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**DEVELOPMENTS IN FEDERAL
SEARCH AND SEIZURE LAW**

**By Stephen R. Sady
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October 2009

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A. Introduction

The revolution of the Warren Court, especially in the area of search and seizure under the Fourth Amendment, was largely an expansion of federal constitutional rights in the face of state practices that limited the protection of individual rights embodied in the Bill of Rights. The following outline of federal cases construing the protections of the Fourth Amendment reflects a dynamic tension between the need to secure evidence to convict law-breakers and the protection of citizens' reasonable expectations of privacy. The result has been an overall contraction of protection of the right to privacy. This outline sets out basic principles and counterpoints from which criminal defense lawyers can fashion arguments for a more expansive view of the Fourth Amendment's protections.

In federal court, in most cases, federal law provides the relevant authority in assessing the legality of the search. In federal prosecutions, even searches solely by state officers are judged only against federal standards. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1372-74 (9th Cir. 1987). There are exceptions regarding the standard for arrest and detention where, in the absence of an applicable federal statute, the law of the state where the warrantless arrest takes place determines its validity. *United States v. Shephard*, 21 F.3d 933, 936 (9th Cir. 1994); *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993). Favorable state court precedents construing the Fourth Amendment provide persuasive authority equal to federal interpretations. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

In order to most effectively serve clients, developments in Supreme Court construction of the Fourth Amendment must be followed. Rather than dwelling on the negative aspects of the recent trends, the purpose of this article is to trace developments in selected areas and juxtapose the lead cases with federal court cases in which the defendant prevailed. The counterpoints are not intended to be exhaustive, but are provided to encourage creative use of the available precedents that may make a decisive difference for clients in state or federal court.

B. What Constitutes A Search?

The definition of a search has, with major exceptions, been contracted by an increasingly narrow view of expectations of privacy that will be deemed reasonable. The first requirement for a search is government action, because private intrusions, no matter how invasive, do not implicate the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The products of private searches are not covered by the exclusionary rule. *Walter v. United States*, 447 U.S. 649 (1980).

COUNTERPOINT – In determining whether the actions of a private person working with the police are attributable to the government, the Ninth Circuit set out a two-part test: 1) whether the government knew of and acquiesced in the conduct; and 2) whether the party performing the search intended to assist law enforcement or to further his or her own ends. *United States v. Walther*, 652 F.2d 788, 791-92 (9th Cir. 1981) (holding that an airport employee’s examination of luggage constituted a Fourth Amendment search); *see also United States v. Reed*, 15 F.3d 928, 930-33 (9th Cir. 1994) (invalidating warrantless search of a hotel guest’s room conducted by the hotel manager in the presence of police officers). The government exceeded the scope of a private party search when it examined, without a warrant, computer disks that the private party provided but had not viewed. *United States v. Runyan*, 275 F.3d 449, 463-64 (5th Cir. 2001).

The Warren Court freed the scope of Fourth Amendment searches from the constraints of property rights by focusing on whether government action infringed upon a reasonable expectation of privacy in *Katz v. United States*, 389 U.S. 347 (1967). The Court has imposed a restrictive reading of what expectations of privacy are reasonable. For example, in *California v. Greenwood*, 486 U.S. 35 (1988), the Court approved warrantless police searches of trash left in garbage bags at the curb in front of the defendant’s house. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court found unreasonable the defendant’s expectation of privacy from surveillance by airplane 1,000 feet over his fenced backyard. *See also Florida v. Riley*, 488 U.S. 445 (1989) (surveillance of backyard by helicopter hovering at 400 feet not a search).

COUNTERPOINT – A person may have a reasonable expectation of privacy in a tent, whether in a public campground, *United States v. Gooch*, 6 F.3d 673, 676-79 (9th Cir. 1993), or on land where camping is not authorized, *United States v. Sandoval*, 200 F.3d 659, 660-61 (9th Cir. 2000). A homeless person had a reasonable expectation of privacy in a closed container permissively stored in another’s garage in *United States v. Fultz*, 146 F.3d

1102, 1105 (9th Cir. 1998). An occasional overnight houseguest had an expectation of privacy in a gym bag he left under his girlfriend's bed. *United States v. Davis*, 332 F.3d 1163, 1167-68 (9th Cir. 2003). A government employee can have a reasonable expectation of privacy in his private office where the search went beyond reasonable work-related justifications. *Ortega v. O'Connor*, 146 F.3d 1149, 1157-59 (9th Cir. 1998); see *United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991). An attached garage receives the full degree of Fourth Amendment protection afforded to the rest of the home. *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000). A university student did not lose his reasonable expectation of privacy in his personal computer by attaching it to the university network. *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (although the student had a reasonable expectation of privacy, the search was valid under the "special needs" exception). Individuals have a reasonable expectation of privacy in their living and sleeping quarters aboard cruise ships. *United States v. Whitted*, 541 F.3d 480, 489 (3rd Cir. 2008). A hotel guest had a reasonable expectation of privacy in his hotel room, and the luggage he left there, even after hotel staff discovered a firearm in his room and temporarily locked him out. *United States v. Young*, 573 F.3d 711, 720 (9th Cir. 2009).

The Court's restrictive view of privacy rights is also reflected in its limitation on Fourth Amendment protections to the curtilage of the dwelling, not the open fields surrounding it. *Oliver v. United States*, 466 U.S. 170 (1984) (officers not limited by Fourth Amendment from invading open fields surrounding dwelling despite fences and no trespassing signs); see also *United States v. Barajas-Avalos*, 377 F.3d 1040 (9th Cir. 2004) (visual observation of the interior of an unoccupied travel trailer did not constitute a search because the officer was in an open field rather than curtilage). Further, the Court found in *United States v. Dunn*, 480 U.S. 294 (1987), that a barn was not within the curtilage because, in that case, the defendant had not manifested an expectation of privacy in the interior of the barn, even presuming society was prepared to accept such an expectation as legitimate.

COUNTERPOINT – In *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968), the court found that a woodpile 20-35 feet from the house was within the curtilage. Similarly, in *United States v. Depew*, 8 F.3d 1424, 1426-28 (9th Cir. 1993), the curtilage included a driveway area 50-60 feet from the house because of the defendant's efforts to maintain privacy. The court considered the end of a driveway, by a utility pole, 82 feet from the dwelling, within the curtilage because the area showed evidence of personal use and was naturally enclosed in *United States v. Diehl*, 276 F.3d 32, 38-40 (1st Cir.

2002). *See generally United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc).

The Court has defined “search” in the context of technologically-assisted intrusions to include the use of infra-red thermal imaging devices on homes to assist in detecting marijuana grow operations. *United States v. Kyllo*, 533 U.S. 27 (2001). However, the Court has approved the installation and subsequent surveillance by electronic beepers as implicating no Fourth Amendment interests, except when used in private residences. *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). The opposing views on warrantless use of global positioning systems are set out in the majority and dissenting opinions in *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009).

In *California v. Ciraolo*, 476 U.S. 207, 211 (1986), the Court applied a two-part test to determine whether aerial photography constituted a Fourth Amendment search: 1) Has the individual manifested a subjective expectation of privacy in the object of the challenged search? and 2) Is society willing to recognize that expectation as reasonable? *See also Florida v. Riley*, 488 U.S. 445 (1989); *Smith v. Maryland*, 442 U.S. 735 (1979). In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Court approved aerial surveillance of commercial property with cameras that magnified sufficiently to see objects one-half inch in diameter. The Court found the 2,000-acre industrial complex more comparable to an open field than curtilage and, as such, held that “it is open to the view and observation of persons in aircraft lawfully in the public airspace above or sufficiently near the area for the reach of cameras.” 476 U.S. at 239. As to the use of an aerial mapping camera, “[t]he mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems.” 476 U.S. at 238.

COUNTERPOINT – Visual observations into the interior of a home may constitute a search. *LaDuke v. Castillo*, 455 F. Supp. 209, 210 (E.D. Wash. 1978) (shining a flashlight into the windows of units temporarily housing farm workers constituted a search), *aff’d*, *LaDuke v. Nelson*, 762 F.2d 1318, 1332 n.19 (9th Cir. 1985); *see also United States v. Duran-Orozco*, 192 F.3d 1277, 1280-81 (9th Cir. 1999) (peering into the back window of a home using a flashlight constituted a search). Where informants rented a hotel room for a drug transaction, video surveillance of the defendants in the room after the informants left violated the Fourth Amendment given that “[h]idden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement.” *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000). Requiring an apartment resident to open his door so that the officers could see him constituted a search, where the officers gained visual access to

the interior of the dwelling, even though they had not physically entered it. *United States v. Mowatt*, 513 F.3d 395, 400 (4th Cir. 2008).

Dog sniffs present a sui generis search problem. In *Illinois v. Caballes*, 543 U.S. 405 (2005), the Supreme Court held that use of a narcotics-detection dog around a lawfully stopped car does not implicate the Fourth Amendment because it only reveals the presence of contraband. See also *United States v. Place*, 462 U.S. 696, 707 (1983) (upholding the use of dogs to sniff luggage to detect narcotics).

COUNTERPOINT – In *Caballes*, the dog sniff was lawful because it did not extend the duration of the lawful traffic stop. 543 U.S. at 408. However, in *Place*, the 90-minute detention of the luggage for the sniff test was unreasonable. *Place*, 462 U.S. at 707-10. In *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985), the court held that the use of a marijuana-sniffing dog outside an apartment constitutes a search. But in *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993), the Ninth Circuit rejected the *Thomas* position, permitting a dog sniff of contraband in a package located in a sealed commercial warehouse because there could be no legitimate expectation of privacy in contraband. A dog sniff that results in “casting” rather than an “alert” is insufficient to justify a search. *United States v. Rivas*, 157 F.3d 364, 367-68 (5th Cir. 1998). In *State v. Louthan*, 744 N.W.2d 454, 461 (Neb. 2008), the court held that, in order to expand the scope of a traffic stop to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.

Relying on *Place*, in *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1984), the Court found that, by field testing white powder obtained from a private Federal Express examination of a package, federal officers did not engage in an additional intrusion sufficient to implicate the Fourth Amendment.

COUNTERPOINT – In *United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987), the court held that, despite *Jacobsen*, a Fourth Amendment search occurred where pills seized by a private individual were subjected to government chemical test to reveal the substance’s molecular structure and identity several days after the pills were seized. By analogy to closed container cases, courts have recognized a reasonable expectation of privacy in the memory of phone numbers in a defendant’s electronic pager. *United States v. Lynch*, 908 F. Supp. 284, 287 (D.V.I. 1995); *United States v. Chan*, 830 F. Supp. 531, 533-35 (N.D. Cal. 1993). Government’s hash value analysis of

defendant's computer hard drive was a "search" within meaning of the Fourth Amendment. *United States v. Crist*, 627 F. Supp.2d 575, 585 (M.D. Pa. 2008). The *Jacobsen* rationale does not apply to closed containers such as backpacks and suitcases. *United States v. Young*, 573 F.3d 711, 720-21 (9th Cir. 2009).

The Supreme Court delivered a singularly favorable decision on the definition of a search in *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the police were lawfully present in the defendant's apartment and saw electronic equipment that the officer suspected was stolen. The officer moved a turntable to read and record serial numbers that established that the equipment was stolen. Justice Scalia wrote for the majority that even the minimal movement of the equipment constituted a search beyond plain view and, in the absence of probable cause, the evidence must be suppressed.

COUNTERPOINT – The Ninth Circuit relied on *Hicks* in rejecting the government's contention that a limited intrusion at the threshold of a dwelling could be justified by less than probable cause in *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988); see *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997). In *Bond v. United States*, 529 U.S. 334 (2000), the Court held that an officer's physical manipulation of the outside of stowed luggage on a bus was a search that violated the Fourth Amendment. The removal of a car cover to reveal the Vehicle Identification Number constituted a search in *United States v. \$277,000.00*, 941 F.2d 898, 902 (9th Cir. 1991). A police officer's partial unzipping of a suspect's jacket, which exposed a sweatshirt underneath, was a search that intruded on the suspect's reasonable expectation of privacy. *United States v. Askew*, 529 F.3d 1119, 1129 (D.C. Cir. 2008).

