrant is not required under the Fourth Amendment.

The court reasoned that the search warrant represents a judicial determination that there is probable cause to invade the privacy of the suspect's home, which is the main Fourth Amendment concern in this type of scenario. Thus, if the police are lawfully in the suspect's home under a search warrant, they may arrest him if they have probable cause, since a breach of the individual's home, protected under the Fourth Amendment, has not occurred, by virtue of the search warrant sanction to be on the premises.

"Although there is a surprising lack of judicial decisions on this issue, other federal courts have reached the same conclusion that this Court reaches here. "Here, the officers were lawfully in Defendant's home pursuant to a judicially authorized search warrant. The search warrant authorized the officers to search the premises of Defendant for evidence relating to the distribution of controlled substances.

Defendant has not challenged the sufficiency of the warrant or its execution. Thus, the *of*-ficers were lawfully in Defendant's home when they arrested him. Defendant's argument that his arrest was unlawful because the officers arrested him without a warrant, therefore, fails. This Court holds that because the officers were lawfully present in Defendant's home when they arrested him without an arrest warrant, the arrest at Defendant's home was not unlawful...."

WARRANTLESS ENTRY ANONYMOUS REPORT OF BURGLARY

State v. Alexander, ‘21 A.2d 275 (Md.App. 1998).

“Reasonableness,” not probable cause, was the appropriate standard for determining the constitutionality under the Fourth Amendment of a warrantless entry of a home made by police officers who had received a report of a possible burglary in progress at the home, during which they discovered evidence of criminal conduct b~ residents of the home. The court said the proper standard for judging the officers’ conduct was general reasonableness because they were acting pursuant to their community caretaking function, and not whether they had probable cause to believe that a burglary had been or was then being committed in the home, because at the point of entry the police were engaged in activity that was not purely a criminal investigation.

“Particularly in circumstances where there is no reason to be skeptical about the police exercise of their caretaking function because of any fear of subterfuge, the conduct of the two officers was exemplary. The appellees were not in any way suspected of being involved in any crime. The officers, who came to the scene only to be of assistance, had reason for being apprehensive that the appellees’ home, the appellees’ personal property, and possibly even the appellees themselves were in danger. Had the officers walked away from the scene, they would have been derelict in their duty.

“We do not attach negative significance, as did the trial judge, to the fact that the officers checked no further with the neighbor who was observing them from nearby. He may not have been the neighbor who made the initial call. Even if he were, the officers had already observed directly everything that the neighbor had passed on in his initial telephone call. We will not, moreover, fault the officers for being solicitous of the tele-phoning neighbor’s legitimate desire to remain anonymous. What the oft officers did in this case was the quintessence of the reasonable performance of their community care taking function.

As an alternative, the court also said the officers in any event had probable cause to enter based on a belief that a burglary was in progress.

WARRANTLESS SEARCH OF SUSPENDED OFFICER'S DUTY BAG

*United States v. Chandler*197 F.3d 1198 (8th Cir. 1999).

A police department's warrant-less search of a suspended officer's duty bag was reasonable under the Fourth Amendment, where the officer had abandoned the bag by leaving it in the office of another officer at the time of his suspension. Additionally, the discovery of the contents of the bag was inevitable because, if the officer had sought to retrieve the bag from the office the department would have inventoried the bag before relinquishing its custody to the officer.

"In these circumstances, the district court's finding that Chandler abandoned the duty bag is supported by substantial evidence, a critical part of the clearly erroneous standard of review. . . . But there is further reason why the warrantless search of his duty bag was constitutionally reasonable. Chandler argues on appeal that the IAD officers should have obtained a warrant to search the bag when it was found in Major Zambo's locked closet eight months after Chandler's suspension. That was not his employer's relevant alternative.

"When Chandler was indefinitely suspended from duty, the Police Department had the right to reclaim any of its property in his possession. To that end, IAD officers padlocked Chandler's lockers and advised that he could not return to his former police station. The Department would reasonably believe that Chandler's duty bag, like his lockers, might contain Department property (as the subsequent search confirmed). Therefore, had Chandler attempted to leave police headquarters with the bag at the time of his suspension, Captain Nocchiero would have inventoried its contents, and the narcotics would have been discovered. Chandler left the bag in Major Zambo's office (whether intentionally or inadvertently is irrelevant to our analysis). Had he later retrieved the bag, the Department would have inventoried the bag with Chandler before relinquishing its custody. Again, the narcotics would have been discovered.

