

THE FOURTH AMENDMENT

- I. **GOVERNMENTAL ACTION** 5
 - A. **PRIVATE SEARCHES ARE NOT REGULATED BY THE FOURTH AMENDMENT** 5
 - B. **WHETHER A SEARCH IS “PRIVATE” DEPENDS ON THE TOTALITY OF THE CIRCUMSTANCES** 5
 - C. **THE LAWFULNESS OF GOVERNMENT SEARCHES WHICH FOLLOW PRIVATE ONES** 5
- II. **REASONABLE EXPECTATIONS OF PRIVACY** 5
 - A. **THERE IS A TWO-PART TEST FOR DETERMINING WHETHER A REASONABLE EXPECTATION OF PRIVACY EXISTS**.. 5
 - B. **AREAS WHERE EXPECTATIONS OF PRIVACY MAY OR MAY NOT EXIST** 6
 - 1. Inside the Body of the Suspect 6
 - 2. Outside the Body of the Suspect 6
 - 3. The Exterior of a Vehicle 6
 - 4. The Interior of a Vehicle 6
 - 5. Vehicle Identification Numbers 6
 - 6. Containers 7
 - 7. Homes 7
 - 8. Hotels/Motels 7
 - 9. Curtilage 7
 - 10. Government Workplaces 7
 - 11. Abandoned Property 8
 - 12. Trash 8
 - 13. Dog Sniffs 8
 - 14. Prison Cells 8
 - 15. Mail 8
 - 16. Tracking Devices (Beepers) 8
 - 17. Aerial Surveillance 9
- III. **INVESTIGATIVE DETENTIONS** 9
 - A. **INVESTIGATIVE DETENTIONS MAY BE CONDUCTED WHERE REASONABLE SUSPICION EXISTS TO BELIEVE CRIMINAL ACTIVITY IS AFOOT** 9
 - B. **REASONABLE SUSPICION IS DETERMINED BY LOOKING AT THE TOTALITY OF THE CIRCUMSTANCES** 9
 - C. **CRIMINAL ACTIVITY AFOOT** 9
 - D. **MEANS OF ESTABLISHING REASONABLE SUSPICION** 10
 - 1. Officer’s Personal Observations 10
 - 2. Information From Other Law Enforcement Officers 10
 - 3. Information From Third Parties 10
 - E. **REASONABLE SUSPICION TO BELIEVE CRIMINAL ACTIVITY IS AFOOT COULD BE BASED ON WHOLLY INNOCENT ACTIVITY** 10
 - F. **FACTORS USED TO JUSTIFY INVESTIGATIVE DETENTIONS** 10
 - 1. Nervousness 10
 - 2. Flight 11
 - 3. Presence in a High Crime Area 11
 - 4. Time and Location 11
 - 5. Presence in a High Crime Area 11
 - G. **THE LENGTH OF AN INVESTIGATIVE DETENTION MUST BE REASONABLE** 11
 - H. **THE USE OF FORCE DURING AN INVESTIGATIVE DETENTION MUST BE REASONABLE** 12
 - 1. Pointing Guns During an Investigative Detention 12
 - 2. Use of Handcuffs During an Investigative Detention 12
 - I. **REQUIRING IDENTIFICATION DURING AN INVESTIGATIVE DETENTION** 12
 - 1. The Supreme Court Has Never Ruled on the Issue 12

2.	Federal Courts are Split on the Issue of Whether the Right is “Clearly Established” for Purposes of Qualified Immunity	13
J.	IN CERTAIN CIRCUMSTANCES, A SUSPECT MAY BE “FRISKED” DURING AN INVESTIGATIVE DETENTION	13
1.	The Requirements to Conduct a “Frisk”	13
2.	Factors Used to Justify “Frisks”	14
3.	A Law Enforcement Officer is Looking for Weapons During the “Frisk”, Not Evidence	15
4.	Evidence Recognized Through “Plain Touch” During a “Frisk” is Admissible	15
5.	The “Automatic Companion” Rule	15
K.	VEHICLES - INVESTIGATIVE STOPS AND “FRISKS”	15
1.	Permissible Actions During Vehicle Stops	15
2.	A “Frisk” of a Vehicle	17
3.	The Duration of a Vehicle Stop	17
4.	Pretextual Stops	17
IV.	<u>PROBABLE CAUSE</u>	18
A.	DEFINITIONS	18
1.	Generally	18
2.	Probable Cause to Search	18
3.	Probable Cause to Arrest	18
B.	THE EXISTENCE OF PROBABLE CAUSE IS BASED UPON THE TOTALITY OF THE CIRCUMSTANCES	18
C.	THERE ARE VARIOUS METHODS OF ESTABLISHING PROBABLE CAUSE	18
1.	Direct Observation	18
2.	Observations By Fellow Law Enforcement Officers	18
3.	A Law Enforcement Officer’s Training and Experience	19
4.	Information From a Drug Dog	19
5.	Information From Victims or Witnesses	19
6.	Information From Informants	19
V.	<u>THE EXCLUSIONARY RULE</u>	21
A.	THE PURPOSE OF THE RULE	21
B.	EXCEPTIONS TO THE EXCLUSIONARY RULE	22
1.	Defendant Has No Expectation of Privacy (No Standing)	22
2.	Impeachment	22
3.	Good Faith	22
4.	Deportation Hearings	23
5.	Grand Jury Proceedings	23
6.	Civil Proceedings	23
7.	Inevitable Discovery	23
8.	Independent Source	23
9.	Attenuation	24
VI.	<u>ARRESTS</u>	24
A.	GENERALLY	24
B.	WARRANTLESS ARRESTS INSIDE A SUSPECT’S HOME	24
C.	ENTERING A SUSPECT’S HOME TO MAKE AN ARREST PURSUANT TO AN ARREST WARRANT	24
1.	Does “Reason to Believe” Mean “Probable Cause?”	25
2.	Factors to Consider in Determining Whether There is “Reason to Believe” a Suspect is in the Home	25
D.	ENTERING A THIRD PARTY’S HOME TO MAKE AN ARREST PURSUANT TO AN ARREST WARRANT	26
VII.	<u>KNOCKING AND ANNOUNCING</u>	27
A.	PART OF THE “REASONABLENESS” ANALYSIS OF THE FOURTH AMENDMENT	27
B.	THE RATIONALE BEHIND THE RULE	27
C.	“NO-KNOCK” ENTRIES ARE PERMITTED IN CERTAIN CIRCUMSTANCES	27

VIII.	<u>SEARCH WARRANTS</u>	27
A.	THE PREFERENCE FOR WARRANTS	27
B.	WARRANTS CAN SAVE OTHERWISE UNLAWFUL SEARCHES	28
C.	GENERAL WARRANTS ARE PROHIBITED	28
D.	PARTICULARITY	28
E.	THE PURPOSES SERVED BY THE PARTICULARITY REQUIREMENT	28
1.	Limits the Discretion of the Officers Executing the Warrant	28
2.	Informs the Subject of What the Officers are Entitled to Take	28
3.	Defines the Scope of the Search	28
F.	STANDARD FOR PARTICULARITY	29
1.	Particular Description of the Place to be Searched	29
2.	Particular Description of the Thing to be Seized	29
G.	NEUTRAL AND DETACHED MAGISTRATES	29
1.	Participation in the Search	29
2.	State Attorney General Issued the Warrant	30
3.	Magistrate Has Financial Interest in Issuance of Warrants	30
H.	STALE INFORMATION	30
1.	Age of the Information Contained in the Affidavit	30
2.	Whether the Criminal Activity is Continuing	30
3.	The Type of Evidence Sought in the Search	31
4.	The Nature of the Location to be Searched	31
I.	FALSE OR MISLEADING INFORMATION IN THE AFFIDAVIT	31
1.	Generally	31
2.	The Requirements for a Hearing Under Franks	31
IX.	<u>PROTECTIVE SWEEPS</u>	33
A.	DEFINED	33
B.	SCOPE	33
C.	REQUIREMENTS	33
1.	Reasonable Belief the Area to be Swept Harbors an Individual Posing a Danger	33
2.	Officers May Look Only in Places Where Persons Could Be Located	33
3.	The Protective Sweep May Last No Longer Than is Necessary to Dispel the Danger	34
D.	PROTECTIVE SWEEP WHEN ARREST OCCURS OUTSIDE THE RESIDENCE	34
X.	<u>PLAIN VIEW</u>	35
A.	GENERALLY	35
B.	REQUIREMENTS	35
XI.	<u>THE VEHICLE EXCEPTION</u>	35
A.	GENERALLY	35
B.	RATIONALES FOR THE VEHICLE EXCEPTION	35
1.	Inherent Mobility of the Vehicle	35
2.	Reduced Expectation of Privacy	36
C.	REQUIREMENTS	36
1.	Probable Cause	36
2.	Readily Mobile	36
D.	NO EXIGENCY IS REQUIRED TO CONDUCT THE SEARCH	36
E.	THE SEARCH NEED NOT BE CONTEMPORANEOUS WITH THE SEIZURE	36
F.	THE SCOPE OF THE SEARCH	37
G.	CONTAINERS PLACED IN THE VEHICLE	37
XII.	<u>EXIGENT CIRCUMSTANCES</u>	37
A.	GENERALLY	37

B.	EMERGENCY SCENES	37
1.	The Probable Cause Standard is Different for Emergency Scene Searches.....	37
2.	Evidence Found in Plain View May Be Seized.....	38
3.	There is No “Murder Scene” Exception to the Fourth Amendment.....	38
C.	DESTRUCTION OF EVIDENCE	38
1.	Generally.....	38
2.	Requirements.....	38
D.	HOT PURSUIT	39
1.	Generally Requires a “Serious” Crime.....	39
2.	Immediate or Continuous Pursuit.....	39
3.	Probable Cause the Suspect is in the Residence.....	40
XIII.	<u>SEARCHES INCIDENT TO ARREST</u>	40
A.	GENERALLY	40
B.	RATIONALES FOR THE SEARCH INCIDENT TO ARREST EXCEPTION	40
C.	REQUIREMENTS	40
1.	Valid Custodial Arrest.....	40
2.	Search Must be “Substantially Contemporaneous” With the Arrest.....	41
D.	THE SCOPE OF THE SEARCH	41
1.	The Arrestee’s Person.....	41
2.	Areas Within an Arrestee’s Immediate Control.....	41
XIV.	<u>CONSENT SEARCHES</u>	42
A.	GENERALLY	42
B.	REQUIREMENTS	42
1.	Voluntarily Given.....	42
2.	Authority.....	44
C.	THE SCOPE OF A CONSENT SEARCH	44
D.	LIMITATIONS MAY BE PLACED ON CONSENT SEARCHES	44
E.	DESTRUCTION OF PROPERTY BASED UPON CONSENT	45
F.	THIRD PARTY CONSENT RULES APPLY EVEN WHEN ANOTHER PERSON WITH AUTHORITY IS PRESENT AND OBJECTS	45
XV.	<u>INVENTORY SEARCHES</u>	45
A.	GENERALLY	45
B.	RATIONALES FOR INVENTORY SEARCHES	45
C.	REQUIREMENTS	45
1.	Lawful Impoundment of the Property.....	45
2.	Standardized Policy.....	46
XVI.	<u>ADMINISTRATIVE SEARCHES</u>	46
A.	GENERALLY	46
B.	ADMINISTRATIVE SEARCHES AND CRIMINAL INVESTIGATIONS	46
C.	WARRANTS ARE REQUIRED FOR SOME ADMINISTRATIVE SEARCHES	47
1.	Generally.....	47
2.	Probable Cause for Administrative Warrants.....	47
D.	CLOSELY REGULATED BUSINESSES	47
1.	Generally.....	47
2.	Warrants are Generally Not Required for Searches of “Closely Regulated” Businesses.....	47
XVII.	<u>OTHER WARRANTLESS SEARCHES</u>	49
A.	VEHICLE CHECKPOINTS	49
B.	SCHOOL SEARCHES	49
C.	AIRPORT SEARCHES	49

THE FOURTH AMENDMENT

I. GOVERNMENTAL ACTION

A. Private Searches Are Not Regulated By the Fourth Amendment

The Fourth Amendment is “wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.” United States v. Jacobsen, 466 U.S. 109, 113 (1984)(quotation and internal quotation marks omitted).