C. What Constitutes A Seizure?

An increasingly restrictive definition of what constitutes a seizure has provided law enforcement with an expanded range of intrusions free from Fourth Amendment limitations. A "seizure" of an item occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Karo*, 468 U.S. 705, 712 (1989) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). A person is seized within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 545 (1980) (no seizure in airport of passenger who was approached, questioned, and asked for ticket and identification); see *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (examination and retention of driver's license and ticket rendered airport request by federal officers to accompany them a seizure).

COUNTERPOINT – Absent probable cause or judicial authorization, the involuntary removal of a suspect from his home to a police station for investigative purposes constitutes an unreasonable seizure. *Kaupp v. Texas*, 538 U.S. 626, 629-31 (2003). Fourth Amendment seizures include official action assisting in legal, forceful eviction of mobile home park tenants and their mobile home from the park even though no privacy interests were implicated by the seizure. *Soldal v. Cook County*, 506 U.S. 56 (1992). By blocking the defendant’s driveway, the sheriff went beyond a voluntary encounter between officer and citizen – a seizure occurred. *United States v. Kerr*, 817 F.2d 1384, 1386-87 (9th Cir. 1987). A seizure occurs when, with his hand on his gun, a police officer retains a motorist’s license while continuing with other investigation. *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997). In *United States v. Jordan*, 951 F.2d 1278, 1283 (D.C. Cir. 1991), the court indicated that if the district court found, on remand, that the police retained defendant’s driver’s license during questioning, a seizure occurred. A seizure occurred, and was unlawful, when employees of a suspected corporation were held incommunicado, without probable cause, unless they submitted to interrogations. *Ganwich v. Knapp*, 319 F.3d 1115, 1120-24 (9th Cir. 2003). Police knocking loudly on a door for several minutes at night for a “knock and talk” constituted a seizure in *United States v. Velazco-Durazo*, 372 F. Supp. 2d 520, 525-26 (D. Ariz. 2005). A confrontation in the front yard constituted custody once the suspect admitted that incriminatory evidence belonged to her and the police had probable cause to arrest her. *United States v. Spurr*, 2005 WL 3478195, at *3 (D. Or. 2005). A police officer’s removal of a bag from the cargo area of the bus to the bus’s passenger seating area constituted a seizure in *United States v. Alzare-Manzo*, 570 F.3d 1070, 1076-77 (8th Cir. 2009).

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court rejected the Florida Supreme Court’s finding that the general policy of questioning bus passengers and requesting consent to search violated the Fourth Amendment. The Court noted that each case must be examined on its individual facts to determine whether the degree of intrusion constituted a seizure. In *United States v. Drayton*, 536 U.S. 194 (2002), the Court concluded that officers did not seize bus passengers when the officers boarded the bus because they did not brandish weapons, make intimidating movements, or block the aisle.

COUNTERPOINT – The Supreme Court held that the traffic stop of a private vehicle “necessarily curtails the travel a passenger has chosen” and thus constitutes a seizure not only of the driver, but of the passengers as well. *Brendlin v. California*, 551 U.S. 249, 257-58 (2007). In *United States v.*

Cuevas-Ceja, 58 F. Supp.2d 1175, 1189 (D. Or. 1999), the court held that police seized bus passengers when the officers boarded at a scheduled stop and requested consent to search the passengers. Repeated questioning of ex-pro baseball player Joe Morgan, while he was using a public telephone in an airport, was held to be a seizure in *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1993). The focus is on the mental state of the suspect: even if the officer knows the person stopped has a right to walk away, the totality of the circumstances can establish an arrest as a matter of law. *Allen v. City of Portland*, 73 F.3d 232, 235-36 (9th Cir. 1995). In *United States v. Izguerra-Robles*, 2009 WL 2973215, at *3 (D. Or. 2009), the court held that defendant was constructively arrested when he was ordered out of a motor home.

The definition of the seizure of an individual underwent a dramatic restriction in *California v. Hodari D.*, 499 U.S. 621 (1991). Previously, the Court had left open the question of whether a person who flees after an officer communicates that the suspect is not free to leave has a Fourth Amendment interest to assert. *Michigan v. Chesternut*, 486 U.S. 567, 575 n.9 (1988). In *Hodari*, Justice Scalia, referring to common law standards, wrote that no seizure occurred unless the officer physically touched the suspect or the suspect submitted to the show of authority. 499 U.S. at 625.

COUNTERPOINT – In *United States v. Coggins*, 986 F.2d 651, 653-54 (3d Cir. 1993), a suspect who briefly submitted to an order to stay put, reconsidered almost immediately, and ran off, was held to have been seized under *Hodari*.

The balance between consensual conversations and temporary seizures tilted against the individual in *INS v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, the INS surrounded a factory and began approaching workers at work stations and exits regarding their immigration status. The Court held that, because there was insufficient evidence that workers did not feel free to leave, no seizures occurred. 466 U.S. at 220-21; *see also United States v. Drayton*, 536 U.S. 194 (2002) (officers boarding a bus, even if armed, were not so intimidating that passengers did not feel free to leave).

COUNTERPOINT – In *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985), *modified by* 796 F.2d 309 (9th Cir. 1986), the court distinguished *Delgado* in holding that INS officers seized residents of labor camps when they “cordoned off migrant housing during early morning or late evening hours, surrounded the residences in emergency vehicles with flashing lights, approached the homes with flashlights, and stationed officers at all doors and windows.” In *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987), the

court held that temporary detentions of an employee by INS agents during a factory sweep “exceeded any detention approved in *Delgado*.” A home visit by INS officers was a seizure without a sufficient articulable basis in *Orhorhaghe v. INS*, 38 F.3d 488, 494-99 (9th Cir. 1994). A late-night knock and talk at a motel room was deemed to be a seizure in *United States v. Jerez*, 108 F.3d 684, 689-93 (7th Cir. 1997); *see also United States v. Washington*, 387 F.3d 1060, 1068-69 (9th Cir. 2004) (detention during “knock and talk” violated Fourth Amendment); *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999) (same); *United States v. Freeman*, 2009 WL 1939164 (D. Or. 2009) (same). In *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007), the court held that, under the totality of the circumstances, the police improperly seized the defendant, even though he had already consented to the search of his person. In making its determination, the court considered the tension between Portland police and the African-American community, the authoritative manner of the search, and the fact that the search occurred at night. *Id.* at 772; *see also Izguerra-Robles*, 2009 WL 2973215 (D. Or. 2009) (seizure exceeded lawful scope when suspect held for 45 minutes after arresting him for failure to produce a driver’s license).

D. Standing

Proof that a defendant had “standing” was once a cornerstone of any Fourth Amendment challenge. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98 (1980) (under totality of circumstances, petitioner lacked standing to challenge search of friend’s purse in which he placed drugs); *United States v. Salvucci*, 448 U.S. 83 (1980) (individuals charged with possession of stolen mail did not have standing to challenge search of mother’s apartment where incriminating checks were found); *Rakas v. Illinois*, 439 U.S. 128 (1978) (passenger who failed to claim interest in weaponry seized from car lacked standing); *see also United States v. Padilla*, 508 U.S. 77 (1993) (participation in a conspiracy gave co-conspirators no special standing to challenge a search of their co-conspirator’s car unless they demonstrate a reasonable expectation of privacy under the usual standing rules). A defendant has a limited immunity to claim standing for the purposes of a motion to suppress, so incriminating statements may not be used against the defendant at trial on the issue of guilt unless no objection is made. *Simmons v. United States*, 390 U.S. 377 (1968). The Court has more recently moved away from standing as a method of analyzing Fourth Amendment violations. *Minnesota v. Carter*, 525 U.S. 83 (1998). Instead, the relevant question is simply whether the defendant personally has an expectation of privacy in the place searched, and whether that expectation is reasonable based on concepts of real or personal property or on “understandings that are recognized and permitted by society.” *Carter*, 525 U.S. at 88. In

Carter, the defendants, who were in another person’s apartment for a short time to package cocaine, had no legitimate expectation of privacy. *Id.*

COUNTERPOINT – Overnight visitors have a reasonable expectation of privacy in their temporary shelter because “[s]taying overnight in another’s house is a long-standing social custom that serves functions recognized as valuable by society. . . . We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings.” *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990). The *Olson* phrasing may provide expanded protection for some defendants. *See, e.g., United States v. Gamez-Orduno*, 235 F.3d 453, 458-61 (9th Cir. 2000) (marijuana smugglers who stayed overnight in trailer had expectation of privacy); *United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998) (homeless person had reasonable expectation of privacy in the contents of cardboard boxes stored in acquaintance’s garage). Even though the car rental had expired, the defendant still had an expectation of privacy in his rental car where the company’s policies and practices extended reasonable possession of the vehicle beyond checkout time. *United States v. Henderson*, 241 F.3d 638, 646-47 (9th Cir. 2000); *see United States v. Dorais*, 241 F.3d 1124 (9th Cir. 2001) (same test for hotel guest after checkout time). A hotel guest still maintains a reasonable expectation of privacy, despite unconfirmed reports that the room was rented with a stolen credit card, until the hotel management takes affirmative steps to end the tenancy. *United States v. Bautista*, 362 F.3d 584 (9th Cir. 2004); *cf. United States v. Cunag*, 386 F.3d 888 (9th Cir. 2004) (holding that expectation of privacy in hotel room procured by fraud was extinguished when the hotel manager locked defendant out of the room). An occasional overnight visitor had a reasonable expectation of privacy in a gym bag he left under the bed in his girlfriend’s apartment in *United States v. Davis*, 332 F.3d 1163, 1167 (9th Cir. 2003). Employees in the private sector maintain a reasonable expectation of privacy in their private offices. *United States v. Ziegler*, 474 F.3d 1184, 1190 (9th Cir. 2007). However, the employer will likely have the ability to consent to the search, even of personal files on a workplace computer. *Id.* at 1191. Where the defendant had a financial interest in a house and free access, there was no requirement that he live in the house, or exercise control over it, in order to enjoy a privacy interest there. *United States v. Hamilton*, 538 F.3d 162, 168 (2d Cir. 2008).

COUNTERPOINT – The judiciary has been somewhat hostile to the government’s adoption of inconsistent positions by challenging standing at the same time as claiming at trial that items belong to the defendant. *United States*

v. Bagley, 772 F.2d 482, 489 (9th Cir. 1985); *United States v. Issacs*, 708 F.2d 1365, 1367-68 (9th Cir. 1983); *but see United States v. Singleton*, 987 F.2d 1444, 1447-50 (9th Cir. 1993). The necessary interest may be established by the joint interest with a co-defendant or a co-conspirator. *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982); *United States v. Broadhurst*, 805 F.2d 849, 852 (9th Cir. 1986); *see also United States v. Taketa*, 923 F.2d 665, 671-72 (9th Cir. 1991); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984). In *United States v. Gomez*, 276 F.3d 694, 697 (5th Cir. 2001), a homeowner had a privacy interest in a car parked in his driveway that was owned and operated by a criminal associate. An uncontroverted affidavit claiming residence establishes the requisite expectation of privacy. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987). Although a defendant has no expectation of privacy in abandoned property, the government bears the burden of proving abandonment. *United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000) (outlining forms of abandonment). An inmate who left computer CDs with a friend for safekeeping, then instructed that the CDs be destroyed, did not abandon his expectation of privacy in the CDs. *United States v. James*, 353 F.3d 606, 615-16 (8th Cir. 2003).

Searches of vehicles involve complicated standing questions. *See United States v. Pulliam*, 405 F.3d 782, 786-87 (9th Cir. 2005) (distinguishing rights of drivers and passengers).

COUNTERPOINT – Passengers in a car have standing to challenge an unlawful car stop, even if they have no possessory or ownership interest in the car. *Brendlin v. California*, 551 U.S. 249, 258-59 (2007); *United States v. Colin*, 314 F.3d 439, 442-443 (9th Cir. 2002). Unauthorized drivers of rental cars can establish standing if the driver has permission to use the car from the authorized renter. *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

E. Probable Cause

1. Probable Cause To Search – The major change in the area of probable cause to issue a search warrant has come through the abandonment of the *Aguilar-Spinelli* requirement (*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964)), that probable cause from an informant must include the basis for the informant’s knowledge and a basis for finding the informant to be reliable. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court rejected reliance on the “two-pronged test” and adopted the flexible standard of whether, given the totality of the circumstances, there is a fair probability that

contraband, evidence, or an individual will be found in a particular place. The Court reiterated the “totality of the circumstances” test in *Massachusetts v. Upton*, 466 U.S. 727 (1984). In *Upton*, the Court emphasized deference for the magistrate’s determination of probable cause, the availability of corroboration by innocent facts to save an otherwise invalid warrant, the preference accorded to warrants, and the need for common-sense review of warrant affidavits. The Ninth Circuit reversed en banc a three-judge panel on the standard for searching a computer for evidence of child pornography in *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006) (en banc).

