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DEVELOPMENTS IN FEDERAL SEARCH AND SEIZURE LAW

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December 2022 Update

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DEVELOPMENTS IN FEDERAL SEARCH AND SEIZURE LAW

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December 2022

A. Introduction

The federal courts are the scene of an ongoing struggle between the government's need to secure evidence to convict law-breakers and the individual's interest in being free from government intrusions. The Fourth Amendment sets out the language central to this conflict:

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

For attorneys representing criminal defendants, court decisions on search and seizure often seem to overwhelmingly favor the interests of law enforcement. For over thirty years, we have been compiling cases in which defendants and civil rights plaintiffs have prevailed. By focusing on successful Fourth Amendment arguments, we hope to provide raw material for criminal defense lawyers to fashion suppression motions, based on chronology and causation, that can enforce our clients' rights against government overreach while supporting an 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 a 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, such as 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).

B. What Constitutes A Search?

The first requirement for a search is government action, because private intrusions, no matter how invasive, do not implicate the Fourth Amendment. *Walter v. United States*, 447 U.S. 649, 657 (1980); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Foreign law enforcement officials are treated as private actors for Fourth Amendment purposes. *United States v. Odoni*, 782 F.3d 1226, 1238-39 (11th Cir. 2015).

1. Private Search Doctrine – Where a private party acts as an "instrument or agent" of the state in effecting a search, Fourth Amendment interests are implicated. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). However, "a private actor does not become a government agent simply by complying with a mandatory reporting statute." *United States v. Rosenow*, 50 F.4th 715, 730 (9th Cir. 2022). In determining whether the actions of a private person 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. *United States v. Walther*, 652 F.2d 788, 791-93 (9th Cir. 1981).

> **COUNTERPOINT** – In *Walther*, an airport employee's actions were attributable to the government, even though the government had no knowledge of the particular search, because government officials previously paid the employee to search bags. 652 F.2d at 791-93; *see also United States v. Reed*, 15 F.3d 928, 930-33 (9th Cir. 1994) (a hotel manager acted as a government agent when the manager reported a guest's suspicious activity to police and police were present while the manager searched the guest's room).

The Fourth Amendment is also triggered when government actors exceed the scope of the initial private search. *United States v. Jacobsen*, 466 U.S. 109, 104 (1984); *see United States v. Phillips*, 32 F.4th 865 (9th Cir. 2022) (no constitutional violation where third party mimicked prior search of laptop in the presence of an officer). In *United States v. Wilson*, the court provided a survey of private search doctrine in addressing "the intersection between electronic communications providers' control over material on their own servers and the Fourth Amendment's restriction of warrantless searches and seizures, which limits only governmental action." 13 F.4th 961, 963-64 (9th Cir. 2021). Google reported to the National Center for Missing and Exploited Children that the defendant had attached apparent child pornography to an email, but Google never opened the email attachments. Because the government agent who received the report opened the attachments without a warrant, exceeding the scope of the private search, the inclusion of descriptions of the images in the search warrant affidavit violated the Fourth Amendment. *Id.* at 972-76. The *Wilson* court explained why inconsistent holdings in the Fifth and Sixth Circuits are wrong in light of Supreme Court authority on the scope of electronic privacy. *Id.* at 978; *but see United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018) (holding that government did not exceed private search when a "hash value" assigned by a private search had already identified the image as child pornography); *United States v. Miller*, 982 F.3d 412, 427 (6th Cir. 2020) (same).

There appears to be a circuit split as to how far reconstructed searches of hard drives and computers may go, specifically whether a search unit is defined as a single file or as the entire electronic device. *Compare Rann v. Atchison,* 689 F.3d 832, 836-38 (7th Cir. 2012) (defining the search unit as the entire electronic device, thereby permitting police to view individual files stored on digital media devices where the private individual previously viewed other images on the same devices), *with*

United States v. Lichtenberger, 786 F.3d 478, 488 (6th Cir. 2015) (defining the search unit in terms of individual files, thereby prohibiting police from searching files not previously viewed by the private actor).

2. Reasonable Expectation Of Privacy – 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, 351 (1967). A reasonable expectation of privacy turns on (1) whether the person had "an actual (subjective) expectation of privacy," and (2) whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

COUNTERPOINT – Individuals retain a reasonable expectation of privacy in a wide variety of circumstances. For example, 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 government employee can have a reasonable expectation of privacy in a 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. Shelton*, 997 F.3d 749, 765 (7th Cir. 2021) (employee who entered into county official's office at agent's behest "outside of normal business hours and lingered beyond any legitimate, anticipated or permissible purpose in order to review and copy the papers on top of her desk" violated reasonable expectation of privacy); *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, even if the garage door is left open. *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000). An individual who is detained by the police has a reasonable expectation of privacy in conversations with his or her attorney in an interview room at the police station. *Gennusa v. Canova*, 748 F.3d 1103, 1117 (11th Cir. 2014). 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); *but see Wells v. United States,* 739 F.3d 511 (10th Cir. 2014) (defendant police officer had no reasonable expectation of privacy that motel room he was searching was not subject to electronic surveillance). Exploratory surgery can violate privacy rights. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 44 (1st Cir. 2009) (citing *Winston v. Lee*, 470 U.S. 753 (1985)).

Closed Containers: A person does not forfeit his or her expectation of privacy in a closed container merely because it is stored in a place not controlled exclusively by the container's owner. *See, e.g.*, *United States v. Monghur*, 588 F.3d 975, 978 (9th

Cir. 2009) (defendant did not waive his expectation of privacy in a closed container that was stored at another's apartment when he mentioned the container in telephone calls made from jail); *United States v. Davis*, 332 F.3d 1163, 1167-68 (9th Cir. 2003) (an occasional overnight houseguest had an expectation of privacy in a gym bag he left under his girlfriend's bed); *United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998) (reasonable expectation of privacy in cardboard boxes permissively stored in another's garage).

Electronic Devices: With respect to cellular telephones, the Supreme Court unanimously held that warrantless searches of the contents of cell phones seized incident to arrest violate the Fourth Amendment. *Riley v. California*, 573 U.S. 373, 393 (2014) ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."). Even probationers have a "substantial" privacy interest in the contents of their cell phones, which is not waived by a condition of probation authorizing the government to search the individual's "property" at any time. *United States v. Lara,* 815 F.3d 605, 611-12 (9th Cir. 2016).

The Ninth Circuit noted that electronic storage devices such as laptops "contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails," and held that "[t]hese records are expected to be kept private and this expectation is one that society is prepared to recognize as reasonable." *United States v. Cotterman,* 709 F.3d 952, 964 (9th Cir. 2013); *accord United States v. Galpin,* 720 F.3d 436, 446 (2d Cir. 2013) ("[A]dvances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain."). Relying on *Riley* and *Cotterman,* the Ninth Circuit recognized "a strong claim to a legitimate expectation of privacy in [one's] personal email, given the private information it likely contains." *In re Grand Jury Subpoena,* 828 F.3d 1083, 1090 (9th Cir. 2016); *accord United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (recognizing a reasonable expectation of privacy in emails stored with commercial internet service providers).

The Court has traditionally held that individuals have no reasonable expectation of privacy in information voluntarily shared with third parties. *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (holding individuals have no reasonable expectation of privacy in the phone numbers they dial). This is true of company laptops, cellphones, or work emails searched by the employer, even where the employer is the police. *Larios v. Lunardi*, 442 F. Supp. 3d 1299, 1310 (E.D. Cal. 2020). Likewise, the Ninth Circuit held that an individual does not have a reasonable expectation of privacy in location data affirmatively disclosed to third parties. *See Sanchez v. L.A. Dep't of Transp.*, 39 F.4th 548, 559 (9th Cir. 2022) (holding individuals have no reasonable expectation of privacy in the location data of rented e-scooters).

COUNTERPOINT – In *Carpenter v. United States*, however, the Supreme Court held that an individual maintains a legitimate expectation of privacy in the record of physical movements as captured by wireless carriers through cell site location information (CSLI). 138 S. Ct. 2206 (2018).[1] The Court in *Carpenter* did not express a view on real-time or "prospective" location data, but the majority of federal courts to have considered the issue conclude that such information may only be obtained pursuant to a warrant supported by probable cause because it effectively converts the cell phone into a tracking device. *See, e.g., United States v. Cooper*, Misc. No. 06-0186, 187, 188, 2015 WL 881578, at *8 (N.D. Cal. Mar. 2, 2015) (reasonable expectation of privacy in prospective cell phone location information); *United States v. Espudo*, 954 F. Supp. 2d 1029, 1035 (S.D. Cal. 2013) (same, concluding real-time cell phone data are not business records under the Stored Communication Act); *In re App. of U.S. for an Order Authorizing Disclosure of Location Information,* 849 F. Supp. 2d 526, 539-42 (D. Md. 2011) (reasonable expectation of privacy in location and movements revealed by cell phone data); *In re App. of the U.S. for an Order Authorizing the Disclosure of Prospective Cell Site Info.,* No. 06-MISC-004, 2006 WL 2871743, at *5 (E.D. Wis. Oct. 6, 2006) (same); *In re App. of the U.S. for an Order Authorizing the Monitoring of Geolocation and Cell Site Data for a Sprint Spectrum Cell Phone No. ESN,* 2006 WL 6217584, at *4 (D.D.C. Aug. 25, 2006) (same: probable cause required for cell-phone tracking data warrant); *In re App. of the U.S. for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device,* 396 F. Supp. 2d 294 (E.D.N.Y.2005) (same); *see also In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) (expressly limiting its holding to historical data).

The Seventh Circuit has pointed out that *Carpenter* declined to rule that warrantless tower dumps "which identif[y] phones near *one location*…at *one time*" "were searches requiring warrants." *United States v. Adkinson*, 916 F.3d 605, 611 (7th Cir. 2019) (emphasis in original). Further, where a mobile company voluntarily uses tower dumps of its own data, rather than being compelled by the government to do so, the data is still subject to the private search doctrine. *Id.* In *United States v. Chatrie*, 590 F. Supp. 3d 901, 935-36 (E.D. Va. Mar. 3, 2022), the district court considering a geofence warrant concluded that the defendant had not voluntarily disclosed his location data to Google for purposes of the third-party doctrine and

[1] CSLI are records of a phone's location based on the cell tower that was used to route an individual's calls or messages, although many newer phones automatically generate this data when they are turned on, even if they are not in use. CSLI is often referred to either as "historical," which can be used to determine where a phone was at a past point in time, or "prospective" or "real time," which reveals a phone's present location. CSLI is different from a phone's Global Positioning System (GPS) location, which is generated by triangulating a cell phone's position by reference to multiple network satellites. Unlike CSLI's passive collection, GPS data is generated at the specific command of the cell phone operator, an action known as "pinging," and can provide a more precise location than CSLI.

retained an expectation of privacy, even though the warrant covered only two hours of location data. However, an ordinance *requiring* data to be turned over to the government constituted a search and seizure implicating the Fourth Amendment in *AirBnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 482 (S.D.N.Y. 2019). In *ACLU v. Clapper,* 785 F.3d 787, 821 (2d Cir. 2015), the court concluded that a provision of the USA PATRIOT Act did not authorize the National Security Agency's since-curtailed bulk telephone metadata collection program and, in dicta, discussed the Fourth Amendment concerns such a program implicates. *Accord United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020).

The Ninth Circuit held there was no reasonable expectation of privacy in wireless signals from a device being used to connect to a neighbor's router without permission. *United States v. Norris*, 942 F.3d 902, 907-09 (9th Cir. 2019) (the technology used by the police did not reach into the home but emanated outside the apartment). Nor is there a reasonable expectation of privacy in information knowingly "provided to and used by internet service providers for the specific purpose of directing the routing of information," including one's IP address and basic subscriber information. *United States v. Rosenow*, 50 F.4th 715, 738 (9th Cir. 2022).

COUNTERPOINT – A university student did not lose his reasonable expectation of privacy in his personal computer by attaching it to a university network. *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007). Nor did an individual necessarily lose his reasonable expectation of privacy in computer files that he inadvertently made accessible to neighbors who connected to his wireless network. *United States v. Ahrndt*, 475 F. App'x 656, 657 (9th Cir. 2012) (remanding to determine whether defendant did "intentionally enable sharing of his files over his wireless network" and "kn[e]w or should have known that others could access his files by connecting to his wireless network").

The Fourth Amendment expectation of privacy test protects the curtilage around a dwelling but not the open fields surrounding it. *Oliver v. United States*, 466 U.S. 170, 176-77 (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 1040,1055-56 (9th Cir. 2004) (officer's visual observation made from an open field into an unoccupied travel trailer did not constitute a search). In *United States v. Dunn*, 480 U.S. 294, 304-05 (1987), the Court identified four factors to be used in determining whether an area is curtilage: proximity to the home, existence of enclosures, manner in which the area is used, and steps an individual has taken to shield the area from public view. *See generally United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc) (noting curtilage determinations are fact-intensive inquiries and the disagreement among the circuits whether curtilage determinations should be reviewed de novo or under the clearly erroneous standard). The automobile exception does not give an officer the right to enter a home or its curtilage, here, the driveway where a covered motorcycle was parked, to access the vehicle without a warrant. *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018).

COUNTERPOINT – Courts have found areas in near proximity to homes to be within the curtilage. *See*, *e.g., Morgan v. Fairfield Cty., Ohio*, 903 F.3d 553,

562 (6th Cir. 2018) (reasonable expectation of privacy was violated where officer stood in defendant's back yard and looked up onto second floor balcony); *United States v. Alexander*, 888 F.3d 628 (2d Cir. 2018) (area in front of shed that was just few steps from back door of defendant's residence was curtilage); *United States v. Perea-Ray*, 680 F.3d 1179, 1185-86 (9th Cir. 2012) (carport part of curtilage); *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (backyard was within the curtilage); *United States v. Depew*, 8 F.3d 1424, 1426-28 (9th Cir. 1993) (driveway 50-60 feet from the house was curtilage because of the defendant's efforts to maintain privacy); *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968) (a woodpile 20-35 feet from a house was within the curtilage). The end of a driveway, which was by a utility pole and 82 feet from the dwelling, was deemed curtilage because the area showed evidence of personal use and was naturally enclosed. *United States v. Diehl*, 276 F.3d 32, 38-40 (1st Cir. 2002); *but see United States v. Coleman*, 923 F.3d 450, 456 (6th Cir. 2019) (driveway in front of house shared with neighbor not curtilage). The area inside a six-foot high chain-link fence, set 100 yards away from and completely surrounding defendant's mobile home, was within the curtilage. *Ysasi v. Brown,* 3 F. Supp. 1088, 1152 (D.N.M. 2014).

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, 34-35 (2001). Where such technology is used in non-criminal investigations, the interests of the government may outweigh the intrusion on privacy interests. *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 528 (7th Cir. 2018) (permitting use of sophisticated electricity-usage meter for regulatory functions, even though its use constitutes a search). In *Ontario v. Quon*, 560 U.S. 746, 764-65 (2010), the Court appeared willing to consider review of text messages as a search but noted that public employees may have a diminished expectation of privacy in mobile communication devices issued by their employers. The Court approved surveillance by electronic beepers as implicating no reasonable expectation of privacy interests except when used in private residences. *United States v. Karo*, 468 U.S. 705, 718 (1984) (beeper in private residence); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper use limited to public space); *but see United States v. Correa*, 908 F.3d 208 (7th Cir. 2018) (driving around town with legally confiscated garage door openers to figure out which garage they opened was a search of the door openers, not the garages themselves, and did not violate a reasonable expectation of privacy).

COUNTERPOINT – The court suppressed evidence obtained through the warrantless use of a cell-site simulator because the use of such a device constitutes a Fourth Amendment search in *United States v. Lambis,* 197 F. Supp. 3d 606, 611 (S.D.N.Y. 2016) (observing a warrant to obtain CSLI does not extend to use of the more precise cell-site simulator).[2] Several district courts have suggested the use of

[2] A cell-site simulator, sometimes referred to as an international mobile subscriber identity (IMSI) catcher, or by the brand names Stingrays, Hailstorm, Triggerfish or Kingfish, is a briefcase-

cell-site simulators may be sufficiently intrusive to constitute a "search" for Fourth Amendment purposes. *See, e.g., In re Application of the U.S. for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device*, 890 F. Supp. 2d 747, 751-52 (S.D. Texas 2012) (denying government's application to authorize use of a stingray device under the pen register statute and suggesting a warrant would be necessary instead); *United States v. Rigmaiden*, 844 F. Supp. 2d 982 (D. Ariz. 2012) (noting the government conceded that the proper analysis should be pursuant to Fourth Amendment search and seizure jurisprudence). One court expressed concern over the cell-site simulator's collection of innocent third parties' information. *In the Matter of the Application of the U.S. for an Order Relating to Telephones*, No. 15 M 0021, 2015 WL 6871289, at *3-4 (N.D. Ill. Nov. 9, 2015) ("there is no dispute that a warrant meeting the probable cause standard is necessary to use a cell-site simulator" and imposing three requirements for the use of cell-site simulators). On September 3, 2015, the Department of Justice issued new guidelines requiring the FBI, the Marshals Service, and DEA agents, but not Homeland Security or state and local law enforcement, to obtain a search warrant before using IMSI devices such as Stingrays. *See* Press Release, U.S. Dep't of Justice, *Justice Department Announces Enhanced Policy for Use of Cell-Site Simulators* (Sept. 3, 2015). On October 19, 2015, the Department of Homeland Security promulgated similar guidelines. *See* Policy Directive 047-02, *Department Policy Regarding the Use of Cell-Site Simulator Technology*, Oct. 19, 2015.

In *California v. Ciraolo*, the Court ruled the defendant lacked a reasonable expectation of privacy from aerial surveillance 1,000 feet above his fenced-in backyard. 476 U.S. 207, 213 (1986); *see also Florida v. Riley*, 488 U.S. 445, 450 (1989) (surveillance of backyard by helicopter hovering at 400 feet was not a search). In *Dow Chemical Co. v. United States*, 476 U.S. 227, 238-39 (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." *Id.* at 239. Relying on *Ciraolo,* the Sixth Circuit held the government did not violate an individual's reasonable expectation of privacy when, without a warrant, it attached a video camera to a utility pole, directed the camera at an individual's home and let it run for ten weeks because the camera captured only what was visible to passersby. *United States v. Houston,* 813 F.3d 282, 287-88 (6th Cir. 2016); *accord United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009) (pole camera installed to record defendant's open

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sized electronic device used to pinpoint a cellphone's location. It works by mimicking a cell tower, forcing mobile phones in the vicinity to transmit "pings" to the simulator, the strength of which is used to determine a phone's precise location. The cell-site simulator also captures a phone's identifying information, such as its electronic serial number, mobile subscriber identification, and telephone number. Law enforcement, therefore, can use a cell-site simulator to locate a suspect whose telephone number, for example, is known, or use the device to reveal a suspect's number, where only the suspect's location is known

field does not implicate Fourth Amendment). In *United States v. Moore-Bush*, 36 F.4th 320 (2022), the First Circuit took rehearing en banc in a similar pole camera case, but issued only two concurring opinions with no controlling opinion of the court. The concurrence by Chief Judge Barron denied suppression on good faith grounds, but provided a detailed justification for finding that eight months of surveillance of a home's curtilage recorded by a hidden camera on a nearby public utility pole implicated a reasonable expectation of privacy in the aggregate: "[W]hile it is true that one has no reasonable expectation of privacy in the discrete moments of intimacy that may occur in the front of one's home -- from a parting kiss to a teary reunion to those moments most likely to cause shame -- because of what a passerby may see through casual observation, it does not follow that the same is true with respect to an aggregation of those moments over many months." *Id.* at 336 (Barron, C.J., concurring).

COUNTERPOINT – Based on *Carpenter*, the court upheld an injunction against systematic aerial surveillance in *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 341-46 (4th Cir. 2021). Visual observations into the interior of a home may constitute a search. *LaDuke v. Nelson*, 762 F.2d 1318, 1332 n.19 (9th Cir.), *amended by* 796 F.2d 309 (1986) (shining a flashlight into the windows of units temporarily housing farm workers constituted a search); *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). Hidden video surveillance a hotel room that continued after the informants who set up a planned drug deal with the defendants 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 officers could see him constituted a search where the officers gained visual access to the dwelling, even though they had not physically entered it. *United States v. Mowatt*, 513 F.3d 395, 400 (4th Cir. 2008), *abrogated on other grounds by Kentucky v. King,* 563 U.S. 452 (2011).