B. Whether a Search is “Private” Depends On the Totality of the Circumstances

“Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government’s participation in the private party’s activities.” Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 614 (1989).

- **Whether the government knows of or acquiesces in the private actor’s conduct;**
- **Whether the private party intends to assist law enforcement officers at the time of the search; and**
- **Whether the government affirmatively encourages, initiates, or instigates the private action.**

See, e.g., United States v Pervaz, 118 F.3d 1, 6 (1st Cir. 1997); United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003); United States v. Paige, 136 F.3d 1012, 1017 (5th Cir. 1998); United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985); United States v. Shahid, 117 F.3d 322, 325-326 (7th Cir.), *cert. denied*, 522 U.S. 902 (1997); United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990), *cert. denied*, 501 U.S. 1258 (1991); United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982); United States v. Smythe, 84 F.3d 1240, 1242-1243 (10th Cir. 1996)

C. The Lawfulness of Government Searches Which Follow Private Ones

“Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information.” United States v. Jacobsen, 466 U.S. 109, 117 (1984).

“Even though some circumstances - for example, if the results of the private search are in plain view when materials are turned over to the Government - may justify the Government’s re-examination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search.” Walter v. United States, 447 U.S. 649, 657 (1980).

II. REASONABLE EXPECTATIONS OF PRIVACY

A. There is a Two-Part Test for Determining Whether a Reasonable Expectation of Privacy Exists

In determining whether a reasonable expectation of privacy exists, there is “a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” Katz v. United States, 388 U.S. 347, 361 (1967)(Harlan, J., concurring).

B. **Areas Where Expectations of Privacy May or May Not Exist**

1. **Inside the Body of the Suspect**

“In light of our society’s concern for the security of one’s person, ... it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.” Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 616 (1989)(internal citation omitted)(urine sample).

“Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned.” Schmerber v. California, 384 U.S. 757, 770 (1966)(blood sample for alcohol testing).

“Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or ‘deep lung’ breath for chemical analysis, ... implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search.” Skinner v. Railway Labor Executives’ Ass’n, 498 U.S. 602, 616-17 (1989)(internal citation omitted).

2. **Outside the Body of the Suspect**

“The physical characteristics of a person’s voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man’s facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.” United States v. Dionisio, 410 U.S. 1, 14 (1973).

“Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person’s script than there is in the tone of his voice.” United States v. Mara, 410 U.S. 19, 21 (1973).

“Fingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.” Davis v. Mississippi, 394 U.S. 721, 727 (1969).

3. **The Exterior of a Vehicle**

“The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a ‘search.’” New York v. Class, 475 U.S. 106, 114 (1986)(*citing* Cardwell v. Lewis, 417 U.S. 583, 588-89 (1974)).

4. **The Interior of a Vehicle**

“There is no legitimate expectation of privacy ... shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.” Texas v. Brown, 460 U.S. 730, 740 (1983)(internal citations omitted).

5. **Vehicle Identification Numbers**

“In sum, because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, we hold that there was no reasonable expectation of privacy in the VIN.” New York v. Class, 475 U.S. 106, 114 (1986).

6. **Containers**

“[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.” United States v. Ross, 456 U.S. 798, 822-23 (1982).

7. **Homes**

Noting that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” United States v. United States District Court, 407 U.S. 297, 313 (1972).

“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.” Kyllo v. United States, 533 U.S. 27, 31 (2001).

Noting that, “in some circumstances a person may have a legitimate expectation of privacy in the house of someone else.” Minnesota v. Carter, 525 U.S. 83, 89 (1998).

“We need go no further than to conclude, as we do, that Olson’s status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.” Minnesota v. Olson, 495 U.S. 91, 96-97 (1990).

“Thus, an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.” Minnesota v. Carter, 525 U.S. 83, 90 (1998).

8. **Hotels/Motels**

“No less than a tenant of a house, or the occupant of a room in a boarding house, ... a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.” Stoner v. California, 376 U.S. 483, 490 (1964).

9. **Curtilage**

“At common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life,’ ... and therefore has been considered part of the home itself for Fourth Amendment purposes. ... Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields.” Oliver v. United States, 466 U.S. 170, 180 (1984)(citations omitted).

“[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.” United States v. Dunn, 480 U.S. 294, 301 (1987).

10. **Government Workplaces**

“Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make some employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.” O’Connor v. Ortega, 480 U.S. 709, 718 (1987).

11. **Abandoned Property**

“Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia*. There can be nothing unlawful in the Government's appropriation of such abandoned property.” Abel v. United States, 362, U.S. 217, 241 (1960).

12. **Trash**

“It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage ‘in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,’ ... respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.” California v. Greenwood, 486 U.S. 35, 40-41 (1988)(internal citations and footnotes omitted).

13. **Dog Sniffs**

“Therefore, we conclude that the particular course of investigation that the agents intended to pursue here - exposure of respondent's luggage, which was located in a public place, to a trained canine - did not constitute a ‘search’ within the meaning of the Fourth Amendment.” United States v. Place, 462 U.S. 696, 707 (1983).

14. **Prison Cells**

“[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.” Hudson v. Palmer, 468 U.S. 517, 525-526 (1984).

15. **Mail**

“It has long been held that first-class mail such as letters and sealed packages subject to letter postage - as distinguished from newspapers, magazines, pamphlets, and other printed matter - is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment.” United States v. Van Leeuwen, 397 U.S. 249, 251 (1970).

16. **Tracking Devices (Beepers)**

“Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.” United States v. Knotts, 460 U.S. 276, 282 (1983).

The Fourth Amendment is violated “where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house.” United States v. Karo, 468 U.S. 705, 715 (1984).

17. **Aerial Surveillance**

“In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.” California v. Ciraolo, 476 U.S. 207, 215 (1986).

“As a general proposition, the police may see what may be seen ‘from a public vantage point where they have a right to be’ Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was.” Florida v. Riley, 488 U.S. 445, 449-50 (1989)(citation omitted).

“We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the ‘curtilage’ of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.” Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986)(internal footnote omitted).

III. INVESTIGATIVE DETENTIONS

A. **Investigative Detentions May Be Conducted Where Reasonable Suspicion Exists to Believe Criminal Activity is Afoot**

“[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” Illinois v. Wardlow, 528 U.S. 119, 123 (2000)(citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

B. **Reasonable Suspicion is Determined By Looking at the Totality of the Circumstances**

“When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. ... This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’ ... Although an officer's reliance on a mere ‘hunch’ is insufficient to justify a stop, ... the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” United States v. Arvizu, 534 U.S. 266, 273-274 (2002)(internal citations omitted).

C. **Criminal Activity Afoot**

This generally means that the officer must reasonably suspect that (1) a crime is about to be committed, Terry, supra; (2) a crime is being committed, Adams v. Williams, 407 U.S. 143 (1972); or (3) a crime has been committed, United States v. Hensley, 469 U.S. 221 (1985).

D. **Means of Establishing Reasonable Suspicion**

1. **Officer's Personal Observations**

"[A] trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person." United States v. Cortez, 449 U.S. 411, 418 (1981).

2. **Information From Other Law Enforcement Officers**

"The law enforcement interests promoted by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal. The same interests that weigh in favor of permitting police to make a Terry stop to investigate a past crime, ... support permitting police in other jurisdictions to rely on flyers or bulletins in making stops to investigate past crimes." United States v. Hensley, 469 U.S. 221, 232 (1985)(internal citation omitted).

3. **Information From Third Parties**

"[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable." Alabama v. White, 496 U.S. 325, 329 (1990)(internal quotation marks omitted).

"Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, ... an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." Florida v. J.L., 529 U.S. 266, 270 (2000)(internal citations and quotations omitted).

E. **Reasonable Suspicion to Believe Criminal Activity is Afoot Could Be Based on Wholly Innocent Activity**

"[T]here could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." Reid v. Georgia, 448 U.S. 438, 441 (1980).

"A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." United States v. Arvizu, 534 U.S. 266, 277 (2002).

F. **Factors Used to Justify Investigative Detentions**

1. **Nervousness**

"Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." Illinois v. Wardlow, 528 U.S. 119, 124 (2000)(citations omitted).

“We have concluded that nervousness combined with several other more revealing facts can generate reasonable suspicion. ... Generally, however, ‘nervousness is of limited significance in determining reasonable suspicion.’” United States v. Jones, 269 F.3d 919, 928 (8th Cir. 2001)(citation omitted).

2. **Flight**

“Headlong flight - wherever it occurs - is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

3. **Presence in a High Crime Area**

“The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.” Brown v. Texas, 443 U.S. 47, 52 (1979).

“[W]e have previously noted the fact that the stop occurred in a ‘high crime area’ among the relevant contextual considerations in a Terry analysis.” Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

4. **Time and Location**

“In this case, the district court identified four factors that, when considered in their totality, established the reasonableness of Sergeant Feirson’s suspicion that Edmonds was engaging in criminal activity: (1) Livingston Road’s notoriety as an ‘open air drug market’; (2) **Edmonds’s presence in a van parked after hours in a school lot known to be the site of numerous drug transactions**; (3) the ‘furtive gestures’ made by Edmonds as Feirson approached the van; and (4) the perception that McFadden, Edmonds’s companion, began to flee when he noticed the officers’ unmarked car.” United States v. Edmonds, 240 F.3d 55, 60 (D.C. Cir. 2001)(emphasis added).

5. **Presence in a High Crime Area**

“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. ... But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.” Illinois v. Wardlow, 528 U.S. 119, 124 (2000)(internal citation omitted).

G. **The Length of an Investigative Detention Must Be Reasonable**

“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time. ... It is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.” Florida v. Royer, 460 U.S. 491, 500 (1983)(internal citation omitted).

“Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on Terry stops.” United States v. Sharpe, 470 U.S. 675, 685 (1985).

H. The Use of Force During an Investigative Detention Must Be Reasonable

“Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” Graham v. Connor, 490 U.S. 386, 296 (1989).

1. **Pointing Guns During an Investigative Detention**

“There is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest.” Baker v. Monroe Township, 50 F.3d 1186, 1193 (3d Cir. 1995).