COUNTERPOINT – Even under the looser *Gates* standard, the government has often fallen short of probable cause. *See, e.g., United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991) (absent proof that the defendant was a “collector” of child pornography, controlled delivery of a single order of child pornography did not establish probable cause to search for other illegal images in his home); *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991) (allegation of corruption and large amounts of money insufficient); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988) (missing page of affidavit eliminated nexus to location); *United States v. Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990) (youth fitting the vague description of suspect and crouching behind a tree did not amount to probable cause). Corroboration of an anonymous tip by static, innocent details is insufficient to establish probable cause. *United States v. Mendonsa*, 989 F.2d 366, 368-69 (9th Cir. 1993). A civil contract dispute does not give rise to probable cause. *Allen v. City of Portland*, 73 F.3d 232, 236-38 (9th Cir. 1995). A dog sniff of supposed drug money was insufficient to establish probable cause based on expert evidence that 75% of money in circulation in the area was tainted. *United States v. \$30,060.00*, 39 F.3d 1039, 1041-44 (9th Cir. 1994). To find probable cause based solely on a dog sniff, the prosecution must show that the dog is reliable. *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355 (W.D. Wash. 2004) (drug dog’s alert in front of defendant’s apartment did not provide probable cause for arrest because the dog-handler team was not certified and the dog had no track record of reliability). The court found no qualified immunity and no probable cause where officers arrested the plaintiff for rape based on unreliable canine identification, suggestive eyewitness identification procedures, and mere resemblance to a general description of the attacker. *Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (“passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing.”). The presence of stolen tags on a car did

not give probable cause for the police to search for contraband in the trunk in *United States v. Jackson*, 415 F.3d 88, 91-95 (D.C. Cir. 2005).

2. Probable Cause To Arrest – In *Maryland v. Pringle*, 540 U.S. 366 (2003), the Supreme Court held that the presence of drugs in a car established probable cause to arrest all three occupants. The Court reasoned that, even though the officers did not have evidence that any one of the three occupants was responsible for the drugs, probable cause existed as to all of them because co-occupants of a vehicle are often engaged in a common enterprise and all three denied knowing anything about the drugs. In *Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004), the Supreme Court again expanded the permissible bases for arrest, holding that an arrest is lawful even though there is no probable cause to support the offense cited by the arresting officer, so long as the facts known to the officer establish probable cause as to some offense, even if that offense is not closely related.

COUNTERPOINT – After *Pringle*, it is even more important to challenge cases where guilt is established merely by association. The inference that everyone on the scene of a crime is a party to it evaporates when there is information to single out the guilty person. *United States v. Di Re*, 332 U.S. 581, 594 (1948). A warrant application establishing probable cause to search a tavern and the bartender for heroin did not provide probable cause to search patrons of the tavern who were present when the warrant was executed. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); see *United States v. Collins*, 427 F.3d 688, 691 (9th Cir. 2005) (arriving in a parking lot where an illicit transaction was occurring did not establish guilt because, other than “proximity and timing,” there was no individualized suspicion); *United States v. Robertson*, 833 F.2d 777, 782-83 (9th Cir. 1987) (presence in a house being searched based on probable cause is insufficient to justify an arrest). Mere presence in a car in which the driver possessed marijuana and reeked of chemicals did not establish probable cause to search the passenger. *United States v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993); see also *United States v. Huguez-Ibarra*, 954 F.2d 546, 551-52 (9th Cir. 1992) (association with persons involved with drugs and unusual vehicle traffic insufficient). Because probable cause has “both a burden-of-proof component (facts sufficient to make a reasonable person believe...) and a substantive component (...that the suspect is involved in crime),” detention of a person without probable cause for purposes of criminal investigation “is repugnant to the Fourth Amendment.” *Al-Kidd v. Ashcroft*, 2009 WL 2836448, *14, 17 (9th Cir. 2009) (arrest of material witness is not justified unless both components established).

F. Searches And Seizures Pursuant To A Warrant

An important limitation on the scope of the exclusionary rule is the good faith exception carved out in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In *Leon* and *Sheppard*, the Court held that evidence derived from the execution of an invalid search warrant was admissible as long as the officers were acting in good faith. The good faith exception to the exclusionary rule has also been applied indirectly to reasonable errors in the description of the place searched (*Maryland v. Garrison*, 480 U.S. 79 (1987)) and directly to warrantless searches based on a statute subsequently held to be unconstitutional (*Illinois v. Krull*, 480 U.S. 340 (1987)). The Court has also found the arrest of a suspect based on a quashed warrant that remained outstanding due to a clerical error to be within the good faith exception to the exclusionary rule. *Arizona v. Evans*, 514 U.S. 1 (1995). In *Herring v. United States*, the Court went even further to find the exclusionary rule did not apply when an officer reasonably believed that there was an outstanding arrest warrant but the belief turned out to be wrong because of the negligent bookkeeping error by another police officer. 129 S. Ct. 695, 703 (2009). However, if police were shown to have been reckless in maintaining a warrant system or to have knowingly made false entries, exclusion would such be justified. *Id.*

COUNTERPOINT – In *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009), the court opened a circuit split on whether good faith applied to a search lawful under Supreme Court authority reversed later by the Supreme Court. The officer’s use of a search warrant does not mean suppression is unavailable. There are at least six areas that can develop a basis for suppression, notwithstanding *Leon*.

1. Controverted Warrant Affidavit – *Leon* expressly excepts from the scope of its holding warrants that are challenged under *Franks v. Delaware*, 438 U.S. 154 (1978). *Leon*, 468 U.S. at 923. In *Franks*, the Court held that warrant affidavits containing reckless or intentional false statements by the affiant are subject to challenge by a motion to controvert. If the affidavit, cleansed of the challenged statements, does not establish probable cause, the defendant is entitled to suppression of the derivative evidence. *Franks*, 438 U.S. at 171-72. Material omissions as well as false statements are subject to challenge. *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993); *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *amended*, 769 F.2d 1410 (9th Cir. 1985). The fact that probable cause existed and could have been established in a truthful affidavit will not cure a *Franks* error. *Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005). Misstatements or omissions of government officials in an affidavit for a search warrant are grounds for a *Franks* hearing even if the official at fault is not the affiant. *United States v. DeLeon*, 979 F.2d 761, 763-64 (9th Cir. 1992). The defendant need not present clear proof that

misrepresentations were deliberate or reckless in order to obtain a *Franks* hearing; all that is needed is a substantial showing. *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111 (9th Cir. 2005). The deliberately false or reckless inclusion of perceptions of sight, smell, and sound – given the court’s reliance on officers’ experience – is “unforgiveable.” *Hervey v. Estes*, 65 F.3d 784, 789-91 (9th Cir. 1995) (applying *Franks* to false statements regarding officers’ experience and the smell of a meth lab). The due process principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny concerning the production of exculpatory or potentially exculpatory evidence are applicable to suppression hearings involving a challenge to the truthfulness of allegations in the affidavit for a search warrant. *United States v. Barton*, 995 F.2d 931, 934-36 (9th Cir. 1992). When a warrant describes a vehicle and house in detail but, due to a cut-and-paste error, only allows a search of the vehicle, any evidence obtained from the house must be suppressed. *United States v. Robinson*, 358 F. Supp. 2d 975, 980 (D. Mont. 2005).

2. Overbreadth And Particularity – Where the warrant is facially overbroad, the officer cannot reasonably rely on its validity. *United States v. Kow*, 58 F.3d 423, 426-30 (9th Cir. 1995); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 751-54 (9th Cir. 1989); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *United States v. Dozier*, 844 F.2d 701, 707-08 (9th Cir. 1988); *United States v. Spilotro*, 800 F.2d 959, 964, 968 (9th Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1463 (9th Cir. 1986); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982). A warrant is overbroad if it allows the officer to seize virtually all of a business’s assets. *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003). To cure the warrant, the application must specifically allege that the business is “permeated with fraud.” *Id.* The warrant may also be seen to lack particularity. *Leon*, 468 U.S. at 923; *United States v. Collins*, 830 F.2d 145, 146 (9th Cir. 1987). Lack of particularity in a warrant cannot be cured by a detailed warrant affidavit unless it is specifically incorporated by reference. *Groh v. Ramirez*, 540 U.S. 551 (2004). Warrants to search individuals present at the place to be searched must be particularized and supported by probable cause. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Marks v. Clarke*, 102 F.3d 1012, 1027-29 (9th Cir. 1996). The Supreme Court upheld anticipatory search warrants against a particularity challenge in *United States v. Grubbs*, 547 U.S. 90 (2006). The Tenth Circuit approves blanket suppression where the search had an improper ulterior motive. *United States v. Foster*, 100 F.3d 846, 849-53 (10th Cir. 1996). Warrants for computer searches must affirmatively limit a search to evidence of specific federal crimes or specific types of material. *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009); concern regarding overbreadth of computer warrants led to guidance for the proper administration of warrants in *United States v. Comprehensive Drug Testing*, 2009 WL 2605378, at *15-16 (9th Cir. 2009 (en banc)).

3. Obvious Lack Of Probable Cause – The level of probable cause may be insufficient for a reasonable officer to rely on the warrant affidavit. *Leon*, 468 U.S. at 923; *United States v. Weaver*, 99 F.3d 1372, 1377-81 (6th Cir. 1996); *Greenstreet v. County of San Bernadino*, 41 F.3d 1306, 1309-10 (9th Cir. 1994); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988). This determination is based only on what is included in the affidavit, not on what the officer orally conveyed to the magistrate, *United States v. Luong*, 470 F.3d 898, 904 (9th Cir. 2006), nor what the officer may have known but failed to include. *United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005). “[A] warrant cannot be based on the claim of an untrained or inexperienced person to have smelled growing plants which have no commonly recognized odor.” *United States v. DeLeon*, 979 F.2d 761, 765 (9th Cir. 1992). Boilerplate recitations regarding sex crimes “so lacked the requisite indicia for probable cause” that the products of the search were suppressed in *United States v. Zimmerman*, 277 F.3d 426, 436 (3rd Cir. 2002). *See also United States v. Greathouse*, 297 F. Supp. 2d 1264, 1272-73 (D. Or. 2003) (evidence suppressed because thirteen-month old child pornography evidence was impermissibly stale). Despite a 41-page affidavit, the court found no reasonable officer would believe the affidavit established probable cause where close analysis disclosed, through the mass of boilerplate and irrelevancies, no links to establish that contraband would be in the house to be searched. *United States v. Sartin*, 262 F. Supp. 2d 1154 (D. Or. 2003). An unverified tip is insufficient to create a reasonable belief that probable cause existed. *Luong*, 470 F.3d at 903.

4. Product Of Prior Illegality – The government cannot insulate an illegal warrantless search by including the product of that search in a warrant affidavit. *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987); *United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989); *United States v. Vasey*, 834 F.2d 782, 789-90 (9th Cir. 1987); *United States v. Jay*, 242 F. Supp. 2d 960, 974-76 (D. Or. 2003). *See also Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1996) (facts learned or evidence obtained as a result of an illegal stop or arrest cannot be used to justify probable cause for that arrest); *accord United States v. Collins*, 427 F.3d 688, 691 (9th Cir. 2005).