Thus, the inevitable discovery doctrine applies, not because the government was actively pursuing a substantial alterna*tive* line of investigation, which is the typical inevitable discovery situation, but because the law enforcement agency's legitimate interests as employer would have inevitably led it to discover the contraband before Chandler, a suspended employee, could remove it from the workplace."

WARRANTLESS SEARCH AUTO EXCEPTION – BICYCLE

People v. Allen, 92 Cal.Rptr.2d 869 (Cal.App. 2000).

Is a bicycle being operated on a public Street within the automobile exception to the Fourth Amendment warrant requirement? The court answered "yes," and therefore the bicycle was subject to a warrantless search upon probable cause.

On the probable cause issue, the court found probable cause to believe that contraband would be found in the bicycle, where the rider of the bicycle, who was known to the police officer to have an arrest history involving drug offenses, and who had been observed running a stop sign, initially refused the officer's order to stop and was then seen stuffing something into the handlebar of his bicycle, and the suspect was armed with a knife and became nervous when the officer started to look at his bicycle

WARRANTLESS SEARCH AUTO EXIGENT CIRCUMSTANCES

White v. State, 710 So.2d 949,) (Fla. 1998).

Defendant was arrested at his place of employment on charges unrelated to this case. After taking him into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of defendant's employment. The police did not seize the vehicle incident to defendants arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that defendant's automobile had been used several months earlier to deliver illegal drugs. and therefore the vehicle was subject to forfeiture by the government. After confiscation of the vehicle, a search turned up two pieces of crack cocaine in the ashtray. Based on the discovery of the cocaine, defendant was then charged with possession of' a controlled substance. Defendant subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile.

The Supreme Court of Florida ruled that in the absence of current probable cause to believe contraband was in the vehicle, combined with the lack of any exigent circumstances, the automobile exception to the warrant requirement was not applicable to the seizure of defendant's automobile, since the vehicle was parked safely at defendant's employment, the officers had the keys to the vehicle, and defendant was in custody on unrelated charges. In short, there was no justification for the search.

. . the *only* basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement. . . . The automobile exception is predicated upon the existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost it is not immediately seized because of the mobility of the automobile. See Chambers v. Maroney, 399 U.S. 42. 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

'Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that. . . the automobile exception [is] inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may he lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.

The absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to he therein, and that might he lost if not seized immediately."

The chief justice and three justices concurred. Two justices dissented.

WARRANTLESS SEARCH - MERE REQUEST TO TALK

Phuagnong v. State, 711 So.2d 527 (Fla.App. 1998).

A resident of an apartment did not give an assumed or implied consent for a police officer to make a warrantless entry into the apartment where the officer accosted a young man who had just left the apartment and prevailed upon him to convince somebody inside the apartment to open the door. The officer then stepped into the apartment without asking for permission.

The court ruled that a mere positive response to a request to "talk" does not constitute consent for a warrantless entry into a persons home.

Two judges concurred.

WARRENTLESS SEARCH OF HOME - EXIGENT CIRCUMSTANCES

State v. *David,* 501 S.E.2d 494 (Ga. 1998).

A police officer made a warrantless intrusion into an apartment after observing contraband from a lawful vantage point outside the apartment. The court said this was justified by exigent circumstances involving the likelihood that contraband was in danger of immediate destruction.

It was undisputed in this case that the officer saw one of the occupants of the apartment attempt to conceal the contraband upon seeing the officer at the open door.

In the case at bar, it is clear that the officer's warrantless intrusion into the apartment was justified by classic exigent circumstances: the likelihood that the contraband was in danger of immediate destruction, as it was undisputed that the officer saw one of the apartment's occupants attempt to conceal the contraband upon seeing the officer at the open door. . . . Thus, the officer's warrant-less intrusion into the home was authorized and the trial court and Court of Appeals erred in ruling otherwise.'