“The use of guns in connection with a stop is permissible where the police reasonably believe the weapons are necessary for their protection.” United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993)(quotation and internal brackets omitted).

See also United States v. Navarrete-Barron, 192 F.3d 786, 791 (8th Cir. 1999); United States v. Alvarez, 899 F.2d 833, 838 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991); United States v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988); United States v. Serna-Barreto, 842 F.2d 965, 968 (7th Cir. 1988); United States v. Jones, 759 F.2d 633, 638 (8th Cir.), cert. denied, 474 U.S. 837 (1985); United States v. Jackson, 652 F.2d 244, 249 (2d Cir.), cert. denied, 454 U.S. 1057 (1981).

2. **Use of Handcuffs During an Investigative Detention**

“Nor does the use of handcuffs exceed the bounds of a Terry stop, so long as the circumstances warrant that precaution.” Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809, 815 (6th Cir. 1999).

“It is clear, however, that, because safety may require the police to freeze temporarily a potentially dangerous situation, both the display of firearms and the use of handcuffs may be part of a reasonable Terry stop.” United States v. Merkley, 988 F.2d 1062, 1064 (10th Cir. 1993).

See also United States v. Navarrete-Barron, 192 F.3d 786, 791 (8th Cir. 1999); United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993); United States v. Esieke, 940 F.2d 29, 36 (2d Cir.), cert. denied, 502 U.S. 992 (1991); United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989).

I. Requiring Identification During an Investigative Detention

1. **The Supreme Court Has Never Ruled on the Issue**

“We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements.” Brown v. Texas, 443 U.S. 47, 53 n.3 (1979).

“[T]he Supreme Court has expressly left open the question of whether it violates the Fourth Amendment to punish an individual for violating state or local laws by refusing to identify himself during a lawful Terry stop.” Risbridger v. Connelly, 275 F.3d 565, 570 (6th Cir. 2002).

“Twice the Supreme Court has specifically refused to determine whether an individual can be arrested for refusing to identify himself in the context of a lawful investigatory stop.” Albright v. Rodriguez, 51 F.3d 1531, 1537 (10th Cir. 1995).

2. **Federal Courts are Split on the Issue of Whether the Right is “Clearly Established” for Purposes of Qualified Immunity**

COMPARE: “[S]tatutes authorizing arrest for a refusal to provide identification are unconstitutional because ‘the statutes bootstrap the authority to arrest on less than probable cause, and because the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest.’” Graves v. City of Coeur D’Alene, 339 F.3d 828, *26-27 (9th Cir. 2003)(citation and internal brackets omitted).

“[T]he police cannot, consistent with the Fourth Amendment, compel identification during an investigatory stop” Carey v. Nevada Gaming Control Board, 279 F.3d 873, 880 (9th Cir. 2002).

WITH: “Given the Supreme Court’s express reservation of the question of whether a Fourth Amendment right to refuse to provide identification during a valid Terry stop renders invalid an arrest that is based on probable cause to believe the individual has violated a presumptively valid state or local law, as well as the lack of clear precedent from our circuit, we ... find that the contours of such a right were not sufficiently clear that the unlawfulness of plaintiff’s arrest must have been apparent at the time.” Risbridger v. Connelly, 275 F.3d 565, 572 (6th Cir. 2002).

“[T]he right to refuse to present identification in the context of a lawful investigative detention has not been clearly established.” Oliver v. Woods, 209 F.3d 1179, 1190 (10th Cir. 2000)(citation omitted).

“Here we touch on a central problem in the law of investigative stops: do citizens have a right to refuse to respond to questions posed during investigative stops based merely on reasonable suspicion? Answering this question in either the affirmative or the negative poses problems. If citizens do have a right to refuse to answer, then the Terry stop is a rather weak law enforcement device, useful only against the suspect who does not make any attempt to assert his or her rights. But if citizens do not have a right to refuse to answer, then the Terry stop becomes an extraordinarily powerful law enforcement device, for it permits law enforcement officers to bootstrap their reasonable suspicion of criminal activity justifying an investigative stop into probable cause justifying a search or an arrest based solely on the suspect’s refusal to respond to the investigative stop.” Tom v. Volda, 963 F.2d 952, 959 (7th Cir. 1992)(internal footnote omitted).

J. **In Certain Circumstances, a Suspect May Be “Frisked” During an Investigative Detention**

1. **The Requirements to Conduct a “Frisk”**

“[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” Terry v. Ohio, 392 U.S. 1, 30 (1968).

“So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.” Adams v. Williams, 407 U.S. 143, 146 (1972).

2. **Factors Used to Justify “Frisks”**

a. Past Associations and Reputation of the Suspect

“Officer Wages began patting Strahan down, fearing that he might have a weapon. Wages testified that he had this concern based upon ... his prior experience with the defendant and the defendant’s alleged membership in the Banditos motorcycle gang, a group whose members carry weapons.” United States v. Strahan, 984 F.2d 155, 157 (6th Cir. 1993).

“Because Officer Extine knew that he was approaching a person with a violent criminal past, it was even more reasonable for him to take the precautionary measure of conducting a limited Terry search.” United States v. Perrin, 45 F.3d 869, 873 (4th Cir.), cert. denied, 515 U.S. 1126 (1995).

b. A Bulge in the Suspect’s Clothing

“The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of ‘reasonable caution’ would likely have conducted the ‘pat-down.’” Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977).

c. Furtive Movements By the Suspect

“The fact that he kept his right hand in his pocket at all times, given the surrounding circumstances, was reason enough to suspect Michelletti of possibly being armed and warranted the pat down frisk for the officers’ and, possibly, the bystanders’ safety.” United States v. Michelletti, 991 F.2d 183, 185 (5th Cir. 1993), reh’g en banc, 13 F.3d 838 (5th Cir.), cert. denied, 513 U.S. 829 (1994).

“Officer Flaherty’s decision to frisk Brown to determine if he was armed was permissible, especially since Flaherty saw Brown put his hands inside his pants.” United States v. Quarles, 955 F.2d 498, 501-502 (8th Cir.), cert. denied, 504 U.S. 944 (1992).

d. The Nature of the Offense Under Investigation

“The officers’ reasonable suspicion that McMurray was dealing drugs provides an adequate basis for them to reasonably believe he might be armed and dangerous, because ‘weapons and violence are frequently associated with drug transactions.’” United States v. McMurray, 34 F.3d 1405, 1410 (8th Cir. 1994), cert. denied, 513 U.S. 1179 (1995)(quotation omitted).

“His knowledge of the prior burglaries in the area led to his concern that these two leery men were involved in a burglary in progress at this early hour of the morning. The dimly lit area where the officer was questioning the two men heightened his skepticism. More importantly, his experience that burglars often carry weapons or other dangerous objects and the evasive conduct on the part of Chrispman when asking to return to the cab to get his identification, clearly support Officer Lyons’ concern for his safety and suspicions that these men might be armed.” United States v. Walker, 924 F.2d 1, 4 (1st Cir. 1991).

3. **A Law Enforcement Officer is Looking for Weapons During the “Frisk”, Not Evidence**

“If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.” Minnesota v. Dickerson, 508 U.S. 366, 373 (1993).

“The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence” Adams v. Williams, 407 U.S. 143, 146 (1972).

4. **Evidence Recognized Through “Plain Touch” During a “Frisk” is Admissible**

“If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.” Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993).

5. **The “Automatic Companion” Rule**

“All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory ‘pat-down’ reasonably necessary to give assurance that they are unarmed.” United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971).

“We decline to adopt an ‘automatic companion’ rule, as we have serious reservations about the constitutionality of such a result under existing precedent.” United States v. Bell, 762 F.2d 495, 498 (6th Cir. 1985).

“This rule allows officers the freedom to conduct a cursory pat-down search regardless of the individual circumstances presented in each case. This appears to be in direct opposition to the Supreme Court’s directions in both Terry and Ybarra that the officers articulate specific facts justifying the suspicion that an individual is armed and dangerous. We decline to adopt the ‘automatic companion’ rule.” United States v. Flett, 806 F.2d 823, 827 (8th Cir. 1986).

K. **Vehicles - Investigative Stops and “Frisks”**

“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief.” Delaware v. Prouse, 440 U.S. 648, 653 (1979).

“[T]he usual traffic stop is more analogous to a so-called ‘Terry stop,’ ... than to a formal arrest.” Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

1. **Permissible Actions During Vehicle Stops**

a. *The Driver May Be Removed From the Vehicle*

“We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.” Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

b. *The Passengers May Be Removed From the Vehicle*

“We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.” Maryland v. Wilson, 519 U.S. 408, 415 (1997).

c. *The Passengers May Be Ordered to Remain **Inside** the Vehicle*

“This court concludes that in the circumstances presented, it follows from Wilson v. Maryland 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.” Rogala v. District of Columbia, 161 F.3d 44, 53 (D.C. Cir. 1998).

“In view of the Supreme Court’s ruling in Wilson, we have no hesitancy in holding that the officers lawfully ordered Moorefield to remain in the car with his hands in the air.” United States v. Moorefield, 111 F.3d 10, 13 (3d Cir. 1997).

d. *A Flashlight May Be Used to Illuminate the Interior of the Vehicle*

“It is likewise beyond dispute that Maples’ action in shining his flashlight to illuminate the interior of Brown’s car trenches upon no right secured to the latter by the Fourth Amendment. . . . Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.” Texas v. Brown, 460 U.S. 730, 739-40 (1983).

e. *Where the Vehicle’s Windows are Heavily Tinted, a Door May Be Opened to Check for Weapons*

”[W]henver, during a lawful traffic stop, officers are required to approach a vehicle with windows so heavily tinted that they are unable to view the interior of the stopped vehicle, they may, when it appears in their experienced judgment prudent to do so, open at least one of the vehicle’s doors and, without crossing the plane of the vehicle, visually inspect its interior in order to ascertain whether the driver is armed, whether he has access to weapons, or whether there are other occupants of the vehicle who might pose a danger to the officers.” United States v. Stanfield, 109 F.3d 976, 981 (4th Cir.), cert. denied, 522 U.S. 857 (1997).

f. *License and Registration Checks May Be Conducted*

“A reasonable investigation following a justifiable traffic stop may include asking for the driver’s license and registration, asking the driver to sit in the patrol car, and asking about the driver’s destination and purpose.” United States v. Allegree, 175 F.3d 648, 650 (8th Cir.), cert. denied, 528 U.S. 958 (1999).

See also United States v. Simmons, 172 F.3d 775, 778 (11th Cir. 1999); United States v. Dexter, 165 F.3d 1120, 1126 (7th Cir. 1999); United States v. Mendez, 118 F.3d 1426, 1429 (10th Cir. 1997).

g. *Questions Regarding Travel Plans May Be Asked*

“Questions about travel plans are routine and ‘may be asked as a matter of course without exceeding the proper scope of a traffic stop.’” United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000)(citation omitted).

During lawful stop, “the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered.” United States v. \$ 404,905.00, 182 F.3d 643, 647 (8th Cir. 1999).

“Travel plans typically are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop. For example, a motorist's travel history and travel plans may help explain, or put into context, why the motorist was weaving (if tired) or speeding (if there was an urgency to the travel).” United States v. Holt, 264 F.3d 1215, 1221(10th Cir. 2001).