5. Manner Of Execution – Until recently, the manner in which the warrant is executed could render the search unreasonable and implicate the exclusionary rule. *See, e.g., United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc); *United States v. Warner*, 843 F.2d 401, 405 (9th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271, 1279 n.4 (9th Cir. 1986). Violation of the knock-and-announce requirements of 18 U.S.C. § 3109 required suppression. *United States v. Zermeno*, 66 F.3d 1058, 1062-63 (9th Cir. 1995). The Supreme Court has recognized knock and announce as a component of the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927 (1995); *see Richards v. Wisconsin*, 520 U.S. 385 (1997). The Supreme Court allowed no-knock entry upon “reasonable suspicion” of officer danger, with some unspecified level of balancing for unnecessary destruction of

property in making the entry. *United States v. Ramirez*, 523 U.S. 65 (1998); *see also United States v. Peterson*, 353 F.3d 1045 (9th Cir. 2003) (exigent circumstances existed to authorize no-knock entry when officers had reasonable evidence that drug evidence could be destroyed and that explosives were in the house); *United States v. Bynum*, 362 F.3d 574 (9th Cir. 2004) (defendant's strange behavior – appearing at the door naked and carrying a loaded semiautomatic pistol – authorized no-knock entry). However, in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), the Court held that the exclusionary rule does not apply to violations of the constitutional knock-and-announce rule. In a 2-1 Ninth Circuit panel opinion, the majority held that *Hudson* applied to massive force in the execution of a warrant even where police could have obtained a no-knock warrant. *United States v. Ankeny*, 502 F.3d 829, 835-38 (9th Cir. 2007). Judge Reinhardt dissented, asserting that *Hudson* should not be extended “beyond the specific context of the knock-and-announce requirement” to cases where the police use excessive force in executing a search. *Id.* at 841-48. In footnote 3, the majority refused to reach the issue of whether *Hudson* applies to statutory knock-and-announce under 18 U.S.C. § 3109. The Fourth Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest even if the officers violate applicable state laws of arrest. *Virginia v. Moore*, 128 S.Ct. 1598, 1605 (2008).

6. Role Of Magistrate – The good faith exception does not apply where the issuing judge was not operating as a neutral magistrate. *Leon*, 468 U.S. at 923; *United States v. Decker*, 956 F.2d 773, 778 (8th Cir. 1992); *see also Connally v. Georgia*, 429 U.S. 245 (1977). An officer also cannot rely on an unsigned warrant because such reliance is not “objectively reasonable.” *United States v. Evans*, 469 F. Supp.2d 893, 900 (D. Mont. 2007).

The Fourth Amendment prohibits warrantless entry into a home for the purposes of making an arrest. *Kirk v. Louisiana*, 536 U.S. 635, 637-39 (2002); *Payton v. New York*, 445 U.S. 573, 586-87 (1980). To justify a warrantless entry into a residence, the government must show the existence of probable cause *and* exigent circumstances. *Kirk*, 536 U.S. at 638. The existence of an arrest warrant allows entry into a dwelling in which the defendant lives, but entry into the home of a third party must be supported by a search warrant or exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 211-22 (1981). A non-exigent entry to effect an arrest of an overnight guest of a third party requires at least an arrest warrant to comply with the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91 (1990).

COUNTERPOINT – Warrantless entry of a third party's home to execute an arrest warrant requires substantial evidence of the target's presence – an unverified anonymous tip is not enough. *Watts v. County of Sacramento*, 256 F.3d 886, 889-90 (9th Cir. 2001). A misdemeanor arrest warrant executed on a person standing in his doorway did not authorize a non-consensual entry into the dwelling. *United States v. Albrektsen*, 151 F.3d 951, 953-54 (9th Cir.

1998). Defendant did not expose himself to a warrantless arrest in his entryway merely by reaching his arm through a hole out to the front porch. *United States v. Flowers*, 336 F.3d 1222, 1226-29 (10th Cir. 2003); *see also United States v. Quaempts*, 411 F.3d 1046, 1048-49 (9th Cir. 2005) (when a “trailer home was so small that he could open the front door while lying on his bed,” the defendant did not waive *Payton* protections, because he was in the private area of his home). In *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984), the Court rejected the argument that a suspected drunk driver’s entry into his home justified a warrantless entry, narrowly construing the claim of exigency, especially when “the underlying offense for which there is probable cause to arrest is relatively minor.” *See LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) (exigency related to misdemeanor will seldom if ever justify warrantless entry into home).

G. Warrantless Searches And Seizures

The traditional rule is that warrantless searches and seizures are *per se* unreasonable and that the burden is on the government to establish that a search or seizure falls within a well-established exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Stoner v. California*, 376 U.S. 483, 486 (1964). However, the government argument that the warrant requirement only applies to dwellings – unanimously rejected in *United States v. Chadwick*, 433 U.S. 1, 7 (1977) – has been well received by Justices Scalia and Thomas. *See California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring). The exceptions to the warrant requirement have generally been given increasingly broad readings. In his dissent to *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004), Justice Thomas noted that the current status of the case law surrounding the warrant requirement stands “for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.” Determinations of probable cause and reasonable suspicion are given *de novo* review by the appellate courts. *Ornelas v. United States*, 517 U.S. 690 (1996).

1. Consent – “To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person’s house as unreasonable *per se*, one ‘jealously and carefully drawn’ exception recognizes the validity of searches with the voluntary consent of an individual possessing authority.” *Georgia v. Randolph*, 126 S. Ct. 1515, 1520 (2006). A search without a warrant or any level of suspicion can be conducted if, under the totality of the circumstances, the officers have obtained voluntary consent, regardless of whether the officers advised that consent could be refused. *United States v. Drayton*, 536 U.S. 194, 206-07 (2002); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-28 (1973). Under the totality of the circumstances analysis, the Ninth Circuit specifically considers five factors: (1) whether

the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. *United States v. Soriano*, 346 F.3d 963, 969-70 (9th Cir. 2003), *amended by* 361 F.3d 494, 503 (9th Cir. 2004) (holding mother's consent to search hotel room voluntary despite threat that children may be removed and that warrant could be obtained). *But see United States v. Perez-Lopez*, 348 F.3d 839, 846-48 (9th Cir. 2003) (questioning the relevance of *Miranda* warnings to voluntariness of consent).

COUNTERPOINT – The government bears the burden of establishing voluntary consent, and 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). In *Kaupp v. Texas*, 538 U.S. 626 (2003), the police, without probable cause, woke the 17-year-old defendant in his home at 3 a.m., telling him that they needed to talk to him about a murder investigation. Kaupp said “okay,” whereupon the officers handcuffed him and led him, shoeless and dressed only in his boxer shorts and T-shirt, to the patrol car. The Court held that under the circumstances, “Kaupp’s ‘okay’ . . . is no showing of consent There is no reason to think Kaupp’s answer was anything more than a ‘mere submission to a claim of lawful authority.’” *Kaupp*, 538 U.S. at 631. In *United States v. Washington*, the court noted that its determination that the defendant had been seized prior to the alleged consent had a “major impact” on its consent decision. 490 F.3d 765, 775 (9th Cir. 2007). Though only one factor of five, the court held that the fact of custody “raise[d] grave questions” as to the voluntariness of his consent. *Id.* An individual’s consent to search as a condition of pretrial release did not relieve the government of the burden to prove that the search was “reasonable.” *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006).

The absence of clear words of consent undercuts a government claim of permissive entry. *United States v. Shaibu*, 920 F.2d 1423, 1426-28 (9th Cir. 1990) (“[W]e interpret failure to object to the police officer’s thrusting himself into Shaibu’s apartment as more likely suggesting submission to authority than implied or voluntary consent”). Where INS agents made misleading statements implying they did not need a warrant to enter an apartment and talk, the court found no voluntary consent. *Orhorhaghe v. INS*, 38 F.3d 488, 500-01 (9th Cir. 1994); *see also United States v. Escobar*, 389 F.3d 781, 785 (8th Cir. 2004) (consent to search luggage was not voluntary when officers falsely claimed that a drug dog had alerted to the luggage). When a trooper falsely stated that he did not need a warrant to search a car, the subsequent consent to

the search by the motorist was invalid. *Cisneros v. State*, 165 S.W.3d 853, 858 (Tex. App. 2005). Expert testimony regarding a defendant's rudimentary grasp of English can establish lack of voluntary consent. *United States v. Higareda-Santa Cruz*, 826 F. Supp. 355, 359 (D. Or. 1993); see *United States v. Garibay*, 143 F.3d 534, 537-39 (9th Cir. 1998) (invalid *Miranda* waiver). A language barrier, even where the police officer has a rudimentary knowledge of Spanish, can prevent a defendant from voluntarily consenting to a search. *United States v. Garcia-Rosales*, 2006 WL 468320, at *12 (D. Or. 2006). The officer's hand on his gun, on a deserted stretch of highway, with no advice of the right to refuse consent, rendered the purported consent involuntary in *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326-28 (9th Cir. 1997). Police officers' show of authority and failure to inform bus passengers of the right to refuse consent rendered consent involuntary in *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998), and *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). Consent was involuntary after police ordered the suspect against a wall in a spread-eagle position, frisked him, handcuffed him, and told him he was going to jail. *United States v. Reid*, 226 F.3d 1020, 1026-27 (9th Cir. 2000). The fact that defendant twice refused to open the door prior to the officer identifying himself proved that, when he eventually opened the door, he was merely submitting to police authority and not consenting to entry. *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1361-62 (W.D. Wash. 2004). A defendant can withdraw consent by unequivocal acts such as repeatedly lowering hands to block officers from searching pockets, even without explicitly saying he no longer consented. *United States v. Sanders*, 424 F.3d 768, 775 (8th Cir. 2005). A defendant who had allowed police officers to enter his residence did not impliedly consent to officer's entry into his bedroom when the inebriated suspect "kind of flipped his hand" in that direction after the officer asked him for identification. *United States v. Castellanos*, 518 F.3d 965, 970 (8th Cir. 2008).

The scope of consent is generally determined objectively by the expressed object of the search. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (consent to search car for narcotics included search of paper bag in car); *United States v. Reeves*, 6 F.3d 660 (9th Cir. 1993) (consent to "complete search" of car included search of briefcase in trunk of car).

COUNTERPOINT – Intrusions that exceed the reasonable scope of the consent violate the Fourth Amendment. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989) (consent to search "person" in airport did not include "frontal touching" of genitals to locate drugs); *United States v. Washington*, 739 F. Supp. 546, 550-51 (D. Or. 1990) (permission to open locked trunk did

not include consent to pull seats out of car, without causing damage, to look in trunk); *see United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002) (written consent to search trailer did not include contents of computer, but defendant later consented to expanded search). After an initial consent to search a home to look for a burglar, the officers exceeded the scope of the consent in conducting second and third searches for drugs. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 547-48 (6th Cir. 2003). An initially consensual encounter can be transformed into a seizure within the meaning of the Fourth Amendment by increasingly intrusive police procedures. *Kaupp*, 538 U.S. at 631-32. The routine nature of police restraints is irrelevant to the effect of the restraints on the subject, and the absence of resistance to restraint is not a waiver of Fourth Amendment protection. *Kaupp*, 538 U.S. at 632. New consent was required for a marshal's second warrantless entry into a defendant's house when the second entry exceeded the scope of the defendant's consent to the first entry. *United States v. McMullin*, 576 F.3d 810, 816 (8th Cir. 2009). Defendant's consent to the search of his trunk did not include the entire car, even though he handed the officer the keys to his car, left the door of his car open, and failed to object to a search of the interior of the car. *United States v. Neely*, 564 F.3d 346, 351 (4th Cir. 2009). Following the lawful stop of his car, defendant's consent for DEA agents to search his car did not extend to search of his cell phones that were removed from his person and placed on the roof of his vehicle. *United States v. Zavala*, 541 F.3d 562, 576 (5th Cir. 2008).

Consent to search may be given by a third party who has common authority over the place to be searched. *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). Such third parties do not include hotel managers, landlords, and similar non-resident persons with a property interest. *Stoner v. California*, 376 U.S. 483, 488-89 (1964) (hotel clerk); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlord).

COUNTERPOINT – When two individuals with equal authority in the home are both present and disagree on consent, officers may not enter. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). In *United States v. Murphy*, 516 F.3d 1117, 1121-25 (9th Cir. 2008), the court held that, under *Randolph*, the occupant of a storage unit's refusal to consent trumped a co-tenant's consent, even if the co-tenant paid the rent. Refusal of consent by a person with greater authority over the property will override the consent of another with less authority. *United States v. Jones*, 335 F.3d 527, 531 (6th Cir. 2003) (holding that consent given by the handyman was insufficient when officers knew that the homeowner had already refused consent).

In a major expansion of the consent exception to the warrant requirement, the apparent authority of a third party consenter is sufficient to make the search lawful as long as the mistake is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (approving search based on roommate's consent even though, unknown to the police, she had moved out a month before and retained a key without permission); *see also United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005) (third party had apparent authority to consent to search of gun case in trailer).