Dog sniffs present a sui generis search problem. In *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), the Supreme Court held that use of a narcotics-detection dog around a lawfully stopped car does not implicate the Fourth Amendment because a dog 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 for narcotics but holding that the search was unreasonable because it took 90 minutes to complete); *United States v. Pierce*, 622 F.3d 209, 213-14 (3d Cir. 2010) (joining the Eighth and Tenth Circuits in holding a narcotics dog may enter and sniff the interior of a car if the dog acts instinctively and without law enforcement facilitation); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (permitting a dog sniff of a package located in a sealed commercial warehouse because there is no legitimate expectation of privacy in contraband).

COUNTERPOINT – Police cannot extend an otherwise-completed traffic stop to conduct a dog sniff absent reasonable suspicion. *Rodriguez v. United States,* 575 U.S. 348, 357-58 (2015); *United States v. Nault*, 41 F.4th 1073, 1078 (9th Cir. 2022) (inquiries other than "ordinary inquiries incident to the traffic stop," including dog sniffs and non-routine checks, "must be justified by independent reasonable suspicion"); *accord United States v. Evans,* 786 F.3d 779, 788 (9th Cir. 2015) (applying *Rodriguez* to find police use of drug dogs impermissibly extended a traffic stop). The Fourth Amendment is implicated when police use a dog sniff at the front door of a house as that area is protected curtilage. *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (focusing on the physical intrusion and noting that the search method is irrelevant when the police's purpose is investigatory). The Seventh Circuit extended the rule announced in *Jardines* to apartment hallways, holding police officers engaged in a warrantless search in violation of the Fourth Amendment when they walked drug-sniffing dogs to the door of the suspect's apartment to search for illegal drugs. *United States v. Whitaker,* 820 F.3d 849, 852-54 (7th Cir. 2016); *see also United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding use of a marijuana-sniffing dog outside an apartment constituted a search). An unlawful search occurs where a drug dog enters the curtilage of a suspect's home off the leash, while the handling officer remains in a lawful location. *United States v. Burston,* 806 F.3d 1123, 1127-28 (8th Cir. 2015). 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).

A chemical test that can only reveal whether or not a substance is a narcotic is not a search. In *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1984), the Court ruled that no search occurred where federal officers conducted a field test of white powder for the purpose of determining whether it was cocaine.

COUNTERPOINT – In *United States v. Mulder*, the court held a search occurred where, several days after a private individual seized the defendant's pills and turned them over to the government, federal officials conducted a series of chemical tests to determine the tablets' molecular structure. 808 F.2d 1346, 1348 (9th Cir. 1987) (distinguishing *Jacobsen* on ground that "the greater sophistication of these tests…could have revealed an arguably private fact."). 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, which an officer suspected was stolen. 480 U.S. at 323. The officer moved a turntable to read and record serial numbers that established the equipment was stolen. The Court held that even the minimal movement of the equipment constituted a search beyond what was in plain view. *Hicks*, 480 U.S. at 326-28.

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) ("[A]n unconstitutional search occurs when officers gain visual or physical access to a motel room after an occupant opens the door not voluntarily, but in response to a demand under color of authority."). In *Bond v. United States*, 529 U.S. 334, 337-38 (2000), the Court held an officer's physical manipulation of the outside of luggage stowed 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); *see also United States v. Neugin*, 958 F.3d 924, 932 (10th Cir. 2020) (officer lifting the back of a camper van lid without permission to allow girlfriend of the owner to obtain belongings constituted a search). 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).

In *Ioane v. Hodges*, the court found that a reasonable jury could find a Fourth Amendment violation when, during a search pursuant to a warrant for evidence of tax evasion, a female officer insisted on accompanying the suspect's wife to the bathroom and monitoring her while police searched for evidence. 939 F.3d 945, 955-56 (9th Cir. 2018).

3. <u>Positive Law Rights</u> – The Fourth Amendment is not bound solely by the reasonable expectation of privacy. The Supreme Court reaffirmed the pre-*Katz* rule that a physical trespass can constitute a search even when no privacy right is implicated. *Florida v. Jardines,* 569 U.S. 1, 11 (2013) (trespassing on curtilage to allow police dog to investigate constituted a search regardless of whether defendant had a separate expectation of privacy); *United States v. Jones*, 565 U.S. 400, 404-05 (2012) (attaching a global positioning system device to defendant's car with the purpose of gathering information constitutes a search); *United States v. Dixon*, 984 F.3d 814, 820 (9th Cir. 2020) (inserting a key into a vehicle's lock to determine its owner constituted a search, as it was a "physical intrusion done for the express purpose of obtaining information"); *United States v. Perea-Ray*, 680 F.3d 1179, 1184-86 (9th Cir. 2012) (trespass on defendant's carport within curtilage constituted a search); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1029 (9th Cir. 2012) (upholding injunction prohibiting police from seizing possessions of homeless people that were left unattended in public because the Fourth Amendment protects "possessory and liberty interests even when privacy rights are not implicated"); *see also United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013) ("[I]t is conceivable that, by directing the drug dog to touch the truck and toolbox in order to gather sensory information about what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion.").

Defense lawyers may be waiving potentially winning issues by failing to argue "positive legal rights" – like trespass and bailment – in addition to reasonable expectations of privacy. *See Carpenter v. United States*, 138 S. Ct. 2206, 2267-72 (2018) (Gorsuch, J., dissenting). In *Byrd v.*

United States, the Court stated that cases like *Jardines* "clarified" that the reasonable expectation of privacy standard "supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" 138 S. Ct. 1518, 1526 (2018); *accord United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018) ("The Supreme Court uses two analytical approaches to decide whether a search has occurred[,]" the property-based or trespass approach and the approach based on expectations of privacy). In *Byrd*, the defendant tried to argue common-law property rights as an alternative theory (permissive use of rental car conferred the interest of a second bailee), but was deemed to have waived the argument by not raising it below. 138 S. Ct. at 1526-27. Which means in every Fourth Amendment case, defense counsel needs to work up both *Katz* reasonable expectation of privacy AND any property or other positive law interest at stake. As Justice Gorsuch stated in his *Carpenter* dissent, "this case marks the second time this Term that individuals have forfeited Fourth Amendment arguments based on positive law by failing to preserve them. . . These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence." *Carpenter*, 138 S. Ct. at 2272.

When putting together positive law arguments, this law review article provides a good starting point: William Baude & James Y. Stearn, *The Positive Law of the Fourth Amendment*, 129 Harvard L. Rev. 1821, 1825 (2016). Under the positive law model, the focus is not on the degree to which one has an interest in privacy in a given situation, but rather on the actions of the government. *Id.* at 1831. Positive law relies largely on statutory and common law rights rather than judicial line-drawing. In a positive law model, the government conducts a search or seizure when it does something that a private citizen would be criminally or civilly liable for doing. *Id.* If the action constitutes trespass, such as in *Jones* and *Jardines*, for example, the government's trespass would violate the Fourth Amendment. This model is useful for the defense because arguments can be drawn from statutory and civil protections against such conduct as wiretapping, stalking, and harassment to demonstrate that the government's conduct should be viewed as unconstitutional, even where there is no strong precedent to support that finding. *Id.* at 1835.

Justice Gorsuch in his *Carpenter* dissent suggested that, under positive law, the third party doctrine, which eliminates reasonable expectations of privacy when material is given to another, would protect sensitive data provided to third party service providers. Rather than abandoning privacy interests, the use of service providers is more akin to "toss[ing] your keys to a valet" – it's a *bailment*: "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust." *Carpernter,* 138 S. Ct. at 2268 (Gorsuch, J., dissenting) (quoting Joseph Story, *Commentaries on the Law of Bailments* § 2, p. 2 (1832)). Justice Gorsuch suggested that such practices as garbage searches and aerial surveillance, approved under the *Katz* test, could violate the Fourth Amendment under positive law. 138 S. Ct. at 2266 (citing *Florida v. Riley*, 488 U.S. 445 (1989), and *California v. Greenwood*, 486 U.S. 35 (1988)). Justice Gorsuch noted that "positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition." *Id.* at 2270.

> **COUNTERPOINT** – The lower courts are paying heed to the Court's supplemental positive law analyses. In *United States v. Richmond*, the court found that an officer pressing on the tire of a vehicle while conducting a traffic stop

constituted a search. 915 F.3d 352, 357 (5th Cir. 2019). Chalking of tires to measure how long the vehicle stayed in a parking spot constituted a search in *Taylor v. City of Saginaw*, 922 F.3d 328, 332-34 (6th Cir. 2019). The Ninth Circuit generated a split opinion on tire-chalking, with the dissent providing a detailed positive law and originalist explanation of why the practice violates the Fourth Amendment, and even the majority assumed it was a search, while applying the administrative search exception. *Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022). In *United States v. Wilson*, the court granted relief based on privacy-based Fourth Amendment rights in email correspondence routed through a private service provider, so did not need to reach property-based Fourth Amendment rights. 13 F.4th 961, 967 n.7 (9th Cir. 2021) ("[F]ew doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest.") (quoting *Carpenter*, 138 S. Ct. at 2269 (Gorsuch, J. dissenting)). In emerging litigation regarding geofence warrants, which compel a technology company to disclose anonymized location records for devices within a specified area during a specified time period, then permit searches of individualized data on potential suspects without further judicial approval, the defense has asserted not only privacy interests but property interests based on the service provider's privacy policy. *See* Lawfare, *Do Geofence Warrants Violate the Fourth Amendment?* (Feb. 24, 2020). In *United States v. Chatrie*, 590 F. Supp. 3d 901, 927 (E.D. Va. 2022), the district court held that a geofence warrant was unconstitutional for lack of probable cause as to each of the warrant's targets.

Under the *Katz* test, what a person knowingly exposes to the public is not subject to a reasonable expectations of privacy, as in *Greenwood,* 486 U.S. at 40-41 (no reasonable expectation of privacy in garbage placed in opaque bags outside the home for collection). In *United States v. Marr,* the court denied a defendant's motion to suppress warrantless audio recordings of conversations captured by microphones installed outside courthouse entrances, finding no reasonable expectation of privacy in communications "at or near a courthouse entrance." No. 14-cr-00580-PJH, 2016 WL 3951657, at *7 (N.D. Cal. Jul. 22, 2016); *see also Kee v. City of Rowlett,* 247 F.3d 206, 213-15 (5th Cir. 2001) (identifying six factors courts consider in determining whether an individual may claim a reasonable expectation of privacy in conversations). However, the government conducts a search when it attaches a device to a person's body, without the person's consent, for the purposes of tracking the individual's movements. *Grady v. North Carolina*, 575 U.S. 306, 309-10 (2015) (remanding to state court to determine in the first instance whether North Carolina's program requiring certain sex offenders to wear global positioning systems devices is an "unreasonable" search under *Jones* and *Jardines*). The Seventh Circuit, interpreting *Grady* as permitting satellite-based monitoring if it is reasonable, held that requiring certain sex offenders to wear an ankle monitor for the rest their lives does not violate the Fourth Amendment. *Belleau v. Walls,* 811 F.3d 929, 937 (7th Cir. 2016).

C. What Constitutes A Seizure?

An increasingly restrictive definition of what constitutes a seizure has expanded the range of intrusions free from Fourth Amendment limitations.

1. **Seizure Of Property** – A "seizure" of property 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). An interference is not "meaningful" when it is short in duration and non-invasive. *United States v. Roberts*, 603 F. App'x 426, 436 (6th Cir. 2015) (holding no seizure of hotel key cards occurred when investigator reached into defendant's back pocket to remove his wallet and the cards came out with it); *accord United States v. Mastronardo*, 987 F. Supp. 2d 569, 576 (E.D. Pa. 2013) (photographing documents is not a seizure because it does not meaningfully interfere with the owner's possessory interest). Law enforcement detention of property entrusted to a third-party common carrier constitutes a seizure only when the detention results in significant delay or deprives the carrier of its custody. *United States v. Alvarez-Manzo*, 570 F.3d 1070, 1075 (8th Cir. 2009).

> **COUNTERPOINT** – "[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests," for example by retaining property for an unreasonably long time. *United States v. Jacobsen,* 466 U.S. 109, 124 & n.25 (1984). A 30-day delay in returning a vehicle to its owner turned what was originally a lawful seizure into an unlawful one in *Sandoval v. City of Sonoma,* 72 F. Supp. 3d 997, 1010 (N.D. Cal. 2014). The forceful removal of a mobile home from a mobile-home park constitutes a seizure, even if the owner's privacy interest is not invaded. *Sodal v. Cook County,* 506 U.S. 56, 72 (1992); *see also United States v. Miller*, 799 F.3d 1097, 1102 (D.C. Cir. 2015) ("It is well established that the reasonableness of a seizure turns on the nature and extent of interference with possessory, rather than privacy, interests."). A police officer's removal of a bag from a bus cargo hold to its passenger seating area constituted a seizure in *United States v. Alvarez-Manzo*, 570 F.3d 1070, 1076-77 (8th Cir. 2009). While brief detentions of personal effects may be permissible under *United States v. Place*, 462 U.S. 696, 706 (1983), the duration of the seizure of items like cell phones and cameras, as well as transportation to another location implicates the Fourth Amendment. *Robbins v. City of Des Moines*, 984 F.3d 673, 681 (8th Cir. 2021). Securing a home from the outside, even without entering, constitutes a seizure. *United States v. Shrum*, 908 F.3d 1219, 1230 (10th Cir. 2018) (citing *Segura v. United States*, 468 U.S. 796, 811 (1984)).

2. **Seizure Of Persons** – An objective test governs the analysis of whether and when a person has been seized. "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Michigan v. Chesternut*, 486 U.S. 567, 574 n.9 (1988). The Court has recognized two forms of seizure: seizure by force and by authority. *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Seizure by force requires 1) use of force that 2)

objectively manifests intent to restrain. *Torres v. Madrid*, 141 S. Ct. 989 (2021). "We rarely probe the subjective motivations of police officers in the Fourth Amendment context." *Id.* at 998. Seizure by force occurs the instant touch occurs, regardless of whether the person is actually restrained, and lasts as long as the application of force, absent submission. *Id.* at 999. The police officer need not actually touch the person to effect an arrest by use of force: the Court held that shooting and hitting a fleeing person with two bullets was an instantaneous seizure. *Id.* "Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement." *Id.* at 1001.

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 of airline passenger who was questioned and asked for ticket and identification); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (airport passenger seized when officers retained his driver's license and ticket, accused him of a crime, and asked him to accompany them to police room); *see also United States v. Redlightning*, 624 F.3d 1090, 1102-06 (9th Cir. 2010) (defendant not seized because he voluntarily accompanied police to FBI office and submitted to a polygraph test). Factors courts consider include the number of officers, the location of the encounter, whether weapons were displayed, and whether officers advised individuals that they were free to leave. *See*, *e.g.*, *United States v. Black,* 707 F.3d 531, 537-38 (4th Cir. 2013); *United States v. Fox,* 600 F.3d 1253, 1258 (10th Cir. 2010); *United States v. Washington,* 387 F.3d 1060, 1068 (9th Cir. 2004).

> **COUNTERPOINT** – A seizure of a person lawful at its inception can also violate the Fourth Amendment because of its manner of execution. A reasonable jury could conclude that keeping teenagers who officers thought had a gun handcuffed (in this case, for five hours) after it was apparent they were not actually armed was an unreasonable seizure. *Nicholson v. City of Los Angeles*, 935 F.3d 685, 961-62 (9th Cir. 2019). 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). The defendant was seized when a sheriff pulled into and blocked his driveway. *United States v. Kerr*, 817 F.2d 1384, 1386-87 (9th Cir. 1987). In *United States v. Delaney*, 955 F.3d 1077, 1082 (D.C. Cir. 2020), parking in front of a vehicle such that it would have required multiple turns to maneuver out of the spot while aiming a floodlight at the car constituted a detention for Fourth Amendment purposes. A seizure occurred when, with his hand on his gun, a police officer retained a motorist's license and initiated further inquiry. *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997). A seizure occurred when an off-duty officer ordered the occupants of a car that struck his car out of their vehicle and held them at gunpoint. *Vanderhoef v. Dixon*, 938 F.3d 271, 276-77 (6th Cir. 2019). In *United States v. Jordan*, 951 F.2d 1278, 1283 (D.C. Cir. 1991), the court indicated that, if the police retained the defendant's driver license during questioning, a seizure occurred.

An unlawful seizure occurred when employees of a suspect corporation were held incommunicado, without probable cause, unless they submitted to interrogations. *Ganwich v. Knapp*, 319 F.3d 1115, 1120 (9th Cir. 2003). Police knocking loudly on a door for two-and-a-half 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). An individual was seized when a police officer entered her car, directed her to drive to a nearby parking lot, and never advised her that she was free to leave. *United States v. Fox*, 600 F.3d 1253, 1258 (10th Cir. 2010). A seizure also occurred where police, responding to a mentally infirm man walking down the highway, followed him in a patrol vehicle until the officer persuaded him to get into the car. *Keller v. Fleming*, 952 F.3d 216, 223 (5th Cir. 2020). "When a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007); *see also Salmon v. Blesser,* 802 F.3d 249, 253 (2d Cir. 2015) (police officer seized an individual by grabbing his collar, twisting his arm, and shoving him toward the door in an effort to remove him from the courthouse). When local officers responding to the plaintiff's 911 call detained him for about 50 minutes for immigration authorities, they violated the Fourth Amendment because mere unauthorized presence in the United Sates is not a crime. *Macareno v. Thomas*, 378 F. Supp. 3d 933, 943 (W.D. Wash. 2019).

In *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991), the Court invalidated the Florida Supreme Court's blanket rule that the sheriff's practice of questioning bus passengers and requesting their consent to search violated the Fourth Amendment and instead required courts to consider the totality of the circumstances. In *United States v. Drayton*, the Court concluded that officers did not seize bus passengers when the officers boarded the bus because the officers did not brandish weapons, make intimidating movements or block the aisle. 536 U.S. 194, 203-04 (2002); *accord United States v. Easley*, 911 F.3d 1074, 1079-80 (10th Cir. 2018).

COUNTERPOINT – A traffic stop constitutes a seizure of the vehicle's occupants. *See*, *e.g., Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (characterizing routine traffic stops as investigative); *Heien v. North Carolina,* 574 U.S. 54, 60 (2014); *Navarette v. California*, 572 U.S. 393, 396-97 (2014); *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 airline customer 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). In *United States v. Izguerra-Robles*, 660 F. Supp. 2d 1202, 1207 (D. Or. 2009), the court held that the defendant was constructively arrested when he was ordered out of a motor home.

The definition of a seizure underwent a significant restriction in *California v. Hodari D.*, 499 U.S. 621 (1991). In *Hodari*, the Court addressed the question left open by *Michigan v. Chesternut*, 486 U.S. 567, 575 n.9 (1988): does a seizure occur if an officer communicates that a suspect is not free to leave and the suspect then flees? In holding that a seizure does not occur, the majority, referring to common law standards, stated that a seizure requires either physical force or, where that is absent, submission to a show of authority. *Id.* at 625; *accord United States v. Smith*, 633 F.3d 889, 892-93 (9th Cir. 2011). In *United States v. Stover*, the police, without reasonable suspicion, pulled up behind the defendant's parked truck and activated their emergency lights. 808 F.3d 991, 1000 (4th Cir. 2015). The driver then got out of his car and discarded a gun before complying with commands to return to his vehicle. The court held he was not seized until after the gun was abandoned. *Id.*

> **COUNTERPOINT** – Momentary submission to authority will suffice to establish a seizure. A seizure occurred when an officer ordered a suspect to place his hands on a nearby car, the suspect did so, then fled "a few seconds later." *United States v. Brodie*, F.3d 1058, 1060 (D.C. Cir. 2014); *see also Flythe v. District of Columbia*, 4 F. Supp. 3d 216, 220 (D.D.C. 2014) (reading *Brodie* as holding that momentary submission is sufficient to establish a seizure for purposes of the Fourth Amendment). Similarly, 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 before fleeing was seized under *Hodari*. A suspect who uniformed officers singled out from a group and accused of a crime was seized because a reasonable person would not feel free to leave under the circumstances. *United States v. Williams*, 615 F.3d 657, 664 (6th Cir. 2010). An individual would not have felt free to leave due to a combination of a "collective show of authority" by a number of officers, the seizure of property, and the search of companions. *United States v. Black*, 707 F.3d 531, 538 (4th Cir. 2013) ("Black's subsequent decision to leave does not negate the finding that a reasonable person in Black's circumstances would not feel free to leave."); *see also United States v. Jones*, 678 F.3d 293, 304 (4th Cir. 2012) (individual would not have felt free to leave where "officers suspected him of some sort of illegal activity in a 'high crime area,' which, in turn, would convey that he was a target of a criminal investigation"). A sheriff seized an attorney when he briefly grabbed her arm at a courthouse security checkpoint. *West v. Davis,* 767 F.3d 1063, 1070 (11th Cir. 2014).