2. A “Frisk” of a Vehicle

“[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” Michigan v. Long, 463 U.S. 1032, 1049 (1983).

“Officers may conduct a protective search of a vehicle’s passenger compartment when they have a reasonable belief that the suspect poses a danger and that their safety may be threatened by the possible presence of weapons.” United States v. Wimbush, 337 F.3d 947, 6-7 (7th Cir. 2003).

Noting Terry searches “are limited to areas immediately accessible to the suspect,” specifically, “the passenger compartment of the car.” United States v. Brown, 334 F.3d 1161, 1170 (D.C. Cir. 2003).

3. The Duration of a Vehicle Stop

“To detain the motorist any longer than is reasonably necessary to issue the traffic citation ... the officer must have reasonable suspicion that the individual has engaged in more extensive criminal conduct.” United States v. Townsend, 305 F.3d 537, 541 (6th Cir. 2002).

“If the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions.” United States v. Gregory, 302 F.3d 805, 809 (8th Cir. 2002)(citation omitted).

“The scope and duration of a traffic stop may be expanded beyond its initial purpose if, and only if, the police officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997).

Questioning that prolongs the detention, yet cannot be justified by the purpose of such an investigatory stop, is unreasonable under the Fourth Amendment.” United States v. Childs, 277 F.3d 947, 952 (7th Cir.), cert. denied, 537 U.S. 829 (2002).

4. Pretextual Stops

“We think [the] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.” Whren v. United States, 517 U.S. 806, 813 (1996).

“[A]n officer may stop a vehicle for a traffic violation when his true motivation is to search for contraband, as long as the officer had probable cause to initially stop the vehicle.” United States v. Hill, 195 F.3d 258, 264 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

IV. PROBABLE CAUSE

A. Definitions

1. **Generally**

“Articulating precisely what ... ‘probable cause’ mean[s] is not possible.” Ornelas v. United States, 517 U.S. 690, 695 (1996).

“[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules.” Illinois v. Gates, 462 U.S. 213, 232 (1983).

2. **Probable Cause to Search**

“We have described ... probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” Ornelas v. United States, 517 U.S. 690, 696 (1996)(citation omitted).

3. **Probable Cause to Arrest**

“The standard for arrest is probable cause, defined in terms of facts and circumstances ‘sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.’” Gerstein v. Pugh, 420 U.S. 103, 111 (1975)(citation and internal brackets omitted).

B. The Existence of Probable Cause is Based Upon the Totality of the Circumstances

“[W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. ... The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983).

C. There Are Various Methods of Establishing Probable Cause

1. **Direct Observation**

“Obviously, direct observation of the offense during its commission, as here, constitutes probable cause.” United States v. Marshall, 463 F.2d 1211, 1212 (5th Cir. 1972)(citation omitted).

2. **Observations By Fellow Law Enforcement Officers**

“Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.” United States v. Ventresca, 380 U.S. 102, 111 (1965).

“Under the ‘fellow-officer’ rule, law enforcement officials cooperating in an investigation are entitled to rely upon each other’s knowledge of facts when forming the conclusion that a suspect has committed or is committing a crime. ... Thus, when a law enforcement officer with information amounting to probable cause directs an officer who lacks the knowledge to make the arrest, we ‘impute’ to the arresting officer the directing officer’s knowledge.” United States v. Meade, 110 F.3d 190, 193-94 (1st Cir. 1997)(internal citations omitted).

3. **A Law Enforcement Officer's Training and Experience**

“Furthermore, when interpreting seemingly innocent conduct, the court issuing the warrant is entitled to rely on the training and experience of police officers.” United States v. Gil, 58 F.3d 1414, 1418 (9th Cir.), cert. denied, 516 U.S. 969 (1995).

“The affidavit was prepared by a police officer whose experience and expertise provided the clerk magistrate with further reason to credit the representation in the warrant application” United States v. Soule, 908 F.2d 1032, 1040 (1st Cir. 1990).

While an officer's ‘training and experience’ may be considered in determining probable cause, ... it cannot substitute for the lack of evidentiary nexus in [a] case.” United States v. Schultz, 14 F.3d 1093, 1097 (6th Cir. 1994).

4. **Information From a Drug Dog**

“A drug-sniffing canine alert is sufficient, standing alone, to support probable cause for a search.” Resendiz v. Miller, 203 F.3d 902, 903 (5th Cir. 2000)

“An alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle.” United States v. Hill, 195 F.3d 258, 273 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

“It is undisputed that a drug sniffing dog's detection of contraband in itself establishes probable cause for a search warrant.” United States v. Scarborough, 128 F.3d 1373, 1378 (10th Cir. 1997).

“When the canine alerted, the officers then had probable cause to search the vehicle and did not need a search warrant under the automobile exception.” United States v. Munroe, 143 F.3d 1113, 1116 (8th Cir. 1998).

5. **Information From Victims or Witnesses**

“When police officers obtain information from an eyewitness or victim establishing the elements of a crime, the information is almost always sufficient to provide probable cause for an arrest in the absence of evidence that the information, or the person providing it, is not credible.” Pasiewicz v. Lake County Forest Pres. Dist., 270 F.3d 520, 524 (7th Cir. 2001).

“When an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.” United States v. Phillips, 727 F.2d 392, 397 (5th Cir. 1984).

“Whereas other informants, who often are intimately involved with the persons informed upon and with the illegal conduct at hand, may have personal reasons for giving shaded or otherwise inaccurate information to law enforcement officials, such is not true of bystanders or eyewitness-victims who have no connection with the accused.” United States v. Flynn, 664 F.2d 1296, 1302-03 (5th Cir.), cert. denied, 456 U.S. 930 (1982)(internal quotation marks omitted).

6. **Information From Informants**

“When a search warrant is based solely on an informant's tip, the proper analysis is whether probable cause exists from the totality of the circumstances to determine a sufficient level of reliability and basis

of knowledge for the tip.” United States v. Bishop, 264 F.3d 919, 924 (9th Cir. 2001)(citing Illinois v. Gates, 462 U.S. 213, 238 (1983)).

a. Proven Track Record

“Information may be sufficiently reliable to support a probable cause finding if the person providing the information has a track record of supplying reliable information” United States v. Williams, 10 F.3d 590, 593 (9th Cir. 1993).

“One of the ways in which reliability of a tip can be substantiated ... is by showing that the informant has proven credible in other instances.” United States v. Warren, 42 F.3d 647, 652 (D.C. Cir. 1994).

“Law enforcement ‘reports’ as to a defendant’s ‘previous drug smuggling activities’ can corroborate a confidential informant’s ‘veracity.’” United States v. Bynum, 293 F.3d 192, 198 (4th Cir. 2002).

b. Declarations Against Penal Interest

“People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search.” United States v. Harris, 403 U.S. 573, 583 (1971).

“The fact that an informant’s statements are against his or her penal interest adds credibility to the informant’s report.” United States v. Schaefer, 87 F.3d 562, 566 (1st Cir. 1996).

c. Corroboration of the Informant’s Information

“When there is sufficient independent corroboration of an informant’s information, there is no need to establish the veracity of the informant.” United States v. Danhauer, 229 F.3d 1002, 1006 (10th Cir. 2000)

“Corroboration of the [confidential informant’s] information by independent investigation is an important factor in the calculus of probable cause.” United States v. Formaro, 152 F.3d 768, 770 (8th Cir. 1998).

d. First-Hand Observations By the Informant

“[E]ven if we entertain some doubt as to an informant’s motives, his explicit and detailed description of alleged wrongdoing, **along with a statement that the event was observed firsthand**, entitles his tip to greater weight than might otherwise be the case.” Illinois v. Gates, 462 U.S. 213, 234 (1983)(emphasis added).

“First-hand observations by a CI support a finding of reliability.” United States v. Johnson, 289 F.3d 1034, 1039 (7th Cir. 2002).

“An important indicia of reliability is the fact that the informant’s knowledge was based upon personal observation.” United States v. Cochrane, 896 F.2d 635, 641 (1st Cir.), cert. denied, 496 U.S. 929 (1990).

e. *The Informant's Presence Before the Judge*

“When a CI accompanies the officer and is available to give testimony before the judge issuing the warrant, his presence adds to the reliability of the information used to obtain the warrant, because it provides the judge with an opportunity to assess the informant’s credibility and allay any concerns he might have had about the veracity of the informant's statements.” United States v. Jones, 208 F.3d 603, 609 (7th Cir. 2000)(internal quotation marks omitted).

f. *A Face-to-Face Encounter With the Officer*

“Agent Thom’s initial attempt to verify his source came when he insisted on meeting personally with the informant, rather than simply taking an anonymous tip over the telephone. This allowed Thom to question the informant face-to-face and to determine whether he or she appeared to be a credible person. That first-hand observation gives greater weight to Agent Thom’s decision to rely on the informant’s information.” United States v. Robertson, 39 F.3d 891, 893 (8th Cir. 1994), cert. denied, 514 U.S. 1090 (1995).

Noting tip was reliable in part because the law enforcement officer “had an opportunity to assess the informant’s credibility because he gave his tip in person.” United States v. Gabrio, 295 F.3d 880, 883 (8th Cir.), cert. denied, 537 U.S. 962 (2002).

g. *Consistency Between Independent Informants*

“Courts often have held that consistency between the reports of two independent informants helps to validate both accounts.” United States v. Schaefer, 87 F.3d 562, 566 (1st Cir. 1996). “Each informant gave information to the police independent of the other informants, and each one’s information corroborate the others.” United States v. Fields, 72 F.3d 1200, 1214 (5th Cir.), cert. denied, 519 U.S. 807 (1996).

“By telling consistent yet independent stories, the informants provide cross-corroboration, and enhance the reliability of the application as a whole.” United States v. Pritchard, 745 F.2d 1112, 1121 (7th Cir. 1984)(quotation omitted).

h. *The Degree of Detail Given By the Informant*

“[E]ven if we entertain some doubt as to an informant’s motives, **his explicit and detailed description of alleged wrongdoing**, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.” Illinois v. Gates, 462 U.S. 213, 234 (1983)(emphasis added).

“Where the affidavit is supported by an informant’s tip, the totality-of-the-circumstances inquiry encompasses several factors, including ... the amount of detail provided” United States v. Koerth, 312 F.3d 862, 866 (7th Cir. 2002), cert. denied, ___ U.S. ___, 123 S. Ct. 1947 (2003).

V. THE EXCLUSIONARY RULE

A. **The Purpose of the Rule**

“The rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.” Elkins v. United States, 364 U.S. 206, 217 (1960).

“[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.” United States v. Leon, 468 U.S. 897, 916 (1984).

B. Exceptions to the Exclusionary Rule

1. **Defendant Has No Expectation of Privacy (No Standing)**

“[S]ince the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, ... it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule’s protections.” Rakas v. Illinois, 439 U.S. 128, 134 (1978)(internal citation omitted).

“[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.” Minnesota v. Carter, 525 U.S. 83, 88 (1998).

2. **Impeachment**

“We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences.” United States v. Havens, 446 U.S. 620, 626 (1980).