COUNTERPOINT – Police officers had no apparent authority to search belongings where the lessee identified a houseguest's belongings in a gym bag under a bed. *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003); *see also United States v. Fultz*, 146 F.3d 1102, 1105-06 (9th Cir. 1998) (a homeowner had neither actual nor apparent authority to consent to the search of cardboard boxes stored in her garage by a homeless person). In *United States v. Welch*, 4 F.3d 761, 765 (9th Cir. 1993), *overruled in part on other grounds by United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997), the court held the consent given by the defendant's boyfriend to search the defendant's purse, which was located in a car they had joint control over, was invalid because the information known at the time did not support a reasonable belief in the boyfriend's authority to consent. In *United States v. Dearing*, 9 F.3d 1428, 1430 (9th Cir. 1993), *overruled in part on other grounds by United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997), the court held that an ATF agent's reliance on consent from a caretaker was unreasonable, even though the agent knew that the caretaker had been in the bedroom on prior occasions, because there was nothing to indicate that the prior access was authorized, the bedroom door was closed at the time of the search, and the agent knew that the caretaker's relationship with the homeowner was nearing an end. In *United States v. Salinas-Cano*, 959 F.2d 861, 865 (10th Cir. 1992), the court held the consent given by the defendant's girlfriend to open the defendant's closed suitcase, which was located in the girlfriend's house, was invalid because the information known at the time did not support a reasonable belief in the girlfriend's authority to consent. The police have a duty of inquiry when relying on a third party's apparent authority. *United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000). Third party consent that stems from prior government illegality is not valid. *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000). Agents' discovery of men's clothing in a duffle bag that a female suspect claimed was hers created sufficient ambiguity to erase her apparent authority to consent to a search of bags within hotel room. *United States v. Purcell*, 526 F.3d 953, 964 (6th Cir. 2008)

2. Plain View – In *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971), the plurality opinion articulated the plain view doctrine as allowing a warrantless seizure where the officers inadvertently observed an item in a place where they have a right to be, and probable cause to believe the item is subject to seizure is readily apparent. In *Horton v. California*, 496 U.S. 128 (1990), the Court shaved back the test to eliminate the requirement of inadvertence. In *Horton*, the Court approved the seizure of weapons not named in the search warrant for rings that were the proceeds of an armed robbery; the incriminating nature of the guns was readily apparent to the searching officer, and the officer was lawfully present on the premises deliberately to search for evidence. 496 U.S. at 141-42.

COUNTERPOINT – After ATF agents had fully executed their search warrant, the plain view doctrine was no longer applicable because they were no longer lawfully on the premises when they saw the rifle that was seized. *United States v. Limatoc*, 807 F.2d 792, 795 (9th Cir. 1987); *see also United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986) (plain view seizure of jewelry during execution of general warrant held invalid); *United States v. Miller*, 769 F.2d 554, 560 (9th Cir. 1985) (after field test of bag’s contents revealed innocuous white powder, further probing and puncturing of bag’s contents held invalid). Where a meth lab was in plain view during a protective sweep of a storage locker, the subsequent search required a warrant in the absence of exigent circumstances, *United States v. Murphy*, 516 F.3d 1117, 1121 (9th Cir. 2008). Where the warrant failed to particularly describe the items to be seized, material that is not contraband in plain view is suppressed. *United States v. Van Damme*, 48 F.3d 461, 465-67 (9th Cir. 1995). The “single purpose container” exception allows officers to search a container only if, solely by the container’s exterior, officers can be certain of what is inside. *United States v. Gust*, 405 F.3d 797, 800-05 (9th Cir. 2005) (black plastic case was not readily identifiable as a gun case, nor could its contents be readily inferred from outward appearances).

Application of the plain view doctrine to computer searches raises troubling issues. *United States v. Comprehensive Drug Testing, Inc.*, 2009 WL 2605378 (9th Cir. 2009) (en banc), the court stated that, when the government obtains a warrant to examine a computer hard driver or electronic storage medium to search for certain incriminating files, magistrate judges should insist that the government waive reliance upon the plain view doctrine. The search of a computer exceeded the scope of a warrant for drug records, resulting in the suppression of child pornography in *United States v. Payton*, 573 F.3d 859, 861-62 (9th Cir. 2009). The subscriber number of a defendant’s cell phone was not admissible under a plain view theory when the agent had to open the

cell phone and manipulate it in order to retrieve the number. *United States v. Zavala*, 541 F.3d 562, 577 n.5 (5th Cir. 2008).

3. Investigative Stops Less Intrusive Than Arrest – In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that a limited stop and frisk of an individual could be conducted without a warrant based on less than probable cause. The stop must be based on a reasonable, individualized suspicion based on articulable facts, and the frisk is limited to a pat-down for weapons. An anonymous tip that a person is carrying a gun is not, by itself, sufficient to justify a stop and frisk. *Florida v. J.L.*, 529 U.S. 266 (2000). A refusal to cooperate does not furnish the objective justification required for a stop. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). On the other hand, a person’s unprovoked flight in a high crime area when an officer approaches provides reasonable suspicion for a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000). The Court has also upheld an airport stop based in part on a drug courier profile. *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989). But police officers may not seize non-threatening contraband detected through groping and manipulating the object after a protective pat-down revealed no weapons. *Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993).

COUNTERPOINT – The need to rigorously apply *Terry* to outlaw race-based stops is strongly supported in *Washington v. Lambert*, 98 F.3d 1181, 1185-92 (9th Cir. 1996). The concurrence in *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000), also highlights racial issues in stops. In *United States v. Montero-Camargo*, 208 F.3d 1122, 1134-35 (9th Cir. 2000) (en banc), the court rejected reliance on the racial or ethnic appearance of the driver as the basis for a stop. In *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003), officers received an anonymous complaint on a drug hotline alleging that a group of young men located on a particular street corner were selling drugs. This complaint did not create reasonable suspicion to stop the defendant, who was among a group of eight to ten black males found on the same street corner, despite the fact that the group retreated when they observed the police officers and one of the members of the group appeared to dispose of something in the bushes. *Patterson*, 340 F.3d at 371-72. Though officers may rely partially on general “factors composing a broad profile,” ultimately they must show something that establishes *particularized* suspicion. *United States v. Manzo-Jurado*, 457 F.3d 928, 939-40 (9th Cir. 2006) (“a group of Hispanic-looking men, who appeared to be in a work crew, calmly conversing in Spanish to each other” was not enough to create reasonable suspicion that the men were illegal immigrants, although each of these facts bore some relevance to establishing reasonable suspicion).

To conduct a *Terry* pat-down for weapons, police officers must have a “reason to believe that [the suspect is] armed or dangerous.” *United States v. Flatter*, 456 F.3d 1154, 1155 (9th Cir. 2006). In determining whether officers had this “reason to believe,” the court considers the nature of the suspected crime, along with other possible clues as to the defendant’s dangerousness. *Id.* at 1157-58. For example, “an officer’s observation of a visible bulge in an individual’s clothing” or “sudden movements by defendants, or repeated attempts to reach for an object that was not immediately visible.” *Id.* The intrusiveness of a pat-down under *Terry* is limited by its purpose. *United States v. Miles*, 247 F.3d 1009, 1013-15 (9th Cir. 2001) (shaking matchbox exceeded permissible scope of *Terry* frisk). By shoving his hand into defendant’s pocket, instead of frisking him, an officer had converted a permissible pat-down into an unlawful search. *United States v. Casado*, 303 F.3d 440, 449 (2d Cir. 2002).

The same requirement of founded suspicion for a stop applies to stops of individual vehicles. *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Cortez*, 449 U.S. 411 (1981); *Delaware v. Prouse*, 440 U.S. 648 (1979). The scope of the “frisk” for weapons during a vehicle stop may include areas of the vehicle in which a weapon may be placed or hidden. *Michigan v. Long*, 463 U.S. 1032 (1983). The police may order passengers and the driver out of or into the vehicle pending completion of the stop. *Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Williams*, 419 F.3d 1029, 1034 (9th Cir. 2005) (officers have the general authority to control all movement in a traffic encounter). The suspicion to justify a stop may relate to crimes already committed, *United States v. Hensley*, 469 U.S. 221 (1985) (permissible to stop vehicle for further investigation based on “wanted flyer”), and the stop may be based on traffic violations observed by another officer. *United States v. Miranda-Guerena*, 445 F.3d 1233, 1237-38 (9th Cir. 2006). The “reasonable suspicion” standard cannot justify extended seizure for questioning in the hall outside the suspect’s hotel room. *United States v. Washington*, 387 F.3d 1060, 1067-68 (9th Cir. 2004). A traffic stop subjects a passenger, as well as the driver, to a Fourth Amendment seizure. *Brendlin v. California*, 551 U.S. 249, 257 (2007). During a stop for traffic violations, the officers need not independently have reasonable suspicion that criminal activity is afoot to justify frisking passengers, but they must have reason to believe the passengers are armed and dangerous. *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009).

COUNTERPOINT – The Fourth Amendment does not allow law enforcement officers to conduct an investigatory detention on the basis of reasonable suspicion that a person committed a misdemeanor that poses no threat to public safety. *United States v. Grigg*, 498 F.3d 1070, 1075-83 (9th

Cir. 2007) (reported violation of a noise ordinance insufficient to justify stop). In the following cases, the Ninth Circuit rejected a claim that founded suspicion justified a stop: *United States v. Colin*, 314 F.3d 439, 443-46 (9th Cir. 2003); *United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1126 (9th Cir. 2002); *United States v. Salinas*, 940 F.2d 392, 394-95 (9th Cir. 1991); *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418-19 (9th Cir. 1989); *United States v. Robert L.*, 874 F.2d 701, 703-05 (9th Cir. 1989); and *United States v. Thomas*, 863 F.2d 622, 628-29 (9th Cir. 1988). A defendant was unlawfully detained when a police officer questioned her in her car for a prolonged period incident to a traffic stop. *United States v. Garcia-Rosales*, 2006 WL 468320, at *10 (D. Or. 2006). In analyzing whether a detention exceeds the justification for the stop, the crucial question is whether the detention is unnecessarily prolonged. *United States v. Mendez*, 476 F.3d 1077, 1079-80 (9th Cir. 2007). *See also Muehler v. Mena*, 544 U.S. 93 (2005) (holding that, although the police may question a suspect about issues unrelated to the purpose of the stop, the officers may not unnecessarily prolong the detention). When officers at an immigration checkpoint detained travelers after checking their immigration status, their continued detention and questioning about drugs was unreasonable. *United States v. Portillo-Aguirre*, 311 F.3d 647, 653-56 (5th Cir. 2002); *see United States v. Higareda Santa-Cruz*, 826 F. Supp. 355, 358-59 (D. Or. 1993). *United States v. Izguerra-Robles*, 2009 WL 2973215 (D.Or. 2009). Police officers exceeded their authority to conduct a traffic stop for failure to carry an operator's license.

In *United States v. Garcia-Camacho*, 53 F.3d 244, 246-49 (9th Cir. 1995), the court noted the problems with profile-based traffic stops and deconstructed the “heads I win, tails you lose” justifications for a stop. The court rejected a car stop in *United States v. Thomas*, 211 F.3d 1186, 1191 (9th Cir. 2000), that was based in part on the purported “distinctive sound” of marijuana bales being loaded into the back of an El Camino. In *United States v. Golab*, 325 F.3d 63, 66-67 (1st Cir. 2003), the court held that an INS agent lacked reasonable suspicion based on an occupied car in a remote parking lot, with out-of-state plates, near a Social Security office. In *United States v. Townsend*, 305 F.3d 537, 542-45 (6th Cir. 2002), the court rejected a profile-based detention that included the presence of a Bible (purportedly to deflect suspicion), travel from and to source and destination cities, and food wrappers in the car.

A mistake of law cannot justify a vehicle stop, and there is no good faith exception for officers who rely on erroneous training. *United States v.*

Herrera, 444 F.3d 1238, 1246-49 (10th Cir. 2006) (officer's mistaken belief that a truck qualified as a commercial vehicle did not justify a suspicionless stop, even though officer claimed stopping the truck to check the VIN number was the only way to determine whether or not it qualified as commercial); *United States v. Mariscal*, 285 F.3d 1127, 1130-33 (9th Cir. 2002) (no reasonable suspicion where failure to signal right turn did not affect traffic as required for a violation under state law); *United States v. King*, 244 F.3d 736, 739-41 (9th Cir. 2001) (mistaken belief that ordinance prohibited driving with disabled placard hanging from mirror); *United States v. Lopez-Soto*, 205 F.3d 1101, 1105-06 (9th Cir. 2000) (erroneous belief that a registration sticker was required). In *United States v. Colin*, 314 F.3d 439, 443-47 (9th Cir. 2002), the court conducted a careful analysis of the traffic laws to conclude that the officers did not have reasonable suspicion to stop the defendant's car for lane straddling or for driving under the influence where the driver did not cross over the line and in fact made a safe lane change.