The line between consensual conversations and temporary seizures cut against the individual in *INS v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, immigration agents entered a factory and questioned workers about their immigration status while other agents stood in the building's exits. 466 U.S. at 212. The Court held that such factory sweeps did not constitute a seizure of all the workers inside because there was insufficient evidence that the workers did not feel free to leave. 466 U.S. at 220-21. In *United States v. Gross*, the court held that no seizure occurred when a car of four police officers wearing tactical vests pulled up next to a pedestrian, shined a flashlight on him, asked if he had a gun, and then requested that he pull up his shirt to reveal his waistband. 784 F.3d 784, 787-88 (D.C. Cir. 2015); *but see id.* at 790 (Brown, J.,

concurring) ("While viewing such an encounter as consensual is roughly equivalent to finding the latest Sasquatch sighting credible, I submit to the prevailing orthodoxy, but I continue toreject its counterintuitive premise.").

COUNTERPOINT – In *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986), the court distinguished *Delgado* and held that immigration 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." *See also Orhorhaghe v. INS*, 38 F.3d 488, 494-99 (9th Cir. 1994) (home visit by immigration officers became a seizure without a sufficient articulable basis). In *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987), the court held that immigration agents "exceeded any detention approved in *Delgado"* when they temporarily prevented an employee from exiting the building during a factory sweep. 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, 690-93 (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, 716-20 (7th Cir. 1999) (same); *United States v. Freeman*, 635 F. Supp. 2d 1205, 12-13 (D. Or. 2009) (same).

In *United States v. Washington*, 490 F.3d 765, 770-74 (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 determinations, the court considered "the unique situation in Portland between the African-American community and the Portland police," the authoritative manner of the search, and the fact that the search occurred at night. *Id.* at 775; *see also United States v. Izguerra-Robles*, 660 F. Supp. 2d 1202, 1207 (D. Or. 2009) (seizure exceeded lawful scope when suspect held for 45 minutes after arrest for failure to produce a driver's license). In contrast to the D.C. Circuit in *Gross*, the Seventh Circuit held that the line between consensual encounter and seizure was crossed when police asked a lone citizen in an alley if he had a weapon. *United States v. Smith,* 794 F.3d 681, 686 (7th Cir. 2015).

D. Standing

"The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018); *see Rakas v. Illinois*, 439 U.S. 98 (1978) (Fourth Amendment standing is not rooted in Article III but "is more properly subsumed under substantive Fourth Amendment doctrine."). Under the *Katz* test, the relevant analysis is whether the defendant personally has an expectation of privacy in the place searched, and whether that expectation is reasonable. *Minnesota v. Carter*, 525 U.S. 83, 87-88 (1998) (defendants, who were in another

person's apartment packaging cocaine, had no legitimate expectation of privacy); *United States v. Salvucci*, 448 U.S. 83, 87 (1980) (individuals charged with possession of stolen mail could not challenge search of their mother's apartment where the incriminating checks were found); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (petitioner could not challenge legality of search of friend's purse in which he placed drugs); *see also United States v. Padilla*, 508 U.S. 77 (1993) (co-conspirators have no special standing to challenge a search of their co-conspirator's car); *United States v. Anderson,* 772 F.3d 969 (2d Cir. 2014) (husband lacked standing to suppress evidence seized from his wife's body cavity, even where the seizure was "flagrantly illegal" and coercive).

Before *Byrd*, the circuits were split over how courts should handle the government's waiver of the standing issue. The First and Eighth Circuits ruled that the government cannot waive the issue of Fourth Amendment standing, while the Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh disagree. *United States v. Noble,* 762 F.3d 509, 528 (6th Cir. 2014) (describing the circuit split and holding that if the government fails to challenge an individual's standing in district court, then the government forfeits its right to raise the issue on appeal, including raising standing individually as to each member of a conspiracy). With *Byrd*'s clarification that Fourth Amendment standing is non-jurisdictional, the government's waivers should be treated as effective.

> **COUNTERPOINT** – The judiciary has been somewhat hostile to the government challenging standing then claiming at trial that the 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) (government not estopped from claiming defendant had no privacy interest at trial where it was the government, not the defendant, that demonstrated defendant had an expectation of privacy during the suppression hearing).
>
> Whether a defendant has standing to challenge a search of a space that does not belong to them depends on whether they have a reasonable expectation of privacy in the space. In *Minnesota v. Olson*, 495 U.S. 91, 98-100 (1990), defendant had standing to challenge the search of a home where he was staying as an overnight guest. *But see Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (no reasonable expectation of privacy where defendants used an acquaintance's house for 2.5 hours in exchange for cocaine); *United States v. Schram*, 901 F.3d 1042, 1044 (9th Cir. 2018) (no reasonable expectation of privacy in apartment of defendant's girlfriend, which he was not legally permitted to enter as the result of a no-contact order). Positive law may provide bases to expand standing beyond reasonable expectations of privacy.

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); *United States v. Yang*, 958 F.3d 851, 859 (9th Cir. 2020) (no reasonable expectation of privacy in license plate of a stolen vehicle, which postal inspector had located using a private company that stores and tracks license plate locations).

COUNTERPOINT – Unauthorized drivers of rental cars can establish standing even if the driver is not listed as an authorized driver on the rental agreement. *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018); *but see United States v. Lyle*, 919 F.3d 716, 729 (2d Cir. 2019) (no reasonable expectation of privacy where defendant was an unauthorized driver of a rental car *and* was driving on a suspended license, because his operation of the car rendered his possession and control unlawful, distinguishing *Byrd*). 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); *but see United States v. Davis*, 943 F.3d 1129, 1132-34 (8th Cir. 2019) (passenger in rental vehicle that was being operated by someone other than the renter lacked standing); *United States v. Symonevich*, 688 F.3d 12, 20-21 (1st Cir. 2012) (passenger lacked standing to challenge only the automobile search and not its seizure). A defendant may have standing to challenge a search of a rental car despite lacking a valid license and authorization under the rental agreement if he or she received an authorized driver's permission. *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

E. Probable Cause

1. Probable Cause To Search – In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court rejected reliance on the two-prongs of the *Aguilar-Spinelli* test (*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964)), and adopted the flexible standard for probable cause 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 to the judge'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 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, 1066 (9th Cir. 2006) (en banc), and held that the Fourth Amendment requires only that, "based on the totality of the circumstances, the magistrate judge who issued the warrant made a 'practical, common-sense decision' that there was a 'fair probability' that child pornography would be found."

COUNTERPOINT – Even under the looser *Gates* standard, the government has often failed to establish probable cause. *See*, *e.g.*, *United States v. Abernathy*, 843 F.3d 243, 255 (6th Cir. 2016) (small quantity of marijuana paraphernalia recovered from defendant's garbage failed to create a fair probability that more drugs were in the residence); *United States v. Raymonda,* 780 F.3d 105, 117 (2d Cir. 2015) (evidence that defendant briefly viewed thumbnail of child pornography failed to support probable cause that defendant hoarded such images); *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991) (absent proof that defendant collected 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) (belonging to an allegedly corrupt narcotics unit and being present when a member of that team took a large amount 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) ("By definition, probable cause can only exist in relation to criminal conduct."). A dog sniff of supposed drug money was insufficient to establish probable cause where expert evidence showed 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). Similarly, a dog sniff leading from the scene of a crime to a suspect's apartment complex but not the suspect's apartment, even when combined with tentative witness identifications and general victim's descriptions of the suspect, did not constitute probable cause. *Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002).

"[P]assive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). The presence of stolen tags on a car did not create probable cause to search for contraband in the trunk in *United States v. Jackson*, 415 F.3d 88, 91-95 (D.C. Cir. 2005). The court found a warrant affidavit insufficient because it was based only on (1) an anonymous tip, (2) police observations of short visits by various individuals, and (3) 2.2 grams of marijuana recovered from a visitor leaving the residence. *United States v. Buffer*, 529 F. App'x 482, 486 (6th Cir. 2013). The court noted that the observed visits "provide little information about what sort of evidence police might find inside" and that the recovered marijuana "was discovered off the premises and in a quantity not indicative of a recent sale." *Id.* In *United States v. Cervantes*, the court held the officer lacked probable cause to search defendant's vehicle based on the officer's general statement of expertise, his conclusory statement that a box in defendant's possession came from a "suspected stash house," and his observation that defendant "did not take a direct route to his location." 703 F.3d 1135, 1139 (9th Cir. 2012).

Staleness of the information can undermine probable cause that items will be found in a named location. *United States v. Grant*, 682 F.3d 827, 832-35 (9th Cir. 2012). However, "[t]he mere lapse of substantial amounts of time is not controlling in a question of staleness." *United States v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988). "We evaluate staleness in light of the particular facts of the case and the nature of the criminal activity and property sought." *United States v. Pitts*,

6 F.3d 1366, 1369 (9th Cir. 1993) (internal quotation omitted). The information offered in support of the application for a search warrant is not stale if "there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." *United States v. Gann*, 732 F.2d 714, 722 (9th Cir.1984).

> **COUNTERPOINT** – Staleness claims often arise in child pornography cases: *United States v. Boozer*, 511 F. Supp. 3d 1128, 1138 (D. Or. 2021) ("Given the thirteen months between obtaining the initial evidence and the October 2013 seizure, defendant's lack of prior criminal history or contact with law enforcement, the lack of evidence regarding ongoing criminal activity, as well as the agents knowledge that [the] computer in question was built well after Agent Huntoon's downloads, the Court finds that the information giving rise to probable cause was too stale at the time of the warrantless seizure to justify the government's actions."); *United States v. Greathouse*, 297 F. Supp. 2d 1264 (D. Or. 2003) (unexplained 13 month delay was too long in the absence of ongoing criminal activity or evidence that defendant was a pedophile); *but see United States v. Kvashuk*, 29 F.4th 1077, 1087-88 (9th Cir. 2022); *United States v. Schesso,* 730 F.3d 1040, 1047 (9th Cir. 2013); *United States v. Lacy,* 119 F.3d 742, 745 (9th Cir. 1997). Staleness arguments have also arisen in narcotics cases, however, courts often permit substantial lapses of time where there is evidence of an ongoing criminal business. *United States v. Pitts*, 6 F.3d 1366, 1370 (9th Cir. 1993); *United States v. Greany,* 929 F.2d 523, 525 (9th Cir. 1991).

To find probable cause based solely on a dog sniff, the prosecution must show that the dog is reliable. *See United States v. Cruz-Roma*n, 312 F. Supp. 2d 1355, 1364-65 (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 was not certified and the team had no track record of reliability); *but see United States v. Grupee*, 682 F.3d 143, 147 (1st Cir. 2012) (finding drug dog reliable based on statement in affidavit that police department is dog's "employer"); *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011) (so long as a drug dog is certified by a legitimate organization, courts should not inquire into the capabilities of the individual dog to determine reliability). In *Florida v. Harris*, the Supreme Court held that a drug dog's reliability can be established by a showing of satisfactory performance in a certification or training program. 568 U.S. 237, 246-47 (2015). The Court rejected the Florida Supreme Court's strict evidentiary checklist as inconsistent with the flexible standard of probable cause and reaffirmed that the proper inquiry is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. *Id.* at 248.

2. **Probable Cause To Arrest** – In *Maryland v. Pringle*, 540 U.S. 366, 372 (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. *Id*. at 373-74. In *Devenpeck v. Alford*, the Supreme Court expanded the grounds for arrest, holding an arrest to be lawful where there was no probable cause for the offense cited by the arresting officer, but there was probable cause to arrest for another offense, even though the two offenses were not closely related. 543 U.S. 146, 152-53 (2004) (upholding arrest where the officer told the defendant he was under arrest for violating Washington's Privacy Act, although the criminal offense for which there was probable cause was impersonation of a police officer); *accord United States v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) (citing *Devenpeck* and observing that "if the facts support probable cause to arrest for one offense, the arrest is lawful even if the officer invoked, as the basis for the arrest, a different offense as to which probable cause was lacking"). In *District of Columbia v. Wesby*, the Supreme Court found that police officers responding to complaint of loud music and illegal activities at vacant home had probable cause to arrest partygoers for unlawful entry after partygoers gave vague and implausible responses to who had given them permission to be in the home. 138 S. Ct. 577, 586-87 (2018). In order to determine the existence of probable cause, officers must conduct a reasonably thorough investigation (absent exigent circumstances), but do not need to conduct a "mini-trial" before making the arrest. *Duhe v. City of Little Rock*, 902 F.3d 858, 863 (8th Cir. 2018) (police officer did not need to use a decibel reading before making an arrest for excessive noise as disorderly conduct). Probable cause is not, however, required to arrest parolees for violation of parole; rather, the officer must reasonable believe they are in violation of their parole. *Cornel v. Hawaii*, 37 F.4th 527, 532 (9th Cir. 2022).

> **COUNTERPOINT** – After *Pringle*, it is even more important to challenge cases where guilt is established through association. *Callahan v. Unified Gov't of Wyandotte Cty*., 806 F.3d 1022, 1029 (10th Cir. 2015) (observing that *Pringle* raises questions as to how the particularity requirement is satisfied in multi-suspect situations). The inference that everyone on the scene of a crime is a party to it evaporates when there is evidence singling out the guilty person. *United States v. Di Re*, 332 U.S. 581, 594 (1948); *see also 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 while officers search it pursuant to a valid search warrant 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 to establish probable cause to support a warrantless entry of a residence). That fact that a person matched the general description of burglary suspect and was in close proximity to burglary was insufficient to give rise to probable cause to arrest him. *United States v. Soza*, 686 F. App'x 564, 567-69 (10th Cir. 2017). Once probable cause dissipates, continued detention becomes unreasonable. *Barnett v. MacArthur*, 956 F.3d 1291, 1299 (11th Cir. 2020) (Sheriff's mandatory eight-hour hold for drunk drivers violated the Fourth

Amendment when applied to driver whose breathalyzer and urine tests came back negative).

F. Searches And Seizures Pursuant To A Warrant

The constitutional preference in the Warrant Clause of the Fourth Amendment is for searches to be conducted with judicial pre-approval:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971) (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). The products of unconstitutional searches are subject to the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961); *Weeks v. United States,* 232 U.S. 383, 391-92 (1914).

1. **The Good Faith Exception In The Warrant Context** – An important limitation on the scope of the exclusionary rule is the good faith exception, under which evidence derived from the execution of an invalid search warrant is admissible as long as the officers acted in good faith. *See United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The good faith exception to the exclusionary rule has also been applied both indirectly to reasonable errors in a warrant's description of the place to be searched (*Maryland v. Garrison*, 480 U.S. 79, 86-89 (1987)) and directly to warrantless searches based on a statute that was subsequently ruled unconstitutional (*Illinois v. Krull*, 480 U.S. 340, 349-50 (1987)). The Court has also found the good faith exception applies to the arrest of a suspect based on a quashed warrant that, due to a clerical error, remained outstanding. *Arizona v. Evans*, 514 U.S. 1, 14 (1995). In *Herring v. United States*, the Court went even further and held the exclusionary rule did not apply when an officer wrongly but reasonably believed there was an outstanding arrest warrant because of another officer's negligent bookkeeping. 555 U.S. 135, 145- 46 (2009) ("An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place."). However, if police were reckless in maintaining a warrant system or knowingly made false entries, exclusion would be justified. *Id*. at 146.

Generally, the application of the exclusionary rule to an invalid search warrant depends on the balance of the costs and benefits of exclusion. *Herring*, 555 U.S. at 141. The benefit of deterring the government's Fourth Amendment violations is weighed against the cost of limiting the court's "truth-seeking" function and damaging "law enforcement objectives." *Id.* at 141-42; *accord United States v. Fofana*, 666 F.3d 685, 988 (6th Cir. 2012). The Supreme Court extended

the good faith exception to officers' "reasonable reliance on binding precedent" in *Davis v. United States*, 564 U.S. 229, 241 (2011). The majority of circuits have concluded that warrantless evidence collected from a GPS tracker attached to a suspect's car before the Supreme Court's ruling in *Jones* is admissible under the good-faith exception. *See*, *e.g., United States v. Holt,* 777 F.3d 1234, 1258-59 (11th Cir. 2015); *United States v. Taylor,* 776 F.3d 513, 517-19 (7th Cir. 2015); *United States v. Stephens,* 764 F.3d 327, 336-39 (4th Cir. 2014); *United States v. Fisher*, 745 F.3d 200, 204 (6th Cir. 2014); *United States v. Katzin*, 769 F.3d 163, 181-82 (3d Cir. 2014); *United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012)). Similarly, circuits have widely held that CSLI collected by the government before *Carpenter* is admissible under the good faith exception. *See United States v. Carpenter*, 926 F.3d 313, 317 (6th Cir. 2019); *United States George*, No. 2:18-cr-266 WBS, 2020 WL 1689715 (E.D. Cal. 2020); *United States v. Wright*, 339 F. Supp. 3d 1057, 1061 (D. Nev. 2018). In *Heien v. North Carolina,* the Supreme Court held a stop based on an officer's mistake of law is constitutional if the error is reasonable. 574 U.S. 54, 67 (2014).

> **COUNTERPOINT** – In *United States v. Song Ja Cha*, 597 F.3d 995, 1003-04 (9th Cir. 2010), the court determined that the exclusionary rule applied where officers' unlawful warrant executions were found to be "deliberate, culpable, and systemic[.]" In remanding the case to district court to conduct a cost-benefit analysis, the Sixth Circuit stated that the good faith exception may apply where police rely upon a warrant issued by a judge without the authority to do so, but warned that attempts to circumvent "jurisdictional limits imposed by state law is conduct that can, and should be, considered and deterred[.]" *United States v. Master*, 614 F.3d 236, 241-43 (6th Cir. 2010). The Ninth Circuit has upheld suppression partly on the ground that a police affiant "did not have a supervisor or anyone else review, let alone approve, his affidavit." *United States v. Underwood*, 725 F.3d 1076, 1087- 88 (9th Cir. 2013). The good-faith exception did not apply to officers' unlawful entry into a residence to search for the subject of their arrest warrant because the officers' conduct was, at a minimum, grossly negligent. *United States v. Vasquez-Algarin*, 821 F.3d 467, 482-83 (3d Cir. 2016).

2. **<u>Controverted Warrant Affidavit</u>** – *Leon* expressly excepts from the scope of its holding warrants that are challenged under *Franks v. Delaware*, 438 U.S. 154 (1978). 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. 438 U.S. at 171-72. If the affidavit, cleansed of the challenged statements, does not establish probable cause, the defendant is entitled to suppression of the derivative evidence. *Id*. 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 by* 769 F.2d 1410 (9th Cir. 1985). The fact that probable cause existed and could have been established in a truthful affidavit, but was not cited in the warrant, will not cure a *Franks* error. *Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005).

Showing Required: 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); *see also United States v. McMurtrey*, 704 F.3d 502, 510 (7th Cir. 2013) (holding that in determining whether to grant a *Franks* hearing the court should not consider the government's explanation of contradictions and discrepancies). A government agent acted with at least reckless disregard for the truth by failing to furnish copies of alleged child pornography to the magistrate judge and misleadingly characterizing the image, a material omission warranting suppression. *United States v. Perkins*, 850 F.3d 1109, 1123 (9th Cir. 2017). In investigations of suspected "lascivious" images of minors, the meaning of which is subjective, search warrant applications should ordinarily include copies of the images so that a judge can make the determination. *Perkins*, 850 F.3d at 1123.

Controverted Statements: 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). "[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). 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). The good faith exception did not apply where the search warrant affidavit for a known drug dealer's residence failed to connect the residence to drug-dealing activity, because such reliance would be objectively unreasonable. *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016).