“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.” Walder v. United States, 347 U.S. 62, 65 (1954).

“Expanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and law enforcement officers. As a result, this expansion would not promote the truth-seeking function to the same extent as did creation of the original exception, and yet it would significantly undermine the deterrent effect of the general exclusionary rule. Hence, we believe that this proposed expansion would frustrate rather than further the purposes underlying the exclusionary rule.” James v. Illinois, 493 U.S. 307, 313-14 (1990).

3. **Good Faith**

“Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according ‘great deference’ to a magistrate’s determination. ... Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate’s finding of probable cause does not preclude inquiry into the **knowing or reckless falsity** of the affidavit on which that determination was based. ... Second, the courts must also insist that the magistrate purport to perform his **neutral and detached** function and not serve merely as a rubber stamp for the police. ... A magistrate failing to manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application and who acts instead as an adjunct law enforcement officer cannot provide valid authorization for an otherwise unconstitutional search. ... Third, reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a **substantial basis for determining the existence of probable cause**. ... Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. ... Even if the warrant application was supported by more than a ‘bare bones’ affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because

the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, ... or because the form of the warrant was improper in some respect." United States v. Leon, 468 U.S. 897, 914-15 (1984)(internal quotations and marks omitted).

"The good faith exception cannot apply if one of four circumstances is present: (1) If the issuing magistrate/judge was misled by information in an affidavit that the affiant knew was false or would have known except for reckless disregard of the truth; (2) where the issuing magistrate/judge wholly abandoned his or her judicial role; (3) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid." United States v. Payne, 2003 U.S. App. LEXIS 15367 (5th Cir. 2003)(citation omitted).

4. **Deportation Hearings**

"Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end." Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984).

5. **Grand Jury Proceedings**

"In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect." United States v. Calandra, 414 U.S. 338, 354 (1974).

6. **Civil Proceedings**

"We conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." United States v. Janis, 428 U.S. 433, 454 (1976).

7. **Inevitable Discovery**

"[C]ases implementing the exclusionary rule begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity. ... Of course, this does not end the inquiry. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." Nix v. Williams, 467 U.S. 431, 444 (1984).

8. **Independent Source**

"In short, it is clear from our prior holdings that the exclusionary rule has no application [where] the Government learned of the evidence from an 'independent source.'" Segura v. United States, 468 U.S. 796, 805 (1984)(quotation omitted).

9. **Attenuation**

“Sophisticated argument may prove a causal connection between information obtained through illicit [activity] and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.” Nardone v. United States, 308 U.S. 338, 341 (1939).

“We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Wong Sun v. United States, 371, U.S. 471, 487-88 (1963)(quotation omitted).

VI. ARRESTS

A. **Generally**

“The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.” Carroll v. United States, 267 U.S. 132, 156-57 (1925).

“The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.” United States v. Watson, 423 U.S. 411, 418 (1976).

B. **Warrantless Arrests Inside a Suspect’s Home**

“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” Payton v. New York, 445 U.S. 573, 590 (1980).

“[A]bsent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant.” Steagald v. United States, 451 U.S. 204, 214 n.7 (1981).

“[W]arrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.” Welsh v. Wisconsin, 466 U.S. 740, 749 (1984).

C. **Entering a Suspect’s Home to Make an Arrest Pursuant to an Arrest Warrant**

“[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” Payton v. New York, 445 U.S. 573, 603 (1980).

“Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person’s privacy interest when it is necessary to arrest him in his home.” Steagald v. United States, 451 U.S. 204, 214 n.7 (1981).

“[P]olice officers entering a residence pursuant to an arrest warrant must demonstrate (1) a reasonable belief that the arrestee lived in the residence, and (2) a reasonable belief that the arrestee could be found within the residence at the time of the entry.” Valdez v. McPheters, 172 F.3d 1220, 1224 (10th Cir. 1999)

1. **Does “Reason to Believe” Mean “Probable Cause?”**

COMPARE: “We therefore find that the ‘reason to believe, or reasonable belief, standard of Payton and Underwood should be read to entail the same protection and reasonableness inherent in probable cause.” United States v. Gorman, 314 F.3d 1105, 1114-15 (9th Cir. 2002).

WITH: “While probable cause itself is a relatively low threshold of proof, it is a higher standard than ‘reasonable belief’, which is, as everyone agrees, the appropriate standard.” Valdez v. McPheters, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999).

“Although we agree with the district court’s ultimate conclusion, we note that it applied too stringent a test when it held that ‘officers may properly determine whether they have **probable cause** to believe that an apartment or house is the arrestee’s residence, and if probable cause exists, they may enter such premises to effect the arrest when they have a reasonable basis to believe that the arrestee will be present.’ As noted above, the proper inquiry is whether there is a **reasonable belief** that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present.” United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995)(emphasis in original).

“All but one of the other circuits that have considered the question are in accord, relying upon the ‘reasonable belief’ standard as opposed to a probable cause standard. To the extent that this court has not already done so in Woods, we adopt today the ‘reasonable belief’ standard of the Second, Third, Eighth, and Eleventh Circuits.” United States v. Route, 104 F.3d 59, 62 (5th Cir.), cert. denied, 521 U.S. 1109 (1997)(internal footnote omitted).

See also United States v. Risse, 83 F.3d 212, 216 (8th Cir. 1996); United States v. Edmonds, 52 F.3d 1236, 1248 (3d Cir.), vacated in part on other grounds, 52 F.3d at 1251 (1995); United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir.), cert. denied, 516 U.S. 869 (1995).

2. **Factors to Consider in Determining Whether There is “Reason to Believe” a Suspect is in the Home**

a. *Surveillance Indicating the Suspect is in the Residence*

“While surveillance certainly may bolster a Payton entry, the cases fail to reveal any requirement of substantial prior surveillance of a residence prior to entry.” Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. 1999).

b. *The Presence of the Suspect’s Automobile*

“The suspect’s presence may be suggested by the presence of an automobile.” Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. 1999).

”The presence of a vehicle connected to a suspect is sufficient to create the inference that the suspect is at home.” United States v. Magluta, 44 F.3d 1530, 1538 (11th Cir.), cert. denied, 516 U.S. 869 (1995).

c. *The Time of Day*

“Moreover, the agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that Terry would be home.” United States v. Terry, 702 F.2d 299, 319 (2d Cir.), cert. denied, 461 U.S. 931 (1983)

“The agents came to the apartment to arrest Carlton Love at 6:45 a.m., early enough that it was unlikely someone living in the apartment would have already departed for the day.” United States v. Edmonds, 52 F.3d 1236, 1248 (3d Cir.), vacated in part on other grounds, 52 F.3d at 1251 (1995)

d. *Observing the Lights or Other Electrical Devices*

“Faber also testified at the suppression hearing that when he arrived at 1520 Mims, although Route was leaving the residence, Faber could hear the television inside the house and noticed another vehicle remaining in the driveway. In light of Faber’s reasonable belief that Crossley resided at 1520 Mims, we agree with the district court that Faber’s observations were sufficient to form a reasonable belief that Crossley was in fact in the residence at the time of the warrant.” United States v. Route, 104 F.3d 59, 63 (5th Cir.), cert. denied, 521 U.S. 1109 (1997).

“[T]he suspect’s presence may be suggested by ... observing the operation of lights or other electrical devices” Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. 1999).

e. *The Circumstances of a Suspect’s Employment*

“The CI also told Graham that Lauter was unemployed and typically slept late, thus supporting a reasonable belief that Lauter was present in the apartment when the warrant was executed.” United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995).

D. **Entering a Third Party’s Home to Make an Arrest Pursuant to an Arrest Warrant**

“The issue in this case is whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. Concluding that a search warrant must be obtained absent exigent circumstances or consent, we reverse the judgment of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction.” Steagald v. United States, 451 U.S. 204, 205-06 (1981).

“[A]bsent exigent circumstances or consent, the police cannot search for the subject of an arrest warrant in the home of a third party, without first obtaining a search warrant directing entry.” Minnesota v. Carter, 525 U.S. 83, 100 (1998)(Kennedy, J., concurring).

“The principle discussed in Payton, allowing officers to enter the residence of the suspect named in the arrest warrant, does not authorize entry into a residence in which the officers do not believe the suspect is residing but believe he is merely visiting.” United States v. Lovelock, 170 F.3d 339, 344 (2d Cir.), cert. denied, 528 U.S. 853 (1999).

VII. KNOCKING AND ANNOUNCING

A. Part of the “Reasonableness” Analysis of the Fourth Amendment

“Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.” Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

B. The Rationale Behind the Rule

”[T]he purposes of the knock and announce rule ... include: 1) the potential for violence; 2) preventing unnecessary destruction of private property; and 3) showing respect for the individual’s privacy interests.” United States v. Mendoza, 281 F.3d 712, 717 (8th Cir.), cert. denied, ___ U.S. ___, 123 S. Ct. 515 (2002).

“We say this having in mind three interests that are advanced by the knock and announce requirement ... : (1) reducing the potential for a violent confrontation between the police and an occupant startled by an unannounced intrusion; (2) preventing needless destruction of private property; and (3) showing respect for the individual’s privacy interest in his home.” United States v. Kemp, 12 F.3d 1140, 1142 (D.C. Cir. 1994).

“The interests sought to be protected by [the knock and announce requirement] are not debatable and have been expressed to be (1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) the needless destruction of private property; and (3) a recognition of the individual’s right of privacy in his house.” United States v. Brown, 52 F.3d 415, 421 (2d Cir. 1995), cert. denied, 516 U.S. 1068 (1996).

C. “No-Knock” Entries are Permitted in Certain Circumstances

“[A]lthough a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.” Wilson v. Arkansas, 514 U.S. 927, 936 (1995).

“In order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

VIII. SEARCH WARRANTS

A. The Preference for Warrants

“Instead, the legitimacy of the decision to impound the dwelling follows from the law’s strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later, judicial review than a search without one.” Illinois v. McArthur, 531 U.S. 326, 338 (2001)(Souter, J., concurring).

“There is a strong preference for searches and entries conducted under the judicial auspices of a warrant.” United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002), cert. denied, ___ U.S. ___, 123 S. Ct. 966 (2003).

“A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant.” United States v. Hodge, 246 F.3d 301, 307 (3rd Cir. 2001).

B. Warrants Can Save Otherwise Unlawful Searches

“The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” United States v. Ventresca, 380 U.S. 102, 109 (1965).

“Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.” United States v. Leon, 468 U.S. 897, 922 (1984)(internal brackets and citations omitted).

C. General Warrants are Prohibited

“General warrants ... are prohibited by the Fourth Amendment. The problem posed by the general warrant is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings....” Andresen v. Maryland, 427 U.S. 463, 480 (1976)(citation omitted).

D. Particularity

“The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one ‘particularly describing the place to be searched and the persons or things to be seized.’ The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” Maryland v. Garrison, 480 U.S. 79, 84 (1987)(footnote omitted).

E. The Purposes Served By the Particularity Requirement

1. Limits the Discretion of the Officers Executing the Warrant

“The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” Stanford v. Texas, 379 U.S. 476, 485 (1965)(citation omitted).