Even if police officers have legitimately stopped a vehicle, the officers may search the vehicle only if they have probable cause to do so. *United States v. Parr*, 843 F.2d 1228, 1232 (9th Cir. 1988). The level of intrusion during a stop may also trigger the probable cause requirement. *United States v. Lopez-Arias*, 344 F.3d 623, 627-28 (6th Cir. 2003) (transporting vehicle occupants away from the scene of the stop requires probable cause); *United States v. Rodriguez*, 869 F.2d 479, 483 (9th Cir. 1989); *United States v. Strickler*, 490 F.2d 378, 380-81 (9th Cir. 1974); *see also Longshore v. State*, 924 A.2d 1129, 1145 (Md. Ct. App. 2007) (handcuffing a suspect turns an investigative stop into an arrest and thus requires probable cause absent "special circumstances," such as a reason to believe the suspect will flee or endanger the officer).

In *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), the Supreme Court held that a Nevada statute requiring a person to disclose his name to an officer during a *Terry* stop did not violate any provisions of the Constitution and upheld the defendant's arrest.

COUNTERPOINT – In *State v. Affsprung*, 87 P.3d 1088 (N.M. Ct. App. 2004), the New Mexico Court of Appeals held that, after lawfully pulling a vehicle over for a traffic violation, the officer exceeded the scope of the *Terry* stop when he asked for and obtained the passenger's identification to run a wants and warrants check. The court pointed out that the scope of the stop permitted investigative detention of the vehicle and driver only, not the passenger. *Affsprung*, 87 P.3d at 1094. In *Martiszus v. Washington County*,

325 F. Supp.2d 1160, 1168-70 (D. Or. 2004), the court held that refusing to provide identification, standing alone, is insufficient justification for a *Terry* stop. In *United States v. Henderson*, 463 F.3d 27, 46-47 (1st Cir. 2006), the court found that an officer could not demand a driver's identifying information "for reasons of officer safety" when the officer did not perceive any danger, there was no reasonable suspicion that the defendant was engaged in any illegal activity, the stop was not in a dangerous location, and the traffic violations for which the defendant was pulled over for did not "raise the specter of illegal activity."

4. Incident To Arrest – An arrest must be supported by probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). As an incident to a lawful arrest, officers may conduct a detailed search of the person arrested, regardless of whether specific danger to the officer or of destruction of evidence is shown to exist. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

COUNTERPOINT – In the absence of a specific justification, body cavity searches as an incident to arrest are unreasonable. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991). The blanket policy of strip searching arrestees solely because they are classified for housing in the general population, in the absence of any reasonable suspicion, may violate the arrestee's constitutional rights. See *Bull v. City and County of San Francisco*, 539 F.3d 1193, 1196-97 (9th Cir. 2008), *rehearing en banc granted*, 558 F.3d 887 (9th Cir. 2009).

The officers must actually arrest the person – not simply have the right to arrest – to justify a search. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998) (full search of car pursuant to issuance of speeding citation violated the Fourth Amendment even though authorized by state statute). In the infamous soccer mom case, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court held that if an officer has probable cause to believe that an individual has committed even a non-jailable minor crime (failure to wear seatbelts) in his presence, he may arrest the offender without violating the Fourth Amendment.

COUNTERPOINT – The search of possessions within an arrestee's control must be "roughly contemporaneous with the arrest." *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1036 (9th Cir. 1997) (search of vehicle after defendant was transported to the police station was not a search incident to arrest); *United States v. Park*, 2007 WL 1521573, at * 8-9 (N.D. Cal. 2007) (holding that search of defendants' cell phones was not a "search of the person" and so the hour and a half delay caused the search to be invalid as "incident to arrest").

Police may search a vehicle incident to a recent occupant's arrest only when (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) it is reasonable to believe that evidence regarding the arrest might be found in the vehicle. *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009). *Gant* reversed the previous bright line test allowing searches of vehicles incident to arrest without regard to the rationale for the search. *Thornton v. United States*, 541 U.S. 615 (2004); *New York v. Belton*, 453 U.S. 454 (1981).

COUNTERPOINT – The question whether a suspect is a “recent occupant” depends on the suspect’s temporal and spatial relationship to the vehicle, which should be guided by the rationales underlying *Chimel v. California*, 395 U.S. 752 (1969). *Thornton*, 541 U.S. at 622. When no vehicle is involved, the area that may be searched pursuant to this exception is limited to the reaching distance, or area in the immediate control, of the suspect. *Chimel*, 395 U.S. at 763. A backpack on a nearby park bench was not close enough to the defendant to be searched incident to arrest. *United States v. Spurk*, 2005 WL 3478195, at *5 (D. Or. 2005). A backpack found 8 to 12 feet from the place of the defendant’s arrest was not within the defendant’s lunge area for purposes of a search incident to arrest. *United States v. Manzo-Small*, 2006 WL 1113584, at *3 (D. Or. Apr. 21, 2006). The defendant must also be under arrest; where a suspect was detained in the back of a patrol car on suspicion of driving with a suspended license, the search incident to arrest exception did not justify the search of the vehicle because he was not under arrest. *United States v. Parr*, 843 F.2d 1228, 1230-31 (9th Cir. 1988); *but see United States v. Smith*, 389 F.3d 944, 951-52 (9th Cir. 2004) (search may take place prior to actual arrest).

Incident to a lawful arrest of a person in his or her home, officers may conduct a warrantless sweep of places in the house where a person could hide if the officers reasonably believe that the area to be swept harbors someone posing a danger. *Maryland v. Buie*, 494 U.S. 325 (1990).

COUNTERPOINT – If the police detain rather than arrest the resident, no protective sweep is allowed. *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000). The purpose of the sweep is to protect officers against surprise attack by unknown co-conspirators and is narrowly confined to a cursory visual inspection of potential hiding places. *United States v. Furrow*, 229 F.3d 805, 811-12 (9th Cir. 2000). Even items in plain view must be suppressed where the evidence was located after the purposes of a protective sweep have

been accomplished. *United States v. Murphy*, 516 F.3d 1117, 1121 (9th Cir. 2008); *United States v. Noushfar*, 78 F.3d 1442, 1447-48 (9th Cir. 1996).

In general, pretextual traffic stops and arrests are permitted, and the subjective intent of the officer is irrelevant. *Whren v. United States*, 517 U.S. 806 (1996); *see also Arkansas v. Sullivan*, 532 U.S. 769 (2001) (reaffirming *Whren* regarding custodial arrest). The Ninth Circuit, with a dissent from Judge Reinhardt, extended *Whren* to use of a pretextual warrant to enter a home. *United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996).

COUNTERPOINT – In the absence of an equal protection violation, little is probably left of the cases on pretextual traffic stops, even where an objective test finds a purpose for investigating a crime other than the traffic infraction. *See United States v. Millan*, 36 F.3d 886 (9th Cir. 1994); *but see United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (police use of pretextual DUI roadblock aimed at drug interdiction unconstitutional). Despite *Hudson*, there still should be some room under pretext precedent for challenging the timing of the execution of a warrant in order to search a location otherwise protected by the Fourth Amendment. *See United States v. Lefkowitz*, 285 U.S. 452, 467 (1932); *Williams v. United States*, 418 F.2d 159, 161 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971); *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961). The pretextual use of an administrative warrant to arrest an individual in the home may still violate the Fourth Amendment even after *Whren*. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1360-63 (9th Cir. 1994).

5. Exigent Circumstances – The Court has traditionally allowed an exception for warrantless searches based on exigent circumstances under the rationales for warrantless arrests in residences (*Payton v. New York*, 445 U.S. 573 (1980)), “hot pursuit” (*Warden v. Hayden*, 387 U.S. 294 (1967)), imminent fire safety needs in the aftermath of a blaze (*compare Michigan v. Tyler*, 436 U.S. 499 (1978), *with Michigan v. Clifford*, 464 U.S. 287 (1984)), or an emergency such as a report of shots fired (*see Arizona v. Hicks*, 480 U.S. 321, 324-25 (1989)). However, the warrantless search must be strictly circumscribed by the emergency that justified its initiation. *Minnesota v. Olson*, 495 U.S. 91, 101 (1990); *Mincey v. Arizona*, 437 U.S. 385 (1978) (rejecting murder scene exception to warrant requirement). The premises may be secured while a warrant is obtained. *Segura v. United States*, 468 U.S. 796, 811 (1984). A warrantless detention of a resident outside a home does not violate the Fourth Amendment when the police have probable cause to believe the home contains evidence of a “jailable offense,” the seizure is temporary and prevents the resident from entering the home and destroying evidence before a warrant is obtained. *Illinois v. McArthur*, 531 U.S. 326, 331-36 (2001). The officer’s subjective motivation is irrelevant to

determine whether a warrantless entry based on exigency is justified – the sole considerations are whether objective circumstances justify the action. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404-05 (2006).

COUNTERPOINT – The courts have placed a number of restrictions on the exigent circumstances justification for warrantless searches and seizures.

a. Telephonic warrants – The availability of telephonic warrants for a period of time prior to the search severely undercuts a government claim of exigent circumstances. Surveillance of a hotel room for 90 to 120 minutes without seeking a search warrant by telephone required suppression of the products of the ensuing search in *United States v. Alvarez*, 810 F.2d 879, 881-83 (9th Cir. 1987). Further, the unavailability of the equipment needed for telephonic warrants does not excuse failure to seek such a warrant where the procedure is provided for by law. *Alvarez*, 810 F.2d at 882-83 n.4.

b. Knowledge of suspect – Even a suspect who is dangerous and possesses evidence capable of destruction does not justify warrantless entry where the officers lacked reasonable belief that the suspect knew of, or was about to learn of, his imminent capture. *United States v. George*, 883 F.2d 1407, 1412-15 (9th Cir. 1989). Where officers demanded entrance to an apartment to investigate loud music and marijuana odor, the officers set up a wholly foreseeable risk that the occupant would seek to destroy evidence of the crime, thereby obviating the exigent circumstances exception. *United States v. Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008).

c. Imminence of exigency – The Ninth Circuit has established a two-prong test to determine the constitutionality of a warrantless emergency entry: (1) considering the totality of the circumstances, did officers have an objectively reasonable basis for finding an immediate need to protect others or themselves from serious harm? and (2) were the search’s scope and manner reasonable to meet that need? *United States v. Snipe*, 515 F.3d 947, 951-42 (9th Cir. 2008). The Ninth Circuit has found no sufficient emergency where a landlord informed officers of methamphetamine chemicals’ presence in hot weather because the chemical had been in the location for over two weeks without incident. *United States v. Warner*, 843 F.2d 401, 404 (9th Cir. 1988). The products of the warrantless search of a backpack seized at the time of arrest were suppressed because there was no danger that the defendant could have removed the contents, destroyed the contents, or threatened the officers’ safety. *United States v. Robertson*, 833 F.2d 777, 785-86 (9th Cir. 1987). A

police officer's claim that he was performing a community caretaking function by investigating a potential burglary was insufficient to justify a warrantless search of a private residence, in this case pulling back plastic from a window that exposed a marijuana grow. *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993). Nonspecific noise from within the house, which was more consistent with someone coming to answer the door than resistance or destruction of evidence, does not establish exigency. *United States v. Mendonsa*, 989 F.2d 366, 370-71 (9th Cir. 1993). In a drunk-driving case, the need for evidence preservation does not justify a non-consensual blood sample where the arrestee has agreed to take a breath or urine test. *Nelson v. City of Irvine*, 143 F.3d 1196, 1207 (9th Cir. 1998). Where officers had a week to plan the execution of a search warrant, shooting dogs could not be justified by exigent circumstances. *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 976 (9th Cir. 2005). When police suspected a burglary, the fact that the intruders were known to have a personal relationship with the homeowner lessened the need for immediate action. *Frunz v. City of Tacoma*, 468 F.3d 1141, 1145 (9th Cir. 2006). Other circumstances in *Frunz* also pointed to a complete lack of exigency, including the "fact that it took the police forty minutes to respond" to the call. *Id.* Investigation of an ongoing criminal trespass, a fourth degree misdemeanor, did not constitute an exigency that justified a warrantless search of an apartment. *United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009). The possibility that the defendant was manufacturing methamphetamine in his hotel room did not create a danger to the agents and hotel guests that justified the warrantless search of his luggage. *United States v. Purcell*, 526 F.3d 953, 962 (6th Cir. 2008).