3. **Overbreadth** – Where the warrant is facially overbroad, the officer cannot reasonably rely on its validity. *Millender v. County of Los Angeles*, 620 F.3d 1016, 1024-28 (9th Cir. 2010), *rev'd on other grounds*, 565 U.S. 535 (2012); *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). The Ninth Circuit set out the following factors to determine if a warrant is sufficiently specific: "(1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the

government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued." *Spilotro*, 800 F.2d at 963.

In *Millender*, occupants of a residence brought a §1983 claim following a nighttime search and seizure of their home. 620 F.3d at 1020. The complainant reported that her partner (Bowen) assaulted her with a sawed-off shotgun when she tried to end the relationship. *Id.* at 1021. Police acquired a search warrant that authorized search of the address reported by the victim (the home of the Bowen's foster parents) for "any firearms" and "evidence showing street gang membership". *Id.* The Court of Appeals applied the Ninth Circuit's three part test for overbreadth, concluding that: in the absence of evidence that Bowen had other firearms or that such firearms were contraband or evidence of a crime, police lacked probable cause to seize arms other than the sawed-off shotgun; the warrant could not be upheld based on alleged objective standards in the affidavit and there was no evidence that investigators relied on the affidavit to narrow the scope of the search; and the government was able to particularly describe the firearm used by Bowen in connection with the assault. *Id.* at 1025-1028. Additionally, though Bowen had multiple felony convictions, the Court found his criminal history to be irrelevant to the analysis because it was not included in the affidavit and the magistrate judge was not made aware of it. *Id.* at 1029. The Court similarly found the warrant for gang-related evidence to be unsupported by probable cause where there was no evidence to link the assault to Bowen's alleged gang membership. *Id.* at 1031.

In *United States v. King*, 985 F.3d 702 (9th Cir. 2021), police investigated King, who had two prior felony convictions, for possession of a firearm following reports that King had hid the gun of a man suspected of domestic violence (the victim admitted to delivering it to King). A warrant authorized the search of King's residence for "any firearm" pursuant to probable cause that he was a felon in possession. The Court of Appeals held that there was a substantial basis to authorize the search "because there was a 'fair probability' that other firearms might be found at King's home and they would constitute evidence of a crime." *Id.* at 708 (quoting *United States v. Diaz*, 491 F.3d 1074, 1078 (9th Cir. 2007)). The allegations in the affidavit supported an inference that he possessed other firearms: "after all, the suspect wouldn't have entrusted the revolver to King if the suspect didn't believe King was willing and able to covertly store firearms." *Id.*

> **General Seizure:** 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, 1016-18 (9th Cir. 2003). To cure the warrant, the application must specifically allege that the business is "permeated with fraud." *Id*. at 1018. The "pervasive fraud" doctrine focuses not on the percentage of a business that is fraudulent but rather the extent to which fraud has permeated the business. *United States v. Bradley*, 644 F.3d 1213, 1259-60 (11th Cir. 2011). The doctrine applies not just where a company is engaged solely in fraud, but where "evidence of fraud is likely to be found in records related to a wide range of company business." *Id*. at 1259; *see also In re United States' Application For A Search Warrant To Seize & Search Elec. Devices From Edward Cunnius*, 770 F. Supp. 2d 1138, 1143 (W.D. Wash. 2011) (finding overbroad the government's request to seize all of defendant's digital devices without limitation).

Scope: Police executing a limited search warrant may not search or seize items that are beyond the scope of the warrant. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (a warrant to search a tavern and the bartender for heroin does not provide probable cause to search patrons of the tavern who were merely present when the warrant was executed); *accord United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013) (federal agents exceeded scope of warrant authorizing seizure of documents relating to suspected tax fraud when they searched computer for evidence that defendant financially supported terrorist groups, even though the probable cause affidavit for the warrant alleged the tax fraud was intended to cover up the alleged support).

Unrestricted Emails: A search warrant for email was overbroad "because it is unreasonable to compel a provider to disclose every email in its client's account when the provider is able to disclose only those emails the government has probable cause to search." *Matter of Search of Info. Associated With Four Redacted Gmail Accounts*, 371 F. Supp. 3d 843, 845 (D. Or. 2018). When the email service provider is willing and able to date-restrict the email content it discloses to the government, the search warrant should be restricted to a search of only the emails within the probable cause time period. *Id*.

4. **Particularity** – The warrant also requires particularity. *Leon*, 468 U.S. at 923; *United States v. Collins*, 830 F.2d 145, 146 (9th Cir. 1987). Warrants to search individuals present at the place to be searched must be particularized and supported by probable cause. *Marks v. Clarke*, 102 F.3d 1012, 1027-29 (9th Cir. 1996). A novice officer's failure to show a homeowner a list of specific items to be seized, however, will not trigger the exclusionary rule if the failure can be fairly attributed to the agent's lack of experience and reasonable misunderstanding. *United States v. Franz*, 772 F.3d 134, 149 (3d Cir. 2014). The court held that installing a GPS tracking device on a defendant's car outside the county specified in the warrant was a "technical deficiency" that did not invalidate the warrant in *United States v. Faulkner*, 826 F.3d 1139, 1145 (8th Cir. 2016) (distinguishing *Jones*, 565 U.S. 400, as simply standing for the proposition that a warrant is required in such circumstances); *see also Manriquez v. Ensley*, 46 F.4th 1124, 1129 (9th Cir. 2022) ("[A] technical error (such as an incorrect address) is not necessarily fatal if the rest of the description in the warrant adequately describes the place to be searched.").

COUNTERPOINT – A search warrant for a multi-family dwelling unit lacks particularity where there is not probable cause that evidence will be found in each unit. *United States v. Clark*, 638 F.3d 89, 95-99 (2d Cir. 2011) (finding the informant's assertion that the defendant "controlled" the entire building insufficient grounds to search all units). Lack of particularity in a warrant cannot be cured by a detailed affidavit unless it is specifically incorporated by reference. *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004); *see United States v. Rosa*, 626 F.3d 56, 65-66 (2d Cir. 2010) (refusing to apply *Groh* where the "price" of suppression outweighed the need to deter unlawful police conduct). The Tenth Circuit approves

blanket suppression where the search has an improper ulterior motive. *United States v. Foster*, 100 F.3d 846, 849-53 (10th Cir. 1996).

A search warrant for an apartment for evidence of a stabbing violated the Fourth Amendment's particularity requirement when the warrant's list of items to be searched was prefaced with a catch-all phrase stating that items to be searched "include but are not limited to" listed items, thereby authorizing search of everything in apartment. *United States v. Dunn*, 719 F. App'x 746, 749 (10th Cir. 2017). A warrant to search the home of a defendant who lived with his girlfriend, and who was suspected of being the getaway driver in a homicide, was unconstitutionally overbroad because it authorized police to search for and seize all electronic devices, even if police knew the device belonged to someone other than defendant. *United States v. Griffith*, 867 F.3d 1265, 1276 (D.C. Cir. 2017).

Where the face of the warrant only authorized a search of the defendant's residence and vehicles on the premises, officers' ruse to draw the defendant and his car to the premises with a false claim they were investigating a burglary violated the particularity requirement of the Fourth Amendment because the face of the warrant only authorized searches of named locations. *United States v. Ramirez*, 976 F.3d 946, 954-59 (9th Cir. 2020). Official deception can be unreasonable under the Fourth Amendment depending on individual circumstances: while ruses are generally permissible to facilitate what could be done anyway, they are generally "unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the target's trust and cooperation to conduct searches or seizures beyond that which is authorized by the warrant or other legal authority[.]" *Id*. at 953.

Anticipatory search warrants are sufficiently particular so long as "'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Gates*, 462 U.S. at 238). Going beyond the letter of the warrant does not always violate the Fourth Amendment. In *United States v. Brewer*, 915 F.3d 408, 414 (7th Cir. 2019), the court held that, when a warrant authorized the use of a GPS in Indiana, and police used it to track the suspect to California, no violation occurred.

COUNTERPOINT – An anticipatory search warrant "predicated on the bare inference that those who molest children are likely to possess child pornography" does not alone "establish probable cause to search a suspected child molester's home for child pornography." *United States v. Needham*, 718 F.3d 1190, 1195 (9th Cir. 2013).

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 controversial guidance on the proper administration of warrants for computer-stored information in *United States v. Comprehensive Drug Testing*, 621 F.3d 1162 (9th Cir. 2010) (en banc). In *Comprehensive Drug*

Testing, the court pointed to an array of protective measures for computer privacy during searches, stating, "[d]istrict and magistrate judges must exercise their independent judgment in every case, but heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful." 621 F.3d at 1178. However, the *Comprehensive Drug Testing* guidance is advisory, and the real test remains reasonableness assessed on a case-by-case basis. *See United States v. Schesso*, 730 F.3d 1040, 1047 (9th Cir. 2013). Other circuits have refused to afford special Fourth Amendment protections or guidance pertaining to computers, opting instead to evaluate reasonableness on a case-by-case basis. *See United States v. Burgess*, 576 F.3d 1078, 1090-92 (10th Cir. 2009); *United States v. Richards*, 659 F.3d 527, 539-540 (6th Cir. 2011).

The First, Fourth, Eighth, and Tenth Circuits are in accord that, even if network investigative technique (NIT) warrants violate the Fourth Amendment's particularity requirement, because the targets of such warrants are typically unknown, the *Leon* good faith exception applies. *United States v. Levin*, 874 F.3d 316, 324 (1st Cir. 2017); *United States v. McLamb*, 880 F.3d 685, 690 (4th Cir. 2018); *United States v. Horton*, 863 F.3d 1041, 1051 (8th Cir. 2017); *United States v. Workman*, 863 F.3d 1313, 1320 (10th Cir. 2017).[3]

5. 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; *Millender*, 620 F.3d at 9-15; *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). Officers could not in good faith rely on a search warrant to investigate a homicide, which occurred nine months earlier, where the affidavit provided insufficient evidence to link the defendant to the murder. *United States v. Grant*, 682 F.3d 827, 832-38 (9th Cir. 2012). The probable cause determination is based only on what is included in the affidavit, not on what the officer orally conveyed to the judge, *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). The circuits are split on the use of facts outside the affidavit in order to apply the good faith exception. *Compare Laughton*, 409 F.3d at 751-52 ("conclud[ing] that a determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit"), *and Hove*, 848 F.2d at 140 (finding that the good faith exception is limited by the facts presented to the judge), *with United States v. McKenzie-*

[3] NIT warrants, which are sometimes referred to as data extraction software, port reader, harvesting program, remote search, or Computer and Internet Protocol Address Verifier (CIPAV), are trojan devices used to ascertain the identity of Internet users who have masked their online identities and to surveil computer activity. The Onion Router (Tor network), for example, is a browser used to access the Darknet and designed to preserve users' anonymity by concealing their Internet Protocol (IP) addresses. In sting operations, where government agents have seized control of an illicit website, when an anonymous user accesses that website, agents may covertly transmit a trojan device, which is essentially a string of computer code, to the user's computer, and the device then transmits identifying information, such as the user's IP address, back to government servers.

Gude, 671 F.3d 452, 460 (4th Cir. 2011) (permitting the consideration of facts outside the affidavit to apply the good faith exception), *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (same), *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992) (same), *and United States v. Taxacher*, 902 F.2d 867, 871-73 (11th Cir. 1990) (same).

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 child pornography evidence from thirteen months earlier was too stale). Despite a 41-page affidavit, the court found no reasonable officer would believe the affidavit established probable cause where, through the mass of boilerplate and irrelevancies, there were 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, anonymous tip is insufficient to create a reasonable belief that probable cause existed. *Luong*, 470 F.3d at 903. A three-year-old allegation of attempted child molestation and current allegations of inappropriate touching and looking at students did not establish sufficient probable cause to support a search for possession of child pornography in *Dougherty v. City of Covina*, 654 F.3d 892, 898 (9th Cir. 2011). *See Virgin Islands v. John*, 654 F.3d 412, 418-19 (3d Cir. 2011) (affidavit that defendant committed sex crimes against students on school property and kept two pieces of evidence of crimes did not amount to probable cause that defendant possessed child pornography); *United States v. Hodson*, 543 F.3d 286, 292-93 (6th Cir. 2008) (probable cause for child molestation did not equal probable cause for possession of child pornography). A warrant to search a defendant's residence lacked probable cause where it was based on his status as a known drug dealer and a drug dog's alert to the odor of narcotics on defendant's car while it was parked at a co-defendant's home because such facts did not create a sufficient nexus between the residence to be searched and the suspected drug-dealing activity. *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016) (also holding the good-faith exception did not apply because reliance on the warrant was objectively unreasonable).

6. 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); *see 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); *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).

7. Manner Of Execution – Violation of the knock-and-announce statute, 18 U.S.C. § 3109, required suppression in *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, 71-73 (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 suspicion that drug evidence could be destroyed and 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*, 547 U.S. 586, 594 (2006), the Court held that the exclusionary rule does not apply to violations of the constitutional knock-and-announce rule. Several courts have extended *Hudson* to no-knock entries accompanied by massive force even where police could have obtained a no-knock warrant. *See*, *e.g.,* *United States v. Garcia-Hernandez*, 659 F.3d 108, 112-14 (1st Cir. 2011) (applying *Hudson* to a knock-and-announce violation with aggressive, military-style tactics); *United States v. Ankeny*, 502 F.3d 829, 835-38 (9th Cir. 2007) (refusing to suppress evidence seized in aggressive search that caused physical injury and property damage). In *Ankeny*, Judge Reinhardt dissented and argued against extending *Hudson* "beyond the specific context of the knock-and-announce requirement" to cases where police use excessive force in executing a search warrant. 502 F.3d 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. *Id.* at 835. In *Trent v. Wade*, 776 F.3d 368, 381-84 (5th Cir. 2015), the court ruled the hot-pursuit exception does not necessarily justify a failure to knock and announce.

Searches of computer drives are governed by objective reasonableness rather than formulaic search protocols, and courts have found it reasonable to remove computers from defendants' homes to conduct the search at another location. *United States v. Stabile,* 633 F.3d 219, 239 (3d Cir. 2011); *United States v. Upham,* 168 F.3d 532, 535 (1st Cir. 1999) (the "narrowest definable search and seizure reasonably likely to obtain" the evidence described in a warrant is, in most instances, "the seizure and subsequent off-premises search of the computer and all available disks"); *United States v. Hay,* 231 F.3d 630, 637 (9th Cir. 2000) (seizure of entire computer reasonable because affidavit "justified taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis"); *United States v. Grimmett,* 439 F.3d 1263, 1269 (10th Cir. 2006) ("we have adopted a somewhat forgiving stance when faced with a 'particularity' challenge to a warrant authorizing the seizure of computers").

> **COUNTERPOINT** – In *United States v. Metter*, 860 F. Supp. 2d 205, 215-16 (E.D.N.Y. 2012), the government failed to review seized electronic data to determine whether it fell within the scope of the warrant. The court found that "retention of *all* imaged electronic documents, including personal emails, without *any* review whatsoever" was "unreasonable and disturbing" *Id*. at 215 (emphasis in original). Because the government engaged in a general search and acted in bad faith, the court suppressed all the data. *Id*. at 216.

8. **Role Of Judicial Officer** – 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) (justice not neutral where paid through fees collected when a warrant is issued and not paid when warrant is denied). Even when an arrest warrant is constitutionally infirm because the magistrate judge did not read the citation prior to her finding of probable cause, the good- faith exception applies so long as the officers acting on the warrant had no reason to be aware of the judge's

abandonment of her judicial role. *United States v. Barnes*, 895 3d 1194, 1201 (9th Cir. 2018). But an officer's reliance on an unsigned search warrant would not be "objectively reasonable." *United States v. Evans*, 469 F. Supp. 2d 893, 900 (D. Mont. 2007); *but see United States v. Cruz*, 774 F.3d 1278, 1285-89 (10th Cir. 2014) (declining to follow *Evans* as did the court in *United States v. Lyons*, 740 F.3d 702 (1st Cir. 2014)). In child pornography cases, at least two district courts have held the good faith exception does not apply where a warrant was never valid because the issuing court lacked jurisdiction to authorize it in the first instance. *United States v. Matish*, 193 F. Supp. 3d 585 (E.D. Va. 2016) (suppressing evidence derived from a child pornography investigation where the defendant's computer was not located in the magistrate's district and finding the failure to comply with Rule 41 is not mere procedural error); *United States v. Levin*, No. 15-10271-WGY, at *24 (D. Mass. April 20, 2016) (same); *but see United States v. Horton*, 863 F.3d 1041 (8th Cir. 2017) (good faith exception applied despite magistrate judge's lack of authority to issue search warrant allowing government to use NIT to search computers out of the district).[4]

9. **Arrest Warrants** – 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 or consent. *Kirk*, 536 U.S. at 638. Where police officers have an arrest warrant, but lack a search warrant, they may enter a residence if they have a "reasonable belief" that (1) the arrestee resides at the dwelling, and (2) the arrestee is present at the time of entry. *United States v. Vasquez-Algarin*, 821 F.3d 467, 472 (3d Cir. 2016). There is a circuit split as to whether *Payton*'s "reason to believe" language amounts to a probable cause standard. *Compare Vasquez-Algarin*, 821 F.3d at 477 (holding "reason to believe" requires probable cause), *United States v. Gorman*, 314 F.3d 1105, 1114-15 (9th Cir. 2002) (same), *United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) (noting in dictum that it is "inclined" toward interpreting "reason to believe" as "probable cause"), *and United States v. Hardin*, 539 F.3d 404, 415-16 & n. 6 (6th Cir. 2008), *with United States v. Bohannon*, 824 F.3d 242, 244 (2d Cir. 2016) (holding "reason to believe" requires less than probable cause), *United States v. Werra*, 638 F.3d 326, 337 (1st Cir. 2011) (same), *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) (same), *and Valdez v. McPheters*, 172 F.3d 1220, 1224-25 (10th Cir. 1999) (same).

The circuits are also split over whether law enforcement officers violate *Payton* without physically entering the home, such as in a warrantless "across the threshold" arrest whereby police summon a suspect to the front door and arrest him there. *Compare United States v. Nora,* 765 F.3d 1049, 1054 (9th Cir. 2014) (under doctrine of constructive entry, officers do not have to physically enter the home for *Payton* to apply because it is the location of the arrested person, not the arresting agents, that determines if an arrest occurs inside the home), *United States v. Reeves,* 524 F.3d 1161, 1167-68 (10th Cir. 2008) (same), *and United States v. Saari,* 272 F.3d 804, 807-08 (6th Cir.

[4] Federal Rule of Criminal Procedure 41(b)(6), effective December 1, 2016, permits magistrate judges to issue search warrants for computers outside of their district, where the location of the computer has been concealed through technological means, such as The Onion Router (TOR) network.

2001) (same), *with Knight v. Jacobson,* 300 F.3d 1272, 1277 (11th Cir. 2002) (no *Payton* violation unless police physically cross the threshold and enter the home), *United States v. Berkowitz,* 927 F.2d 1376, 1386-88 (7th Cir. 1991) (same), *and United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (same). The Second Circuit rejected the doctrine of constructive entry and held that, where police summon the defendant to the door of his home, they may not effect a warrantless "across the threshold" arrest in the absence of exigent circumstances. *United States v. Allen,* 813 F.3d 76, 88-89 (2d Cir. 2016). The existence of an arrest warrant does not justify entry into a third-party's residence unless the officers first obtain a search warrant "based on their belief that [the arrestee] might be a guest there," the entry is consensual, or justified by exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 213-16 (1981).

> **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 subject himself to a warrantless arrest in his entryway merely by reaching his arm through a hole out to the front porch in *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). If police serving an arrest warrant cannot locate the residence listed on the warrant, but see two residences identically labelled with an adjacent address, one of which is presumably mislabeled, the police cannot simply select one and enter it. *United States v. Shaw*, 707 F.3d 666, 670 (6th Cir. 2013). Even when police do not actually enter a home, *Payton* prohibits them from forcing people outside at gunpoint. *Nora*, 765 F.3d at 1054 (an individual was seized in violation of *Payton* because his arrest was accomplished "by surrounding his house and ordering him to come out at gunpoint").