2. Informs the Subject of What the Officers are Entitled to Take

“The requirement that the warrant itself particularly describe the material to be seized is not only to circumscribe the discretion of the executing officers but also to inform the person subject to the search and seizure what the officers are entitled to take.” In re Application of Lafayette Academy, Inc. v. United States, 610 F.2d 1, 5 (1st Cir. 1979).

3. Defines the Scope of the Search

“The particularity requirement also ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.” United States v. Janus Indus., 48 F.3d 1548, 1554 (10th Cir.), cert. denied, 516 U.S. 824 (1995)(citation and internal brackets omitted).

F. **Standard for Particularity**

1. **Particular Description of the Place to be Searched**

“It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.” Steele v. United States, 267 U.S. 498, 503 (1925).

“The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.” United States v. Bonner, 808 F.2d 864, 866 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987)(quotation omitted)

”The warrant must ... enable the searcher to locate and identify the premises with reasonable effort.” United States v. Bieri, 21 F.3d 811, 815 (8th Cir.), cert. denied, 513 U.S. 878 (1994).

2. **Particular Description of the Thing to be Seized**

“The constitutional standard for the particularity of a search warrant is that the language must be sufficiently definite to enable the searcher to reasonably ascertain and identify the things authorized to be seized.” United States v. Saunders, 957 F.2d 1488, 1491 (8th Cir.), cert. denied, 506 U.S. 889 (1992).

“The requirement of particularity arises out of a hostility to the Crown’s practice of issuing ‘general warrants’ taken to authorize the wholesale rummaging through a person’s property in search of contraband or evidence.” United States v. Upham, 168 F.3d 532, 535 (1st Cir.), cert. denied, 527 U.S. 1011 (1999).

“In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the ‘things to be seized’ is to be accorded the most scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas which they contain.” Stanford v. Texas, 379 U.S. 476, 485 (1965)(internal footnote omitted).

G. **Neutral and Detached Magistrates**

“The primary reason for the warrant requirement is to interpose a ‘neutral and detached magistrate’ between the citizen and ‘the officer engaged in the often competitive enterprise of ferreting out crime.’” United States v. Karo, 468 U.S. 705, 717 (1984)(citation omitted).

“We have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the ‘persons, houses, papers, and effects’ of citizens.” Thompson v. Louisiana, 469 U.S. 17, 20 (1984).

“An issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search.” Shadwick v. Tampa, 407 U.S. 345, 350 (1972).

1. **Participation in the Search**

“The Town Justice did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure. ... He allowed himself to become

a member, if not the leader, of the search party which was essentially a police operation.” Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-27 (1979).

2. State Attorney General Issued the Warrant

“In this case, the determination of probable cause was made by the chief ‘government enforcement agent’ of the State - the Attorney General - who was actively in charge of the investigation and later was to be chief prosecutor at the trial. ... [Thus] there could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances.” Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971)(emphasis in original).

3. Magistrate Has Financial Interest in Issuance of Warrants

“The justice is not salaried. He is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his *issuance* of the warrant, and he receives nothing for his *denial* of the warrant. His financial welfare, therefore, is enhanced by positive action and is not enhanced by negative action. The situation, again, is one which offers ‘a possible temptation to the average man as a judge ... or which might lead him not to hold the balance nice, clear and true between the State and the accused.’ It is, in other words, another situation where the defendant is subjected to what surely is judicial action by an officer of a court who has ‘a direct, personal, substantial, pecuniary interest’ in his conclusion to issue or to deny the warrant.” Connally v. Georgia, 429 U.S. 245, 250 (1977).

H. Stale Information

“There is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case, and the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit.” United States v. Koelling, 992 F.2d 817, 822 (8th Cir. 1993)(citation omitted).

1. Age of the Information Contained in the Affidavit

“Age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist.” United States v. Harvey, 2 F.3d 1318, 1322 (3d Cir. 1993).

“The determination of probable cause is not merely an exercise in counting the days or even months between the facts relied on and the issuance of the warrant.” United States v. Williams, 897 F.2d 1034, 1039 (10th Cir. 1990), cert. denied, 500 U.S. 937 (1991).

2. Whether the Criminal Activity is Continuing

“When the evidence sought is of an ongoing criminal business ... greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time.” United States v. Pitts, 6 F.3d 1366, 1369-1370 (9th Cir. 1993).

“[T]he longer the expected duration of the criminal activity ... the more likely that [information] from the seemingly distant past will be relevant to a current investigation.” United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996).

3. **The Type of Evidence Sought in the Search**

“[C]ourts demand less current information if the evidence sought is of the sort that can be reasonably be expected to be kept for long periods of time in the place to be searched.” United States v. McKeever, 5 F.3d 863, 866 (5th Cir. 1993).

“The warrant did not target items of transient existence, but, rather, featured chattels of relatively dear value and solid construction (including hardware commonly used in the growing and distribution of marijuana), likely to be in service for several years. Since these items possessed enduring worth and utility, information that might be considered ancient history in considering the probable whereabouts of more transient goods would be timely here.” United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996).

4. **The Nature of the Location to be Searched**

“The target’s ownership of the real estate to be searched influences the staleness calculus.” United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996).

“[I]n the case of drug dealers, evidence is likely to be found where the dealers live.” United States v. Vaandering, 50 F.3d 696, 700 (9th Cir. 1995).

I. **False or Misleading Information in the Affidavit**

1. **Generally**

“[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

2. **The Requirements for a Hearing Under Franks**

a. *Affidavit Contains a False Statement or Material Omission*

(1) False Statements

First, the defendant must show “the warrant affidavit contained false information ...” United States v. Whitley, 249 F.3d 614, 620 (7th Cir. 2001).

“In order to prevail on a challenge to a warrant affidavit under Franks, a defendant must [first] show ... “that a false statement ... was included in the affidavit ...” United States v. Gladney, 48 F.3d. 309, 313 (8th Cir. 1995).

(2) Material Omissions

“A material omission of information may also trigger a Franks hearing.” United States v. Castillo, 287 F.3d 21, 25 (1st Cir. 2002)(citation omitted).

“Omissions ... can constitute improper government behavior.” United States v. Tomblin, 46 F.3d 1369, 1377 (5th Cir. 1995).

b. *The False Statement or Omission was Made Knowingly and Intentionally, or With Reckless Disregard for the Truth*

(1) Knowing and Intentionally

“When the Fourth Amendment demands a factual showing sufficient to comprise ‘probable cause,’ the obvious assumption is that there will be a truthful showing. This does not mean ‘truthful’ in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge that sometimes must be garnered hastily. But surely it is to be ‘truthful’ in the sense that the information put forth is believed or appropriately accepted by the affiant as true.” Franks v. Delaware, 438 U.S. 154, 164-65 (1978).

“[M]isstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause” United States v. Hammett, 236 F.3d 1054, 1058 (9th Cir.), cert. denied, 534 U.S. 866 (2001).

With regard to omissions, the defendant must show “that the affiant omitted facts with the intent to make ... the affidavit misleading” United States v. LaMorie, 100 F.3d 547, 555 (8th Cir. 1996).

“Negligent omissions will not undermine the affidavit” United States v. McCarty, 36 F.3d 1349, 1356 (5th Cir. 1994).

(2) Reckless Disregard for the Truth

“The test for determining whether an affiant’s statements were made with reckless disregard for the truth is thus not simply whether the affiant acknowledged that what he reported was true, but whether, viewing all of the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.” United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995).

“[O]missions are made with reckless disregard if an officer withholds a fact in his ken that any reasonable person would have known that this was the kind of thing the judge would wish to know.” Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000)(quotation omitted).

c. *The False Statement or Omission Must Be Necessary to the Finding of Probable Cause*

“Even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause.” United States v. Dickey, 102 F.3d 157, 162 (5th Cir. 1996)(citations omitted).

”Disputed issues are not material if, after crossing out any allegedly false information

and supplying any omitted facts, the ‘corrected affidavit’ would have supported a finding of probable cause.” Velardi v. Walsh, 40 F.3d 569, 573 (2d Cir. 1994)(citation omitted).

“When a defendant offers proof of an omission, ‘the issue is whether, even had the omitted statements been included in the affidavit, there was still probable cause to issue the warrant.’” United States v. Higgins, 995 F.2d 1, 4 (1st Cir. 1993)(citation omitted).

IX. PROTECTIVE SWEEPS

A. Defined

“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” Maryland v. Buie, 494 U.S. 325, 237 (1990).

B. Scope

“We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Maryland v. Buie, 494 U.S. 325, 334 (1990).

C. Requirements

“We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Maryland v. Buie, 494 U.S. 325, 335-36 (1990).

1. **Reasonable Belief the Area to be Swept Harbors an Individual Posing a Danger**

“We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing, ... that the area swept harbored an individual posing a danger to the officer or others.” Maryland v. Buie, 494 U.S. 325, 327 (1990).

“The officer’s belief must be based on specific and articulable facts.” United States v. Cunningham, 133 F.3d 1070, 1073 (8th Cir.), cert. denied, 523 U.S. 1131 (1998).

2. **Officers May Look Only in Places Where Persons Could Be Located**

“We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found.” Maryland v. Buie, 494 U.S. 325, 335 (1990).

“Rather, such a search may only encompass those spaces where an individual might be found.” United States v. Blue, 78 F.3d 56, 61 (2d Cir. 1996).

3. **The Protective Sweep May Last No Longer Than is Necessary to Dispel the Danger**

“The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Maryland v. Buie, 494 U.S. 325, 335-36 (1990).

“Although Mr. Burrows claims that the search was too lengthy, the record supports the determination that the search of the four bedrooms and linen closet, which required the officers to force four locked doors, took no more than five minutes, an interval compatible with the officers’ legitimate purpose.” United States v. Burrows, 48 F.3d 1011, 1017 (7th Cir.), cert. denied, 515 U.S. 1168 (1995).

“The sweep was properly limited in scope, because the officer did not enter the garage when it appeared no one was in it. And its duration was between thirty and forty seconds, well within the time it took to arrest Mr. Snider and depart.” United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997), cert. denied, 522 U.S. 1141 (1998).

“Because the government failed to establish these facts, we will not presume that the sweep was short and that it occurred immediately after arresting Mr. Kalasho. If the agents were concerned about safety, it seems unlikely that they would have lingered in the house for forty-five minutes after confronting Mr. Kalasho at the front door with no resistance. Consequently, under the circumstances of this particular protective sweep, we conclude that the search was improper.” United States v. Akrawi, 920 F.2d 418, 421 (6th Cir. 1990).

D. **Protective Sweep When Arrest Occurs Outside the Residence**

“If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect the reasonableness of the officer’s conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another. The likelihood of the destruction of evidence is the same whether the arrest is indoors or in an outside area within the sight or hearing range of an accomplice within the residence.” United States v. Hoyos, 892 F.2d 1387, 1397 (9th Cir. 1989), cert. denied, 498 U.S. 825 (1990).

“Even cases that countenance protective sweeps when an arrest is made just outside the home do so on the theory that the officers are as much at risk from an unexpected assault on the defendant’s doorstep as they might be inside the home.” United States v. Arch, 7 F.3d 1300, 1303 (7th Cir. 1993), cert. denied, 510 U.S. 1139 (1994).