d. Pretext – The police cannot create the exigency by which they seek to justify the intrusion. *United States v. Coles*, 437 F.3d 361, 370-71 (3d Cir. 2006); *United States v. Allard*, 600 F.2d 1301, 1304 n.2 (9th Cir. 1979); *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1365 (W.D. Wash. 2004). Although entry may be justified by an emergency (*Brigham City, Utah v. Stuart*, 547 U.S. 398, 404-05 (2006)), the area searched should still be reasonably within the scope of the justification. See *United States v. Russell*, 436 F.3d 1086, 1093 (9th Cir. 2006) (mentioning that the "style of search" showed that it was for purposes of responding to emergency, not searching for evidence); *United States v. Martinez*, 406 F.3d 1160, 1165 (9th Cir. 2005). Where officers had conducted extensive surveillance, had established probable cause, and chose not to seek a warrant, they could not justify the warrantless search by exigent circumstances created when they conducted a knock-and-

talk visit to the home. *United States v. Chambers*, 395 F.3d 563, 566-69 (6th Cir. 2005).

e. Probable cause – The Ninth Circuit has rejected a government argument that the exigencies of “hot pursuit” allow entry into a residence upon less than probable cause. *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988); *United States v. Howard*, 828 F.2d 552, 554-56 (9th Cir. 1987). The half-hour period during which the police lost sight of the suspect, and during which police received no new information on his whereabouts, broke the continuity of the chase required for “hot pursuit.” *United States v. Johnson*, 256 F.3d 895, 907-08 (9th Cir. 2001) (en banc).

f. Particularized evidence – Mere speculation is not sufficient to show exigent circumstances. The government bears a heavy burden to show exigent circumstances based on particularized evidence and specific articulable facts. *United States v. Furrow*, 229 F.3d 805, 812 (9th Cir. 2000); *United States v. Reid*, 226 F.3d 1020, 1027-28 (9th Cir. 2000). There must be a reasonable basis, approaching probable cause, to connect the emergency with the place searched. *United States v. Deemer*, 354 F.3d 1130, 1132-33 (9th Cir. 2004) (911 call traced back to a hotel room did not create sufficient nexus for emergency search of a different room, despite loud noise coming from that room and the officer’s belief the call did not originate from the room traced).

6. Automobiles And Other Vehicles – The inherent mobility of cars and the layered protections for closed containers within cars has provided the grist for a generation of Supreme Court cases refining the scope of the automobile exception to the warrant requirement. The Court has historically allowed searches of vehicles where there is probable cause to believe the vehicle contains a seizable item. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). The vehicle exception includes motor homes in a “place not regularly used for residential purposes – temporary or otherwise.” *California v. Carney*, 471 U.S. 386, 392 (1985). The automobile exception does not require exigent circumstances. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam).

COUNTERPOINT – Based on language in *Coolidge v. New Hampshire*, 403 U.S. 443, 458-62 (1971), there may still be a warrant requirement for vehicles parked in private driveways. *See also Cardwell v. Lewis*, 417 U.S. 583, 593 (1974) (distinguishing *Coolidge* because that search occurred on private, not public, property). However, in *United States v. Hatley*, 15 F.3d 856, 858-59 (9th Cir. 1994), the court held that the automobile exception

authorized the search of an apparently mobile car located in a residential driveway. IRS agents' warrantless seizure of an automobile in a private driveway was held to be unlawful in the absence of a warrant in *United States v. Main*, 598 F.2d 1086, 1092 (7th Cir. 1979).

If probable cause exists to search the vehicle, then any container in the vehicle may also be searched for contraband. *California v. Acevedo*, 500 U.S. 565, 579-80 (1991); *United States v. Ross*, 456 U.S. 798, 824 (1982); *United States v. Johns*, 469 U.S. 478 (1985). This includes containers belonging to passengers that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

COUNTERPOINT – The automobile exception did not apply to the search of a defendant's vehicle when she returned to a coin shop to pick up payment four days after delivering stolen coins because the connection between crime and car was only speculative. *United States v. Perez*, 67 F.3d 1371, 1375-76 (9th Cir. 1995), *rev'd in part on other grounds*, 116 F.3d 840 (9th Cir. 1997) (en banc). Closed containers not within the automobile exception should still be subject to the warrant requirement. *See United States v. Chadwick*, 433 U.S. 1, 11-12 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

7. Inventory – Beyond examinations during a *Terry* stop or a search incident to arrest, the government is free to promulgate policies for inventory of the personal possessions of an arrestee and the contents of vehicles without a warrant. *South Dakota v. Opperman*, 428 U.S. 364 (1976) (car); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (arrestee's pockets and shoulder bag). The regulations must be reasonably related to protection of the individual's property and the state's interest in being free from false claims of theft and damage. The scope of such inventories, pursuant to policy, may include closed containers, provided that the inventory is not a pretext to search indiscriminately for incriminating evidence. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *see also Colorado v. Bertine*, 479 U.S. 367 (1987).

COUNTERPOINT – The failure of police to correctly follow state law on inventory searches requires suppression of evidence uncovered during the search. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1035-36 (9th Cir. 1997); *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991); *United States v. Wanless*, 882 F.2d 1459, 1463-64 (9th Cir. 1987). In *United States v. Park*, 2007 WL 1521573, at *11 (N.D. Cal. 2007), the court held that because the government did not prove that a policy allowing searches of cell phones was in place, nor give any reason why such a search would be necessary, the search of defendants' cell phones was not valid as an inventory

search. Officers may not impound vehicles pursuant to their community caretaking function unless the vehicle “jeopardizes the public safety or is at risk of loss.” *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005). After a lawful arrest, police lacked authority to impound and conduct an inventory search of the defendant’s car, “which was lawfully parked on the street two houses away from his residence – because doing so did not serve any community caretaking purpose.” *United States v. Caseres*, 533 F.3d 1064, 1074 (9th Cir. 2008).

8. Special Needs And Administrative Searches – A dangerously expanding area of warrantless searches falls under the category of special needs and administrative searches. These cases arose from several Warren-era opinions in which warrantless searches by building inspectors were tested under a reasonableness test balancing the need for the search or seizure against the invasion that the search or seizure entails. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). In a series of cases, this administrative exception has expanded to encompass large areas of interaction between government and the individual. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *New York v. Burger*, 482 U.S. 691 (1987). The Supreme Court utilized this type of balancing test to uphold the warrantless search by a police officer of a probationer’s apartment based on reasonable suspicion. *United States v. Knights*, 534 U.S. 112 (2001). The Court further extended *Knights* in *Samson v. California*, upholding as constitutional a statute that allowed for suspicionless searches of parolees. 547 U.S. 843, 847 (2006).

COUNTERPOINT – In a post-*Knights* decision, the Ninth Circuit held that a search or seizure is not reasonable if the facts that would make the search reasonable, like the suspect’s parole status and outstanding warrant, are not known to the officers at the time of the search. *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005); *see also Fitzgerald v. City of Los Angeles*, 485 F. Supp.2d 1137, 1143 (C.D. Cal. 2007) (holding that officers must have “advance knowledge” of the parolee’s status and search condition before a suspicionless search is valid). Officers must have probable cause to administer a drug test on pretrial releasees, even if the individual consented to suspicionless drug tests as a condition of release. *United States v. Scott*, 450 F.3d 863, 865-72 (9th Cir. 2006). The warrantless search of a parolee’s acquaintance’s residence violated the Fourth Amendment when there was reason to believe the parolee still resided at his reported address and there was insufficient evidence to establish that he lived with the acquaintance. *United States v. Howard*, 447 F.3d 1257, 1267-68 (9th Cir. 2006). The inclusion of dormitories in a search of a horse-racing track exceeded the scope of the regulatory purpose in *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002). In

Portillo v. United States Dist. Court, 15 F.3d 819, 822-24 (9th Cir. 1994), the court held that a standing order requiring pre-sentence urine testing violated the Fourth Amendment where the defendant's theft offense bore no relation to drug usage. In *Way v. County of Ventura*, 445 F.3d 1157, 1163 (9th Cir. 2006), the court held that a blanket policy allowing strip searches of individuals detained on any drug charge violated the Fourth Amendment. The court held that any such policy must be "reasonably related" to a security interest. *Id.* at 1161; *see also Craft v. County of San Bernadino*, 468 F. Supp.2d 1172, 1179 (C.D. Cal. 2006) (holding unconstitutional a blanket policy allowing the strip searches of pre-arraignment arrestees regardless of the seriousness or type of their alleged crimes).

In *United States v. Munoz*, 701 F.2d 1293, 1298-1300 (9th Cir. 1983), the court rejected the government argument that national forests are sufficiently regulated that the stopping of all vehicles to check for game violations, regardless of the absence of specific suspicion, was justified as an administrative search. In *United States v. Bulacan*, 156 F.3d 963, 967-74 (9th Cir. 1998), the court suppressed results of a search because the purported administrative search had an impermissible criminal investigative purpose. Administrative search exceptions should be narrowly construed. *United States v. Herrera*, 444 F.3d 1238, 1246 (10th Cir. 2006) (an officer's reasonable mistake that a truck fell within the administrative exception for commercial vehicles did not justify the suspicionless search). For airport security screening for domestic flights, a search is limited to detection of weapons and explosives. *United States v. Fofana*, 620 F. Supp.2d 857, 862-63 (S.D. Ohio 2009) (the extent of the search went beyond this scope in opening envelopes for investigative purposes).

The "special needs" cases have expanded the rationale applied in administrative searches to a wider array of suspicionless searches and seizures. For example, suspicionless stops of all vehicles are permitted at police checkpoints to check for sobriety, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990), citizenship at the border, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and perhaps valid vehicle licensing, *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Illinois v. Lidster*, 540 U.S. 419 (2004), the Supreme Court held that a checkpoint designed to seek information regarding a recent hit-and-run crime did not violate the Fourth Amendment because the purpose of the checkpoint was not to find evidence of crimes committed by the drivers and the scope of the stop was reasonable in context. To qualify as a "special need," the program for suspicionless searches or seizures must satisfy a government interest beyond "ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000).

COUNTERPOINT – When the primary purpose of the checkpoint is to detect evidence of criminal wrongdoing, the suspicionless stop violates the Fourth Amendment. *Edmond*, 531 U.S. at 39-40; *see also Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004) (roadblock used to discourage rock concert violated Fourth Amendment). In *Bourgeois v. Peters*, 387 F.3d 1303, 1311-16 (11th Cir. 2004), the court held that a city’s invocation of September 11 did not justify the use of magnetometer searches at a peaceful protest.

9. Border Searches – A search may be conducted of all persons and property entering the country without individualized suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). In *United States v. Ramsey*, 431 U.S. 606 (1977), the Court held that the opening of international packages at the port of entry fell within the border search exception. Therefore, no probable cause or warrant was necessary when a customs official opened suspicious-looking packages from Thailand. Similarly, the search of a package from Canada that had been stored at a local post office for nine days was justified as an “extended border search” because the ICE agents had reasonable suspicion that the package contained contraband. *United States v. Sahanaja*, 430 F.3d 1049, 1054 (9th Cir. 2005). Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage device at the border. *United States v. Arnold*, 523 F.3d 941, 946 (9th Cir. 2008). The Court has also held that border patrol officials may stop ships on the open sea for documents inspection without articulable suspicion. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588-89 (1983). Border patrol agents do not need reasonable suspicion to conduct any search of vehicles at the border so long as (1) the search does not seriously damage the vehicle in a way that reduces its safety or functionality and (2) the search is not carried out in an offensive manner. *United States v. Flores-Montano*, 541 U.S. 149 (2004) (fuel tank disassembly); *United States v. Hernandez*, 424 F.3d 1056 (9th Cir. 2005) (removal of door panels); *United States v. Chaudhry*, 424 F.3d 1051 (9th Cir. 2005) (drilling into bed of truck); *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005) (slashing spare tire); *United States v. Camacho*, 368 F.3d 1182 (9th Cir. 2004) (x-ray search of tire).