G. Warrantless Searches And Seizures

The traditional rule is that warrantless searches and seizures are per se unreasonable, and 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). The exceptions to the warrant requirement have generally been given increasingly broad readings. In his dissent in *Groh v. Ramirez*, 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." 540 U.S. 551, 572-73 (2004) (Thomas, J., dissenting). Determinations of probable cause and reasonable suspicion are given de novo review by the appellate courts. *Ornelas v. United States*, 517 U.S. 690, 699 (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*, 547 U.S. 103, 109 (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, 248 (1973). The Ninth Circuit considers five factors in determining whether consent was voluntarily given: (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 he or she had a right to refuse consent; and (5) whether the defendant had been told a search warrant could be obtained. *United States v. Soriano*, 346 F.3d 963, 968-69 (9th Cir. 2003), *amended by* 361 F.3d 494, 503 (9th Cir. 2004) (mother's consent to search hotel room was 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). A police officer's request to search a Spanish-speaker's car, which was mistranslated to "May I look for your car?" did not invalidate the defendant's consent to the search because "it was clear the that the officer did not need to look for or locate the car," the defendant readily consented to the search, and "did not seem boggled by the question as nonsensical." *United States v. Leiva*, 821 F.3d 808, 818-19 (7th Cir. 2016). The Fourth Amendment allows some police deception so long the suspect's will was not overborne. *United States v. Spivey*, 861 F.3d 1207, 1216 (11th Cir. 2017) (approving of officer's misrepresentation that he was following up on two burglaries to gain consent to search a home for credit card fraud).

> **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, 627-28 (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. *Id.* at 628. The Court held that under the circumstances, "Kaupp's 'okay' in response to [the officer]'s statement 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.'" *Id.* at 631. In *United States v. Washington*, the court noted that the fact a defendant was in custody when he consented "raise[d] grave questions" as to its voluntariness. 490 F.3d 765, 775 (9th Cir. 2007). The fact that an individual consented to government searches as a condition of pretrial release did not relieve the government of its burden of proving the search was "reasonable." *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2005). Consent may be presumed involuntary where multiple police officers and squad cars surround an individual and officers engage in "immediately accusatory" questioning. *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013).

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 immigration 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 federal agents garnered consent from the defendant to search a home through trickery, implying that the home might be in danger, the consent was involuntary. *United States v. Harrison*, 639 F.3d 1273, 1279-80 (10th Cir. 2011). When an officer wrongly stated that a search would occur regardless of the individual's consent, consent could be presumed involuntary. *United States v. Vazquez*, 724 F.3d 15, 24 (1st Cir. 2013). Wearing a body camera and filming the inside of a social security beneficiary's home under false pretenses constituted an unconsented-to search that did not fall within the special needs exception. *Whalen v. McMullen*, 907 F.3d 1139, 1151-52 (9th Cir. 2018). 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 also United States v. Garcia-Rosales*, No. 05-402-MO, 2006 WL 468320, at *12 (D. Or. Feb. 27, 2006) (even where the officer has a rudimentary knowledge of Spanish, language barriers can still result in an involuntary consent).

The officer's hand on his gun, on a deserted stretch of highway, with no advice on 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). *See also United States v. Perez*, 506 F. App'x 672, 674 (9th Cir. 2013) (finding consent involuntary because defendant "was ordered out of [his] vehicle, frisked, seated, and forbidden to rise" by uniformed police officers with their guns drawn; "not advised of his right to refuse to consent or given a *Miranda* warning"; and "denied his right to call his lawyer, despite his repeatedly asking to do so"). 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 through unequivocal acts, such as repeatedly lowering his hands to block officers from searching his pockets, even without explicitly saying he no longer consents. *United States v. Sanders*, 424 F.3d 768,

775 (8th Cir. 2005). A defendant who allowed police officers to enter his residence did not impliedly consent to officer's entry into his bedroom when he "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). In two Oregon cases, courts rejected claims of voluntary consent based on the agents' inadequate reports and conflicting testimony. *United States v. Eggleston*, No. 08-169-HA, 2010 WL 2854682, at *3 (D. Or. July 19, 2010); *United States v. Freeman*, No. 08-289-1-JO, 2009 WL 2046039, at *4 (D. Or. July 8, 2009). Law enforcement officers' warrantless entry into an arrestee's home was not justified under consent exception to warrant requirement, even though arrestee's girlfriend consented to officers entering the house where arrestee was physically present inside the home and non-verbally refused express consent. *Bonivert v. City of Clarkston*, 883 F.3d 865 (9th Cir. 2018).

The scope of consent is 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, 662 (9th Cir. 1993) (consent to "complete search" of car included search of briefcase in trunk of car); *see United States v. Flores*, 368 F. App'x. 424, 434-35 (4th Cir. 2010) (if consent does not limit search, officers may lawfully drill into a vehicle's axle to search for contraband); *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011) (holding police did not exceed the scope of defendant's consent to search his residence for drugs and "other material or records pertaining to narcotics" by searching the defendant's personal computer because the computer was not password protected and the defendant did not object).

COUNTERPOINT – Intrusions that exceed the reasonable scope of consent violate the Fourth Amendment. *United States v. Lopez-Cruz*, 730 F.3d 803, 808 (9th Cir. 2013) (police exceeded scope of consent to search a phone when they answered incoming calls); *United States v. Cotton*, 722 F.3d 271, 276 (5th Cir. 2013) (search of entire car was unlawful where defendant only consented to a search of his luggage); *Winfield v. Trottier*, 710 F.3d 49, 57 (2d Cir. 2013) (officer exceeded scope of consent to search car for contraband when he opened an envelope in the car and read its contents); *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002) (written consent to search trailer did not include consent to search a computer located within); *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 a locked trunk did not include consent to pull the seats out of the car in order to look in trunk). After an initial consent to search a home for a burglar, the officers exceeded the scope of the consent in conducting subsequent searches for drugs. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 547-48 (6th Cir. 2003); *see also United States v. McMullin*, 576 F.3d 810, 816 (8th Cir. 2009) (new consent required for a marshal's second warrantless entry into a defendant's house because the second entry exceeded the scope of consent to the first entry). 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. 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 open, and failed to object to a search of its interior. *United States v. Neely*, 564 F.3d 346, 351 (4th Cir. 2009). Following the lawful stop of his car, the defendant's consent for DEA agents to search his car did not extend to a search of his cell phones, which 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); *but see United States v. Lumpkins*, 687 F.3d 1011, 1013-14 (8th Cir. 2012) (holding a vehicle rental manager may consent to a search of rented car over defendant-driver's objection). A wife had the authority to consent to a forensic search of her husband's computer, which contained child pornography, where the defendant-husband failed to adequately safeguard his internet history through separate logins or encryption. *United States v. Thomas*, 818 F.3d 1230, 1241-42 (11th Cir. 2016) (the facts that the defendant was the primary user, typically deleted his internet history, and used popup and spam filters were insufficient to vitiate the wife's common authority to provide consent).

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); *see United States v. Moore,* 770 F.3d 809, 813-14 (9th Cir. 2014) (holding *Randolph* requires an express objection, so defendant's refusal to open the door to police, prompting them to use a battering ram with his roommate's permission, did not render the entry nonconsensual). If one occupant of a home consents but another occupant does not, police can enter after removing the objecting occupant only if the removal was "objectively reasonable." *Fernandez v. California*, 571 U.S. 292, 301-05 (2014); *see also United States v. Witzlib*, 796 F.3d 799, 801-02 (7th Cir. 2015) (man lured outside to speak with police lost authority to overrule his grandmother's consent to a warrantless search of their shared residence). *Fernandez* also suggests that one occupant can continue to override another occupant's consent as long as the non-consenting occupant remains anywhere on the premises. 571 U.S. at 305-06. The Sixth Circuit refused to draw a distinction between consent from individuals with varying possessory interests in the property. *United States v. Johnson*, 656 F.3d 375, 378-79 (6th Cir. 2011) (police acted unreasonably in searching defendant's bedroom after he objected to the search over his wife's consent).

The apparent authority of a third party to give consent is sufficient to make the search lawful if the mistake about authority is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 187 (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. Amratiel*, 622 F.3d 914, 916-17 (8th Cir. 2010) (defendant's wife had apparent authority to consent to a search of the defendant's locked gun safe, even though the police retrieved the safe's keys from the defendant, not the wife); *United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005) (holding it reasonable to believe that a co-resident in a trailer had authority to grant consent to search a gun case, where the case was located in plain view in a common area and when asked about the contents of the case, the co-resident did not disclaim ownership but merely stated he did not know whether a gun was inside).

COUNTERPOINT – 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). Police could not assume, without further questioning, that a "sleepy-looking" person who answered the door and agreed the officers could "look around" had authority to allow a search. *United States v. Arreguin*, 735 F.3d 1168, 1178 (9th Cir. 2013). Police officers had no authority to search a gym bag under a bed, which the lessee identified as belonging to a houseguest. *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003); *see also United States v. Peyton*, 745 F.3d 546, 553 (D.C. Cir. 2014) (police could not search a defendant's belongings where the defendant's great grandmother, who lived with defendant, told officers the property in question belonged to the defendant); *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), the court held consent given by the defendant's boyfriend insufficient to search defendant's purse, which was located in a car they had joint control over, 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), the court held a federal agent's reliance on a caretaker's consent to search the defendant's bedroom was unreasonable where the agent knew the caretakers' prior entries into defendant's bedroom were unauthorized and the caretaker's relationship with the defendant 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, to be invalid. Third party consent that stems from prior government illegality, such as an illegal arrest, 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, which a female suspect claimed was hers, created sufficient ambiguity to negate her apparent authority over other bags in the hotel room. *United States v. Purcell*, 526 F.3d 953, 964 (6th Cir. 2008); *see also United States v. Terry*, 915 F.3d 1141, 1145-46 (7th Cir. 2019) (Barrett, J.) ("A bathrobe alone does not clothe someone with apparent authority over a residence, even at 10:00 in the morning."); *United States v. Taylor*,

600 F.3d 678, 681-82 (6th Cir. 2010) (female tenant lacked apparent authority over male suspect's closet).

2. Plain View – Under the plain view doctrine, an officer may seize as evidence property that is in plain view if the officer is already lawfully on the premises to search for evidence and the incriminating nature of the evidence is immediately apparent. *Horton v. California*, 496 U.S. 128, 137 & n.7 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). The plain view doctrine does not give officers the right to seize evidence in plain view when they are not in a location to lawfully seize it (that is, if the police see drugs through a window of a house, they cannot enter the house to seize the drugs without a warrant or exception to the warrant requirement).

COUNTERPOINT – The "immediately apparent" requirement for plain view required suppression where, although lawfully in the house, officers seized glass vials containing drugs that could have been for common household purposes. *United States v. Arredondo*, 996 F.3d 903, 907-08 (8th Cir. 2021). Similarly, despite lawful presence on the premises, officers' seizure of a piece of a firearm, later determined to be unlawful, required suppression because the nature of the "Glock switch" was not readily apparent. *United States v. Barajas*, 517 F. Supp. 3d 1008, 1022-25 (N.D. Cal. 2021).

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 should be 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). 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). The plain view doctrine does not allow searches of wallets that are in an officer's plain view. *United States v. Rivera-Padilla*, 365 F. App'x. 343, 346 (3d Cir. 2010).

Application of the plain view doctrine to computer searches raises troubling issues. In *United States v. Comprehensive Drug Testing, Inc.*, the concurring judges stated that, when the government obtains a warrant to examine a computer hard drive or electronic storage medium to search for certain incriminating files, magistrate judges should insist that the government waive reliance upon the plain view doctrine. 621 F.3d 1162, 1178 (9th Cir. 2010) (en banc) (Kozinski, J., concurring); *but see United States v. Stabile*, 633 F.3d 219, 240-41, 241 n.16 (3d Cir. 2011) (declining to follow the Ninth Circuit's approach and holding that the plain view doctrine applies to computer file searches). 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).

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. A *Terry* stop must be predicated on a reasonable, individualized suspicion based on articulable facts, and the frisk is limited to a pat-down for weapons. Temporarily restraining the person, including putting them in handcuffs, does not necessarily turn a *Terry* stop into a de facto arrest. *United States v. Fiseku*, 915 F.3d 863, 870 (2d Cir. 2018) (stop not converted into arrest by continued restraint in handcuffs in the middle of the night, even though all suspects had been patted down and there was no evidence of weapons or contraband). A person's unprovoked flight in a high crime area when an officer approaches provides articulable facts supporting reasonable suspicion for a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

> **COUNTERPOINT** – An anonymous tip failed to establish reasonable suspicion, even when coupled with flight in *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019). "In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race." *Brown*, 925 F.3d at 1156. "Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an 'innocent' explanation of flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop." *Id*. at 1157.

Although a *Terry* stop requires specific, articulable facts, some inferences may be allowed. The Supreme Court has upheld an airport stop based in part on a drug courier profile. *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989). The Court has also upheld a *Terry* stop based on the inference that a car was being driven by the registered owner, whose license had been revoked, and pulling the car over on that basis. *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020). After tracking two Black robbers to the parking lot of a nearby Walmart, stopping and questioning the only Black man in the store was permitted in *United States v. Street*, 917 F.3d 586, 594 (7th Cir. 2019).

> **COUNTERPOINT** – A *Terry* stop must be based on recent observations. *United States v. Valerio*, 718 F.3d 1321, 1324 (11th Cir. 2013) (holding that a stop "nearly a week after [police] had last observed" the defendant was "well outside" the scope of *Terry* because it was "not responsive to the development of suspicion within a dynamic or urgent law enforcement environment"). Reasonable suspicion must be based on articulable facts related to the individual, rather than generalizations like their presence in the area. Seeing a man and woman in a parking lot about a minute after hearing gunshots from somewhere nearby did not support reasonable suspicion. *United States v. Delaney*, 955 F.3d 1077, 1086 (D.C. Cir. 2020).

In executing a warrant for documents at a business, immigration agents acted in egregious violation of workers' Fourth Amendment rights when they rounded them up, frisked them, ran their identifications for immigration status and detained them without individualized reasonable suspicion. *Perez Cruz v. Barr*, 926 F.3d 1128 (9th Cir. 2019) Refusal to cooperate with police does not furnish the objective justification required for a stop. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Nor does an observation of "nervous" behavior. *United States v. Bowman*, 884 F.3d 200, 214 (4th Cir. 2018) (nervousness, innocuous items in car, and inability to provide address from which the defendant supposedly picked up his passenger did not provide reasonable suspicion); *United States v. Monsivais*, 848 F.3d 353, 361 (5th Cir. 2017) (appearing nervous and repeatedly placing hands in pockets did not give rise to reasonable suspicion of criminal activity); *United States v. I.E.V.*, 705 F.3d 430, 438 (9th Cir. 2012) (police cannot "justify a *Terry* search based on mere nervous or fidgety conduct and touching of clothing"); *United States v. Wilson*, 506 F.3d 488, 495 (6th Cir. 2007) ("Nervous behavior, standing alone, is not enough to justify a *Terry* search."); *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) ("Nervousness is a common and entirely natural reaction to police presence."); *United States v. Ford*, 333 F.3d 839, 842, 845 (7th Cir. 2003) (finding "no reasonable suspicion that would justify a protective pat-down" of an individual who "appeared nervous, looked around, stepped backward and reached for his pocket after he activated [a] metal detector").

The Ninth Circuit found a stop unjustified because it was "essentially based on nothing more than the suspicion that drugs could be found," because the defendant "acted in a compliant and nonthreatening manner," and because there was "no evidence that [he] was dangerous." *I.E.V.*, 705 F.3d at 435*; see also United States v. Cole*, 445 F. Supp. 3d 484, 489-90 (N.D. Cal. 2020) (no reasonable suspicion where suspect known to be associated with gangs and to be on probation was at a known gang hangout, looked nervously at police, and had a satchel weighed down by a long rigid object that could have been a gun). The police could not conduct an investigatory stop based in part on a suspicious handshake because "[t]he Fourth Amendment does not allow the Government to label a person as a drug dealer and then view all of their actions through that lens." *United States v. Drakeford*, 992 F.3d 255, 264 (4th Cir. 2021). In overturning a drug conviction due to lack of reasonable suspicion, the Fourth Circuit expressed "concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011) ("[T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.").

Police cannot conduct an investigatory detention based on 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). "[S]imply driving with out-of-state

license plates on a particular stretch of highway where [police say] much drug trafficking occurs" does not amount to reasonable suspicion. *Huff v. Reichert*, 744 F.3d 999, 1004-05 (7th Cir. 2014). In the following cases, the Ninth Circuit rejected a claim that reasonable 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).

The "reasonable suspicion" standard cannot justify extended seizure for questioning outside a suspect's hotel room. *United States v. Washington*, 387 F.3d 1060, 1067-68 (9th Cir. 2004). Mere proximity to the United States-Mexico border and areas known for drug or illegal alien smuggling alone cannot sustain reasonable suspicion to stop. *United States v. Rangel-Portillo*, 586 F.3d 376 (5th Cir. 2009). Response to a report of domestic violence, alone, does not create reasonable suspicion to justify frisking the suspect for weapons. *Thomas v. Dillard,* 818 F.3d 864, 882 (9th Cir. 2016).

Despite the requirement of individualized, reasonable suspicion, a *Terry* stop may be supported under the "collective knowledge" or "fellow officer" doctrine. *United States v. Hensley*, 469 U.S. 221, 232 (1985); *Whiteley v. Warden*, 401 U.S. 560, 568 (1971). "When an officer acts on an instruction from another officer, the act is justified if the instructing officer had sufficient information to justify taking such action herself; in this very limited sense, the instructing officer's knowledge is imputed to the acting officer." *United States v. Massenburg*, 654 F.3d 480, 492 (4th Cir. 2011) (citing *Whiteley* and *Hensley*); *see also United States v. Ramirez*, 473 F.3d 1026, 1032-33 (9th Cir. 2007).

COUNTERPOINT – The Fourth Circuit limited the collective knowledge doctrine to "vertical knowledge," where an instructing officer communicates probable cause or reasonable suspicion to an acting officer, and refused to extend the doctrine to "horizontal knowledge," where uncommunicated information aggregates to form reasonable suspicion or probable cause. *Massenburg*, 654 F.3d at 493-94; *see also United States v. Rodriguez-Rodriguez*, 550 F.3d 1223, 1228 n.5 (10th Cir. 2008). 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. *See also Washington v. Lambert*, 98 F.3d 1181, 1185-92 (9th Cir. 1996) ("[O]ther equally general descriptions could serve as the basis for similar demeaning treatment of many other African-Americans."). 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. Although 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 could have some relevance to establishing reasonable suspicion).

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). 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 mere hunch that a suspect's furtive actions meant he was carrying a gun, without articulable reasons to believe criminal activity is afoot, does not support a *Terry* stop. *United States v. Jones*, 606 F.3d 964, 966-67 (8th Cir. 2010).

An anonymous tip can furnish the basis for an investigative stop if, under the totality of the circumstances, the tip demonstrates "sufficient indicia of reliability to provide reasonable suspicion." *Navarette v. California*, 572 U.S. 393, 397-98 (2014) (quoting *Adams v. Williams*, 407 U.S. 143, 147 (1972)). Police may rely on an anonymous tip only to the extent that they corroborate details of the tip or have other reason to trust its reliability. *Navarette* relied on a totality-of-the-circumstances analysis that considered several factors supporting the reliability of an anonymous tip that a driver had tried to run the tipster off the road. *See* 572 U.S. at 399-401. As evidence of the tip's reliability, the Court noted that (1) the tipster described the truck and gave a license number; (2) the tipster claimed eyewitness knowledge of the alleged dangerous activity; (3) the tip was made contemporaneously with the alleged conduct; (4) the tip was made in a 911 call and police can identify 911 callers; and (5) the call described the sort of erratic behavior that police could conclude, based on experience and training, was the product of drunk driving. *Id.; see also United States v. Edwards*, 761 F.3d 977, 984-85 (9th Cir. 2014) (explaining that an anonymous tip is more reliable when it reports an ongoing emergency, such as an individual presently shooting at cars). Similarly, in *Alabama v. White*, the Court upheld a search based on an anonymous tip because the police had confirmed "innocent details" of the tip and this "corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity." 496 U.S. 325, 327 (1990).