SEARCH WARRANT – NO KNOCK RUSE TO GAIN ENTRY

Coleman v. United States, 728 A.2d 1230 (D.C. 1999).

Does entry of a dwelling obtained by means of a ruse constitute a "breaking" within the meaning of knock-and-announce statutes? This court answered "no" and ruled that entry into a defendant's house by officers with a valid search warrant, by use of a ruse about a burglary call on defendant's elderly, invalid mother, was reasonable under the Fourth Amendment.

The court noted that the potential for violence was greatly reduced by the type of ruse employed, the ruse reduced the possibility of danger of harm to defendant's mother that might have resulted if entry had been denied and the police found it necessary to break down the door, and the effectiveness of the ruse forestalled any destruction of property that might otherwise have resulted. Additionally, the court noted that the privacy of occupants of the dwelling was maintained because the officers at the door knocked and waited to get permission to enter from the mother.

WARRANTLESS SEARCH SCOPE SMELL OF MARIJUNANA AUTOMOBILE

State v. Wriqht, 977 P.2d 505 (Utah App. *1999).*

The strong smell of raw marijuana emanating from a defendant's vehicle at the time of a stop for a possible traffic violation, as opposed to the mere odor of burnt marijuana, gave a police officer probable cause to search the vehicle's trunk. The court followed a distinction between the odor of burnt marijuana and the smell of raw marijuana for the scope of a search.

See United States v. Downs, 151 F.3d 1301, 1303 (10th Cir. 1998). In *Downs,* the court recognized 'a common sense distinction between the smells of burnt and raw marijuana based on the imperative that the scope of a warrantless search "is defined by the object of the search and the places in which there is probable cause to believe that it may he found." *Id.* (quoting *Ross [United* States v. , 456 U.S. 798 (19g2)1, 456 U.S. at 824, 102 S.Ct. at 2172). In further explanation, the court stated that the smell of burnt marijuana is generally consistent with personal use *of* marijuana in the passenger compartment of an automobile. In such a case, therefore, there is no fair probability that the trunk of the car contains marijuana and an officer must limit the search to the compartment absent corroborating evidence of contraband. When, on the other hand, an officer encounters, as was the case here, the overpowering smell of raw marijuana, there is a fair probability that the car is being used to transport large quantities of marijuana and that the marijuana has been secreted in places other than the passenger compartment. Accordingly, in such circumstances, a search **of** the trunk **is** appropriate. *Id.* (citations omitted).

We agree with the Tenth Circuit's rationale and apply it here. In this case, Wright does not dispute the trial courts finding that Sergeant Mangelson smelled the odor of marijuana coming from his car. The only testimony on this issue at the hearing was that the odor was that of raw marijuana. An odor of raw marijuana strong enough to be smelled from outside a car would lead a person of ordinary caution' to believe that marijuana in bulk may be stored in the car trunk. *Id.* The trial court thus correctly determined that Sergeant Mangelson had probable cause to search the trunk."

WARRENTLESS SEARCH FOLLOWING TRAFFIC CITATION

Knowles v. Iowa, 119 S.Ct. 507, 1998 WL 781827, No. 97-7597 (1998).

A police officer stopped defendant for speeding and issued a citation rather than making a custodial arrest. The officer then searched the car, without consent or probable cause, finding drugs and paraphernalia, possession of which defendant was arrested and convicted. The trial court denied a motion to dismiss based on an Iowa statute giving officers authority to conduct a full-blown search of an automobile and driver where they issue a citation instead of making a custodial arrest.

This was affirmed by the Iowa Supreme Court, 569 N.W. 2d 601 (Iowa 1997), as a search incident to citation" on the basis that as long as the officer had probable cause to make a custodial arrest there was no need for there to have been an actual custodial arrest.

The United States Supreme Court reversed in a unanimous opinion written by the Chief Justice. Even though the search was authorized by a state statute—apparently the only one of its kind in the country—it clearly violated the Fourth Amendment. The search was not justified by either of the two cases the Court has relied upon in the past for searches incident to arrest—the protection of the officer or the need to discover and preserve destructible evidence.