COUNTERPOINT – In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court limited the warrantless border search to the immediate vicinity of the border or the functional equivalent thereof. Also, border officials on roving patrols must have a reasonable suspicion before stopping a motor vehicle. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Nicacio v. United States*, 797 F.2d 700, 702 (9th Cir. 1985). In *United States v. Whiting*, 781 F.2d 692, 696-98 (9th Cir. 1986), the court refused to apply the border search exception where the search was undertaken by a Department of Commerce agent who did not have the same statutory authorization as INS and

Customs agents. Border searches that are particularly invasive of personal privacy, such as strip searches and x-ray searches, or that impair the vehicle's safe operation, may require reasonable suspicion. *See Flores-Montano*, 541 U.S. at 152; *Montoya de Hernandez*, 473 U.S. at 541; *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998) (drilling into the frame of a vehicle requires reasonable suspicion); *Cortez-Rocha*, 394 F.3d at 1119-20 (distinguishing a search that causes property damage and thus does not require reasonable suspicion with a search that "decreases the safety or operation of the vehicle").

The inspection of Federal Express packages destined overseas may constitute an extended border search, requiring reasonable suspicion, where conducted far from an international border. *United States v. Cardona*, 769 F.2d 625, 628-29 (9th Cir. 1985). The delayed search of a computer seized at the border but examined at a place and time removed from the border fell outside the border search exception in *United States v. Cotterman*, 2009 WL 465028 (D. Ariz. 2009). A statute that authorized customs officials to conduct warrantless searches of "private lands but not dwellings" within a certain radius of the border did not permit searches of the curtilage. *United States v. Romero-Bustamante*, 337 F.3d 1104, 1107-10 (9th Cir. 2003). Searches of private living quarters in a ship cabin at the functional equivalent of a border must be supported by reasonable suspicion of criminal activity. *United States v. Whitted*, 541 F.3d 480, 488-89 (3d Cir. 2008).

H. Fruit Of The Poisonous Tree

The basic rule of *Wong Sun v. United States*, 371 U.S. 471 (1963), is that evidence seized as a result of a Fourth Amendment violation and evidence derived therefrom is inadmissible in criminal trials. The contraction of Fourth Amendment rights in recent years is paralleled by the expansion of exceptions and limitations to the fruit of the poisonous tree doctrine.

1. Independent Source Rule – In *Murray v. United States*, 487 U.S. 533 (1988), the Court elaborated on the independent source rule, which allows evidence to be used that was the product of an unlawful intrusion as long as a separate and distinct evidentiary trail led to the same place. In *Murray*, agents unlawfully entered a warehouse and saw bales of marijuana. Without seizing anything, the officers drafted a warrant affidavit referring only to information in their possession prior to the entry; all reference to the illegal search was omitted. The Court approved the procedure for establishing an independent basis for the seizure of the marijuana.

COUNTERPOINT – However, the Court remanded the case for a determination whether the agents’ decision to seek a warrant was a product of the illegal entry and search. *Murray*, 487 U.S. at 542-44; *accord United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995). When a warrant has been tainted by an illegal search, the government must prove both that the decision to seek the warrant was not prompted by the unlawfully viewed evidence, and that probable cause existed in the absence of the tainted evidence. *United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999). The independent source doctrine did not render admissible weapons and drugs seized in a warranted search of an apartment that followed an illegal warrantless entry into the same apartment. *United States v. Mowatt*, 513 F.3d 395, 404-05 (4th Cir. 2008).

2. Inevitable Discovery – In *Nix v. Williams*, 467 U.S. 431 (1984), the Court revisited the “Christian burial speech” case in which the Court earlier found that a confession leading to the discovery of a murder victim’s body violated the Sixth Amendment. On remand, the state established that, with the massive search ongoing at the time of the confession, the body would have been found in a short time anyway. In *Nix*, the Court approved the hypothetical inevitable discovery doctrine, allowing the evidence where the government established that the illegally obtained evidence would have been discovered through legitimate means independent of official misconduct.

COUNTERPOINT – In *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986), the court rejected a government claim that, if the illegal search had not occurred, a warrant would have been sought and obtained. The court stated that the means by which the hypothetical inevitable discovery would have occurred must parallel, not follow, the primary illegality. *See also United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399-1400 (9th Cir. 1989); *United States v. Maxwell*, 734 F. Supp. 280, 282-83 (S.D. Tex. 1990); *but see United States v. Boatwright*, 822 F.2d 862, 864-65 (9th Cir. 1987). In both *United States v. Mejia*, 69 F.3d 309, 319-20 (9th Cir. 1995), and *United States v. Reilly*, 224 F.3d 986, 994 (9th Cir. 2000), the court rejected the government’s argument that the inevitable discovery doctrine applied where the police had probable cause to search but simply failed to obtain a warrant. The court rejected speculative application of the inevitable discovery rule in *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000), when the government offered no evidence of the procedures that would have been followed had the illegal car stop not occurred. *See also United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003) (no inevitable discovery where police were only looking for

defendant and could not establish that the firearm would inevitably have been found.). In *United States v. Johnson*, 380 F.3d 1013 (7th Cir. 2004), the court held that neither the inevitable discovery nor the independent source exception may be premised on the violation of another's constitutional rights. In *United States v. Young*, 573 F.3d 711, 722-23 (9th Cir. 2009), inevitable discovery did not apply because a hotel policy could have allowed over-staying guest to store the seized firearm or take his belongings with him and vacate the room.

3. Attenuation – In *Brown v. Illinois*, 422 U.S. 590, 604-05 (1975), the Court set out factors to be examined in determining whether a *Mirandized* statement obtained after an illegal arrest must be suppressed. In finding that the statement must be suppressed, the Court weighed three factors: 1) temporal proximity of the illegal conduct and the later statement; 2) the existence of intervening circumstances; and 3) the flagrancy of the initial misconduct. *Accord Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003); *see also United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003) (no attenuation between illegal search and later non-custodial statements). This methodology applies to the Fourth Amendment. *United States v. Patzer*, 277 F.3d 1080, 1084-85 (9th Cir. 2002); *United States v. Ricardo D.*, 912 F.2d 337, 342-43 (9th Cir. 1990); *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1299-1300 (9th Cir. 1988); *United States v. Perez-Esparza*, 609 F.2d 1284, 1290-91 (9th Cir. 1979). However, a *Miranda* violation does not require suppression of resulting physical evidence under the exclusionary rules. *United States v. Patane*, 542 U.S. 630 (2004). A warrantless arrest in the home, with probable cause and without exigent circumstances, did not require suppression of the subsequent confession in *New York v. Harris*, 495 U.S. 14, 21 (1990); *accord United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc) (illegal seizure in home and illegal search of home did not require suppression of later confession).

COUNTERPOINT – In determining whether a statement must be suppressed following an illegal search, the government has the burden of showing the statements were “a product of free will.” *Brown v. Illinois*, 422 U.S. 590, 604 (1975). Consent obtained after an illegal arrest is invalid, even after *Miranda* warnings, in the absence of evidence breaking the chain of causation. *Kaupp*, 538 U.S. at 633; *United States v. Lopez-Arias*, 344 F.3d 623, 629-30 (6th Cir. 2003); *United States v. Washington*, 387 F.3d 1060, 1072-77 (9th Cir. 2004) (finding insufficient attenuation based on temporal proximity, lack of intervening circumstances, and flagrancy of misconduct). An illegal seizure without an arrest also “weighs toward suppression.” *United States v. Washington*, 490 F.3d 765, 777 (9th Cir. 2007). In *United States v. Freeman*, 2009 WL 2046039 at *3 (D. Or. 2009), the court found the nineteen month interval between an unlawful search and seizure and a later arrest was not sufficient to dissipate the taint of the original unlawful conduct.

4. **Witness Testimony** – Causation is more difficult to establish where the product of the illegal search is witness testimony. Because witnesses might independently come forward regardless of the primary illegality, the witness’s testimony is only excluded if there is a close and direct link between the illegality and the witness testimony. *United States v. Ceccolini*, 435 U.S. 268 (1978).

COUNTERPOINT – In *United States v. Padilla*, 960 F.2d 854, 862-63 (9th Cir. 1992), *rev’d on other grounds*, 508 U.S. 77 (1993), the court held that all evidence based on an illegal stop of a drug courier was tainted by the stop and subject to suppression, including live witnesses who were induced to testify through cooperation agreements. *See also United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396-99 (9th Cir. 1989).

In *United States v. Crews*, 445 U.S. 463, 471-72 (1980), the Court held that in-court identification testimony need not be suppressed where a pretrial identification procedure was the product of an illegal arrest.

COUNTERPOINT – Testimony describing the defendant at the time of arrest should be suppressed if it is the fruit of an illegal arrest. *See United States v. Terry*, 760 F.2d 939, 943 (9th Cir. 1985).

5. **Impeachment** – A testifying defendant can be impeached with the products of an illegal search or seizure if he or she testifies on direct examination in a manner that is contradicted by the tainted evidence. *Walder v. United States*, 347 U.S. 62 (1954). In *United States v. Havens*, 446 U.S. 620 (1980), the Court expanded allowable impeachment of the defendant with the product of an illegal search and seizure to statements elicited in cross-examination “plainly within the scope” of the direct. However, the Court limited the impeachment exception to the exclusionary rule by reversing a case in which a defense witness, rather than the defendant, provided the inconsistent testimony. *James v. Illinois*, 493 U.S. 307 (1990).

6. **Nature Of Illegal Intrusion** – The exclusionary rule is generally considered a remedy for violations of the Fourth Amendment rather than non-constitutional protections. In *United States v. Caceres*, 440 U.S. 741 (1979), conversations recorded in violation of IRS regulations were held to be admissible at trial. However, violation of statutes, such as the limitations on the use of wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2210-2225), may require suppression. *See United States v. Gonzalez, Inc.*, 412 F.3d 1102 (9th Cir. 2005) (suppressing wiretap evidence under Title III because agents failed to provide a full and complete statement that traditional investigative techniques had failed or that they were unlikely to succeed or dangerous).

United States v. Eide, 875 F.2d 1429, 1434-37 (9th Cir. 1989) (Veterans Administration drug records should have been suppressed because of applicable confidentiality statute).

7. Type Of Proceeding – In addition to criminal trials, the exclusionary rule applies to civil forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). However, the Supreme Court has allowed the use of illegally seized evidence in non-criminal contexts such as civil tax cases (*United States v. Janis*, 428 U.S. 433 (1976)), civil deportation hearings (*INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)), and grand juries (*United States v. Calandra*, 414 U.S. 338 (1974)). The federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights. *Pa. Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998).

COUNTERPOINT – Under some circumstances, the exclusionary rule may apply to sentencing proceedings. *See United States v. Perez*, 67 F.3d 1371, 1376 (9th Cir. 1995); *United States v. Kidd*, 734 F.2d 409, 414 (9th Cir. 1984); *Verdugo v. United States*, 402 F.2d 599, 612-13 (9th Cir. 1968); *but see United States v. Lynch*, 934 F.2d 1226, 1234-37 (11th Cir. 1991); *United States v. McCrory*, 930 F.2d 63, 67-69 (D.C. Cir. 1991); *United States v. Torres*, 926 F.2d 321, 322-25 (3d Cir. 1991). Where the Fourth Amendment violation is egregious, due process requires suppression of evidence even in civil and administrative proceedings. *Orhorhaghe v. INS*, 38 F.3d 488, 501-04 (9th Cir. 1994); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448-52 (9th Cir. 1994). The good faith exception does not apply to motions for return of property under Rule 41(e). *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927-28 (9th Cir. 1996).

The admissibility of identity information in criminal cases, especially in immigration prosecutions under 8 U.S.C. § 1326, is the subject of a major conflict in the Circuits and within the Ninth Circuit. *See United States v. Ortiz-Hernandez*, 427 F.3d 567, 576-77 (9th Cir. 2005), *petition for panel rehearing and rehearing en banc denied*, 441 F.3d 1061 (9th Cir. 2006) (Paez, J., and eight other judges dissenting from denial of rehearing); *United States v. Garcia-Beltran*, 443 F.3d 1126, 1135 (9th Cir. 2006).

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This outline has been periodically updated by law clerks from Lewis and Clark Law School, most recently Caroline Livett.

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