COUNTERPOINT – An anonymous tip that a person is carrying a gun is not, by itself, sufficient to justify an investigative stop. *Florida v. J.L.*, 529 U.S. 266 (2000). The Court in *J.L.* held that police had no basis for believing that the

tipster had "knowledge of concealed criminal activity" because he did not explain how he knew about the gun, did not suggest that he had any special familiarity with the defendant's affairs, and did not predict any future behavior. 529 U.S. at 271-72. In *United States v. Watson*, the court distinguished *Navarette* based on the tipster's use of a borrowed phone, "guns in public does not suggest likely criminal activity," and lack of emergency. 900 F.3d 892, 895-96 (7th Cir. 2018) (Barrett, J.); *United States v. Brown*, 925 F.3d 1150, 1154 (9th Cir. 2019) (tip that defendant was armed did not justify a *Terry* stop because it "created at most a very weak inference that he was" committing the misdemeanor offense of "unlawfully carrying the gun without a [concealed carry] license").

"In assessing whether a detention is too long in duration to be justified as an investigative stop," courts should examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" and "whether the police are acting in a swiftly developing situation." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). An officer's check on a driver's immigration status did not unreasonably prolong a *Terry* stop because the status check was a diligent pursuit of investigation and very brief. *United States v. Guijon-Ortiz*, 660 F.3d 757, 770 (4th Cir. 2011). Prolonged *Terry* stops for further investigation are acceptable when facts come to light "indicating that information furnished by the driver, which the officers had a right to inquire into, was materially false." *United States v. Pack*, 622 F.3d 383 (5th Cir. 2010). A permissible *Terry* stop of an armed individual can sustain the brief detention of companions for whom individualized reasonable suspicion does not exist. *United States v. Lewis*, 674 F.3d 1298, 1308-09 (11th Cir. 2012). The detention of companions during a *Terry* stop of armed individuals is reasonable in light of "substantial risks to officers' safety." *Id*. at 1309.

COUNTERPOINT – In analyzing whether a detention exceeds the justification for the stop, the crucial question is whether the detention is unnecessarily prolonged. *See Rodriguez v. United States*, 575 U.S. 1609 (2015) (extension of traffic stop to conduct dog sniff without reasonable suspicion to conduct dog sniff constitutes unreasonable seizure); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."); *accord United States v. Mendez*, 476 F.3d 1077, 1079-80 (9th Cir. 2007); *United States v. Jones*, 438 F. Supp. 3d 1039, 1051 (N.D. Cal. 2020); *see also Muehler v. Mena*, 544 U.S. 93 (2005) (although the police may question a suspect about issues unrelated to the purpose of the stop, the officers may not unnecessarily prolong the detention).

The same requirement of reasonable 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 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). "[A]n officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009).

COUNTERPOINT – The mission of a traffic stop includes determining whether to issue a traffic ticket and checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance; a stop that is unreasonably prolonged beyond the time needed to perform these tasks ordinarily violates the Constitution. *United States v. Gorman*, 859 F.3d 706 (9th Cir.), *order corrected*, 870 F.3d 963 (9th Cir. 2017) (half an hour traffic stop unreasonably prolonged); *see also United States v. Evans*, 786 F.3d 779, 786 (9th Cir. 2015) (felon registration checks differ from vehicle records and warrants checks, requiring independent reasonable suspicion to prolong a traffic stop). Police cannot detain a driver and ask for his license after it becomes clear that the initial justification for the stop has evaporated. *People v. Cummings*, 6 N.E.3d. 725, 734 (Ill. 2014). 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*, No. 05-402-MO, 2006 WL 468320, at *10 (D. Or. Feb. 27, 2006). In *United States v. Ngumezi*, 980 F.3d 1285 (9th Cir. 2020), the defendant was unlawfully searched when, following a stop where police had reasonable suspicion due to lack of license plates, police opened the door and leaned in the car to ask for license and registration. The intrusion was illegal because it was not justified through an exception to the warrant requirement, and the police lacked probable cause or a particularized justification such as reasonable belief of danger. *Id.* at 1288.

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 also United States v. Higareda Santa-Cruz*, 826 F. Supp. 355, 358-59 (D. Or. 1993). The officer violated the Fourth Amendment's limit on the duration and the scope of traffic stops, when a police officer delayed the traffic violation processing to ask questions about drug trafficking and to request consent for a search. *United States v. Digiovanni*, 650 F.3d 498, 500-13 (4th Cir. 2011). Unreasonable detention did not terminate when state trooper told motorist she was "free to go and everything" because, in the same breath, the trooper continued to interrogate her. *United States v. Rodriguez-Escalera*, 884 F.3d 661 (7th Cir. 2018). 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 United States v. Bailey*,

743 F.3d 322, 340 (2d Cir. 2014) (a lawful detention-incident-to-search became unlawful at the moment that police handcuffed the individual, because the police had already searched him for weapons and the government never argued that he was a flight risk); *Longshore v. State*, 924 A.2d 1129, 1145 (Md. Ct. App. 2007) (handcuffing a suspect turns an investigative stop into an arrest that requires probable cause absent "special circumstances," such as a reason to believe the suspect will flee or endanger the officer).

Probable cause to believe a parking offense is ongoing justifies at least a brief stop. *United States v. Shields,* 789 F.3d 733, 744-46 (7th Cir. 2015); *see also United States v. Choudhry,* 461 F.3d 1097, 1103-04 (9th Cir. 2006) (allowing investigatory stop of vehicle in no-stopping/tow-away zone); *United States v. Copeland,* 321 F.3d 582, 594 (6th Cir. 2003) (allowing stop based on parking violation). Investigation of a potential parking violation, in which police officers believed a car was parked too close to a crosswalk, justified the seizure of the car's passengers. *United States v. Johnson,* 823 F.3d 408, 410 (7th Cir. 2016). The Supreme Court held that a police officer's reasonable mistake of law may provide the individualized reasonable suspicion necessary to justify a traffic stop under the Fourth Amendment. *Heien v. North Carolina*, 574 U.S. 54 (2014). In *Heien*, a North Carolina officer stopped a vehicle for having only one working brake light, which turned out not to be a violation of North Carolina's traffic laws. 574 U.S. at 60-61. Because the "ultimate touchstone of the Fourth Amendment is reasonableness," Chief Justice Roberts explained that there is no significant difference between searches and seizures based on mistake of fact and searches and seizures based on mistake of law – both can be "reasonable." *Id*. at 61.

COUNTERPOINT – *Heien* may affect significant circuit decisions regarding errors of law. *See*, *e.g.*, *United States v. Nicholson*, 721 F.3d 1236, 1241 (10th Cir. 2013) (an officer's mistake of law was "unreasonable whether or not the ordinance was 'plain and unambiguous'"); *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); *United States v. Pena-Montes*, 589 F.3d 1048, 1054-55 (10th Cir. 2010) (officer's mistaken belief that dealer plates are only installed on vehicles not yet sold did not justify a stop based on a suspicion that a vehicle was stolen from the dealership).

In *United States v. Izguerra-Robles*, 660 F. Supp. 2d 1202, 1206 (D. Or. 2009), police officers exceeded their authority to conduct a traffic stop for failure to carry an operator's license. 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. The Seventh Circuit has held that "a discrepancy between the observed color of a car and the color listed on its registration" is not alone "sufficient to give rise to reasonable suspicion." *United States v. Uribe*, 709 F.3d 646, 651 (7th Cir. 2013). The Second Circuit held in a § 1983 case that police cannot stop a vehicle solely on the basis of a passenger "giving the finger." *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013).

In *United States v. Sowards*, the Fourth Circuit concluded that an officer's traffic stop for exceeding the speed limit by five miles lacked probable cause when officer visually determined the vehicle's speed. 690 F.3d 583, 597 (4th Cir.2012); *but see United States v. Mubdi*, 691 F.3d 334, 340-41 (4th Cir. 2012), *vacated and remanded on other grounds*, 570 U.S. 913 (2013) (distinguishing *Sowards* from a traffic stop with "two independent and virtually identical estimates as to Mubdi's speed by officers who were required, as part of a radar certification class, to visually estimate the speed of vehicles within a narrow margin of error").

Like the more stringent standard for individual stops based on race, 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. In *United States v. Golab*, 325 F.3d 63, 66-67 (1st Cir. 2003), the court held that an immigration 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.

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*, 555 U.S. 323, 326-27 (2009). 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).

COUNTERPOINT – Reasonable suspicion for a frisk must be "something more than an inchoate and unparticularized suspicion or hunch." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Police cannot frisk an individual without "reasonable suspicion that the subject is 'armed and dangerous' as opposed to being generally suspicious." *United States v. Williams*, 731 F.3d 678, 686 (7th Cir. 2013). Radio communication warning of the defendant's prior criminal activity and an alleged false statement by the defendant did not create reasonable suspicion that the defendant was armed and dangerous to justify a traffic stop frisk. *United States v. Powell*, 666 F.3d 180, 187-89 (4th Cir. 2011). Officer observation that the driver and passenger switched places during traffic stop and that passenger fidgeted with front dashboard did not provide reasonable suspicion to conduct a vehicle frisk.

Jackson v. United States, 56 A.3d 1206, 1212 (D.C. 2012). 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, 1231-32 (9th Cir. 1988).

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 *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."

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). But an officer impermissibly deviated from the purpose of the stop when he asked driver to step out of the car and commenced questioning about drugs inside the vehicle based only on knowledge of driver's identity and criminal history. *United States v. Jackson*, 321 F. Supp. 3d 1223, 1230 (D. Or. 2018). 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).

Other than *Terry* stops, officers may detain the occupants of the premises while conducting a search pursuant to a valid warrant. *Michigan v. Summers*, 452 U.S. 692, 705 (1981). The detention is a seizure under the Fourth Amendment, but the Court justified the seizure as necessary for three reasons: (1) officer safety; (2) orderly execution of the search; and (3) prevention of a flight risk. *Summers*, 452 U.S. at 702-03. In *United States v. Allen*, the court allowed the detention of a third party during the execution of a search warrant for business premises based solely on officer safety. 618 F.3d 404, 406, 408 (3d Cir. 2010). However, the Fourth Circuit held that officers cannot detain occupants of a multi-tenant building while waiting for a warrant without probable cause with respect to that particular tenant. *United States v. Jackson*, 728 F.3d 367 (4th Cir. 2013).

COUNTERPOINT – When executing a search warrant, officers cannot detain recent occupants who have left the immediate vicinity of the premises to be searched. *Bailey v. United States*, 568 U.S. 186, 200 (2013). In *Bailey*, the Court refused to extend *Summers* because none of the three factors justifying detention at the scene apply with the same force to recent occupants who pose no real threat to police investigation.

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). Many of these searches are justified as routine administrative procedure and by the significant government interest in processing suspects after arrest. *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *see also Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 191 (2000) (the government has an interest in properly identifying arrested suspects). A warrant is not required to compel a driver arrested for driving under the influence to submit to a breathalyzer test, but a warrant is required to draw blood. *Birchfield v. North Dakota*, 579 U.S. 438, 474 (2016). However, the exigent circumstances doctrine almost always permits a blood test without a warrant, where the driver is unconscious and therefore cannot be given a breathalyzer test. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

> **COUNTERPOINT** – Although search incident to arrest may be broad in scope, the search must be reasonable. *Amaechi v. West*, 237 F.3d 356, 361 (4th Cir. 2001) (citing *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983)). Strip searches, for example, are particularly invasive searches that require a balancing test to ensure reasonableness. *United States v. Edwards*, 666 F.3d 877, 883 (4th Cir. 2011) (weighing (1) the place in which the search was conducted, (2) the scope of the particular intrusion, (3) the manner in which the search was conducted, and (4) the justification for initiating the search). In *Edwards*, the court suppressed the product of a search incident to arrest because the officer's use of a knife to remove a cocaine baggie from the arrestee's penis posed an unreasonable risk to the arrestee. 666 F.3d at 885-87. While finding good faith reliance on a warrant, officer's use of a proctoscope to search a defendant's rectum was unreasonable because of the extreme invasiveness and indignity of the search. *United States v. Gray*, 669 F.3d 556, 565 (5th Cir.), *vacated on other grounds*, 568 U.S. 802 (2012). A female officer's strip search of a male pretrial detainee was unreasonable in *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135, 1140-48 (9th Cir. 2011). Officers who subjected a jail visitor to a strip search, without obtaining consent or providing the option to leave, violated the Fourth Amendment. *Cates v. Stroud*, 976 F.3d 972, 979-84 (9th Cir. 2020).
>
> In the absence of a specific justification, body cavity searches as an incident to arrest are unreasonable. *Schmerber v. California*, 384 U.S. 757, 770 (1966) ("Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned."); *see also Sloley v. VanBramer*, 945 F.3d 30, 38 (2d Cir. 2019) ("[A] visual body cavity search conducted as an incident to a lawful arrest for any offense must be supported by 'a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity.'"); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (same). As such, police illegally searched inside an arrestee's rectum after he was booked into jail because

there was "no evidence that [defendant] could have destroyed evidence or that a medical emergency existed" and where "the government does not contend that it is necessary to physically penetrate the body cavities of every person booked into" the jail. *United States v. Fowlkes*, 804 F.3d 954, 965-66 (9th Cir. 2015). In *Commonwealth v. Morales*, 968 N.E.2d 403, 411-12 (Mass. 2012), the Massachusetts Supreme Court affirmed the lower court's suppression of evidence unreasonably obtained through a public strip search incident to a drug arrest that exposed the defendant's buttocks.

The Supreme Court held that officers could collect a cheek swab DNA sample in a reasonable exercise of administrative booking procedure in compliance with the Fourth Amendment. *Maryland v. King*, 569 U.S. 435, 449-55 (2013). In a deeply divided opinion, the Supreme Court in *King* found that the balance of reasonableness weighed in favor of the government's significant interest in DNA collection as the most reliable method of identification. *Id.* The Court qualified this drastic expansion of "reasonableness" to DNA testing by limiting exposure to those persons arrested for a "serious" new crime. *Id.* at 455. However, the majority failed to define "serious" and consequently imposed a limiting factor that is largely imaginary. *Id.* at 481 (Scalia, J., dissenting) (noting that the "serious" limitation cannot effectively curb the risk of abuse with respect to broad collection and use of DNA).

Officers need a warrant to access the contents of a cell phone seized during an arrest or to use the cell phone to access other information. *Riley v. California*, 573 U.S. 373, 402 (2014). In *Riley*, the Court explained that the government has a much weaker interest in warrantless searches of cell phones because cell phone contents do not implicate the risks that justify warrantless searches of other containers seized during an arrest: cell phone contents cannot be used to harm officers or effectuate an escape, and any potential evidence can only be destroyed either by a third party remotely wiping a phone or through automatic security features "apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest." 573 U.S. 2486 (emphasis in original). Also, cell phones are different from other containers that are seized during an arrest because they contain vast quantities of personal information and because most of their "contents" are in fact stored remotely. *Id.* at 2490-91.

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 in his presence (failure to wear seatbelts), the officer 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."

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*, No. 05-375-SI, 2007 WL 1521573, at *8-9 (N.D. Cal. May 23, 2007) (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"). In *Gonzalez v. ICE*, the court held that, because probable cause is required to seize or detain an individual for a civil immigration offense, the Fourth Amendment requires a prompt probable cause determination by a neutral and detached magistrate – here an immigration judge – to justify continued detention pursuant to an immigration detainer. 975 F.3d 788, 826 (9th Cir. 2020) ("Detaining persons for more than 48 hours pursuant to an immigration detainer implicates *Gerstein*[*v. Peugh*, 420 U.S. 103 (1975)]."). Police cannot search a vehicle incident to a recent occupant's arrest unless (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*, 556 U.S. 332, 351 (2009). *Gant* reversed the previous bright line test allowing searches of vehicles incident to arrest without regard to the rationale for the search. *See Thornton v. United States*, 541 U.S. 615 (2004); *New York v. Belton*, 453 U.S. 454 (1981). Officers may not search a vehicle incident to arrest for a crime that would not yield evidence in the passenger compartment of the vehicle. *United States v. Ruckes*, 586 F.3d 713 (9th Cir. 2009) (search incident to arrest for illegal driving unlawful); *accord United States v. Edwards*, 769 F.3d 509 (7th Cir. 2014) (warrantless search of car's passenger compartment reasonable where defendant arrested on suspicion of driving without car owner's consent).

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. The reasoning of *Gant* applies to non-vehicular containers – like backpacks – so police officers can conduct warrantless searches of such items incident to a lawful arrest "only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search." *United States v. Davis*, 997 F.3d 191, 197 (4th Cir. 2021) (quoting *Gant*, 556 U.S. at 343); *accord United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019); *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010); *United States v. Cook*, 808 F.3d 1195, 1199 n.1 (9th Cir. 2015).

COUNTERPOINT – A backpack on a nearby park bench was not close enough to the defendant to be searched incident to arrest. *United States v. Spurk*, No. 05-226-KI, 2005 WL 3478195, at *5 (D. Or. Dec. 20, 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 in *United States v. Manzo-Small*, No. 05-480-HA, 2006 WL1113584, 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 the 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). Some circuits permit a protective sweep in situations other than a home arrest, such as exigent circumstances or consent. *United States v. Miller*, 430 F.3d 93, 94-95 (2d Cir. 2005); *United States v. Martins*, 413 F.3d 139, 149-50 (1st Cir. 2005); *Leaf v. Shelnutt*, 400 F.3d 1070, 1088-89 (7th Cir. 2005); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) (en banc); *United States v. Taylor*, 248 F.3d 506, 513-14 (6th Cir. 2001); *United States v. Patrick*, 959 F.2d 991, 996 (D.C. Cir. 1992).

> **COUNTERPOINT** – The Ninth and Tenth Circuit limit protective sweeps only to measures taken incident to arrest. *United States v. Torres-Castro*, 470 F.3d 992, 997 (8th Cir. 2006); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000); *see also United States v. Hassock*, 631 F.3d 79, 87-88 (2d Cir. 2011) (permitting protective sweeps in other lawful processes with reasonable danger to officers, but not yet extending sweeps to consent); *see also Guzman v. Commonwealth*, 375 S.W.3d 805, 808-09 (Ky. 2012) (prohibiting protective sweeps in consent situations); *Brumley v. Com.*, 413 S.W.3d 280, 286-87 (Ky. 2013) (officers with information that an arrestee possessed firearms could not search the home simply because they heard "shuffling" noises, given that "an overwhelming amount of law abiding citizens in Kentucky have guns" and also that allowing protective sweeps upon hearing noise would allow police to "sweep almost every house where there is more than one member of the household"); *State v. Guggenmos*, 253 P.3d 1042, 1051 (Or. 2011) (officers violated the Fourth Amendment when they performed a protective sweep of consenting individuals' home after seeing other individuals run out of the home). A protective sweep is not allowed if the police detain rather than arrest the occupant. *Reid*, 226 F.3d at 1027; *see United States v. Green*, 9 F.4th 682 (8th Cir. 2021) ("In a non-arrest context [executing a search warrant], a protective sweep requires reasonable suspicion of dangerous individuals inside from the outset.").

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); *see United States v. Hassock*, 631 F.3d 79, 87-88 (2d Cir. 2011) (noting that officer safety is the only purpose of a protective sweep); *United States v. Fuentes*, 800 F. Supp. 2d 1144, 1155 (D. Or. 2011) (finding protective sweep was unjustified because no particularized information existed to lead police to reasonably believe anyone else was in the home when both occupants had been arrested). A protective sweep must be limited to the immediate vicinity of the arrest. *United States v. White*,

748 F.3d 507, 513 (3d Cir. 2014) (holding that search of a home 20 feet away from where an arrest took place was not a valid protective sweep); *see United States v. Franco*, 744 F. App'x 360, 362-63 (9th Cir. 2018) (search of bedroom and closet did not comport with rationales for protective sweep when officers could have monitored door without entering).

Even items in plain view from the point of the arrest must be suppressed where the evidence was located after the purposes of a protective sweep were 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). The protective sweep of a home that included the bedroom during execution of an arrest warrant did not comply with the Fourth Amendment when the defendant had already been arrested and handcuffed near the front door, which was not adjacent to the bedroom, and officers lacked any knowledge as to whether anyone else was still inside the home at the time bedroom was searched. *United States v. Bagley*, 877 F.3d 1151, 1156 (10th Cir. 2017).

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). In *United States v. Magallon-Lopez*, the Ninth Circuit again applied *Whren* and held the fact that an officer lied about seeing the defendant make an illegal lane change did not undermine the legality of the stop, so long as the facts objectively established reasonable suspicion to justify an investigatory stop. 817 F.3d 671, 675 (9th Cir. 2016).