The Court said a simple traffic stop and issuance of a traffic ticket—which it characterized as a "relatively brief encounter"— poses little threat to officer safety ("a good deal less than in the case of custodial arrest"). Thus a full search of the person and the vehicle could not he justified on this basis.

The Court noted that while a concern for safety during a routine traffic stop may justify the "minimal" additional intrusion of ordering a driver and his passengers out of the car, it would not by itself justify the greater intrusion involved in a full search incident to arrest. If officers have reasonable suspicion for their safety they can always frisk the driver and passengers under standard Terry *v. Ohio* principles.

On the second basis for a search incident to arrest (Iowa's "search incident to citation") the Court, a bit incredulously, noted that there was no need to discover and preserve evidence in a traffic stop, for once defendant was stopped for speeding and issued a citation, all evidence necessary to prosecute that offense had been obtained. (' . . . all the evidence necessary to prosecute the offense had been obtained. . . No further evidence of excessive speed was going to he found either on the person of the offender or in the passenger compartment of the car. . . ").

Finally, the Court also rejected the state's argument that a "search incident to citation" is justified because a suspect may try to hide evidence of his identity or of other crimes. An officer can always arrest a driver if he is not satisfied with the identification furnished, and the possibility that an officer would simply happen onto evidence of an unrelated offense was deemed "remote."

WARRANTLESS SEARCH – GARBAGE BAGS EXPECTATION OF PRIVACY

United States v. Long, 176 F.3d 1304 (10th Cir. 1999).

Garbage bags that were on top of a trailer parked between the defendant's garage and an alley were not within the curtilage of his home, for purposes of determining whether a seizure of the bags violated the Fourth Amendment. The trailer was three feet from the alley, it was closer to the alley than the garage, no fence or barrier enclosed the trailer or the home, and it was unlikely that defendant would use the area in which the garbage was regularly deposited for any intimate activities of the home.

The court also said that whether the police officers violated the Fourth Amendment by seizing the bags did not depend solely on the curtilage issue. In addition to the curtilage question defendant was required to show that he had a reasonable expectation of privacy in the bags. He failed to do so where the trailer was parked only three feet from the alley, and anyone travelling in the alley could have reached out and snatched up the bags. The mere fact that defendant had an agreement with the trash collector that he would leave the bags on the trailer merely designated a location for pickup of the bags and did not change the situation for Fourth Amendment purposes.

WARRANTLESS SEARCH – BOOTSTRAPPING PC

People v. Davis, 76 Cal.Rptr.2d 770 (Cal. 199W.

The warrantless search by police of a defendant's garage for a stolen automobile could not he justified as a search pursuant to the search-and-seizure probation condition of defendant's co-tenant where, at the time of the search, the police were not aware that the co-tenant existed.

To approve the search under these circumstances would be to bootstrap the search on the basis of later discovery of probable cause

"We need not resort to a pretext theory to conclude the search here could not be justified on the basis of a probation condition search. Even under the 'objective standard' the search cannot be justified. Although the arresting or searching officer need not personally be aware of facts justify*ing* the arrest or search, the police must *at* least have 'collective knowledge' objectively justifying the action Even if the law were willing to attribute to the police knowlbedge [that] Robles' brother Armando was on probation, this problem exists: when the search was performed no one knew Armando existed.

"Upholding the search in this case would spawn a rule that a warrantless search or an arrest without probable cause will be validated whenever the police acquire information *after the fact* justifying the search. That result would negate the long-standing axiom in search and seizure law that 'a search cannot be justified l) with what it turns up. . *(People v. Superior (Keifer)* (1970) 3 Cal.3d 807. 821, 91 Cal.Rptr. *~29, CS* P.2d

. . we are unwilling to carve such a big piece out of Fourth Amendment protections.'

WARRANTLESS SEARCH SMELL OF MARIJUANA

People v. Kazmierczak, 605 N.W. 2d 667 (Mich. 2000).

Overruling prior case law, *People v. Taylor, 564* N.W.2d 24 (1977), the Supreme Court of Michigan has held that the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the Fourth Amendment warrant requirement.

. . . by overruling *Taylor,* and declaring that the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement, we return Michigan to the majority view [cases and annotations cited]. As *United States v. Staula,* 80 F.3d 596 (C.A. 1, 1996), states, the law is consistent that the smell of marijuana may provide probable cause to search."