Noting that protective sweep inside home is lawful even where arrest occurred outside “if the arresting officers had ‘(1) a reasonable belief that third persons [were] inside, and (2) a reasonable belief that the third persons (were) aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public.’” United States v. Oguns, 921 F.2d 442, 446 (2d Cir. 1990)(quotation omitted).

“Arresting officers have a right to conduct a quick and cursory check of the arrestee’s lodging immediately subsequent to arrest - even if the arrest is near the door but outside the lodging - where they have reasonable grounds to believe that there are other persons present inside who might present a security risk.” United States v. Jackson, 700 F.2d 181, 189 (5th Cir.), cert. denied, 464 U.S. 842 (1983)(quotation omitted).

X. PLAIN VIEW

A. Generally

“It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.” Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

“An example of the applicability of the ‘plain view’ doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.” Horton v. California, 496 U.S. 128, 135 (1990).

B. Requirements

“It is ... an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view, its incriminating character must also be ‘immediately apparent.’ ... Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.” Horton v. California, 496 U.S. 128, 136-37 (1990).

XI. THE VEHICLE EXCEPTION

A. Generally

“If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.” Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).

“[A] warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment.” United States v. Ross, 456 U.S. 798, 799 (1982).

B. Rationales for the Vehicle Exception

1. Inherent Mobility of the Vehicle

“[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.” Carroll v. United States, 267 U.S. 132, 153 (1925).

“[T]he inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.” South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

“The capacity to be ‘quickly moved’ was clearly the basis of the holding in Carroll, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception.” California v. Carney, 471 U.S. 386, 390 (1985).

2. **Reduced Expectation of Privacy**

“Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspections stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.” South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

“Our first cases establishing the automobile exception to the Fourth Amendment’s warrant requirement were based on the automobile’s ‘ready mobility,’ an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. ... More recent cases provide a further justification: the individual’s reduced expectation of privacy in an automobile, owing to its pervasive regulation. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).

“Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. ... These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways.” California v. Carney, 471 U.S. 386, 391-92 (1985).

C. **Requirements**

1. **Probable Cause**

“In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.” United States v. Ross, 456 U.S. 798, 809 (1982).

2. **Readily Mobile**

“When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes - temporary or otherwise - the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. California v. Carney, 471 U.S. 386, 392-93 (1985)(internal footnote omitted).

“For a vehicle to fall within the automobile exception, it is not necessary that it be occupied or moving at the time of the police officer's intrusion into the vehicle.” United States v. Wesley, 918 F. Supp. 81, 85 (W.D.N.Y. 1996).

D. **No Exigency is Required to Conduct the Search**

“[U]nder our established precedent, the ‘automobile exception’ has no separate exigency requirement.” Maryland v. Dyson, 527 U.S. 465, 466 (1999).

E. **The Search Need Not Be Contemporaneous With the Seizure**

“There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure.” United States v. Johns, 469 U.S. 478, 484 (1985)(citations omitted).

“The justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court’s assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.” Michigan v. Thomas, 458 U.S. 259, 261 (1982).

F. **The Scope of the Search**

“We hold that the scope of the warrantless search authorized by [the mobile conveyance] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of ***every part of the vehicle and its contents that may conceal the object of the search.***” United States v. Ross, 456 U.S. 798, 825 (1982)(emphasis added).

“We hold that police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.” Wyoming v. Houghton, 526 U.S. 295, 307 (1999).

G. **Containers Placed in the Vehicle**

“In the case before us, the police had probable cause to believe that the paper bag in the automobile’s trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.” California v. Acevedo, 500 U.S. 565, 580 (1991).

XII. **EXIGENT CIRCUMSTANCES**

A. **Generally**

“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

“[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.” Michigan v. Tyler, 436 U.S. 499, 509 (1978).

“The exception encompasses several common situations where resort to a magistrate for a search warrant is not feasible or advisable, including: danger of flight or escape, loss or destruction of evidence, risk of harm to the public or the police, mobility of a vehicle, and hot pursuit.” United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002), cert. denied, ___ U.S. ___, 123 S. Ct. 966 (2003).

B. **Emergency Scenes**

“[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.” Mincey v. Arizona, 437 U.S. 385, 392 (1978).

1. **The Probable Cause Standard is Different for Emergency Scene Searches**

“In the typical case, probable cause exists where the circumstances would lead a reasonable person to believe a search will disclose evidence of a crime. In emergencies, however, law enforcement officers are not motivated by an expectation of seizing evidence of a crime. Rather, the officers are compelled

to search by a desire to locate victims and the need to ensure their own safety and that of the public.” United States v. Holloway, 290 F.3d 1331, 1337 (11th Cir. 2002), cert. denied, ___ U.S. ___, 123 S. Ct. 966 (2003).

“Probable cause for a forced entry in response to exigent circumstances requires finding a probability that a person is in ‘danger.’” Koch v. Town of Brattleboro, 287 F.3d 162, 169 (2d Cir. 2002)(quotation omitted).

2. Evidence Found in Plain View May Be Seized

“The police may seize any evidence that is in plain view during the course of their legitimate emergency activities.” Mincey v. Arizona, 437 U.S. 385, 393(1978).

3. There is No “Murder Scene” Exception to the Fourth Amendment

“In sum, we hold that the ‘murder scene exception’ created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments - that the warrantless search of Mincey’s apartment was not constitutionally permissible simply because a homicide had recently occurred there.” Mincey v. Arizona, 437 U.S. 385, 395 (1978).

“In Mincey v. Arizona, 437 U.S. 385 (1978), we unanimously rejected the contention that one of the exceptions to the Warrant Clause is a ‘murder scene exception.’” Thompson v. Louisiana, 469 U.S. 17, 21 (1984).

“This position squarely conflicts with Mincey v. Arizona, *supra*, where we rejected the contention that there is a ‘murder scene exception’ to the Warrant Clause of the Fourth Amendment.” Flippo v. West Virginia, 528 U.S. 11, 14 (1999).

C. Destruction of Evidence

1. Generally

“The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence’ We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.” Schmerber v. California, 384 U.S. 757, 770-71 (1966).

2. Requirements

Generally, a “warrantless entry to prevent the destruction of evidence ‘is justified if the government demonstrates: (1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that the loss or destruction of evidence is imminent.” United States v. Gaitan-Acevedo, 148 F.3d 577, 585 (6th Cir. 1998)(citation omitted).

“A police officer can show an objectively reasonable belief that contraband is being, or will be, destroyed within a home if he can show 1) a reasonable belief that third persons are inside a private dwelling and 2) a reasonable belief that these third persons are aware of an investigatory stop or arrest

of a confederate outside the premises so that they might see a need to destroy evidence.” United States v. Socey, 846 F.2d 1439, 1445 (D.C. Cir.), cert. denied, 488 U.S. 858 (1988).

“A warrantless search of a residence is justified ... to prevent the destruction of evidence if factual circumstances demonstrate ‘a sufficient basis for an officer to believe somebody in the residence will likely destroy evidence.’” United States v. Munoz, 894 F.2d 292, 296 (8th Cir.), cert. denied, 495 U.S. 909 (1990)(citation omitted).

D. **Hot Pursuit**

“‘[H]ot pursuit’ means some sort of a chase, but it need not be an extended hue and cry ‘in and about the public streets.’ The fact that the pursuit here ended almost as soon as it began did not render it any the less a ‘hot pursuit’ sufficient to justify the warrantless entry into Santana’s house. ... We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place.” United States v. Santana, 427 U.S. 38, 43 (1976).

“The Government also suggests that ‘In a sense, the arrest was made in ‘hot pursuit.’ ...” However, we find no element of ‘hot pursuit’ in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence, who claims without denial that she was in bed at the time, and who made no attempt to escape.” Johnson v. United States, 333 U.S. 10, 16 n.7 (1948).

1. **Generally Requires a “Serious” Crime**

“Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government’s interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.” Welsh v. Wisconsin, 466 U.S. 740, 750 (1984)(citation and internal footnote omitted).

“[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.” Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).

2. **Immediate or Continuous Pursuit**

“[T]he claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime.” Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).

“The hot pursuit exception to the warrant requirement only applies when officers are in ‘immediate’ and ‘continuous’ pursuit of a suspect from the scene of the crime.” United States v. Johnson, 256 F.3d 895, 907 (9th Cir. 2001).

“‘Hot pursuit’ has been defined as some sort of chase, although it need not be an extended hue and cry, in and about the public streets. ... The pursuit must be immediate or relatively continuous to justify the failure to secure a warrant.” United States v. Baldacchino, 762 F.2d 170, 177 (1st Cir. 1985) (citation omitted).

3. **Probable Cause the Suspect is in the Residence**

“A warrantless intrusion into an individual’s home is presumptively unreasonable unless the person consents or probable cause and exigent circumstances justify the encroachment.” United States v. Jones, 239 F.3d 716, 719 & n.2 (5th Cir. 2001).

“Exigent circumstances justify a warrantless entry into a residence only where there is also probable cause to enter the residence.” United States v. Johnson, 9 F.3d 506, 509 (6th Cir. 1993).

XIII. SEARCHES INCIDENT TO ARREST

A. **Generally**

“It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.” United States v. Robinson, 414 U.S. 218, 224 (1973).

B. **Rationales for the Search Incident to Arrest Exception**

“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.” Chimel v. California, 395 U.S. 752, 762-63 (1969).

“The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.” United States v. Robinson, 414 U.S. 218, 234 (1973).

C. **Requirements**

1. **Valid Custodial Arrest**

“In Robinson, *supra*, we noted the two historical rationales for the ‘search incident to arrest’ exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. ... But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify [a] search [made pursuant to issuance of traffic citation].” Knowles v. Iowa, 525 U.S. 113, 116-17 (1998).

“This Court’s opinion [in Terry v. Ohio] explicitly recognized that there is a ‘distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons.’” United States v. Robinson, 414 U.S. 218, 227 (1973)(citation omitted).

“Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might be likely instead to be concerned with diverting attention away from himself. Accordingly, we do not hold that a full Chimel search would have been justified in this case without a formal arrest and without a warrant.” Cupp v. Murphy, 412 U.S. 291, 296 (1973).

2. **Search Must be “Substantially Contemporaneous” With the Arrest**

“[A] search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.” Stoner v. California, 376 U.S. 483, 486 (1964).

“The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime - things which might easily happen where the weapon or evidence is on the accused’s person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.” Preston v. United States, 367 U.S. 364, 367 (1964).

D. **The Scope of the Search**

1. **The Arrestee’s Person**

“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated.” Chimel v. California, 395 U.S. 752, 762-63 (1969).

“[W]e hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment. United States v. Robinson, 414 U.S. 218, 235 (1973).

2. **Areas Within an Arrestee’s Immediate Control**

“And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’ - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” Chimel v. California, 395 U.S. 752, 763 (1969).

a. **Immediate Control in a Residence**

“We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” Maryland v. Buie, 494 U.S. 325, 334 (1990).

“The Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, ‘it has always been assumed that one’s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.’” Shipley v. California, 395 U.S. 818, 820 (1965)(citation omitted).