COUNTERPOINT – Although concurring in the judgment in *Magallon-Lopez,* Judge Berzon expressed concern that *Whren* and its progeny encourage police officers to offer "phony explanations" for their actions. 817 F.3d at 677 (Berzon, J., concurring) (also wondering if the Due Process Clause is implicated when officers provide a false basis for the stop). In the absence of an equal protection violation, little is probably left of the cases on pretextual traffic stops unless *Whren* is overruled, 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 driving-while-intoxicated roadblock aimed at drug interdiction was 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 – "Warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *Missouri v. McNeely,* 569 U.S. 141, 149 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). 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). This justification is judged according to the totality of the circumstances as they would have appeared to a reasonable person in the officer's position. *Martinez v. City of Chicago*, 900 F.3d 838 (7th Cir. 2018) (finding no constitutional violation where, in hot pursuit of a subject, officers entered the wrong half of a duplex). In *United States v. Caraballo*, the Second Circuit ruled that exigent circumstances justified warrantless "pinging" of defendant's cell phone by his service provider in order to locate him. 831 F.3d 95, 102 (2d Cir. 2016).

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

a. Preservation of evidence – 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 it 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. *Michigan v. Fisher*, 558 U.S. 45, 47 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006).

b. Telephonic warrants – The availability of telephonic warrants prior to the search severely undercuts a 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. In *United States v. Boozer*, 511 F. Supp. 3d 1128, 1141 (D. Or. 2021), the

government failed to explain why a telephonic warrant was unavailable or impractical where there was no emergency situation or imminent threat of evidence destruction.

c. 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).

d. 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, 951-52 (9th Cir. 2008). In *United States v. Camou*, the court held that, pursuant to *Riley,* exigent circumstances did not justify the warrantless search of a cell phone. 773 F.3d 932, 940 (9th Cir. 2014). 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). Exigent circumstances did not justify a suspicionless stop of a pedestrian walking near where shots had been heard a minute before, where other pedestrians were also walking. *United States v. Curry*, 965 F.3d 313, 316 (4th Cir. 2019) ("to hold otherwise would create a sweeping exception to *Terry*").

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). Nonspecific noise from within the house, which was more consistent with someone coming to answer the door than resistance or destruction of evidence, did not establish exigency in *United States v. Mendonsa*, 989 F.2d 366, 370-71 (9th Cir. 1993). The government failed to show that exigent circumstances justified departing from the warrant requirement where agents had third-party consent to "remain at the apartment and keep potential evidence secure" and defendant was not present and seemed to be actively avoiding contact with the agents. *United States v. Boozer*, 511 F. Supp. 3d 1128 (D. Or. 2021); *but see United States v. Bradley*, 644 F.3d 1213, 1261-63 (11th Cir. 2011) (warrantless seizure of business's servers was justified by exigent

circumstance because employees could easily destroy evidence). Police actions must demonstrate an objective belief that exigent circumstances exist. *United States v. Yengel*, 711 F.3d 392, 400 (4th Cir. 2013) (no exigency where police opened a safe to investigate a grenade inside because police had not ordered anyone, including a nearby infant, to evacuate and therefore could not have had subjective belief that exigency existed). "[P]olice who simply smell burning marijuana generally face no exigency and must get a warrant to enter the home." *White v. Stanley*, 745 F.3d 237, 241 (7th Cir. 2014).

No exigent circumstances existed when police surrounded a house after seeing an individual holding a gun run inside, because the individual had "never aimed the weapon at the officers or anyone else, and the officers had no evidence that he had used or threatened to use it," no other safety risk was present, and officers had the house surrounded. *United States v. Nora*, 765 F.3d 1049, 1054-55 (9th Cir. 2014). The court also emphasized that its conclusion was "buttressed by the fact that the offense involved here was a misdemeanor." *Id.*; *see also LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 956 (9th Cir. 2000) ("[A]n exigency related to a misdemeanor will seldom, if ever, justify a warrantless entry into the home.") (citing *Welsh v. Wisconsin*, 466 U.S. 740, 752-53 (1984)); *but see United States v. Barajas*, 517 F. Supp. 3d 1008 (N.D. Cal. 2021) (emergency aid exception justified officers' entry into home where defendant's family had called police to report he was acting "really crazy" and "very violent" and may be a threat to himself or others, despite the fact that officers only had probable cause to arrest the defendant for misdemeanor vandalism). The Third Circuit held that exigent circumstances, which justified the officers' entry into the home, ended when they had the defendant in handcuffs; therefore, the subsequent warrantless search for a handgun, which the defendant had been seen carrying earlier, violated the Fourth Amendment. *United States v. Mallory,* 765 F.3d 373 (3d Cir. 2014).

The natural metabolism of alcohol in the bloodstream does not create a per se exigency justifying nonconsensual blood testing in all drunk driving cases. *Missouri v. McNeely*, 569 U.S. 141, 145 (2013). In *McNeely*, the Court settled on a totality of the circumstances test to determine whether officers may collect a blood sample without a warrant. *Id.* The Court's opinion was fractured along several lines, with four Justices with the majority, two separate concurrences, and a dissenting opinion arguing that officers must always acquire a warrant before collecting a blood sample. The end result is that each opportunity to collect a warrantless blood sample will be judged on a case-by-case basis. In a pre-*McNeely* drunk-driving case, the need for evidence preservation did not justify a non-consensual blood sample where the arrestee had 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) (holding officers' shooting of dogs was an unreasonable seizure and execution of the search warrants). 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 lack of exigency, including the "fact that it took the police forty minutes to respond" to the call. *Id*. The bare unsubstantiated possibility that a home may contain explosives did not support second warrantless search of veteran's home, especially given delay prior to the search. *Corrigan v. District of Columbia*, 841 F.3d 1022, 1031-32 (D.C. Cir. 2016).

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). There were no exigent circumstances to support a search of the defendant's bedroom for a gun when the officers had secured the "very cooperative and non-combative" defendant and guarded the bedroom entrance. *United States v. Simmons*, 661 F.3d 151, 157-58 (6th Cir. 2011). "A static 911 call, which conveys even less information than a hangup call, cannot justify warrantless entry by police with no substantiating evidence of danger, injury, or foul play. Nor do the messy state of the house, the electronics boxes, and the unlocked balcony door" provide any additional support for the intrusion. *United States v. Martinez*, 643 F.3d 1292, 1296-97 (10th Cir. 2011). Probable cause that a home was used for alien smuggling did not establish exigent circumstances that persons inside needed help. *United States v. Mora*, 989 F.3d 794, 799-800 (10th Cir. 2021).

e. Pretext – The police can create an exigency to justify a warrantless intrusion, as long as the behavior preceding the exigency is reasonable and comports with the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 464 (2011). "[A]t least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted." *Id*. at 462 n.4. The Ninth Circuit has viewed *King* as implicitly overruling precedent approving "knock and talks" based only on the officers' subjective good-faith beliefs. *United States v. Perea-Rey*, 680 F.3d 1179, 1187-89 (9th Cir. 2012) (suppressing product of "knock and talk" involving broad invasion of the curtilage); *accord United States v. Martin*, No. 21-10128, 2022 WL 1577807 (9th Cir. May 19, 2022) (unpublished) (suppressing fruits of a search occasioned by an unconstitutional knock and talk). Where a detective had "no specific, particularized basis for believing that a crime had been committed, that his safety was threatened, or that evidence was being destroyed" when the detective heard movement after the

suspect refused to answer the door, the court suppressed evidence finding no exigency existed that allowed the officers to peer through the suspect's window into the living room and eventually enter the home. *United States v. Fuentes*, 800 F. Supp. 2d 1144, 1153-54 (D. Or. 2011). The court found no destruction of evidence exigency when a defendant attempted to shut the motel room door upon seeing the police, who claimed to be housekeeping. *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012).

The Third Circuit has held that any "knock and talk" exception to the warrant requirement permits a "brief, consensual encounter that begins at the entrance used by visitors, which in most circumstances is the front door," and does not apply when police simply knock somewhere else on the house. *Carman v. Carroll*, 749 F.3d 192, 198 (3d Cir. 2014). Police looking to execute a warrantless arrest cannot rely on the "knock and talk" exception to the warrant requirement as pretext to enter the curtilage of the home at four in the morning, because the implied license permitting police officers and members of the public to approach the front door of a home applies only during "normal waking hours." *United States v. Lundin,* 817 F.3d 1151, 1158-59 (9th Cir. 2016) (after *Jardines,* the "knock and talk" exception depends, at least in part, on the officer's subjective intent). The Tenth Circuit, however, found that officers did not violate the Fourth Amendment when they walked past four "no trespassing signs," knocked on the door to the defendant's home, and asked to speak with him because the "no trespassing signs" did not revoke the public's implied license to approach the house and knock on the front door. *United States v. Carloss,* 818 F.3d 988, 994-95 (10th Cir. 2016). Police officers who have already spoken with a homeowner must knock and re-announce their identity and purpose when they approach an area within the curtilage of the home that they know or reasonably should know is a separate residence. *Mendez v. County of Los Angeles,* 815 F.3d 1178, 1188 (9th Cir. 2016).

f. Hot pursuit – 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). 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). The court found no probable cause or exigency to support a defendant's arrest in his own backyard

after a trespassing complaint. *United States v. Struckman*, 603 F.3d 731, 743-46 (9th Cir. 2010).

Flight of a misdemeanor suspect does categorically justify warrantless entry into a home. *Lange v. California*, 141 S. Ct. 2011 (2021). The majority opinion in *Lange* acknowledged that the misdemeanor-felony distinction does not cleanly define offense severity, emphasizing the need for case-by-case analysis, and declining to consider the argument that *United States v. Santana*, 427 U.S. 38 (1976), "did not establish *any* categorical rule." *Id.* at 2019; *but see id.* at 2025 (Kavanaugh, J., concurring) ("the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home").

g. 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).

h. Manner of execution – "Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior." *Maryland v. King*, 569 U.S. 435, 448 (2013); *see also Bull v. City and Cnty. of S.F.*, 595 F.3d 964, 967 n.2 (9th Cir. 2010) (en banc) ("There is no doubt . . . that 'on occasion a security guard may conduct the search in an abusive fashion,' and '[s]uch an abuse cannot be condoned." (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

6. Community Caretaking – The "community caretaking functions" recognized in *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973), does not create a stand-alone doctrine that justifies warrantless searches and seizures in the home. *Caniglia v. Strom*, 141 S. Ct. 1596, 1598 (2021). In *Caniglia*, petitioner's wife called the police to do a wellness check on her husband, who, during a fight the previous night, had placed his firearm on the table and asked her to "shoot [him] and get it over with." *Id.* at 1597. Officers encountered the petitioner on the porch of his house, and he agreed to go to the hospital for a psychiatric evaluation, on the condition that the officers would not confiscate his firearms. *Id.* The officers nevertheless entered his home and seized his firearms. *Id.* The Court held the entry unlawful, stressing the distinction between homes and the car at issue in *Cady*: there is "not an open-ended license to perform [community caretaking tasks] anywhere." *Id.* at 1600; *see also Ray v. Township of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) ("The community caretaking doctrine cannot be used to justify warrantless searches of a home."). In

United States v. Venezia, the court determined that seizure of a vehicle did not meet the standard for community caretaking balancing factors including the private parking lot, consultation with the property owner, alternatives to impoundment, involvement in crime, and consent of the driver. 995 F.3d 1170, 1178-82 (10th Cir. 2021). 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 by pulling back plastic from a window that exposed a marijuana grow in *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993).

7. **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). The automobile exception does not give an officer the right to enter a home or its curtilage to access a vehicle without a warrant. *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018)**.**

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** – In *United States v. Camou*, the Ninth Circuit held cellphones are not containers for purposes of the vehicle exception. 773 F.3d 932, 942 (9th Cir. 2014) (extending *Riley* to vehicle context). 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). Officers may not search closed containers in the interior of a vehicle stopped for a traffic violation when the driver has been handcuffed and secured in a squad car. *United States v. Maddox*, 614 F.3d 1046, 1048-50 (9th Cir. 2010).

8. **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). When such searches are part of the community caretaking function, they are not limited by standard procedures, as long as officers choose from among "the universe of reasonable choices," even if they are partly motivated by a desire to investigate crime. *Boudreau v. Lussier*, 901 F.3d 65, 72 (1st Cir. 2018) (car impoundment not limited by standard procedures requirement when part of the community caretaking function) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)).

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*, 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. No. 05-375-SI, 2007 WL 1521573, at *11 (N.D. Cal. May 23, 2007). The Eighth Circuit refused to validate a search under the inventory exception because the searching officer failed to itemize specific property in the vehicle. *United States v. Taylor*, 636 F.3d 461, 464 (8th Cir. 2011).

Officers may not use inventory searches as a pretext to gather evidence of crime. *United States v. Johnson*, 889 F.3d 1120, 1127 (9th Cir. 2018) (although inventory search policy was valid, officers themselves explicitly admitted that they seized items from the car in an effort to search for evidence of criminal activity). 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); *see also United States v. Cervantes*, 678 F.3d 798, 805 (9th Cir. 2012) (the community caretaking doctrine did not justify warrantless search of defendant's vehicle because police could not articulate a legitimate caretaking purpose for the search and seizure). 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).

9. **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 for reasonableness by 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). 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). For example, the Eleventh Circuit upheld blanket suspicionless drug testing of all prospective substitute teachers in *Friedenberg v. Sch. Bd. of Palm Beach Cty.*, 911 F.3d 1084, 1109 (11th Cir. 2018).

> **COUNTERPOINT** – When the primary purpose of a checkpoint is to detect evidence of criminal wrongdoing, suspicionless stops violate the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32, 39-40 (2000); *see also Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004) (roadblock used to discourage rock concert violated Fourth Amendment); *Singleton v. Commonwealth*, 364 S.W.3d 97, 101-02 (Ky. 2012). State troopers' stop of tractor-trailer pursuant to Nevada's administrative scheme was an unconstitutional pretext for criminal investigation in *United States v. Orozco*, 858 F.3d 1204, 1214 (9th Cir. 2017). In *United States v. Bulacan*, 156 F.3d 963, 967-74 (9th Cir. 1998), the court suppressed the results of a search because the purported administrative search had an impermissible criminal investigative purpose. Law enforcement officers who were asked to assist in the execution of a valid administrative warrant violated the Fourth Amendment when their primary purpose was to gather evidence in support of their own criminal investigation. *United States v. Grey*, 959 F.3d 1166, 1179 (9th Cir. 2020); s*ee also Advanced Bldg. & Fabrication, Inc. v. California Highway Patrol*, 918 F.3d 654, 658-59 (9th Cir. 2019) (employee of State Board of Equalization violated Fourth Amendment by participating in law enforcement's search of an owner's business); *Gardner v. Evans*, 920 F.3d 1038 (6th Cir. 2019) (police officers' entry pursuant to a valid warrant did not permit them to invite housing code inspectors into the house for purposes unrelated to the search for drugs).

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). The Transportation Security Administration's use of "advanced imaging" scanners and pat-downs at airport checkpoints constitute a "reasonable administrative search." *Corbett v. Transp. Sec. Admin.*, 568 F. App'x 690, 698 (11th Cir. 2014) (holding security screening lasting one hour reasonable).

COUNTERPOINT – 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). Where officers place signs along a highway falsely informing drivers that they are approaching a drug checkpoint further down the highway, but then actually set up the checkpoint on the highway's next exit, the mere fact that a vehicle with out-of-state license plates exited the highway after seeing the "ruse" drug checkpoint did not create individualized reasonable suspicion to stop the vehicle. *United States v. Yousif*, 308 F.3d 820, 827 (8th Cir. 2002) ("reasonable suspicion cannot be manufactured by the police themselves"). A driver's utilization of a rural exit off of the interstate after signs warning of a narcotics checkpoint did not alone provide sufficient reasonable suspicion for a *Terry* stop. *United States v. Neff*, 681 F.3d 1134, 1141-43 (10th Cir. 2012). The driver performing a U-turn and giving the trooper a stunned look after exiting did not provide sufficient additional factors to provide a particularized and objective basis for wrongdoing to justify a *Terry* stop. *Id*. Impounding a vehicle consistent with county policy, where a driver had a valid Mexico driver's license but not a United States license, constituted an unreasonable seizure. *Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 515-16 (9th Cir. 2018).

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). A statute authorizing nonconsensual police inspections of hotel records was invalid even under the standard for administrative searches because "the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015). The Eleventh Circuit struck down a Florida statute requiring aid applicants to submit to suspicionless drug testing in order to receive welfare benefits. *Lebron v. Sec'y of the Fla. Dep't of Children and Families*, 772 F.3d 1352, 1377-78 (2014). In *Bourgeois v. Peters*, 387 F.3d 1303, 1311-16 (11th Cir. 2004), the court held that a city's invocation of September 11th did not justify the use of metal detector searches at a peaceful protest. 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. *See also Tarabochia v. Adkins,* 766 F.3d 1115 (9th Cir. 2014) (officers' warrantless stop of commercial fishermen to inspect their catch along the highway, instead of at a commercial fishing establishment or checkpoint, was not subject to the administrative search exception). 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).

The Supreme Court has upheld a blanket policy of strip searches and purely visual body cavity searches for all arrestees entering detention facilities based on the rationale that it would be difficult for police to identify which detainees were likelier to carry contraband. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 330 (2012).

> **COUNTERPOINT** – Police needed a warrant to perform an inner rectum search of an arrestee at a jail because there was no evidence that the defendant could have destroyed evidence or that a medical emergency existed and because the government did not contend that it is necessary to seize evidence from the body cavities of every person booked into the jail. *United States v. Fowlkes*, 804 F.3d 954, 967 (9th Cir. 2015). 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). 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.

"[S]chool officials may, under certain circumstances, conduct warrantless searches of students 'under their authority.'" *Scott v. Cty. of San Bernardino*, 903 F.3d 943, 948 (9th Cir. 2018) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)). The Tenth Circuit granted qualified immunity to a teacher who had partially unclothed and photographed a student to look for signs of abuse. *Doe v. Woodard*, 912 F.3d 1278, 1293 (10th Cir. 2019) (plaintiff had not cited mandatory authority specifically holding that a warrant would be required).

> **COUNTERPOINT** – A seizure occurred where social workers took children from their classroom into a private room and interviewed them about potential parental drug use. *Schulkers v. Kammer*, 955 F.3d 520, 536-37 (6th Cir. 2020) (distinguishing from other cases on the grounds that the door was closed and no school staff were present); *but see Capp v. Cty. of San Diego*, 940 F.3d 1046, 1059-60 (9th Cir. 2019) (failure to state a claim in similar circumstances because the other parent may have consented). Subjecting children to invasive medical examinations after removing them from the home due to suspicion of child abuse was unreasonable under the special needs exception in *Mann v. Cty. of San Diego*, 907 F.3d 1154, 1165 (9th Cir. 2018)

10. **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 ata local post office for nine days was justified as an "extended border search" because the immigration agents had reasonable suspicion that the package contained contraband. *United States v. Sahanaja*, 430 F.3d 1049, 1054 (9th Cir. 2005). 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). "[R]easonable suspicion is not needed . . . to search a laptop or other personal electronic storage devices at the border." *United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008).

> **COUNTERPOINT** – Border searches that are particularly invasive of personal privacy, such as strip searches and x-ray searches, or that impair a 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"). Likewise, reasonable suspicion is required for a more "comprehensive and intrusive" border search, such as an offsite "forensic examination" of a laptop seized at the border. *United States v. Cotterman*, 709 F.3d 952, 963-64 (9th Cir. 2013) (en banc). The court in *Cotterman* explained that *Arnold*'s exception to the warrant requirement was limited to a "quick look and unintrusive search" and did not apply to the forensic examination in question, which was conducted 170 miles from the border and lasted two days. However, the court did not specify exactly when a border "property search is sufficiently 'comprehensive and intrusive' to require reasonable suspicion." *Id.* at 981 (Smith, J., dissenting). In *United States v. Cano*, 934 F.3d 1002, 1007 (9th Cir. 2019), the Ninth Circuit clarified *Cotterman* by holding that "reasonable suspicion" in border cell-phone searches "means that officials must reasonably suspect that the cell phone contains digital contraband." Even upon valid arrest, *manual* cell phone searches may be conducted by border officials without reasonable suspicion but *forensic* searches do require reasonable suspicion. *Id.* The Sixth Circuit has explained since *Cotterman* that reasonable suspicion may be required for any search that occurs *after* property is cleared for entry. *United States v. Stewart*, 729 F.3d 517, 526 (6th Cir. 2013); *see also United States v. Saboonchi*, 990 F. Supp. 2d 536, 548 (D. Md. 2014) (the "the level of suspicion required depends on whether the forensic search . . . was a routine search"); *United States v. Martinez*, No. 13CR3560-WQH, 2014 WL 3671271 (S.D. Cal. July 22, 2014) (distinguishing a process that "retrieves the phone numbers of phone calls to the phone and phone calls made from [a] phone, as well as text messages, photos and videos" from "the comprehensive forensic evaluation conducted in *Cotterman*").