Two justices dissented.

WARRANTLESS SEARCH ODOR OF CANABIS

State v. Reed, 712 So.2d 458 (Fla. App. 1998).

A police officer had reasonable cause to search and arrest a defendant, where the officer retrieved a cigar he suspected the defendant had just discarded and which smelled of burning cannabis. Additionally, the officer detected the odor of cannabis on defendant's clothing, and defendant's reply to the officer's query whether defendant had more contraband on his person was that he had just what he had been smoking. This was at least an implied admission that defendant had been smoking the cannabis cigar.

. . .based on the circumstances in this case, Fernandez [officer] did have probable cause to arrest Reed at the time he did so. He retrieved a cigar he suspected Reed had just discarded, which smelled of burning cannabis, and when Reed returned to his presence, Fernandez detected the odor of cannabis on his person. That, plus Reed's implied admission he had been smoking the cigar and that it was cannabis in response to Fernandez' query whether he had more contraband on his person gave Fernandez probable cause to believe a crime had been committed and that Reed had committed it."

WARRANTLESS SEARCH – EMERGENCY AID EXCEPTION

*State v. **C**anas,* 597 N.W.2d 488 (Iowa 1999).

State. A warrantless search of a defendant's motel room could not be justified under the emergency aid exception to the warrant requirement, where police officers had no reasonable belief that there was a person in the motel room in need of aid. The Court rejected the officers' explanation that defendant's status as a known drug user created a reasonable fear that the motel cleaning staff would come in contact with drugs or needles. This was deemed patently insufficient to justify a warrantless search of the motel room.

'Our previous cases have recognized that an emergency situation may give rise to exigent circumstances sufficient to support a warrantless search. *See, e.g., State v. Carlson,* 548 N.W.2d 138, 259 (Iowa 1996); *State r. Emerson,* 375 N.W.2d *256, 259* (Iowa 1985). Yet in both Carlson and *Emerson* the police were responding to the reasonable belief that an emergency existed and a warrantless search of a residence was necessary to render aid and assistance to a person located therein. In this case there was no similar belief that someone remained in the motel room who needed emergency aid. The mere suspicion that drugs or drug paraphernalia might be present could not justify a warrantless search under the emergency aid exception."

LOCATION OF WITNESS THROUGH ILLEGAL SEARCH

United States v. Reyes, 157 F.3d 949 (2nd Cir. 1998).

Any nexus between an illegal search of a computer's memory which gave federal agents a witness's telephone number and the witness's subsequent testimony was sufficiently attenuated such that the admission of the testimony in a racketeering case did not constitute plain error. The court relied on the fact that the witness stated his willingness to testify, the illegally seized evidence played a relatively insignificant role in gaining his cooperation, and two and one-half months had gone by between the illegal seizure and the witness's decision to cooperate. The court concluded that the taint of the illegal search and seizure had been sufficiently attenuated.

"In this case, the government used the illegally seized telephone number to locate Vargas, but there was nonetheless sufficient attenuation between the illegal search and Vargas's testimony to purge the taint. At a suppression hearing (regarding other evidence in this case), Vargas testified that he did not even consider cooperating with the government until February 1995, when he was being held pending a bail hearing and encountered a prisoner who explained to him the advantages of cooperation. Vargas explained at the hearing, I was trying to keep it real, somebody flipped on me, I had no choice but to flip and help myself.' Several days after the talk with the fellow *in*mate, Reyes and his lawyer met with Agent Home and AUSA Tom Clark. As Vargas further testified, he told them 'I regretted what I had done and I wanted to do the right thing for me and my family, and that I wanted to clear my conscience.'

In light of (1) Vargas's stated willingness to testify, (2) the relatively insignificant role played by the illegally seized evidence in actually gaining his cooperation, and (3) the two-and-a-half-month lapse between the illegal behavior and Vargas's decision to cooperate, the connection between the illegal search and the testimony is sufficiently attenuated. So, even though Vargas was tracked down with the aid of the illegally seized telephone number and even if the agents would not have located him by means of their preexisting knowledge of the existence of 'Rugi,' it was not plain error for the district court to permit him to testify."