“We hold, therefore, that it is not ‘unreasonable’ under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer’s need to ensure his own safety - as well as the integrity of the arrest - is compelling. Such surveillance is not an impermissible invasion of

the privacy or personal liberty of an individual who has been arrested. ... It follows that Officer Daugherty properly accompanied Overdahl into his room, and that his presence in the room was lawful. With restraint, the officer remained in the doorway momentarily, entering no farther than was necessary to keep the arrested person in his view. It was only by chance that, while in the doorway, the officer observed in plain view what he recognized to be contraband. Had he exercised his undoubted right to remain at Overdahl's side, he might well have observed the contraband sooner. Washington v. Chrisman, 455 U.S. 1, 7 (1982).

b. *Immediate Control in a Vehicle*

"[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. ... Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." New York v. Belton, 453 U.S. 454, 460-61 (1981)(citation and internal footnotes omitted).

"'Container' here denotes 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." New York v. Belton, 453 U.S. 454, 461 n.4 (1981).

Law enforcement officers may "conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest" Knowles v. Iowa, 525 U.S. 113, 118 (1998).

XIV. CONSENT SEARCHES

A. Generally

"It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

B. Requirements

1. Voluntarily Given

"[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

a. *Courts Look at the Totality of the Circumstances to Determine Whether Consent was Voluntarily Given*

"[I]t is only by analyzing all the circumstances of an individual consent that it can be

ascertained whether in fact it was voluntary or coerced.” Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973).

b. Factors to Consider in Determining Voluntariness of Consent

“Some of the factors taken into account have included the youth of the accused ... ; his lack of education ... ; or his low intelligence ... ; the lack of any advice to the accused of his constitutional rights ... ; the length of detention ... ; the repeated and prolonged nature of the questioning ... ; and the use of physical punishment such as the deprivation of food or sleep ...” Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)(citations omitted).

“The six factors are as follows: (1) the voluntariness of the defendant’s custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant’s cooperation; (4) the defendant’s awareness of his right to refuse to consent; (5) the defendant’s education and intelligence; and, (6) the defendant’s belief that no incriminating evidence will be found.” United States v. Asibor, 109 F.3d 1023, 1038 n.14 (5th Cir.), cert. denied, 522 U.S. 902 (1997).

“Certain of Smith’s individual characteristics are relevant to the issue of the voluntariness of his consent, including (1) his age; (2) his general intelligence and education; (3) whether he was under the influence of drugs or alcohol; (4) whether he was informed of his Miranda rights; and (5) whether he had experienced prior arrests and was thus aware of the protections that the legal system affords to suspected criminals. The environment in which Smith allegedly consented to the search is also important, specifically (1) the length of time he was detained; (2) whether the police threatened, physically intimidated, or punished him; (3) whether the police made promises or misrepresentations; (4) whether he was in custody or under arrest when the consent was given; (5) whether the consent occurred in a public or a secluded place; and (6) whether he stood by silently by as the search occurred.” United States v. Smith, 260 F.3d 922, 924 (8th Cir. 2001)(citation omitted).

c. Notification of Right to Refuse Search is Not Required

“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.” Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

d. Acquiescence to Law Enforcement Authority

“When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968)(internal footnote omitted).

“It is well established that there can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.” Orhorhaghe v. Immigration and Naturalization Service, 38 F.3d 488, 500 (9th Cir. 1994).

2. Authority

a. Actual Authority

“The Fourth Amendment generally prohibits the warrantless entry of a person’s home, whether to make an arrest or to search for specific objects. ... The prohibition does not apply, however, to situations in which voluntary consent has been obtained ... from the individual whose property is searched” Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)(citations omitted).

b. Third Party With Common Authority

“[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” United States v. Matlock, 415 U.S. 164, 171 (1974).

“Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” United States v. Matlock, 415 U.S. 164, 172 n.7 (1974).

c. Apparent Authority

Holding “a warrantless entry ... valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe ... possess[es] common authority over the premises, but who in fact does not do so.” Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

“When one person consents to a search of the property owned by another, the consent is valid if ‘the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.’” United States v. Jenkins, 92 F.3d 430, 436 (6th Cir. 1996), cert. denied, 520 U.S. 1170 (1997)(citation omitted).

C. The Scope of a Consent Search

“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect? ... The scope of a search is generally defined by its expressed object.” Florida v. Jimeno, 500 U.S. 248, 251 (1991)(citations omitted).

D. Limitations May be Placed on Consent Searches

“A suspect may of course delimit as he chooses the scope of the search to which he consents.” Florida v. Jimeno, 500 U.S. 248, 252 (1991).

“When an official search is properly authorized - whether by consent or by the issuance of a valid warrant - the scope of the search is limited by the terms of its authorization.” Walter v. United States, 447 U.S. 649, 656 (1980).

E. **Destruction of Property Based Upon Consent**

“[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed.” United States v. Osage, 235 F.3d 518, 522 (10th Cir. 2000).

“Although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents.” United States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990).

F. **Third Party Consent Rules Apply Even When Another Person With Authority is Present and Objects**

“Third party consent remains valid even when the defendant specifically objects to it.” United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992).

“Generally, consent to a search given by someone with authority cannot be revoked by a co-occupant’s denial of consent, even if that denial is clear and contemporaneous with the search.” United States v. Rith, 164 F.3d 1323, 1328 (10th Cir.), cert. denied, 528 U.S. 827 (1999).

“We agree that the primary factor is the defendant’s reasonable expectations under the circumstances. Those expectations must include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry. The risks to property or privacy interests are not substantially lessened because of the defendant’s own lack of consent. Although there is always the fond hope that a co-occupant will follow one’s known wishes, the risks remain. A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence.” United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995), cert. denied, 516 U.S. 1152 (1996).

XV. **INVENTORY SEARCHES**

A. **Generally**

“[I]nventory searches are ... a well-defined exception to the warrant requirement of the Fourth Amendment.” Colorado v. Bertine, 479 U.S. 367, 371 (1987).

B. **Rationales for Inventory Searches**

“These procedures developed in response to three distinct needs: the protection of the owner’s property while it remains in police custody ...; the protection of the police against claims or disputes over lost or stolen property ...; and the protection of the police from potential danger” South Dakota v. Opperman, 428 U.S. 364, 369 (1976)(citations omitted).

C. **Requirements**

1. **Lawful Impoundment of the Property**

“The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. ... The inventory was conducted only after the car had been impounded for multiple

parking violations.” South Dakota v. Opperman, 428 U.S. 364, 375 (1976).

“[I]t is not ‘unreasonable’ for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.” Illinois v. Lafayette, 462 U.S. 640, 648 (1983).

“An impoundment must either be supported by probable cause, or be consistent with the police role as ‘caretaker’ of the streets and completely unrelated to an ongoing criminal investigation.” United States v. Duguay, 93 F.3d 346, 352 (7th Cir. 1996), cert. denied, 526 U.S. 1029 (1999).

2. **Standardized Policy**

“Our view that standardized criteria ... or established routine ... must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into ‘a purposeful and general means of discovering evidence of crime.’” Florida v. Wells, 495 U.S. 1, 4 (1990)(citations omitted).

“Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.” Colorado v. Bertine, 479 U.S. 367, 375 (1987).

“[T]he right to inventory a suspect’s belongings does not carry in its wake unlimited discretion. Instead, the inventory must be conducted pursuant to ‘established inventory procedures.’ ... Particularly when closed containers are involved, the police are required to have an established policy regarding the containers, so that the inventory does not become ‘a ruse for a general rummaging in order to discover incriminating evidence.’ ... Although the policy need not be in writing, there must be a standardized procedure.” United States v. Griffiths, 47 F.3d 74, 78 (2d Cir. 1995) (citations omitted).

“The Supreme Court requires that ‘inventories be conducted according to standardized criteria,’ although the policy need not be written.” United States v. Bullock, 71 F.3d 171, 177 (5th Cir. 1995), cert. denied, 517 U.S. 1126 (1996).

XVI. ADMINISTRATIVE SEARCHES

A. **Generally**

“We have also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited.” City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

B. **Administrative Searches and Criminal Investigations**

“If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the ‘plain view’ doctrine.” Michigan v. Clifford, 464 U.S. 287, 294 (1984).

“The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.” New York v. Burger, 482 U.S. 691, 716 (1987).

C. **Warrants are Required for Some Administrative Searches**

1. **Generally**

“In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment’s protections.” Camara v. Municipal Court of San Francisco, 387 U.S. 523, 534 (1967)(municipal housing inspections).

“The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.” Marshall v. Barlow’s, Inc., 436 U.S. 307, 323 (1978)(OSHA inspections).

2. **Probable Cause for Administrative Warrants**

“Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that ‘reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment].’” Marshall v. Barlow’s, Inc., 436 U.S. 307, 320 (1978)(internal footnote and citation omitted).

“If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” Camara v. Municipal Court of San Francisco, 387 U.S. 523, 539 (1967).

D. **Closely Regulated Businesses**

1. **Generally**

“Certain industries have such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise. Liquor ... and firearms ... are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.” Marshall v. Barlow’s, Inc., 436 U.S. 307, 313 (1978)(citations omitted).

2. **Warrants are Generally Not Required for Searches of “Closely Regulated” Businesses**

“Because the owner or operator of commercial premises in a ‘closely regulated’ industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional

Fourth Amendment standard of reasonableness for a government search ... have lessened application in this context. Rather, we conclude that, as in other situations of ‘special need,’ ... where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.” New York v. Burger, 482 U.S. 691, 702 (1987).

a. Rationale for the “Closely Regulated” Business Exception

(1) Frustration of the Inspection’s Purpose

“[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.” United States v. Biswell, 406 U.S. 311, 316 (1972).

(2) Reduced Expectation of Privacy

“Because the owner or operator of commercial premises in a ‘closely regulated’ industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search ... have lessened application in this context.” New York v. Burger, 482 U.S. 691, 702 (1987).

b. Searches of “Closely Regulated” Businesses Must Still be “Reasonable”

“This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met.” New York v. Burger, 482 U.S. 691, 702 (1987).

(1) Substantial Government Interest

“First, there must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made.” New York v. Burger, 482 U.S. 691, 702 (1987).

(2) Inspections Must be Necessary

“Second, the warrantless inspections must be ‘necessary to further the regulatory scheme.’” New York v. Burger, 482 U.S. 691, 702 (1987)(citation and internal brackets omitted).

(3) Adequate Substitute for a Warrant

“Finally, ‘the statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.’ ... In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” New York v. Burger, 482 U.S. 691, 703 (1987)(citation and internal brackets omitted).

XVII. OTHER WARRANTLESS SEARCHES

A. Vehicle Checkpoints

“In sum, the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of [sobriety checkpoints].” Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 455 (1990).

“The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance ‘the general interest in crime control’ We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.” City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (citation omitted).

“[W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver’s license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.” Delaware v. Prouse, 440 U.S. 648, 663 (1979) (internal footnote omitted).

B. School Searches

“[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider ‘whether the ... action was justified at its inception’ ...; second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place’ Under ordinary circumstances, a search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985)(internal footnote and citations omitted).

C. Airport Searches

“[S]earches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched. As we have seen, screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.” United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973).