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.

> **COUNTERPOINT** – Law enforcement officials on roving patrols *near* the border need reasonable suspicion to stop 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 immigration agents. 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). 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-Bustamente*, 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).

11. <u>Probationers And Parolees</u> – Parolees who are subject to a warrantless, suspicionless search condition have "severely diminished expectations of privacy by virtue of their status alone." *Samson v. California*, 547 U.S. 843, 852 (2006). The Supreme Court has upheld as constitutional a statute that allowed for suspicionless searches of parolees. *Samson*, 547 U.S. at 847. A warrantless search of probationer's apartment, supported by reasonable suspicion and authorized by a condition of his probation, was reasonable within the meaning of the Fourth Amendment. *United States v. Knights*, 534 U.S. 112 (2001). Warrantless, suspicionless searches of a parolee's residence can be reasonable if the search is authorized by the terms of the parolee's search condition. *United States v. Lopez*, 474 F.3d 1208, 1213-14 (9th Cir. 2007), *overruled in part on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). The Ninth Circuit has held the same with respect to probationers, but expressly limited its holding to offenders who are on probation for a violent felony. *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013); *see United States v. Park*, No. 18-50230, 2021 WL 5984980, at *1 (9th Cir. Dec. 16, 2021) (unpublished) (electronic search condition of supervised release invalid for lack of nexus with statutory goals); *United States v. Lara*, 815 F.3d 605, 609-10 (9th Cir. 2016) (warrantless search of probationer's cell phone data was unreasonable under the Fourth Amendment). Mandatory supervision is more akin to parole, and individuals under mandatory supervision, like parolees, may be subject to warrantless, suspicionless search conditions. *United States v. Cervantes*, 859 F.3d 1175, 1182 (9th Cir. 2017). Warrantless searches of parolees' cell phones and other electronic surveillance were upheld as reasonable in *United States v. Johnson*, 875 F.3d 1265, 1275 (9th Cir. 2017), and *United States v. Korte*, 918 F.3d 750, 757 (9th Cir. 2019). In the absence of a nexus between use of electronic devices and statutory goals of supervised release, the condition allowing suspicionless electronic searches constitutes an abuse of discretion. *Park*, 2021 WL 5984980, at

*1. The Ninth Circuit has upheld the requirement that certain federal offenders who were on parole, probation, or supervised release submit to compulsory deoxyribonucleic acid (DNA) profiling, in absence of individualized suspicion that they had committed additional crimes. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

> **COUNTERPOINT** – A search or seizure is not reasonable if the facts that would make the search reasonable, like the suspect's parole status, 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). Police may not perform a warrantless parole-condition search of a residence without probable cause to belief the parolee actually lives at the location. *United States v. Grandberry*, 730 F.3d 968, 982 (9th Cir. 2013); *see also United States v. Howard*, 447 F.3d 1257, 1267-68 (9th Cir. 2006) (warrantless search of parolee's acquaintance's residence violated Fourth Amendment when there was reason to believe the parolee still resided at his reported address and insufficient evidence that he lived with the acquaintance); *United States v. Franco*, 744 F. App'x 360, 362 (9th Cir. 2018) (probationer's search condition did not extend to brother's locked bedroom). Similarly, police cannot conduct a warrantless search of a vehicle pursuant to a supervised release condition unless they have probable cause to believe that the supervisee owns or controls the vehicle. *United States v. Dixon*, 984 F.3d 814, 822 (9th Cir. 2020). The Ninth Circuit has justified these limitations on parole-condition searches as protecting the privacy interests of third parties. *Id.*

H. Fruit Of The Poisonous Tree

The basic rule of *Wong Sun v. United States*, 371 U.S. 471, 484-86 (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.

The government bears the burden of demonstrating that evidence has not been tainted as "fruit of the poisonous tree," or that limiting rules such as attenuation or inevitable discovery apply. *United States v. Ngumezi*, 980 F.3d 1285, 1291 (9th Cir. 2020). The Court may not deny motions to suppress based on unargued theories. *Id.*; *see also United States v. Ruckes*, 586 F.3d 713, 719 (9th Cir. 2009).

1. **Independent Source Rule** – In *Murray v. United States*, 487 U.S. 533, 538 (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 seizure of the marijuana. The

independent source rule has been applied to cell phone records. *United States v. Moody*, 664 F.3d 164, 168 (7th Cir. 2011) (subpoena of defendant's cell phone records was independent of and untainted by invalid search two years earlier).

> **COUNTERPOINT** – When a warrant has been tainted by an illegal search, the government must prove 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. *See Murray*, 487 U.S. at 542-44 (remanding case for a determination of whether the agents' decision to seek a warrant was a product of the illegal entry and search); *accord United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999) (applying *Murray* and ruling that the officers' decision to seek the warrant cannot be prompted by what they saw during the prior, unlawful search) (citing *United States v. Hill,* 55 F.3d 479, 481 (9th Cir. 1995)). 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*, 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. 467 U.S. 431, 445-47 (1984). Because the contents of a vehicle invalidly searched incident to arrest would have been discovered through a later vehicle inventory, the Seventh Circuit refused to suppress evidence discovered in violation of *Gant* under the inevitable discovery doctrine. *United States v. Cartwright*, 630 F.3d 610, 614-16 (7th Cir. 2010).

> **COUNTERPOINT** – There is disagreement among the circuits as to the extent of the inevitable discovery doctrine. The Fifth, Eighth, and Eleventh Circuits will apply it only when an active investigation was already underway prior to the unlawful act. *United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir. 2015), *overruled on other grounds by United States v. Watkins*, 10 F.4th 1179, 1184 (11th Cir. 2021); *United States v. Jackson*, 596 F.3d 236, 241 (5th Cir. 2010); *United States v. Hammons,* 152 F.3d 1025, 1029 (8th Cir. 1998); *but see United States v. Lamas,* 930 F.3d 1099, 1104 (5th Cir. 1991) (questioning continued application of the active-pursuit requirement). In the First, Second, Sixth, Seventh, and Ninth Circuits, proof of a prior, active investigation is not required, rather the government can meet its burden by establishing thatthe police, following routine procedures inevitably would have uncovered the evidence. *United States v. Brown,* 328 F.3d 352, 357 (7th Cir. 2003); *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995); *United States v. Infante-Ruiz*, 13 F.3d 498, 504 (1st Cir. 1994); *United States v. Ramirez-Sandoval,* 872 F.2d 1392, 1399 (9th Cir. 1989); *United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988).
>
> Speculation as to what routine procedures an officer may have followed to lawfully generate the disputed evidence is insufficient to invoke inevitable discovery. *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003) (refusing to apply inevitable

discovery where police failed to identify the specific practices that would have inevitably led to defendant's gun); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000) (same). Probable cause alone does not bring evidence within the inevitable discovery exception. *See, e.g., United States v. Young*, 573 F.3d 711, 722-23 (9th Cir. 2009) (rejecting 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); *United States v. Brown*, 64 F.3d 1083, 1085 (7th Cir. 1995) (probable cause plus a chain of events that would have led to a warrant makes a discovery "inevitable"). To apply the inevitable discovery exception, a court must have a "high level of confidence" that the warrant in fact would have been issued and the evidence would have been obtained by lawful means. *United States v. Heath,* 455 F.3d 52, 59-60 (2d. Cir. 2006) (it is not enough merely to show a judge *could* have validly issue the warrant, but that he or she *would* have); *see also United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005) (same); *but see United States v. Chambers*, 132 F. App'x 25, 33 (5th Cir. 2005) (requiring only that there be a "reasonable probability that the contested evidence would have been discovered by lawful means in the absence of the police misconduct"); *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir. 2004). In *United States v. Johnson*, 380 F.3d 1013, 1018 (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.

3. **Attenuation** – In *Utah v. Strieff*, the Court applied the three factors set out in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), to determine whether the attenuation doctrine permits the introduction of evidence otherwise tainted by a Fourth Amendment violation: (1) temporal proximity of the illegal conduct and the later discovered evidence; (2) the existence of intervening circumstances; and (3) the flagrancy of the initial misconduct. 579 U.S. 232, 239 (2016). In *Strieff*, the Court held that, absent flagrant police misconduct, where an officer stops an individual without reasonable suspicion and thereafter discovers a valid, pre-existing arrest warrant, the doctrine of attenuation makes evidence seized pursuant to the illegal stop admissible. *Id*. at 242. The defendant's consent to a search of his apartment was sufficiently attenuated from an invalid entry into his father's home two hours earlier, given intervening facts including *Miranda* warnings. *United States v. Conrad*, 673 F.3d 728, 733-37 (7th Cir. 2012); *see also United States v. Whisenton*, 765 F.3d 938 (8th Cir. 2014) (the fifteen minutes defendant spent smoking a cigarette and discussing his options with the police before consenting to a search purged the taint of illegal entry).

COUNTERPOINT – "The 'fruit of the poisonous tree' doctrine does not require a particularly tight causal chain between the illegal search and the discovery of the evidence sought to be suppressed." *United States v. Ngumezi*, 980 F.3d 1285, 1291 (9th Cir. 2020); *United States v. Johns*, 891 F.2d 243, 245 (9th Cir. 1989). In *United States v. Bocharnikov*, the court held that lapse of eight months did not attenuate the initial illegality from the second interrogation, which was friendly and non-custodial but began with a request to ask "follow-up questions."

1005-06 (9th Cir. 2020). In *United States v. Garcia*, the court distinguished *Strieff* in finding no attenuation when, minutes after an unlawful entry of a home, the officer entered to arrest a person on supervised release who had a suspicionless search condition. 974 F.3d 1071, 1078 (9th Cir. 2020) ("[T]he Government did not present any evidence regarding the officers' reasons for entering Garcia's home the second time, much less evidence sufficient to show that this decision had nothing to do with what they saw inside the home minutes earlier, during their unconstitutional search."). Unlike in *Strieff*, which involved the mandatory arrest of the individual pursuant to a warrant, the existence of officer discretion in *Garcia* provided insufficient intervening circumstances to attenuate the search from the primary illegality. *Id.* at 1080. The *Garcia* court declined to reach the unsettled question of whether the officers' subjective mental state determines the flagrancy of the initial misconduct, but referenced the killing of Breonna Taylor in commenting: "Recent events have reminded us of the devastating consequences that can follow when armed officers take the residents of a home by surprise." *Id*. at 1081 n.6. The use of a flagrant ruse to circumvent the Fourth Amendment and the unlawful seizure of the defendant foreclosed the government's attenuation argument based on the 45 minutes between primary illegality and statement in *United States v. Ramirez*, 976 F.3d 946, 955-57 (9th Cir. 2020).

Although the police failed to read the defendant his *Miranda* rights, the defendant's voluntary statements attenuated the connection between the *Miranda* violation and the later discovery of physical evidence. *United States v. Patane*, 542 U.S. 630, 642 (2004). Where the police have probable cause to arrest a suspect but lack the requisite warrant to enter his home, a suspect's statement taken at the police station is not subject to the exclusionary rule. *New York v. Harris*, 495 U.S. 14, 21 (1990) (the fact that the statement was made at the police station, as opposed to inside the home, purged the taint of the warrantless entry); *accord United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc) (the presence of probable cause to arrest attenuated the connection between the unlawful seizure and subsequent confession).

COUNTERPOINT – In *United States v. Villa-Gonzalez*, 623 F.3d 526, 535 (8th Cir. 2010), the court, finding *Patane* inapplicable, suppressed defendant's statements made following an illegal seizure and violation of *Miranda*. 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 v. Texas*, 538 U.S. 626, 633 (2003); *United States v. Nora*, 765 F.3d 1049, 1057 (9th Cir. 2014) (ordering suppression of incriminating statements made by an individual immediately after police illegally recovered drugs and cash from his person because "his answers were likely influenced by his knowledge that the police had already discovered" the drugs and cash); *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); *United States v. Lopez-Arias*, 344 F.3d 623, 629-30 (6th Cir. 2003) (insufficient attenuation where defendants consented to search of motel room "within half an hour from the initial stop and during the illegal arrest," with no intervening events). An illegal seizure without an arrest also "weighs toward suppression." *United States v. Washington*, 490 F.3d 765, 777 (9th Cir. 2007).

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, 279-80 (1978). 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 – 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 suppressed evidence derived from an illegal stop of a drug courier, 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). Testimony describing the defendant at the time of arrest should be suppressed if the observations were 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, 65-66 (1954). In *United States v. Havens*, 446 U.S. 620, 628 (1980), the Court expanded allowable impeachment of the defendant with the product of an illegal search and seizure to statements elicited in cross-examination that were "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, 320 (1990).

6. **Nature Of Illegal Intrusion** – The exclusionary rule is generally considered a remedy for violations of the Fourth Amendment only and does not apply to other types of non-constitutional protections. In *United States v. Caceres*, 440 U.S. 741, 751-52 (1979), conversations recorded in violation of Internal Revenue Service regulations were held to be admissible at trial. Violations of certain 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, 1111 (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).

7. **Type Of Proceeding** – The Supreme Court has repeatedly refused to extend the exclusionary rule outside the criminal context. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (civil deportation proceeding); *United States v. Janis*, 428 U.S. 433, 448 (1976) (civil tax

proceeding); *United States v. Calandra*, 414 U.S. 338, 343-46 (1974) (grand jury proceedings). The exclusionary rule also does not apply at parole revocation hearings. *Pa. Board of Probation and Parole v. Scott*, 524 U.S. 357, 364 (1998). The Ninth Circuit held that 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).

> **COUNTERPOINT** – The exclusionary rule has been applied in civil forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965). 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. *Perez Cruz v. Barr*, 926 F.3d 1128, 1146 (9th Cir. 2019); *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); *See B.R. v. Garland*, 26 F.4th 827, 832 (9th Cir. 2022) ("The exclusionary rule is generally not available in immigration proceedings, but we hold that once an alien makes a prima facie showing of an egregious regulatory or Fourth Amendment violation warranting suppression and submits specific evidence that the government's evidence is tainted, the government has the burden and opportunity to rebut that claim of taint."). The admissibility of identity information in criminal cases, especially in immigration prosecutions under 8 U.S.C. § 1326, is the subject of a conflict among the Circuits. *Perez Cruz*, 926 F.3d at 1136 n.3; *see United States v. Ortiz-Hernandez*, 427 F.3d 567, 576-77 (9th Cir. 2005), *petition for panel reh'g and reh'g 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).

8. **Seize-First, Search Later Warrants** – With the massive expansion of potential electronically-gathered data, search warrants can authorize the seizure of numerous electronic devices, then permit those devices to be searched over a period of time designated in the warrant, which can be expanded by later application to the magistrate judge. Where the person subject to the search and seizure asserts overbreadth or other constitutional impediment to searches of the electronic devices, the magistrate judge has authority to entertain a motion for return of property under Rule 41(g) of the Federal Rules of Criminal Procedure. *In the Matter of the Search*, No. 3:17-mc-00588-AC, Findings and Recommendation, ECF 58 (D. Or. July 16, 2019), Order adopting findings and recommendation, ECF 64 (D. Or. Oct. 4, 2021). The Rule 41(g) motion is treated as a civil complaint governed by the rules of civil procedure. *Id.* at 8 (citing *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1172 (9th Cir. 2010) (en banc)). In *Search*, the court rejected the government's contention that the judge lacked jurisdiction to entertain an attack on the search warrant prior to its execution. *Id.* at 12-19. The court's Rule 41(g) jurisdiction is also

not limited because no criminal proceedings are pending against the movant. *Id.* at 19 (citing *Rasden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993), and *United States v. Martinson*, 809 F.2d 1364, 1366-67 (9th Cir. 1987)).

Under Rule 41(g), the court has discretion to seek more limited forms of relief than return of the property "by way of ex ante restrictions designed to safeguard and minimize potential invasions of his privacy during the government's search of the devices." *Id.* at 20. The court in *Search* determined that the equitable nature of the proceedings conferred jurisdiction to consider challenges to the scope of the "search later" aspects of the warrant. *Id*. 20-21. Based on a four-factor test for exercising equitable jurisdiction, the court determined that the privacy issues at stake, the risk of irreparable harm, and the lack of adequate remedies at law required denial of the government's motion to dismiss and exercise of equitable jurisdiction. *Id.* at 22-32. The court granted the equitable remedy of requiring a filter team to prevent the prosecutorial team from having access to material not within the scope of the warrant. *Id.* at 32-36; *but see Trump v. United States*, 54 F.4th 689, 698-701 (11th Cir. 2022) (ex-president established none of the factors for equitable jurisdiction).

I. Discovery

Federal Rules of Criminal Procedure Rule 16(a)(1)(E) permits discovery related to the constitutionality of a search or seizure. *United States v. Soto-Zuniga*, 837 F.3d 992, 1001 (9th Cir. 2016). In *United States v. Cedano-Arellano*, a defendant charged with cocaine smuggling sought discovery of the training records of the narcotics detector dog that "alerted" on his gas tank. 332 F.3d 568, 570 (9th Cir. 2003). The Ninth Circuit acknowledged that the materials at issue "were crucial to [the defendant's] ability to assess the dog's reliability, a very important issue in his defense, and to conduct an effective cross-examination of the dog's handler" at the pretrial evidentiary hearing, holding that such materials were discoverable under Rule 16(a)(1)(E). *Id.*; *see also United States v. Thomas*, 726 F.3d 1086, 1096-97 (9th Cir. 2013) (defendant was entitled under Rule 16(a)(1)(E) to discovery of unredacted training and certification records of narcotics detector dog). A defendant seeking to challenge the legality of an immigration checkpoint was entitled to discovery regarding number and types of arrests and vehicle searches at the immigration checkpoint. *Soto-Zuniga*, 837 F.3d at 998.

Under Federal Rules of Criminal Procedure Rule 12(h), the Jencks Act, which requires witness statements to be produced, applies to suppression hearings. The *Brady* obligation to provide exculpatory material applies to pretrial motions to suppress. *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993). The defense can also invoke the statute requiring the government to affirm or deny electronic surveillance that "a party aggrieved" asserts is inadmissible "because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act[.]." 18 U.S.C. § 3504(a)(1). Depending on the circumstances, defense participation may be necessary to determine whether electronic surveillance must be produced. *Alderman v. United States*, 394 U.S. 165, 182-83 (1969).

Conclusion

The Fourth Amendment has been good to me. As a farmworker legal services attorney in 1977, my first client was Charles LaDuke, who became the class representative in the *LaDuke* case in this outline that enjoined dragnet immigration raids in labor camps because they involved unconstitutional searches and seizures. As a federal defender, my first published appellate decision was in *Munoz*, in which the court suppressed evidence of a dead golden eagle, quoting Justice Frankfurter's observation that "the safeguards of liberty have frequently been forged in controversies involving not very nice people." But further back, when I was 19 years old and working in the shipyards of Pascagoula, Mississippi, I was facing five years in Parchman Farm, falsely accused of possession of marijuana found in a matchbox in a rooming house. On the day of trial, with my peers in the jury box, the successful motion to suppress won my freedom without the inevitable risks of trial.

We criminal defense lawyers share an affinity for Fourth Amendment litigation that can save our clients years of custody and that can help make the cold words of the Constitution come alive in the real world. We litigate suppression issues as we would a civil rights case: listening to our client, investigating the facts, and writing persuasive memoranda in support of our motions to exclude tainted evidence. And those memorandums are only persuasive when we customize them to our facts and use the full range of precedent to support our arguments. We hope this collection of cases can assist in bringing the full share of justice to your clients.

Thanks to Alexandria Hanna her work on this year's update and to past Federal Public Defender law clerks and attorneys, especially Madeleine Rogers, Katie Marchant, and Lisa Ma, who have contributed to this project with updates and commentary over the past three decades.